



भारतीय दिवाला और शोधन अक्षमता बोर्ड

Insolvency and Bankruptcy Board of India

In Association With

**The Institute of Chartered
Accountants of India (ICAI)**

JAIPUR

12.01.2020

Insolvency and Bankruptcy Code, 2016

Personal Guarantors to Corporate Debtors

Madhusudan Sharma

OVERVIEW

INSOLVENCY RESOLUTION PROCESS- PHASE -1

- Application to AA by debtor or creditor - Sec 94 & 95
- Interim moratorium commences – Sec 96
- Appointment of RP, if not filed through RP – Sec 97
- RP examines application – Sec 99
- Submission of report to AA with recommendation to accept, reject or suggest Fresh Start (Within 10 days)
- Approval or rejection by AA (Within 14 days) – Sec 100
- If rejected, on the ground of defrauding creditors, AA Order to record that creditor entitled to file for bankruptcy
- If approved, Moratorium commences
- Copy of Order, Application, RP's report to be provided to Creditors

AFTER ADMISSION OF APPLICATION

- Moratorium commences with Order of AA – Sec 101
- Public notice within 7 days by AA inviting claims from creditors within 21 days–Sec 102
- Registration of claims by creditors with RP– Sec 103
- Preparation of List of Creditors by RP – Sec 104
- Preparation of repayment plan by debtor in consultation with RP – Sec 105
- Submission of repayment plan to AA along with RP's report within 21 days of last date of submission of claim u/s 102
Sec-106

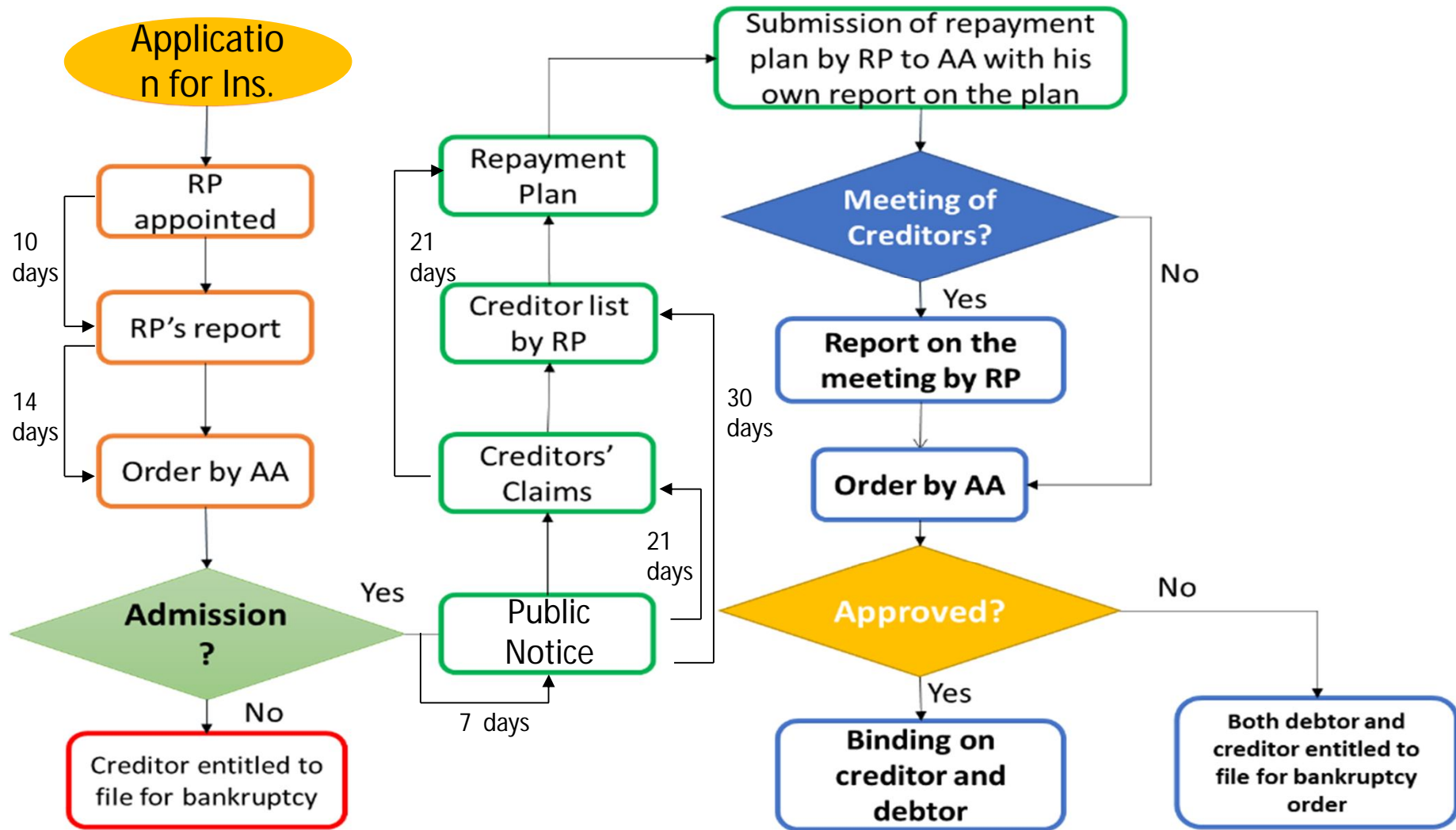
IRP- PHASE 2...

