

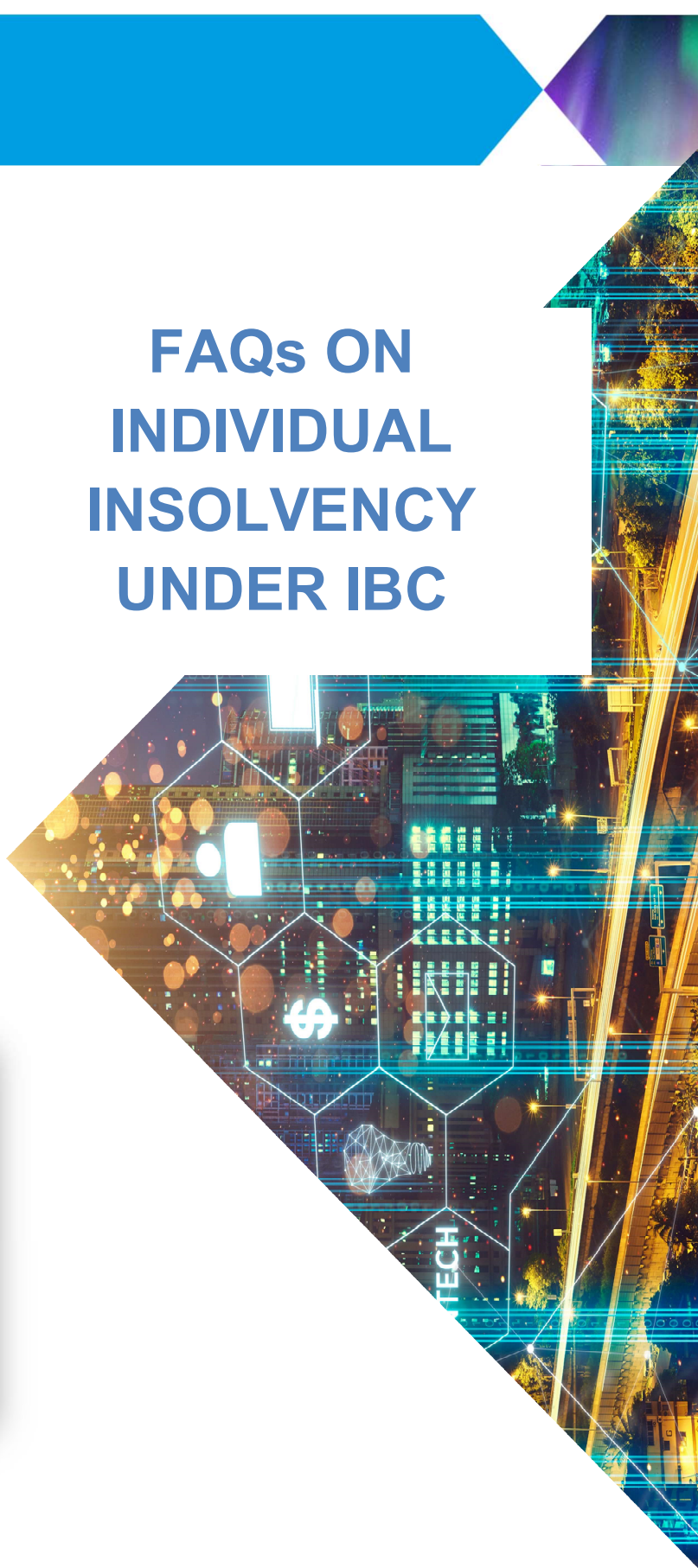


# FAQs ON INDIVIDUAL INSOLVENCY UNDER IBC

## INTRODUCTION

The provisions related to insolvency and bankruptcy of personal guarantor (individual and partnership firm) under The Insolvency and Bankruptcy Code, 2016 (“IBC”) were notified on November 15, 2019 and made effective from December 1, 2019.

Hence, insolvency proceedings of an individual guarantor of corporate debtor will be conducted as per IBC. However, the insolvency proceedings of any individuals, who are not personal guarantors, will be conducted as per Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920.



### 1. WHO IS A PERSONAL GUARANTOR?

**A:** According to Section 5(22) of IBC “personal guarantor” means an individual who is the surety in a contract of guarantee to a corporate debtor.

### 2. WHO CAN FILE AN APPLICATION FOR INSOLVENCY OF INDIVIDUAL GUARANTOR?

**A:** The debtor himself (i.e. Individual) who has committed default of debt either personally or through a Resolution Professional under section 94 of IBC or the creditor either individually or jointly with other creditors directly or through a Resolution Professional under section 95 of IBC can make the application for insolvency.

