

# Corporate Insolvency In India

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- ❖ **1956** – Companies Act, 1956
- ❖ **1985** – Sick Industrial Companies (Special Provisions) Act – SICA
- ❖ **1993** – Recovery of Debts Due to Bank and Financial Institutions Act – RDDB
- ❖ **2002** – Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act – SARFAESI
- ❖ **2013** – Companies Act – Chapter XIX & XX
- ❖ **2016** – The Insolvency and Bankruptcy Code – IBC

# Individual Insolvency In India

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- ❖ **1909** – Presidency Towns Insolvency Act
- ❖ **1920** – Provincial Insolvency Act
- ❖ **1932** – Partnership Act

# Preamble of IBC

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- ❖ To consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons
- ❖ To promote entrepreneurship

# Preamble of IBC

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- ❖ To ensure 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, and for matters connected therewith or incidental thereto

# Consolidation

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- ❖ Why it is called as Code?
- ❖ Separate Laws exist for Insolvency of Corporate Persons, Partnership Firms and Individuals
- ❖ IBC consolidates all laws relating to insolvency and bankruptcy into one law

# Single Law for Insolvency and Bankruptcy

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# Time Bound Manner

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- ❖ Insolvency and Bankruptcy took years to conclude
- ❖ Ease of Doing Business in India – India's Rank stood at 136 amongst all nations
- ❖ It took on an average 4.3 years to dissolve a company
- ❖ After IBC, India's rank has jumped to 100
- ❖ Maximisation of value of assets of such persons

Report of  
the  
Bankruptcy  
Law  
Reforms  
Committee





# Bankruptcy Law Reforms Committee (BLRC)

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- ❖ Formed on 22<sup>nd</sup> August 2014
- ❖ Under the Chairmanship of Dr T K Vishwanathan
- ❖ Submitted its report in November 2015

# Contents of Report

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- ❖ Economic Thinking – Insolvency Reforms and How India will benefit? (Chapter 3)
- ❖ Institutional Infrastructure (Chapter 4)
- ❖ Process for Legal Entities (Chapter 5)
- ❖ Process for Individuals (Chapter 6)

# Finding the Rationale

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❖ Identification of the difficulties in earlier regime

*“As long as debt obligations are met, equity owners have complete control, and creditors have no say in how the business is run. When default takes place, control is supposed to transfer to the creditors; equity owners have no say.*

*This is not how companies in India work today.”*

# Finding the Rationale

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❖ Requirement of Unified Law dealing with bankruptcy and insolvency

*“At present, there are multiple contradictory elements in the legal arrangements. The Committee has chosen the strategy of repealing many existing laws on bankruptcy and insolvency, and writing a clean modern law which is a simple, coherent, and effective answer to the problems under Indian conditions.”*

# Finding the Rationale

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❖ Identifying Key Economic Question in bankruptcy process – what is to be done when default occurs?

*“The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it.”*

# Finding the Rationale

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## ❖ Insolvency Resolution Process

*“The strategy proposed by the Committee runs as follows, when default takes place an Insolvency Resolution Process (IRP) can be initiated and run for as long as 180 days. The IRP is overseen by an “Insolvency Professional” (IP) who is given substantial powers.”*

# Finding the Rationale

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- ❖ This approach has many strengths:
  - ❖ Asset stripping by promoters is controlled after and before default.
  - ❖ The promoters can make a proposal that involves buying back the company for a certain price, alongside a certain debt restructuring.
  - ❖ Others in the economy can make proposals to buy the company at a certain price

# Finding the Rationale

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- ❖ If Resolution fails, then liquidation or bankruptcy
- ❖ Bankruptcy and Insolvency for Individuals
  - ❖ A simplified process is envisaged for default by individuals.
- ❖ Speed is the Essence
  - ❖ Liquidation Value tends to go down



# Finding the Rationale

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- ❖ Identifying and Addressing the sources of Delay
  - ❖ Information Utilities
  - ❖ Adjudicating Authorities
- ❖ Need for a Regulator
  - ❖ The Committee recommended the establishment of an Insolvency and Bankruptcy Board of India
- ❖ Cross Border Insolvency