- Summoning and Conduct of Creditors' unless RP recommends that it is not required. Sec 107 & 108
- Approval of Repayment Plan by Creditors. Sec 111
- RP to prepare and submit report of the meeting to Debtor, Creditors and AA – Sec 112 & 113
- AA approves or rejects the repayment plan or require modification Sec 114
- Copy of order of AA to Board and to IPA for realizing performance security Sec 115
- If approved, binding on creditors mentioned in the plan
- If rejected, debtor and creditors entitled to file for bankruptcy

IRP – AFTER APPROVAL OF PLAN

- Implementation under the supervision of RP – Sec 116
- Completion of Plan and reporting to AA (within 14 days of completion) – Sec 117
- Notice of completion and report to all the person bound by repayment plan
- Discharge Order by AA - Sec 119
- Order shall be forwarded to the Board
- In case of premature end:
 - Debtor or Creditors whose claim not satisfied may apply for bankruptcy
 - Order shall be forwarded to Board

THE PROCESS



UNDERSTANDING TERMINOLOGY

IMPORTANT TERMS

- Personal Guarantor
- Debt
- Excluded Debt
- Excluded Assets
- Associates

PERSONAL GUARANTOR

Rule 3 (e) of AAA Rules for Personal Guarantor

Guarantor means a *“debtor who is a personal guarantor to a corporate debtor and in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or part”*.

Circumstances in which guarantee can be invoked-

- Invocation- subject to terms of guarantee contract;
- In accordance with sections 126- 147 of the Indian Contract Act, 1872

Pre-requisite for initiation of application:

- guarantee has been invoked by the creditor
- remains unpaid in full or part
- Action possible even if partly paid

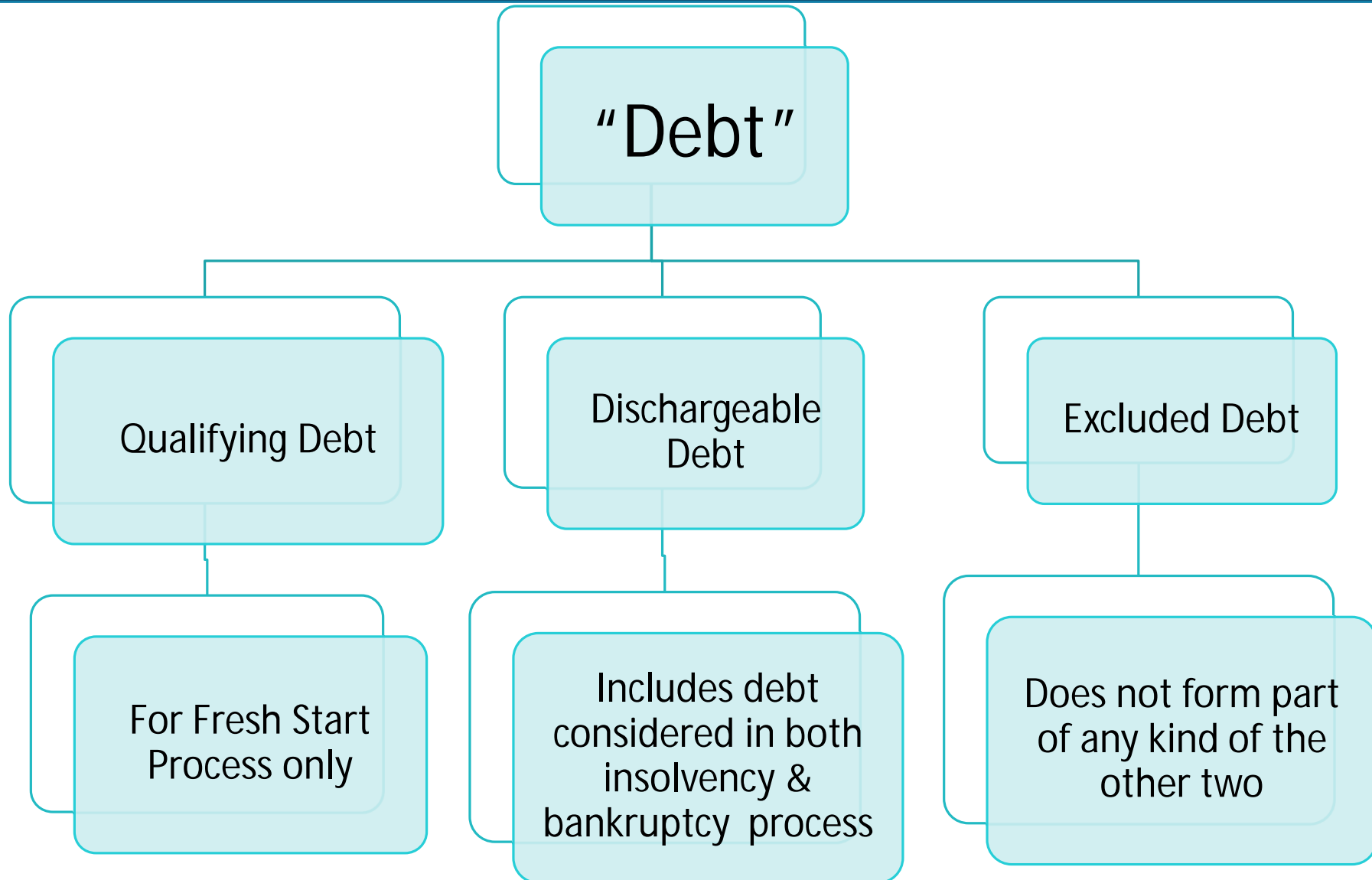
DEBT

Sec. 3 (11) "Debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;