### 3. WHICH IS THE ADJUDICATING AUTHORITY?

**A:** If the Corporate Insolvency Resolution Process (“CIRP”), of the corporate debtor for whom the guarantee is given, is pending with National Company Law Tribunal (“NCLT”), the AA is NCLT. If the CIRP is not pending, the Adjudicating Authority (“AA”) will be Debt Recovery Tribunal (“DRT”).

In the case of NCLT the jurisdiction shall be same bench where CIRP proceedings of the corporate debtor is conducted. In case of DRT, the bench having jurisdiction in residential address of guarantor shall be the jurisdiction. An appeal against order of NCLT can be made to National Company Law Appellate Tribunal (NCLAT). An appeal against order of NCLAT on the question of law can be made to the Supreme Court.

If the proceedings are initiated in DRT and subsequently CIRP proceedings commences, the insolvency proceedings against personal guarantor shall be transferred to the concerned NCLT. An appeal against order of DRT can be made to Debt Recovery Appellate Tribunal (DRAT). An appeal against order of DRAT can be made to the Supreme Court.

### 4. ARE THERE ANY PRE-CONDITIONS FOR INITIATING INSOLVENCY OF INDIVIDUAL GUARANTOR?

**A:** The application can be filed with Adjudicating Authority (“AA”) only if guarantee is invoked and the debtor fails to pay within 14 days of service of demand notice by the creditor.

### 5. CAN GUARANTEE BE INVOKED BEFORE CLAIMING THE SAME DEBT FROM THE CORPORATE PERSON?

**A:** The Hon’ble NCLAT in the matter of Dr. Vishnu Kumar Agarwal v. M/s. Piramal Enterprises Ltd. Company Appeal (AT)(Insolvency) No. 346 of 2018, held that guarantee can be invoked before claiming the same from the principal debtor.

### 6. WHAT HAPPENS IF THERE ARE JOINT / MULTIPLE GUARANTORS?

**A:** In case of joint / multiple guarantors, the application for insolvency can be filed against one or all guarantors. The quantum of default / claim is decided based on the guarantee document.

### 7. DOES IT MAKE ANY DIFFERENCE IF THE PERSONAL GUARANTOR HAS PROVIDED SECURITIES?

**A:** No, it does not make any difference even if the personal guarantor has given securities for the loans.

### 8. WHAT IS THE MINIMUM AMOUNT OF DEFAULT FOR THE INITIATING INSOLVENCY PROCEEDINGS?

**A:** An application for insolvency can be filed for a default of at least Rs.1000/- by the debtor.

### 9. WHAT IS INTERIM MORATORIUM?

**A:** Unlike CIRP, there is a concept of Interim moratorium for individual / personal insolvency. As per the section 96, an interim moratorium commences on the date of the application for insolvency in relation to all the debts of the guarantor and shall cease to have effect on the date of admission of insolvency. During the moratorium period:

- i. Any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed and
- ii. The creditors of the debtor shall not initiate any legal action or proceeding in respect of any debt.

## 10. WHO CAN BE A RESOLUTION PROFESSIONAL (“RP”)?

**A:** As per the Regulation 4 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 following is the eligibility of resolution professional:

- i. Insolvency Professional or Insolvency Professional entity of which he is partner or director & all partners and directors of that Insolvency Professional entity are Independent of the guaranteed.

The term independent here refers to:

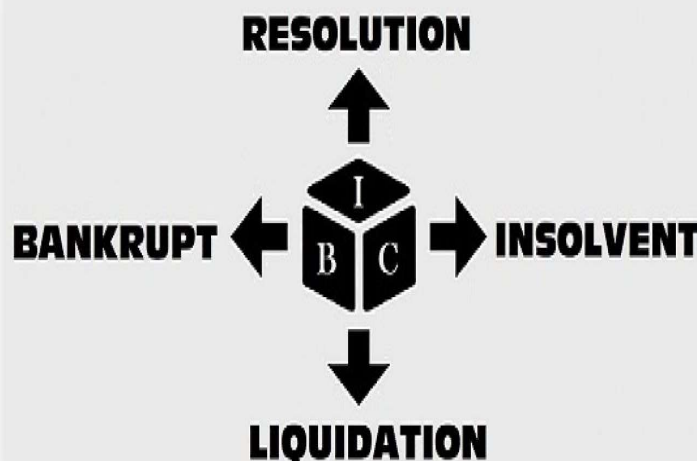
- a. Not an associate of the guarantor;
  - b. Not a related party of the corporate debtor;
  - c. Has not acted as the IRP; RP or liquidator of the Corporate debtor for whom guarantee is given.
- ii. Insolvency Professional or Insolvency Professional entity of which he is partner or director & all partners & directors do not represent any party in resolution process of corporate debtor.
  - iii. Insolvency Professional is not subject to any proceedings by the Insolvency and Bankruptcy Board of India (“IBBI”).