# Committees on Bankruptcy Reforms

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Year	Committee	Outcome
1964	24 <sup>th</sup> Law Commission	Amendments to the Provincial Insolvency Act, 1920
1981	Tiwari Committee (Department of Company Affairs)	Sick Industrial (Special provisions) Companies Act, 1985
1991	Narasimham Committee I (RBI)	Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBFI)
1992	Narasimham Committee II(RBI)	The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI)
1999	Justice Eradi Committee (GOI)	Companies (Amendment) Act, 2002, Proposed repeal of SICA
2001	L. N. Mitra Committee (RBI)	Proposed a comprehensive bankruptcy code
2005	Irani Committee (RBI)	Enforcement of Securities Interest and Recovery of Debts Bill, 2011. (With amendments to RDDBFI and SARFAESI)
2008	Raghuram Rajan Committee (Planning Commission)	Proposed improvements to credit infrastructure.
2013	Financial Sector Legislative Reforms Commission (Ministry of Finance)	Draft Indian Financial Code which includes a “Resolution Corporation” for resolving distressed financial firms

# Reasons for Insolvency

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- ❖ Financial Failure
- ❖ Business Failure
- ❖ Fraudulent Operations

# Suggested Steps in Insolvency

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- ❖ Assessment of Viability
- ❖ Conflicts in Creditor-Debtor negotiation
  - ❖ Asymmetry of Information between creditor and debtor
  - ❖ Conflict amongst different types of creditors
- ❖ Side stepping of Promoters

# Objectives of New Bankruptcy law

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- ❖ Efficient handling of conflicts between creditor and debtor
- ❖ Avoiding destruction of value
- ❖ Identifying reason of failure – Misfeasance or Business Failure

# Perspective in Identifying Failure

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- ❖ Normal business failure
- ❖ Protection of the concept of Limited Liability
- ❖ Control of company is not a divine right
- ❖ Malfeasance – Illegitimate transfer of wealth by promoters etc

# Difficulties in Previous Bankruptcy Regime

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- ❖ Lack of Jurisdictional Clarity – Rights of Creditors/Rights of Debtors
- ❖ Multiple Jurisdictional Forums

# Principles for a New Code

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## UNCITRAL Legislative Guide on Insolvency

- ❖ Provision of **certainty** in the market to promote efficiency and growth.
- ❖ **Maximisation** of value of assets
- ❖ Striking a **balance between liquidation and reorganisation**.
- ❖ Ensuring **equitable treatment** of similarly situated creditors.
- ❖ Provision of **timely, efficient and impartial resolution** of insolvency.



# Principles for a New Code

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## UNCITRAL Legislative Guide on Insolvency

- ❖ Preservation of the insolvency estate to allow **equitable distribution to creditors.**
- ❖ Ensuring a **transparent and predictable insolvency law** that contains incentives for gathering and dispensing information.
- ❖ Recognition of existing creditor rights and establishment of **clear rules for ranking priority of claims.**
- ❖ Establishment of a **framework for cross-border insolvency.**

# 3 Core Features

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- ❖ Linear process
- ❖ Collective Mechanism for Resolving Insolvency
- ❖ Time Bound Process

# Objectives Desired

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- ❖ Low time to resolution
- ❖ Low loss in recovery
- ❖ Higher levels of debt financing

**“Performance of the Code in Implementation will be determined on outcome of above objectives”**

# Principles Driving the Design

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- ❖ Facilitation of Assessment of viability at early stage
  - ❖ Viability is a matter of business
  - ❖ Legislature and courts must control the process but not business decisions
  - ❖ Calm period for insolvency resolution
  - ❖ Law must appoint resolution professional

# Principles Driving the Design

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- ❖ Symmetry of Information between creditors and debtors
  - ❖ Information needed is created and available
  - ❖ Access of Information to creditors
  - ❖ Access of information to third parties
- ❖ Time bound process to preserve economic value
  - ❖ Time value of money is preserved