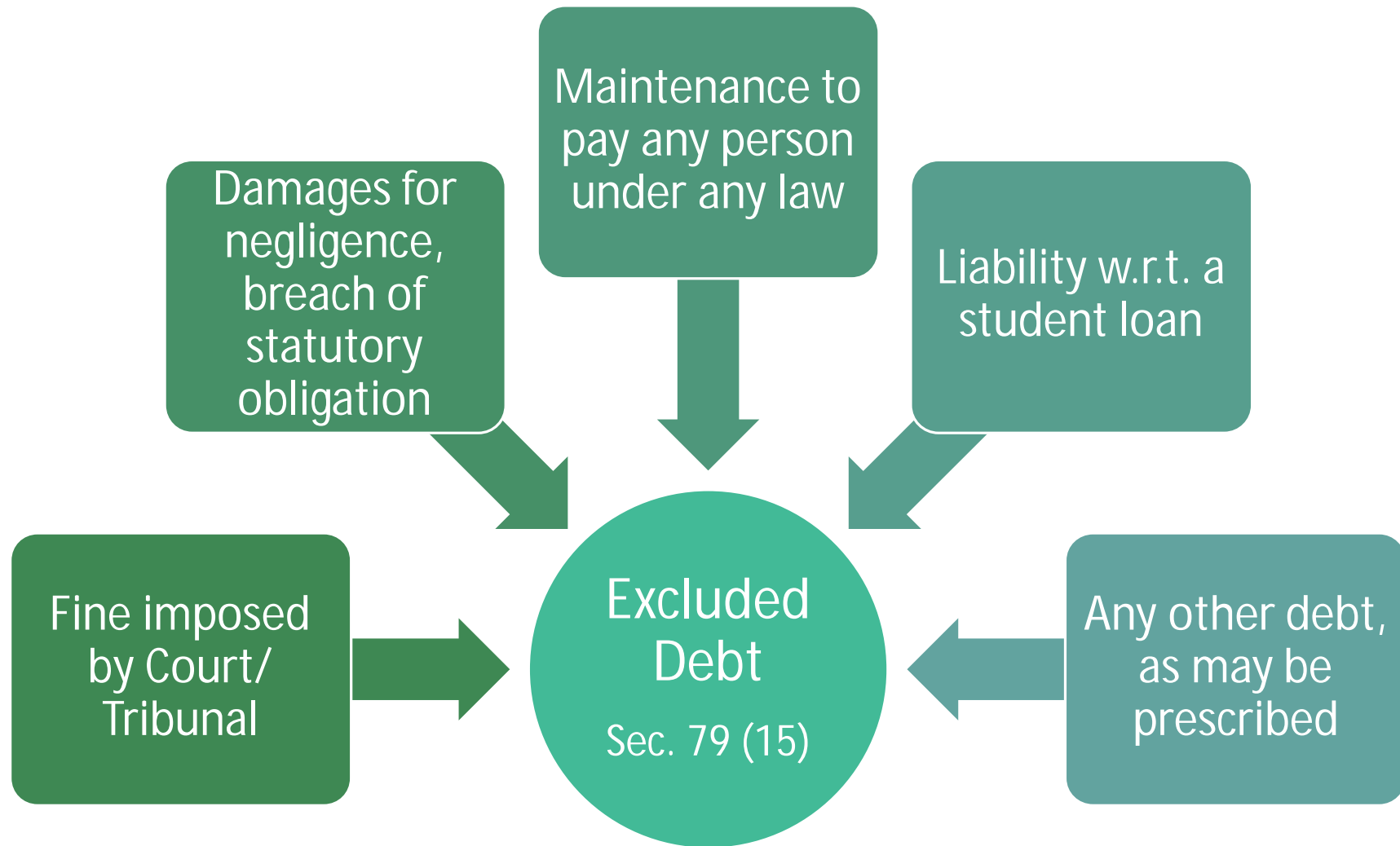
Sec 79 (19) "qualifying debt" means amount due, which includes interest or any other sum due in respect of the amounts owed under any contract, by the debtor for a liquidated sum either immediately or at certain future time and does not include –

- (a) an excluded debt;
- (b) a debt to the extent it is secured; and
- (c) any debt which has been incurred three months prior to the date of the application for fresh start process;

Debt



EXCLUDED DEBT

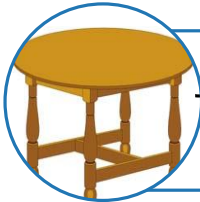


EXCLUDED ASSETS

Sec 79 (14) read with Rule 5



Unencumbered tools, vehicles and other equipment's, necessary for employment, business or vocation



Unencumbered furniture, equipment, necessary for basic domestic needs



Unencumbered personal ornaments, that cannot be parted with accordance with religious usage



Unencumbered life insurance policy/pension plan



Unencumbered single dwelling unit

Up to Rs.
1,00,000

Up to Rs.
20,00,000 in
Urban area
Rs. 10,00,000
in rural area

EXCLUDED ASSETS - UNEMCUMBERED

Tools, books, vehicle or other equipment

- Necessary for personal use or employment, business or vocation of the debtor

Furniture, household equipment or provisions

- Necessary for basic domestic needs of the bankrupt and his immediate family

LIP or pension plan

- In the name of Debtor or his immediate family

EXCLUDED ASSETS – DWELLING UNIT

Personal Ornaments

- Personal ornaments of debtor “or his immediate family” of such value, as may be prescribed, which cannot be parted with as per religious usage. Sec 79 (14) (c)
- Value of such ornaments not to exceed Rs 1 lakh – Rule 5 (a)

