

ROLE OF CREDITORS IN THE CORPORATE INSOLVENCY RESOLUTION PROCESS: A COMPREHENSIVE ANALYSIS

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Abstract:

The Corporate Insolvency Resolution Process (CIRP) is a critical framework under India's Insolvency and Bankruptcy Code (IBC), designed to address the financial distress of corporate entities. This paper offers a comprehensive analysis of the evolving role of creditors within the CIRP, especially in light of the recommendations by the Vishwanathan Committee. Traditionally, creditors remained passive observers until defaults occurred, having minimal control over the debtor's operations. However, modern reforms have redefined their position, granting them significant authority in initiating insolvency proceedings and taking over management during defaults. This shift empowers creditors to play an active role in decision-making, improving the efficiency, transparency, and effectiveness of the resolution process. The study also explores the classification of financial and operational creditors, their voting rights, and their impact on the approval or rejection of resolution plans. Overall, this paper highlights how creditor-centric reforms have transformed the insolvency ecosystem in India.

Keywords: CIRP, Creditors' Committee, Insolvency and Bankruptcy Code (IBC), Financial and Operational Creditors, Vishwanathan Committee Recommendations

INTRODUCTION

The Bankruptcy Legal Reforms Committee also known as Vishwanathan Committee¹ was created for providing a smooth bankruptcy law for India. It recognized the dilemmas faced by the creditors in recovery of their debts from corporate debtor, in order to resolve the same, the committee classified categories of creditors.

It is usually presumed that the creditors must always have an idea about the solvency and sound financial health of his debtor. They should always be informed about the debtor's state of business. Usually default by the debtor makes the creditors aware about the poor financial conditions & financial distress of the debtor. The creditors even at this point of time cannot do anything, as they have little control over the affairs of the debtor. In order to overcome this

¹Bankruptcy Legal Reforms Committee set up under the chairmanship of Shri T.K. Vishwanathan in August, 2014.

situation, the Vishwanathan Committee's report suggested a mechanism to include the creditors as a major part of insolvency and bankruptcy process. The report of this committee suggested a mechanism whereby the movement default is committed in payment of dues or installments thereof, after a reasonable time and demands made by creditors, the debtor loses its right to run the business or on its affairs. Such right over the business is transferred to those respective creditors against whom default has been made.

CONCEPT OF "CREDITOR" UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016:

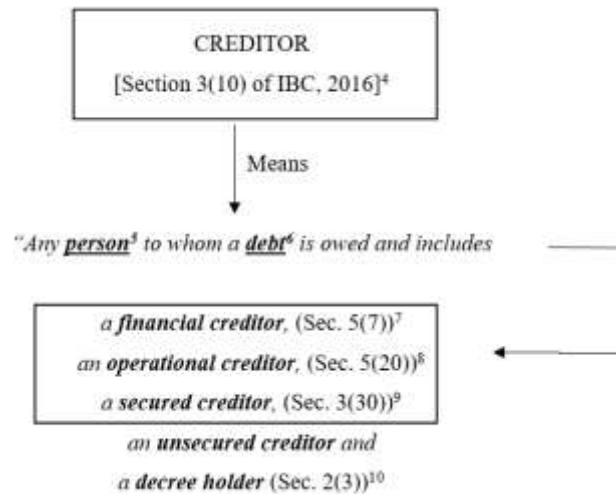
The Bankruptcy law reform committee recognized the difficulties faced by creditors in lending money and recovery of the same. It was important to address this issue as credit facility helps in free-flow of trade which benefits the economy at large. In order to uplift the position of creditors, the report of Vishwanathan Committee suggested a mechanism whereby the movement there is default; the debtor loses its right to run the business or its affairs.² These rights are transferred to creditors, where primacy is given to a financial creditor in corporate insolvency. The Committee based its reports on the following principles affecting creditors:

- i. Ensuring equitable treatment of similar situated creditors.
- ii. Provision of timely, efficient and impartial resolution of insolvency.
- iii. Preservation of the insolvent's estate, to allow equitable distribution among creditors.
- iv. Recognition of existing creditor rights and establishment of clear rules for ranking priority of claims.

As per section 3(10) of Insolvency and Bankruptcy Code, 2016, the term "*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.*" The creditors have an important role to play in the insolvency resolution of a corporate debtor, as they are entitled under the code to initiate insolvency resolution process under part II of the code.³

² Chapter 2- Executive Summary, *The Report of the Bankruptcy Law Reforms Committee, Volume I: Rationale and Design*, November 2015.

³ Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s. 6.



The detailed examination of this section as per IBC, 2016 is essentially necessary, which the researcher has tried to provide below:

- Person:** The definition of creditor under section 3(10) begins with the word “Any Person” hence it is essentially necessary to understand the term ‘Person’. Person is defined in the insolvency and bankruptcy code under section 3(23). As per this section ‘Person’ includes: *an individual, a Hindu undivided family, a company, a trust, a partnership, a limited liability partnership, any other entity established under a statute, and includes a person resident outside India*⁴. The report of Vishwanathan Committee strongly suggested to avoid any discrimination between ‘person residing inside India’ and ‘person residing outside India’ while implementing the provisions of the code.⁵ It is necessary to understand these definitions as provided in the code. The code specifies that a “*person residing outside India means a person other than a person residing in India*”.⁶ A person residing in India has been defined to have the same meaning as provided under section 2(v) of the Foreign Exchange Management Act, 1999 (FEMA).⁷ As per the

⁴Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), section 3(25) defines the term “*Person resident outside India*” means a person other than a person resident in India. “Person resident in India” as defined in section 3(24) shall have the meaning as assigned to such term in clause (v) of section 2 of the Foreign Exchange Management Act, 1999.

⁵Chapter 5- Process for legal entities, The Report of the bankruptcy Law reform Committee, Volume I: Rationale and Design, November 2015.

⁶Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), section 3(25)

⁷Foreign Exchange Management Act, 1999 (FEMA), section 2(v) defines the term ‘Person Resident in India’, which states,

A person resident in India means—
person resident in India” means—

- a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include—
 - a person who has gone out of India or who stays outside India, in either case—
 - for or on taking up employment outside India, or

definition provided under FEMA, ‘person resident of India’ includes persons of India (except those staying abroad for work or business or other purpose) and foreign persons who come to India or stay in India, for carrying out business, employment, or other purpose. Even office, branch or agency can be ‘person’.⁸

- **Debt:** The code defines “debt” as *a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.*⁹ The two categories of debt i.e. financial debt and operational debt have been defined in part II of the code as they are relevant for the purpose of resolving insolvency or liquidating the corporate debtor. The term “claim” defined in the code encompasses two rights i.e. right to payment and right to remedy for breach giving rise to a right to payment. Right to receive payment underlines claim. If there is no right to receive payment, no claim exists.¹⁰ Hence for a “debt” under this code it is essential that there must exist a “claim”, as only in respect of a claim the liability or obligation will be considered as a debt. Furthermore, the aforesaid code also uses “liability” or “obligation”.¹¹ The definition of debt only contemplates the liability due from any person from whom the money is due. A Debt is a sum of money which is now payable or will become payable in future by reason of a present obligation.¹²
- **Financial Creditor:** 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. Where a corporate debtor commits a default in payment of a debt the financial creditor may initiate corporate insolvency resolution process in respect of such

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- b) for carrying on outside India a business or vocation outside India, or
 - c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;
 - B. a person who has come to or stays in India, in either case, otherwise than—
 - a) for or on taking up employment in India, or
 - b) for carrying on in India a business or vocation in India, or
 - c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;
 - ii. any person or body corporate registered or incorporated in India,
 - iii. an office, branch or agency in India owned or controlled by a person resident outside India,
 - iv. an office, branch or agency outside India owned or controlled by a person resident in India;

⁸ Person Resident in India under FEMA, available at: <https://www.taxmann.com/blogpost/2000000249/person-resident-in-india-under-fema.aspx>; The provisions of FEMA act provides that there is a distinction between ‘stay’ and ‘reside’. ‘Stay’ means physical presence in India while ‘reside’ indicates permanency.

⁹ Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s.3(11)

¹⁰ The right to receive payment can arise under an agreement or law or under equity. For Example: if a person renders services or supplies goods to a company, it gives rise to a right to receive payment under an agreement. such right to payment can be fixed, secured, unsecured, legal, equitable, secured, unsecured, distributed or undistributed.

¹¹ As per Webster’s Seventh New Collegiate Dictionary, ‘liability’ means ‘obligation’.