# Principles Driving the Design

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- ❖ Respecting rights of all creditors equally
- ❖ Failure of Negotiations lead to binding outcome i.e. bankruptcy
- ❖ Clarity of Priority and upholding of rights of all stakeholders
  - ❖ Allow individual action in liquidation and bankruptcy

# Design of the Code

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- ❖ Unified Code
- ❖ Insolvency trigger to place least cost on the Adjudicating Authority
- ❖ Strong Base of Information Utilities
- ❖ Adjudicator focusses on matters of procedure

# Design of the Code

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- ❖ Regulated Industry of Insolvency Professionals
- ❖ Regulator to ensure malleability and efficiency
  - ❖ Regulation of IUs
  - ❖ Regulations of IPs
  - ❖ Procedural aspects determination
  - ❖ Data collection, research and performance evaluation



# Design of the Code

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- ❖ Resolution Phase I – Calm Period for Insolvency Resolution
- ❖ Resolution Phase II – Bankruptcy as an outcome of insolvency resolution
- ❖ Swift and efficient bankruptcy or liquidation

# Benefits from Design of the Code

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- ❖ Misplaced Emphasis on Secured Credit
- ❖ Value Destruction in corporate distress – SARFAESI
- ❖ Poor Environment of Credit – Bias in favour of few lenders
- ❖ Industrial Disease continues for years

# Benefits from Design of the Code

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- ❖ Problems of Infrastructure Developers
- ❖ Failure of Auctions
- ❖ Corporate Bond Market Development

# Clarity on Min Default Amount

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❖ Clause 4 of IBC Bill 2015 –

“This Part shall apply to matters relating to the insolvency and liquidation of corporate debtors **where the amount of the default is not less than one lakh rupees or such other amount not exceeding one crore rupees, as the Central Government may, by notification, specify.**”

Changed to –

“This Part shall apply to matters relating to the insolvency and liquidation of corporate debtors **where the minimum amount of the default is one lakh**

# Appointment of Insolvency Professionals

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- ❖ Appointment of insolvency/resolution professional - recommendation/confirmation by the Board
- ❖ The Committee felt that provisions are redundant and may be omitted. Besides for the purpose of uniformity words —if no disciplinary proceedings are pending against him may be added after words interim resolution professional under clause 16(2).
- ❖ Not Agreed to in Final Version of Code

# Operational Creditors to be a part of CoC

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- ❖ In IBC Bill, OC were not a part of CoC
- ❖ Operational Creditors or their representative were made a part of committee of creditors if the amount of their aggregate dues is not less than ten per cent of the debt on the suggestion of the JPC.

# Performance Bond by IP

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- ❖ Bill required IP to furnish Performance Bond and Security Deposit
- ❖ JPC recommended to delete this

# IP to appoint a Substitute

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- ❖ Bill permitted IP to appoint a substitute for himself in Part III
- ❖ JPC recommended to delete this



# Insertion of Clauses of Cross Border Insolvency

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- ❖ JPC recommended that it clauses relating to cross border insolvency be inserted – Section 234 and 235

# Administrative Ministry

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- ❖ Ministry of Corporate Affairs made as administrative Ministry for implementation of IBC

# INSOLVENCY REGULATIONS

Insolvency and Bankruptcy Code, 2016

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

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

Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

Insolvency and Bankruptcy Board of India (Application to Adjudicating Authority) Rules, 2016

Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016

# PREAMBLE OF THE CODE

An Act to:

- consolidate and amend the laws relating to *reorganisation* and insolvency resolution of corporate persons;
- partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons;
- to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders;
- including *alteration in the order of priority of payment of Government dues* and to establish an Insolvency and Bankruptcy Board of India,
- and for matters connected therewith or incidental thereto.