Single dwelling unit of such value as may be prescribed

Sec 79(12) (e)

- Unit owned of by the debtor shall not exceed Rs 20 lakh in urban area
 - Up to Rs 10 lakh in rural area
 - Rural area as defined in NAREGA
 - Urban area - any area other than rural area
- Rule 5 (b)

ASSOCIATE - SEC 79 (2)

"**Associate**" of the debtor means – A person who:

- belongs to the **immediate family** of the debtor;
- Is a relative of the debtor or a **relative** of the spouse of the debtor;
- Is in partnership with the debtor;
- Is a spouse or a relative of any person with whom the debtor is in partnership;
- Is **Employer** of The Debtor or **Employee** of the Debtor;
- Is a trustee of a trust in which the beneficiaries of the trust include a debtor, and
- A **company**, where the debtor or the debtor along with his associates, **own more than fifty per cent** of the share capital of the company or control the appointment of the board of directors of the company.

RELATIVE...

“**Immediate family**” of the debtor means his spouse, dependent children and dependent parents; Sec. 79 (17)

Relative - For the purposes of section 79(2) Explanation (ii), the manner of relationship shall mean the manner as provided in the Explanation to Section 5(24A) - Rule 4 .

Explanation to Sec 5 (24A) -

For the purposes of this clause, “**relative**”, with reference to any person, means anyone who is related to another, in the following manner:-

(i) members of a Hindu Undivided Family;

RELATIVE

(xvi) father's father and mother,
(xvii) mother's father and mother

(iv) father,

(v) mother,

(xviii) father's brother and sister,

(xix) mother's brother and sister; and

(ii) husband,

(iii) wife,

(xii) brother,

(xiii) sister,

RELATIVE

(vi) son,

(vii) daughter,

(xiv) brother's son and daughter,

(xv) sister's son and daughter,

(viii) son's daughter and son,

(ix) daughter's daughter and son,

(x) grandson's daughter and son,

(xi) granddaughter's daughter and son,

b) wherever the relation is that of a son, daughter, sister or brother, their spouses shall also be included;

(Amended w.e.f. 06.06.2018)

RELATIVE

Regulations

3 (a) “associate” in relation to a creditor, a RP or professionals engaged by RP, as the case may be, shall have the same meaning as assigned to it in relation to a debtor in sub-section (2) of section 79;

RELATIVE

Relevant for:

Voting by Creditors Sec 109, and 132

Vulnerable Transactions u/s 164, 166 and 167.

Rules - Form A - List of associates of the guarantor, particulars of debt owed by guarantor to associates

Regulations

4. Eligibility of resolution professional.

10. Statement of affairs.

16. Voting by proxy.

18. Purchase of assets by certain persons.

INSOLVENCY RESOLUTION PROCESS

APPLICATION FOR INITIATION

Applicant

```
graph TD; Applicant[Applicant] --> Guarantor[Guarantor/Debtor (Sec. 94)]; Applicant --> Creditors[Creditors (Sec. 95)];
```

Guarantor/Debtor (Sec. 94)

- ∅ filed by a **debtor** (in Form A with a fee of Rs. 2000-Rule 6);
- ∅ who has committed **default** of debt, other than **excluded debt**;
- ∅ Either personally or through a Resolution Professional (RP)
- ∅ In case of partnership firm, joint application by all or majority of partners;

Creditors (Sec. 95)

- ∅ filed by a **creditor** (in Form C with a fee of Rs. 2000)- Invocation of guarantee- a precondition.
- ∅ either individually or jointly with other creditors directly or through a Resolution Professional (RP)
- ∅ Only if debtors fails to pay within 14 days of service of demand notice (in Form B – Rule-7).

Debtor's ineligibility to file application

Debtor shall not be entitled to make an application if he is-

- (a) an undischarged bankrupt;
- (b) undergoing a fresh start process;
- (c) undergoing an insolvency resolution process; or
- (d) undergoing a bankruptcy process. {Sec 94(4)}

If an application has been admitted in respect of the debtor, during 12 months preceding the date of submission of the application
{Sec 94(6)}


APPLICATION BY GUARANTOR - Rule 6

(1) The application under sub-section (1) of section 94 shall be submitted in Form A, along with an application fee of Rs. 2000.

(2) The guarantor shall serve forthwith a copy of the application referred to every **financial creditor** and the corporate debtor for whom the guarantor is a personal guarantor.

APPLICATION BY CREDITOR – Rule 7

- (1) A demand notice shall be served on the guarantor demanding payment of the amount of default, in Form B.
- (2) The application shall be submitted in Form C, along with a fee of two thousand rupees.
- (3) The creditor shall serve forthwith a copy of the application to the guarantor and the CD for whom the guarantor is a personal guarantor.
- (4) In case of a joint application, the creditors may nominate one amongst themselves to act on behalf of all the creditors.



Application can be filed only if the debt stated in the demand notice is not repaid by the debtor within 14 days of service of the demand notice.