¹² *Banchharam Majumdar v Adyanath Bhattacharjee*, (1909) ILR 36 Cal 936: 13 CWN 966.

corporate debtor. As per Reform Committee, financial creditors are those whose relationship with the entity is a pure financial contract, such as a loan or debt security.¹³

Where the assignee of a debt is financial creditor and the borrower had agreed to pay outstanding loan amounts either to bank or to its assignee or transferee, it was held that the contention of the borrower that no privity of contract exists between the applicant and the borrower cannot be accepted.¹⁴

The definition of 'financial debt' under section 5(8) of the code uses the words "includes", thus the kinds of financial debts illustrated are not exhaustive.¹⁵ The phrase "disbursed against the consideration for the time value of money" has been the subject of interpretation only in a handful of cases under the code. The word "time value" has been interpreted to mean compensation or the price paid for the length of time for which the money has been disbursed. This definition is dealt by the researcher in the latter part of this chapter.

- **Operational Creditor:** An operational creditor on occurrence of a default in payment of operational debt by the debtor is eligible to initiate corporate insolvency resolution process under section 8 of the code. Section 5(20) defines the term "Operational Creditor" and states "*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.*"¹⁶
- **Secured creditor:** The term 'Secured Creditor' has been defined under the IBC, 2016 but prior to IBC this concept was dealt under the SARFAESI Act, 2002, hence for a proper understanding of the term it is essentially necessary to refer SARFAESI Act as well. Section 2(zd) of the said act defines the term secured creditor.¹⁷ This Act helps the Banks and Financial Institutions who are the secured creditors to enforce securities held

¹³ V.S. Wahi, *Treatise on Insolvency & Bankruptcy Code*, (Bharat Law House Pvt. Ltd., New Delhi, 2nd Edition, 2018)

¹⁴ *Edelweiss Assets Reconstruction Co. Ltd. V. Kalpatru Alloys P. Ltd* (2017) 205 Comp. Case 186 NCLT.

¹⁵ Government of India, Report of The Insolvency Law Committee, [Para 1.8]

¹⁶ Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s.5(20)

¹⁷ The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), s.2(zg) defines 'secured creditor' as, secured creditor means any bank or financial institution or any consortium or group of banks or financial institutions and includes-

- i. debenture trustee appointed by any bank or financial institution; or
- ii. securitization company or reconstruction company, whether acting as such or managing as a trust set up by such securitization company or reconstruction company for the securitization or reconstruction, as the case may be; or
- iii. any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created for due repayment by any borrower of financial assistance;

as collaterals to loans disbursed by them, if such loans turn to be Non-Performing Assets. If borrower of financial assistance makes any default in repayment of loan or any installment and his account is classified as Nonperforming Asset. Under SARFAESI Act, secured creditors which include Banks and Financial institution can refer the Non-Performing Asset (“NPA”) to any Asset Reconstruction Company, established with the Reserve Bank of India under section 3 for the purposes of the Asset Reconstruction or Securitization or both.

CATEGORIES OF CREDITOR UNDER IBC, 2016:

The Bankruptcy Law Reform Committee created a new category of creditor under the Indian Insolvency and bankruptcy regime i.e. financial creditor and operational creditor. According to the Bankruptcy Law Reforms Committee in para 5.2.1 of its final report, the difference between a financial creditor and an operational creditor is that a financial creditor is an individual whose relationship with the entity is a pure financial contract, such as a loan or debt security. Whereas, an operational creditor is an individual whose liabilities from the entity comes from a transaction on operations. The report further states that I&B Code also provides for cases where a creditor has indulged in both, a financial transaction as well as an operational transaction, with the entity. In such a case, the creditor can be considered a financial creditor to the extent of the financial debt and an operational creditor to the extent of the operational debt.¹⁸

ROLE OF CREDIRORS UNDER CORPORATE INSOLVENCY RESOLUTION PROCESS:

The Insolvency and bankruptcy code provides creditors with a mechanism to initiate an insolvency resolution process in the event a debtor is unable to pay its debts. Corporate Insolvency Resolution Process is a recovery mechanism for creditors. If a corporate becomes insolvent, a financial creditor, an operational creditor, or the corporate itself may initiate CIRP. After making an application then Corporate Insolvency Resolution Process is initiated. Corporate Insolvency resolution Process is the process through which it is determined whether the person who has defaulted is capable of repayment or not (Insolvency resolution profession is appointed as per the provisions of code, who will evaluate the assets and liabilities to determine the repayment capability). If a person is not capable of repaying the debt the company is restructured or liquidated. As per section 6, for initiating a corporate insolvency resolution process, it is essentially necessary that a ‘default’ is made by the corporate debtor.¹⁹