## 11. WHAT ARE EXCLUDED DEBTS?

**A:** The excluded debts refers to the debt which is not part of either repayment plan or discharged.

As per Section 79(15) excluded debts means:

- i. Maintenance to be paid to any person under any law;
- ii. Liability with respect to a student loan;
- iii. Damages for negligence, breach of statutory obligation;
- iv. Fine imposed by Court/ Tribunal and
- v. Any other debt, as may be prescribed (no such prescription yet).



## 12. WHAT ARE EXCLUDED ASSETS?

**A:** As per Section 79(14) read with Rule 5 following are excluded assets:

- i. Unencumbered tools, vehicles and other equipment, necessary for employment, business or vocation.
- ii. Unencumbered furniture, equipment, necessary for basic domestic needs
- iii. Unencumbered personal ornaments up to Rs. 1,00,000/-, that cannot be parted with in accordance with the religious usage.
- iv. Unencumbered life insurance policy/ pension plan.
- v. Unencumbered single dwelling unit up to Rs. 20,00,000/- in urban area; Rs. 10,00,000/- in rural area.

## 13. WHAT IS THE REPAYMENT PLAN/RESOLUTION PLAN?

**A:** The guarantor is to prepare a repayment plan / resolution plan in consultation with the RP, which should provide for a restructuring mechanism for the debts owed by the guarantor, justification for preparation of such plan with the reasons on the basis of which the creditors may agree upon the plan.

Once such plan is finalized, the RP is required to submit the Plan to the authority within 21 days of receipt of the last claim of any creditor, along with a

report requesting whether or not a meeting of the creditors is required.

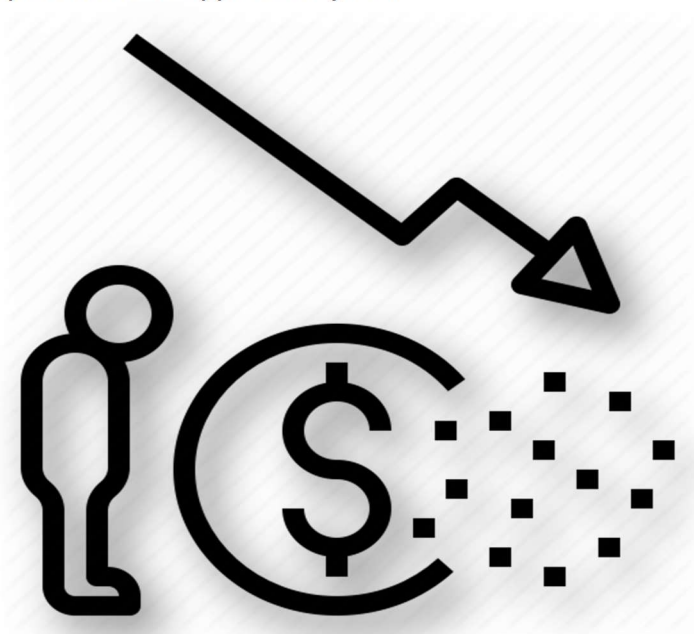
#### 14. WHAT ARE THE KEY CONTENTS OF REPAYMENT PLAN?

A: The key contents of a repayment plan are:

- i. Term of repayment plan and implementation schedule
- ii. Sources of funds for meeting resolution cost
- iii. Funds required for plan implementation
- iv. Variation of any onerous terms
- v. Details of excluded assets and excluded debts
- vi. Terms and conditions for discharge of debtor

#### 15. WHO APPROVES THE REPAYMENT PLAN?

A: The repayment plan must be approved by the majority of three-fourth of creditors present in person or by proxy on the resolution in a meeting of the creditors under Section 111. Further the repayment plan must be approved by AA.



#### 16. WHO CAN VOTE IN THE CREDITORS MEETING?

A: In personal insolvency, there is no difference between financial creditors and operational creditors. All the creditors forming a part of list of creditors can vote in the meeting. No voting right shall be granted pursuant to an unliquidated debt.

#### 17. WHAT ARE THE OPTIONS AVAILABLE TO SECURED CREDITORS?

A: The following options are available to the secured creditors:

- i. Secured creditor can vote in the meeting if he relinquishes his security rights.
- ii. If secured creditor does not relinquish his security right than he shall be entitled to vote only in respect of unsecured debt, if any.

Further if the repayment Plan affects rights of secured creditors in enforcing the security, his concurrence shall be obtained.

#### 18. WHAT IS THE EFFECT OF APPROVAL OF REPAYMENT PLAN?

A: Post approval of the repayment plan,

- i. Approved plan becomes effective as if proposed by the guarantor / debtor
- ii. It is binding on creditors mentioned in the plan
- iii. RP has to supervise implementation of the plan

#### 19. UNDER WHAT CIRCUMSTANCES CAN THE APPLICATION BE WITHDRAWN?

A: The AA may permit withdrawal of the application as the case may be:

- i. before its admission, on a request made by the applicant;
- ii. after its admission, on the request made by the applicant, if 90% of the creditors agree to such withdrawal.