Unlike demand notice in Form 3 of the IBBI (Application to Adjudicating Authority) Rules, 2016, the demand notice in case of personal insolvency **does not give a chance of disputing the notice.**

MORATORIUM

Stages of Moratorium

Interim (Sec. 96)

- From date of filing of application till its admission, in relation to all debts
 - No time limit specified
- Against pending legal action or proceeding w.r.t. **ANY** debt;
- Initiation of any legal action or proceedings against **ANY** debt
- Applicable to debtor as well

Final (Sec. 101)

- From admission of Application till 180 days or approval of Repayment Plan, whichever is earlier.
- Against pending legal action or proceeding w.r.t. **ANY** debt;
- Initiation of legal action or proceedings against any debt
- The debtor shall not transfer, alienate, encumber, any of his assets or legal rights or beneficial interest

INTERIM MORATORIUM - SEC 96

- Commences on the date of admission of application
- During the interim-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 proceedings in respect of any debt.
- Shall not apply to transactions notified in consultation with financial sector regulator.

MORATORIUM - SEC 101

- Moratorium shall commence in relation to all the debts
- shall cease to have effect at the end of the Period of 180 days from admission of application by AA or
- AA Passes an order on the repayment plan whichever is earlier;
- During the interim-moratorium period -
 - (i) Any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed; and

MORATORIUM

(ii) The creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.

Debtor shall not transfer, alienate, encumber or dispose of any of the assets or his legal right or beneficial interest therein;

In relation to a firm, the moratorium shall operate against all the partners of the firm.

The provisions of this section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

LIST OF CREDITORS – SEC 104

The RP shall make the list of creditors within 30 days from the the date of notice on the basis of:

- Information disclosed in the application filed
- Claims received

available for inspection by the persons who submitted claims with proof;

LIST OF CREDITORS – REG 9

The resolution professional shall -

- (a) Make the list of creditors available for inspection by the persons who submitted claims with proof;
- (b) Serve a copy of the list of creditors to the guarantor;
- (c) make available the list of creditors on the website, if any, of the guarantor;
- (d) Present the list of creditors at the meeting of creditors; and
- (e) File a certified copy of the list of creditors with the Adjudicating Authority along with the repayment plan. The list shall contain the name of creditor, amount claimed, amount admitted, and security interest.

CREDITORS MEETING

(Sec 107-109 read with Reg. 11-16)

∅ **No COC – no classification into financial/operational**

∅ Classification of creditors of the corporate debtor?

∅ RP to call general meeting of creditors, if in his opinion, the same is necessary for consideration of repayment plan
OR on requisition by 33% of list of creditors in value

∅ **Voting Rights-**

∅ Present and voting rule

∅ For approval of repayment plan – more than 75% majority

∅ For other matters – more than 50% of voting share of those who voted

- Based on value of the claim as a percentage of **the total claim**;
- No voting right shall be granted pursuant to an unliquidated debt;
- Associates of the debtor are not entitled to vote, even if they form part of the list of creditors.
- **Quorum**
- Creditors representing 33% of voting share
- Can be modified

MEETING OF CREDITORS – REGU. 11

- (1) A creditor, who is included in the list of creditors, shall be entitled to participate in the meetings of creditors.
- (2) The voting share of each creditor shall be in proportion to the debt owed to such creditor.
- (3) The RP shall convene the first meeting of creditors in accordance with section 107 (1) and shall convene the meeting, by giving such notice to the other participants as decided by the creditors, which shall not less than forty-eight hours.
- (4) The RP shall convene a meeting of creditors on a request by creditors having thirty three per cent of voting share of creditors.
- (5) Unless otherwise provided in the Code, any decision of the creditors shall require approval of **more than fifty per cent of voting share of the creditors who voted.**

STATEMENT OF AFFAIRS –REG. 10

(1) The RP shall prepare a statement of affairs of the guarantor for the purposes of section 107(3) (b).

(2) The statement of affairs shall include the following information of the guarantor -

(a) Assets and liabilities for the preceding three financial years and the current financial year;

(b) Details of the excluded assets and excluded debts;

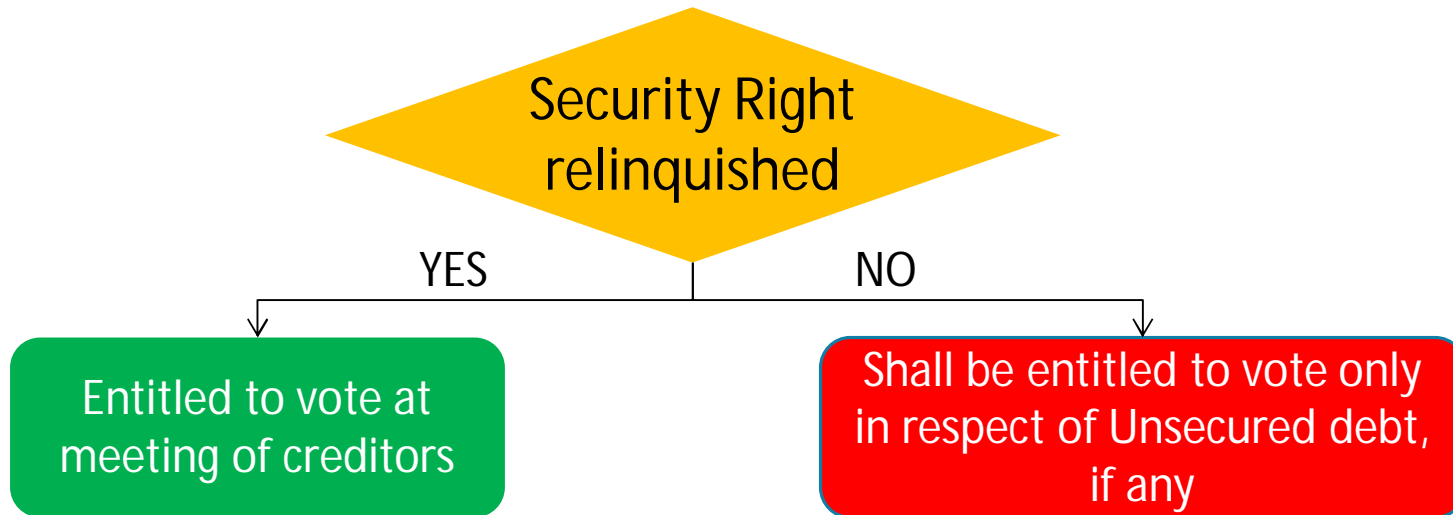
(c) Income statement for the preceding three financial years and the current financial year;