In the matter of *Kirusa Software Private Ltd. v. Mobilox Innovations Pvt. Ltd.*,²⁰ the NCLAT by exercising its appellant jurisdiction, held that section 3(12) defines “default” to mean “non-

¹⁸Government of India , The report of the Bankruptcy Law Reforms Committee ,Volume I: Rationale and Design,(Ministry of Corporate Affairs, 2018), para 5.2.1

¹⁹ Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s. 6

²⁰ *Kirusa Software Private Ltd. v. Mobilox Innovations Pvt. Ltd*, Company Appeal (AT)(Insolvency)6 of 2017

payment of debt” once it has become due and payable and the same is not repaid by the debtor.²¹

‘Default’ occurs on fulfilment of twin conditions:

- a) Debt becoming due and payable; and
- b) Non- Payment thereof.

Apart from the term default, section 6 also provides that when a default is committed by a corporate debtor,²² Corporate Insolvency Resolution Process may be initiated by following persons:

- a) A financial creditor,
- b) An Operational creditor,
- c) The corporate debtor itself.

In the matter of *Urban Infrastructure Trustee Ltd. v. Neelkanth Township and Constructions Pvt. Ltd.*,²³ a corporate debtor raised an objection that the applicant is a shareholder of the corporate debtor, and therefore, he cannot initiate the proceedings under section 7 of the code.²⁴ The NCLT has observed that under the code, there is no restriction on the shareholders to initiate proceedings;

- i) As a financial creditor in case of financial debt; or
- ii) As an operational creditor in case of operational debt.

Initiation of Corporate Insolvency Resolution Process by Financial Creditor:

The financial creditor has been provided power to initiate corporate insolvency resolution process under section 7 of the Insolvency and Bankruptcy code, 2016. Section 7(1) of the code provides that a financial creditor,

- a) Either by itself; or
- b) Jointly with other financial creditors;²⁵

In both the abovementioned cases a financial creditor may file an application for initiating corporate insolvency resolution process against a corporate debtor before the adjudicating authority when a default has occurred. An explanation to section 7(1) provides that for the purpose of section 7(1), a default here includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate

²¹Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s. 3(12)

²² Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s.6.

²³ *Urban Infrastructure Trustee Ltd. v. Neelkanth Township and Constructions Pvt. Ltd.*, NCLT Mumbai C.P. No. 21/1 & BP/NCLT/MB/MAH/2017.,

²⁴ Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s.7.

²⁵ Rule 4(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 provides that a financial creditor, either by itself or jointly, shall make an application for initiating the CIRP against a corporate debtor under section 7 of the Code.

debtor.²⁶ The Adjudicating Authority on receipt of application under section 7(2) is required to ascertain existence of default from the records of Information Utility or on the basis of other evidence furnished by the financial creditor under sub-section (3). Thereafter the adjudicating authority under section 7(5) is required to satisfy:

- a) Whether a default has occurred;
- b) Whether an application is complete;²⁷ and
- c) Whether any disciplinary proceeding is against the proposed Insolvency Resolution Professional.

Upon being satisfied the adjudicating authority is required to admit the case. In case the application is incomplete, financial creditor is to be granted 7 days time to complete the application. However, in a case where there is no default or defects cannot be rectified, or the record enclosed is misleading, the application has to be rejected.

In the matter of *Macquaire Bank Ltd. v. Shilpi Cable Technologies Ltd.*,²⁸ it was held that a minor error which has been discovered by NCLT in Column No. 6 of the application, is a condonable fault and cannot constitute a basis to reject the application.

The NCLAT with reference to its earlier decision of *M/s Innoventive Industries Limited v. ICICI Bank & Anr.*²⁹ Held that before admitting an application under section 9 of the I&B Code, 2016 it is mandatory duty of adjudicating authority to issue notice, non compliance of which would be against the principles of natural justice. But not in an application entertained through section 7 of the code. However the Supreme Court clarified and made it mandatory for a notice to be served on the debtor, as well as to provide the debtor with the right to be heard.³⁰

²⁶ Rule 4(4) the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 provides that where the application is made jointly by the financial creditors, they may nominate one amongst them to act on their behalf.