## 20. IS THERE ANY TIMELINE FOR PERSONAL INSOLVENCY?

A: RP has to submit repayment plan with AA within 120 days of initiation of personal insolvency proceedings.

These events are some of the potential signals that indicate a **triggering event**. In current environment most of the companies has one or more of the above-mentioned indicators. Further, it is important to remember that impairment testing for goodwill is required irrespective of indicators.

Moreover, in several cases where management has been relying on '**Fair Value less cost to Sell**' as the value may now be vitiated. Asset or broker valuation reports which were being relied upon may not be relevant anymore as it relied on their being an '**active market**' which in a large number of cases do not exist at the moment.

If the answer to the above is affirmative the management needs to apply the **Value in Use** method and conduct a discounted cash flow of the future projections. Several companies have begun to engage external valuers to conduct a detailed impairment analysis for their comfort as well as for the auditors to

assess the impact if any of Impairment on the financial statements.

## 21. IF THE REPAYMENT PLAN IS REJECTED DOES IT COMPULSORILY LEADS TO BANKRUPTCY?

A: Unlike CIRP, bankruptcy proceedings are not automatic on rejection of plan by the creditors or AA. After the rejection of repayment plan by AA, a separate application is to be filed for initiating bankruptcy proceedings.

## 22. WHAT IS DISCHARGE ORDER AND ITS IMPACT?

A: RP files an application with AA for discharge order on successful implementation of repayment plan. Based on the report by RP, AA passes orders discharging the guarantors from all debts forming part of repayment plan. However, discharge order does not relieve any other person from their obligations.

## 23. WHAT HAPPENS IF REPAYMENT PLAN FAILS OR TERMINATES PREMATURELY?

A: RP has to intimate AA and the creditors about premature termination (failure) of repayment plan. AA passes an order under section 118 declaring terming of repayment plan. The creditors whose claims are not fully satisfied may apply for bankruptcy order against the individual



#### 24. WHAT IS THE DIFFERENCE BETWEEN PERSONAL INSOLVENCY AND CIRP?

POINT OF DIFFERENCE	PERSONAL INSOLVENCY	CIRP
<b>DISTINCTION BETWEEN CREDITORS</b>	No classification with respect to type of creditor i.e. operational or financial	Three classes of creditors – financial, operational, other
<b>INTERIM MORATORIUM</b>	Yes	No
<b>APPROVAL OF PLAN</b>	Requires 75% assent of creditors present and voting	Requires 66% assent of CoC
<b>ROLE OF THE IP</b>	Pre-scrutiny of the insolvency application and repayment plan by the RP	RP does not come into picture until admission
<b>REJECTION OF PLAN</b>	Application for bankruptcy may be filed	Leads to compulsory liquidation

#### 25. WHAT IS THE DIFFERENCE BETWEEN PERSONAL INSOLVENCY RESOLUTION AND BANKRUPTCY?

POINT OF DIFFERENCE	PERSONAL INSOLVENCY	BANKRUPTCY
<b>NECESSARY CONDITION</b>	Default by the debtor.	Rejection of application for insolvency resolution; or rejection of repayment plan; or premature termination of the repayment plan.
<b>ROLE OF INSOLVENCY PROFESSIONAL</b>	Resolution Professional	Bankruptcy Trustee
<b>MORATORIUM ON CREDITORS</b>	Yes, includes restrictions on creditors too.	Assets of the bankrupt vest in the hands of trustee. Secured creditors may sell by themselves
<b>VESTING OF ESTATE</b>	No	Yes
<b>PERIOD OF DISCHARGE</b>	No default period specified; on implementation of the repayment plan.	Earlier of 1 year or completion of administration is approved by the committee of creditors.



## SUMMARY

The insolvency and debt resolution process in India has in the past involved the simultaneous operation of several statutory instruments. These include the Sick Industrial Companies Act, 1985, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, and the Companies Act, 2013. Broadly, these statutes provided for a disparate process of debt restructuring, and asset seizure and realization in order to facilitate the satisfaction of outstanding debts.

With the introduction of the Insolvency and Bankruptcy Code in 2016 for corporate, the country has witnessed several significant resolutions and liquidations which has given a certain amount of satisfaction to lenders. The process under IBC is time bound and has been fairly effective compared to other . The notification of individual insolvency for personal guarantors opens up one more avenue for debt resolutions for lenders in India.

Insolvency Services of MSS group comprises acting as Insolvency Professionals and advisory services to various stakeholders. With teams in Mumbai, Kolkata and Hyderabad, MSS group has acted as Insolvency Professionals in more than 10 CIRP / Liquidation cases. The group has developed eco system for handling CIRP of operating companies.

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