# Amendment/Repeal in following statutes:

- Indian Partnership Act, 1932 [amendment];
- The Central Excise Act, 1944 [amendment];
- The Income Tax Act, 1961 [amendment];
- The Customs Act, 1962 [amendment];
- Recovery of Debts Due to Banks and Financial Institutions Act, 1993 [amendment];
- The Finance Act, 1994 [amendment];
- The Payment and Settlement Systems Act, 2007 [amendment];
- The Limited Liability Partnership Act, 2008 [amendment];
- The Companies Act, 2013 [amendment];
- Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [amendment];
- SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2006 [amendment];
- SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 [amendment];
- Sick Industrial Companies (Special Provisions) Act, 1985 [repeal];
- Presidency Town Insolvency Act, 1909 [repeal];
- Provisional Insolvency Act, 1920 [repeal];

# APPLICABILITY OF THE CODE

**Companies  
under  
Companies  
Act 2013**

**LLP under  
the LLP  
Act, 2008**

**Companies  
governed  
by Special  
Act of  
Parliament**

**Partnership  
firms and  
Individuals**

# **STRUCTURE OF THE CODE**

**255 Sections divided into 5 Parts and  
Eleven Schedule**

# **STRUCTURE OF THE CODE**

**255 Sections divided into 5 Parts and Eleven  
Schedule**



# ELIGIBILITY CRITERIA

The following are **ineligible** for the insolvency resolution process :

- A Corporate debtor undergoing a corporate insolvency resolution process; or
- A corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or
- A corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or
- A corporate debtor in respect of ***whom a liquidation order has been made*** [corporate debtor include a corporate applicant in respect of such corporate debtor].

# CORPORATE INSOLVENCY RESOLUTION PROCESS [by financial creditor] {Contd.}

**APPLICATION BY FINANCIAL CREDITOR** [in Form 1] to the AA along with the **DEFAULT LIST**, name of proposed Interim Resolution Professional and other information as prescribed by the IBBI

**Within 14 days**

AA may by order [communicate to financial creditor]

**Admit** such application, if AA is satisfied that a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional  
**[Date of admission of application shall be commencement of corporate insolvency resolution]**

Communicate to financial creditor and corporate debtor

**Reject** such application, if AA is satisfied that default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional.

Rectify the defects in application and again file the application with AA.

**Within 7 days of receipt of notice**

**Before rejecting the application,** the AA shall issue notice to **financial creditor rectify the defect in application**

# CORPORATE INSOLVENCY RESOLUTION PROCESS [by Operational Creditor] {Contd.}

Operational creditor deliver a demand notice [in Form 3] of unpaid operational debtor copy of an invoice [in Form 4] demanding payment of the amount involved in the default to the corporate debtor.

Within 10 days

The corporate debtor shall send intimation to the operational creditor about.

Existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute.

The repayment of unpaid operational debt:

By sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor.

Or

By sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor bank account of the corporate debtor.

Operational creditor may file an application with the AA for initiating a corporate insolvency resolution process

Operational creditor does not receive payment;

Does not receive notice of the **DISPUTE**

Or

If after the expiry of ten days from receiving invoice or demand notice



# CORPORATE INSOLVENCY RESOLUTION PROCESS [by Operational Creditor] {Contd.}

Along with the application [in Form 5] to AA:

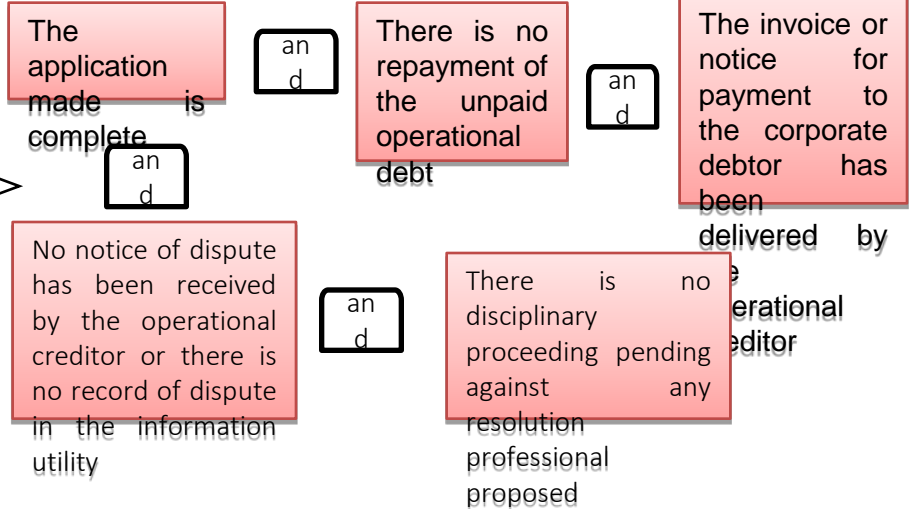
→ A copy of the invoice demanding payment or demand notice delivered;