²⁷ Such application, in order to be a complete one, shall be filed before the adjudication authority i.e. NCLT as per the provisions of section 7. An application filed by financial creditor under section 7(1) shall be in the prescribed form 1 accompanied with fee of Rs. 25000/- as prescribed under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Furthermore, Section 7(3) of the code provides that the financial creditor shall, along with the application in the form 1 has to furnish the following documents:

- a) Record of the default recorded with the information utility or such other record or evidence of default as may be specified;
- b) The name of the resolution professional proposed to act as interim resolution professional;
- c) Authorization letter or the Board of directors resolution for the name and address of person resident in India authorized to accept the service of process on its behalf;
- d) Workings for computation of amount and days of default in tabular form for the amount claimed to be in default and the date on which the default occurred;
- e) Any other information as may be specified.

²⁸ *Macquaire Bank Ltd. v. Shilpi Cable Technologies Ltd* ,(IB) 64 (PB)/2017.

²⁹ *M/s Innoventive Industries Limited v. ICICI Bank & Anr* ,CA (AT) (Insolvency) No. 1&2 of 2017.

³⁰ *Sree Metaliks Limited and another v. Union of India and Anr* , 7 April 2017 W.P. 7144 (W) of 2017; *Standard Chartered Bank Ltd; Standard Chartered Bank Ltd v. Essar Steels Ltd* , 1A 153/2017 with C.P (I.B) No. 39/7/NCLT/AHM/2017.

Furthermore the NCLAT while dealing with the issue of misrepresentation of material fact made by financial creditors before the ‘adjudicating authority’ in order to obtain admission of application by NCLT, held that “*if the application preferred is incomplete, misleading and being non bonafide is fit to be rejected, even if an ex-parte order by the adjudicating authority.*”

In the matter of *Giridhar Infracon Pvt. Ltd. v. Y.K Developers Pvt. Ltd.*,³¹ it was held that if the basic documents were not placed before the NCLT, at the time of filing application, then such application is liable to be rejected. It is immaterial that an FIR has been lodged in the Police Station Crime Branch, Delhi regarding lost bags containing original document of the companies as well as some of the personal documents.

A question for interpretation arose before the NCLT regarding, *whether an application is maintainable having regard to the fact that no record or evidence of default has yet been produced u/s 240(2)(f) of the code?* The NCLT Tribunal dealt with this issue in the case of *Edelweiss Asset Reconstruction Company Ltd. v Bharati Defence and Infrastructure Ltd.*³² In section 7(3)(a), it has been said to produce such other record or such other evidence of default of repayment, means that financial creditor can produce evidence in the place of record as well, it is not that if record as mentioned is not available. Then financial creditor can produce evidence to the belief of the adjudicating authority to admit a petition. The tribunal in this case held that, non-filing of record from utility centre would not make insolvency process invalid because it is only optional, not compulsory to produce record from Information utility center.³³

Section 7(6) provides that the corporate Insolvency resolution process shall commence from the date of admission of the application u/s 7(5).³⁴ Further the code provides that within 7 days of admission or rejection of such application, as the case may be, the adjudicating authority shall communicate u/s 7(7):³⁵

- a) The order u/s 7(5)(a) to the financial creditor and the corporate debtor.
- b) The order u/s 7(5)(b) to the financial creditor.

Initiation of Corporate Insolvency Resolution Process by Operational Creditor:

The Insolvency and Bankruptcy Code, 2016 defines Operational creditor as a person to whom an operational debt is owed including the debt that has been legally assigned or transferred.³⁶ Operational Debt is debt may arise out of provision of goods or services or dues arising out of employment or dues arising under any law for time being in force and payable to the Centre/State

³¹ *Giridhar Infracon Pvt. Ltd. v. Y.K Developers Pvt. Ltd.*, CP (B)No. 19/Chd/Hry/2017 NCLT.

³² *Edelweiss Asset Reconstruction Company Ltd. v Bharati Defence and Infrastructure Ltd* ,CP. No. 292/I&BP/NCLT/MAH/2017

³³ *Edelweiss Asset Reconstruction Co. Ltd. v. Bharti Defence & Infrastructure Ltd.*, 2017, Available at: https://taxpublishers.in/Ency_CL/CL_Judg_Show?80683000?a0.