(d) income-tax returns filed by the guarantor, if any, for the preceding three financial years;

STATEMENT OF AFFAIRS

- (e) Creditor wise amount due, broken up into secured and unsecured debts for the preceding three financial years;
- (f) Details of debt owed by guarantor to his associates for the preceding three financial years;
- (g) Guarantees given in relation to any of his debts, and whether any of the guarantors is an associate of the guarantor; and
- (h) Details of the financial statements for the business owned by the guarantor, or of the firm in which he is a partner, as the case may be, for the preceding three financial years, if applicable.

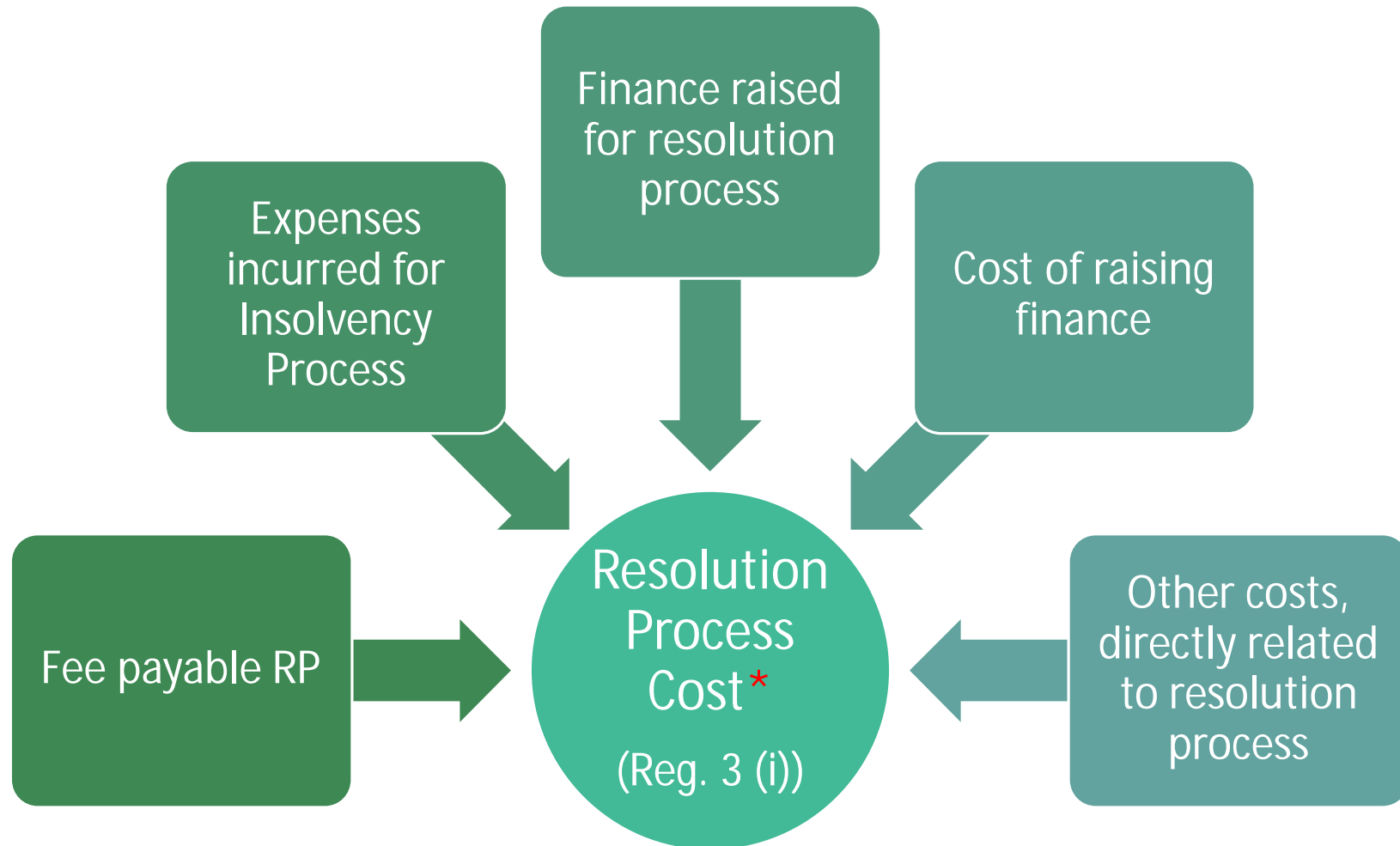
RIGHTS OF A SECURED CREDITOR



NOTE:

"If the Secured creditor does not relinquish his right & the Repayment Plan affects his right to enforce security, his concurrence shall be obtained"

RESOLUTION PROCESS COST



**to the extent approved/ ratified by the creditors*

REPAYMENT PLAN

WHAT IS A REPAYMENT PLAN?