→ An affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

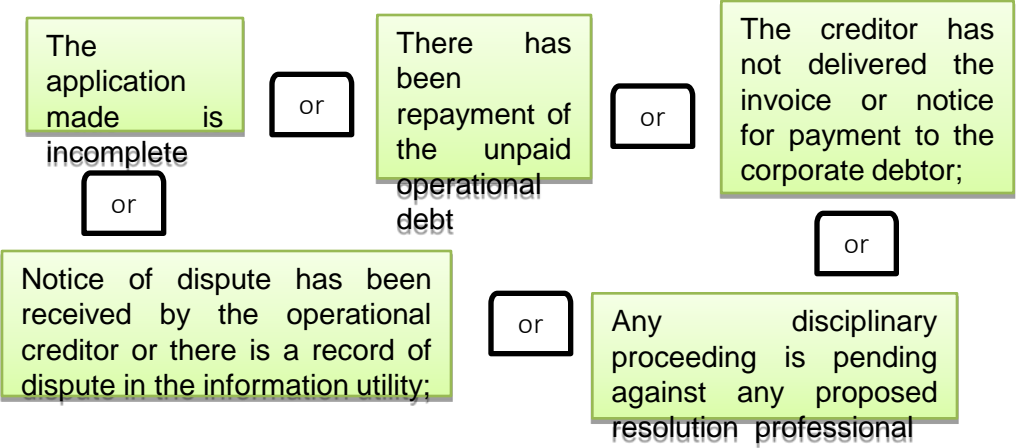
→ A copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor; and

→ Within 14 days as may be order AA may by propose a res order [act as an insolvency professional]

**Admit** the application and communicate such decision to the operational creditor and the corporate debtor if:



**Reject** the application and communicate such decision to the operational creditor and the corporate debtor, if



However, AA, shall before rejecting an application give a notice to the applicant to rectify the defect

Within 7 days of receipt of the date of Notice

Rectify the defects in application and again file the application with AA

# CORPORATE INSOLVENCY RESOLUTION PROCESS [by Operational Creditor] {Contd.}

## EXISTENCE OF DISPUTE

- Dispute must be “pre-existing”.
- The Supreme Court holds that while determining “existence of a dispute”, *all that the NCLT is to see is whether there is “a plausible contention which requires further investigation and that the “dispute” is not a patently feeble legal argument or an assertion of fact unsupported by evidence.”* While opining that “a spurious defence which is mere bluster” should be rejected, the Supreme Court adds a word of caution – while determining whether dispute exists or not, the NCLT is not required to satisfy itself that the defence is likely to succeed or to examine the merits of the dispute. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the application of an operational creditor must be rejected by the NCLT.

**[Mobilox Innovation Private Limited V. Kirusa Software Pvt. Limited (SC)]**

# CORPORATE INSOLVENCY RESOLUTION PROCESS [by Corporate Applicant] {Contd.}

Where a corporate debtor has committed a default a corporate applicant thereof may file an application [in Form 6] for initiating corporate insolvency resolution process with the AA.

Along with the application to AA, furnish the information relating to:

Its books of account and such other documents.

The resolution professional proposed to be appointed as an interim resolution professional



AA shall within 14 days of the application:

Reject the application, if it is incomplete.

If it is complete, admit the application.



However, before rejecting an application, AA shall give a notice to the applicant to rectify the defects in his application.

Rectify the defects in application and again file the application with AA.

AA.

Within 7 days of receipt of the application