³⁴ Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s.7(6).

³⁵ Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s. 7(7).

³⁶ Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s 5(20)

Government.³⁷ In common parlance the Operational Creditor debt emanates from transactions on operations.

In case, the payment has not been made or no notice of '**dispute**' has been received by the operational creditor within the aforesaid statutory period of ten days, the operational creditor has the right to initiate insolvency process by filing its application (Form 5) with the relevant bench of the Honourable NCLT, which has jurisdiction over the place where the registered office of the corporate debtor is located.³⁸

Existence of Dispute: One of the highly debatable issues in relation to invoking insolvency resolution process by an operational creditor is rejection of the application by the Honourable National Company Law Tribunal on account of '**existence of dispute**' between the operational creditor and the corporate debtor. The said issue has been analysed below.

Section 5 (6) of the Code defines the term "dispute".³⁹ A "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;

Now, it is imperative to understand what will construe as an 'existence of dispute'. Will mere sending of notice of dispute by the corporate debtor be construed as an existence of dispute or should there be some genuine dispute?

In view of the aforesaid judgment, it is clear that the term 'dispute' under the Code is illustrative and not exhaustive. It cannot be read solely restricted to dispute in relation to a suit or arbitration proceedings. The Honourable NCLT, before admitting the application, needs to examine and look into the matter to an extent required to ascertain whether actual dispute exists, or the dispute raised is a mere tool to avoid the insolvency resolution process.

Demand Notice: A Demand notice for initiating insolvency resolution by the operational creditor is essentially necessary. Section 8(1) of the code with Rule 5(1) of the insolvency and bankruptcy (Application to Adjudicating Authority) Rules, 2016 provides that on the occurrence of a default of amount Rs. 1.00 Lakh or more, an operational creditor may, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default

³⁷ *Ibid*

³⁸ The aforesaid application (Form-5) is required to be submitted with the Hon'ble NCLT along with the following documents:

1. A copy of the invoice demanding payment or the proof of delivery of demand notice (Form-3).
2. An affidavit to the effect that no notice of dispute regarding unpaid operational debt has been given by the corporate debtor.
3. A certificate from the bank in which the account of the operational creditor is maintained confirming that there is no receipt of the payment due to the corporate debtors along with bank account statements where credits are normally received by the operational creditor confirming non-receipt of the payment due to the corporate debtor. (*In Re: Macquarie Bank Limited Vs. Shilpi Cable Technologies Ltd.* [AIR 2018 SC 498], the Hon'ble Supreme Court of India held that the requirement of the bank certificate is directory in nature).

³⁹ Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s.5(6)

to the corporate debtor in Form 3 or a copy of invoice attached with a notice in Form 4.⁴⁰

In the matter of *Kirusa Software Pvt. Ltd. v. Mobilox Innovations Pvt. Ltd.*,⁴¹ It was held that u/s 8 and 9 notice of demand and notice of dispute become relevant both for the purposes of admission as well as for and rejection.⁴² It may be helpful to interpret sections 8 and 9 and the jurisdiction of the Adjudicating Authority being akin to that of a judicial authority u/s 8 of the Arbitration agreements section 8 as amended in 2015 contemplates the judicial authority to form a prima facie view in relation to existence of a valid arbitration agreement, thereby conferring limited jurisdiction.

In the matter of *Ex Employee of Iyogi Technical Services (P) Ltd. v. Iyogi Technical Services Pvt. Ltd.* the NCLT, Mumbai held that “the delivery of demand notice is a *sine quo non* for putting in motion the corporate insolvency process under I&B Code, 2016 by the operational creditor and failure of the same disentitles the operational creditor from proceeding further.”⁴³

In the case of *Seema Gupta v. Supreme Infrastructure India Ltd. & Ors.*,⁴⁴ an application was preferred by appellant u/s 9, which cannot be rejected at the threshold on the ground of technicalities like the notice has not been issued under section 8 of the I&B Code.⁴⁵ It is contended that earlier a notice was issued under earlier section 433 and 434 of the Companies Act, 1956 which provides for statutory period of 21 days as against notice period of 10 days enshrined u/s 8 of I&B Code. The applicant placed reliance on section 6 of the General Clause Act but it is not necessary to discuss all such submissions in view of the provisions of law.⁴⁶ Before filing of an application u/s 9 it is mandatory to issue a notice u/s 8 of I&B Code, 2016.