Sec 105 read with Chapter V of Personal Guarantor Regulations

Similar to a “Resolution Plan” in case of corporate insolvency, “Repayment Plan” can be said to be the key to resolution in case of non-corporate insolvency.

It is plan/ proposal, containing terms as per which the debtor will pay his debts to the creditors, and also provides for the manner in which the affairs of the debtors will be carried on.

FEATURES OF A REPAYMENT PLAN

Shall be prepared by the debtor, in consultation with the RP

Contains proposal for restructuring of debtor's debts towards the creditors

Features of a Repayment Plan

May authorise the RP to carry the business/trade of the debtor, on behalf of his name.

Must contain justification for preparation of the plan; and
Reasons why the creditors may agree to it.

CONTENTS OF A REPAYMENT PLAN

Ref. Regulation 17

Term of repayment plan and its implementation schedule

Source of funds that will be used to pay resolution cost

Minimum budget for duration of resolution plan

Finance required for implementation of plan

Variation of onerous terms of a contract or transaction involving guarantor

Details of exclude assets and excluded debts of the guarantor

Terms and conditions for discharge of guarantor

APPROVAL OF THE PLAN (1/2)

Approval of Repayment Plan by creditors- Sec 111

*“The repayment plan or any modification to the repayment plan shall be approved by a majority of **more than three-fourth in value** of the creditors **present in person or by proxy** and voting on the resolution in a meeting of the creditors.”*

Illustration:

- Mr. A is under going insolvency process, wherein Mr. B is appointed as the RP. On the basis of public announcement, claims have been received from 10 creditors of total value Rs. 5,00,000/-
- Repayment Plan is placed before the creditors for approval. Only 6 creditors having dues of Rs. 3,50,000/- are present and entitled to vote in the meeting.

APPROVAL OF THE PLAN (3/3)

Scenario 1:

3 Creditors having dues of Rs. 2,75,000/- approve the Plan

Votes in Favour-

% of total claims- 55%

% of present & voting- 78.57%

Outcome-

Plan approved

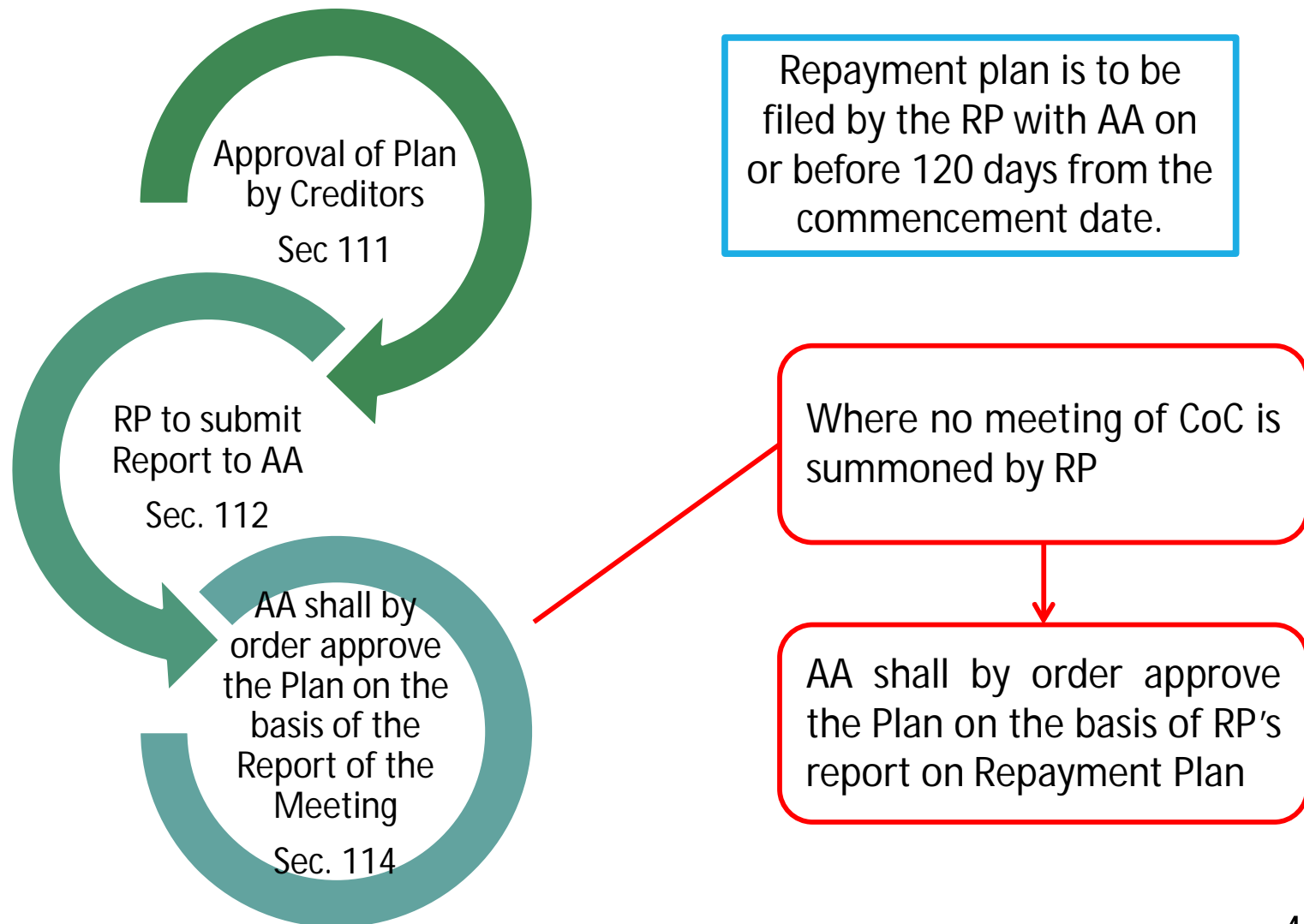
Scenario 2:

Of the 3 creditors who approved the plan, 2 were present in proxy, not in person.