It was held by NCLAT that section 9 mandates filing of the petition only after expiry of the period of 10 days from the date of delivery of notice or invoice demanding payment. From the aforesaid provisions, it will be clear that without a notice u/s 8(1), no application can be preferred u/s 9 of I&B Code is mandatory before initiation of interim resolution process, such notice having not been issued in this case, the adjudicating authority rightly rejected the application.

Adherence to the principles of natural justice by NCLT or NCLAT would not mean that in every situation, NCLT or NCLAT is required to afford a reasonable opportunity of the hearing to the respondent before passing its order.

Acceptance of application: Once the application (Form 5) for initiating insolvency resolution process is filed, the Honourable NCLT will accept the application if the following conditions are satisfied:

⁴⁰ Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s. 8(1) of the code with Rule 5(1) of the insolvency and bankruptcy (Application to Adjudicating Authority) Rules, 2016

⁴¹ *Kirusa Software Pvt. Ltd. v. Mobilox Innovations Pvt. Ltd.*, CA (AT) (Insolvency) 6 of 2017, CP 02/I&BP/NCLT/MAH/2017.

⁴² Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s.8 & 9.

⁴³ *Ex Employee of Iyogi Technical Services (P) Ltd. v. Iyogi Technical Services Pvt. Ltd.*, C.A.No. 3676 of 2016.

⁴⁴ *Seema Gupta v. Supreme Infrastructure India Ltd. & Ors.*, Company Appeals (AT) (Insolvency) No. 53 of 2017

⁴⁵ Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s. 9.

⁴⁶ The General Clause Act, 1897 (Act 10 of 1897), s.6.

1. The application filed should be complete in all respects.
2. There must not be any repayment of the operational debt.
3. The notice for the payment of the debt has been duly delivered by the operational creditor.
4. There is no notice of dispute which has been received by the operational creditor or there is no record of dispute with the information utility (*if applicable*).
5. There are no disciplinary proceedings pending against the proposed interim resolution professional (*To be complied with if the name of the interim resolution professional is mentioned in the application*).

The Honorable NCLT will dismiss or refuse the application if any of the aforesaid conditions are not satisfied or there is any pending dispute between the operational creditor and the corporate debtor as mentioned above.

ROLE OF CREDITORS UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016:

The Insolvency and Bankruptcy code, 2016 has been enacted with intent to address the grievance of creditors in cases where by reason of insolvency a debtor is unable to pay off its debts. The role of creditor here is bifurcated into two parts:

- i) Role of creditors in corporate insolvency resolution process.
- ii) Role of creditors in liquidation process.

Role of creditors in corporate insolvency resolution process:

The creditor has an important role to play in the insolvency resolution of a corporate debtor. The creditors- financial and operational can initiate insolvency resolution process under Part II of the Code,⁴⁷ as provided in the former part of this chapter. After admission of the application for corporate insolvency resolution, the creditors are entitled to file a claim with the interim resolution professional upon the public announcement being made.⁴⁸ The committee of creditors is constituted after the appointment of interim resolution professional, consisting of all financial creditors and in the absence of any financial creditors in the company, it comprises of top eighteen operational creditors in value with a representative of workmen and employees as well.⁴⁹

⁴⁷Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016),s. 6

⁴⁸Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), s. 13, 15.

⁴⁹ Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016),s..21 of IBC read with regulation 16 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

CONCLUSION-

The liquidation process under the code begins when the tribunal passes an order for corporate debtor to be liquidated.⁵⁰ The role of creditors is limited under the liquidation process. It is the liquidator who plays a major role in the liquidation process of a corporate debtor. The liquidator stands in fiduciary capacity to the creditors.⁵¹ The creditors in their own interest, must file claim with the liquidator and if the claim is rejected by the liquidator, the creditor can appeal against such order.⁵² The creditors have a right to object to an undervalued transaction by the liquidator.⁵³ Secured creditors have an option to stand outside the liquidation process.⁵⁴ In other words, they may choose to realize the security interest on their own. The assets are distributed to the creditors in order of priority.⁵⁵ The distribution waterfall ranks operational unsecured creditors lower than the financial unsecured creditors.



⁵⁰ Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016),s. 33

⁵¹ Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016),s.36

⁵² Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016),s.42

⁵³Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016),s. 47

⁵⁴ Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016),s. 52.

⁵⁵ Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016),s. 53.