Outcome-

Plan is still considered approved

ORDER OF THE AA



EFFECT OF APPROVAL OF PLAN

Ref. section 116

Become effective as if proposed by debtor

Be binding on the creditors mentioned in the Plan

Once approved, the Plan shall:

RP shall supervise the implementation of the Plan

AA may issue specific direction w.r.t. implementation

COMPLETION OF REPAYMENT PLAN

Full Completion of Plan (sec. 117)

RP shall notify all persons bound by the Plan, that the Plan has been fully implemented

Report w.r.t. All receipts & payments pursuant to implementation of Plan shall be sent to all persons bound by the Plan

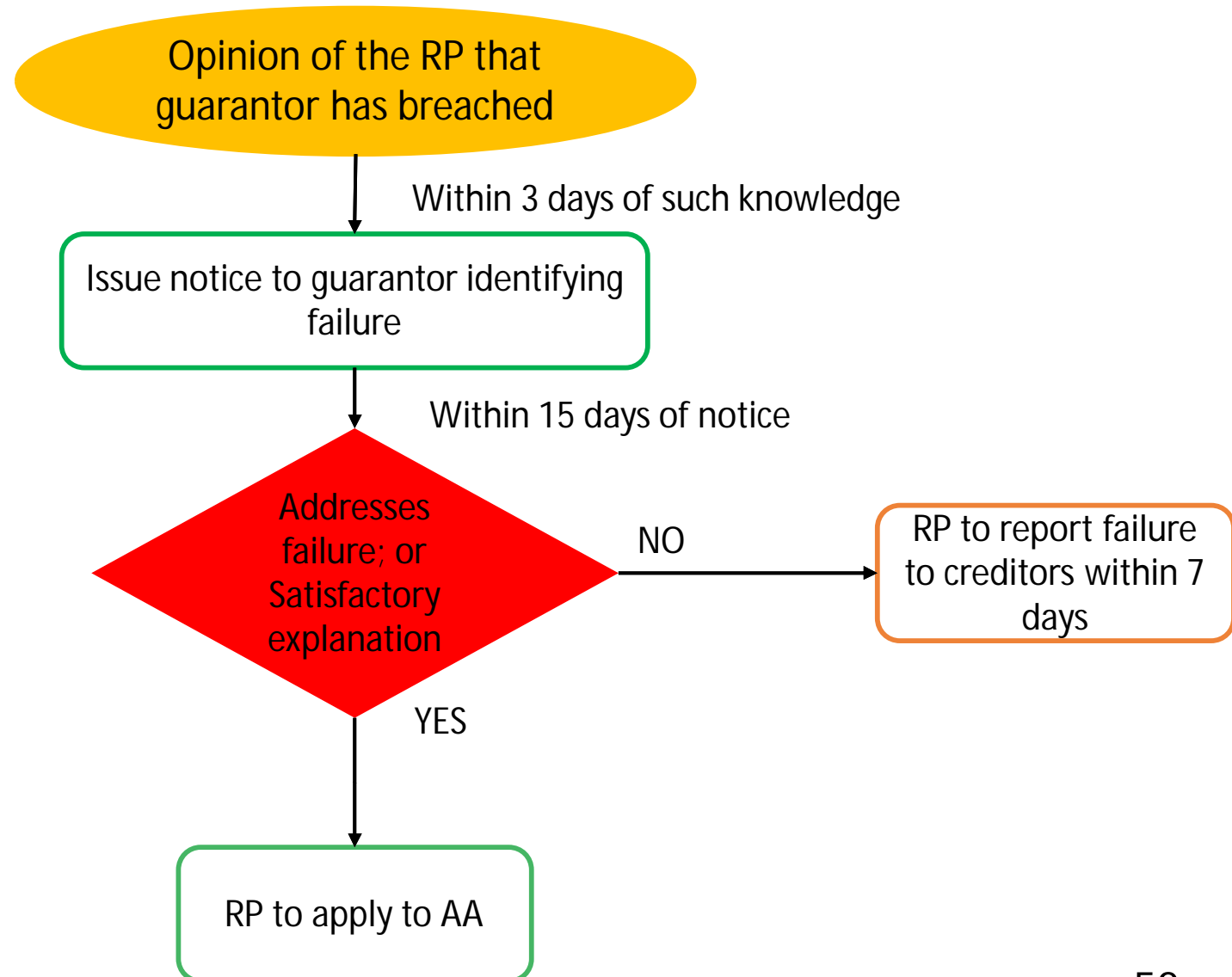
Premature Termination of Plan (sec. 118)

RP shall submit report stating reasons for premature end of repayment plan;
Details of creditors whose dues have not been paid as per Plan

Creditors whose claims have not been fully satisfied may apply for bankruptcy order.

BREACH OF REPAYMENT PLAN

Ref. regulation 20



DISCHARGE ORDER

Application for discharge order (Section 119 read with Reg. 21)-

On the basis of the repayment plan, the resolution professional shall apply to the AA for a discharge order in relation to the **debts mentioned in the repayment plan** and the Adjudicating Authority may pass such discharge order.

The repayment plan may provide for -

- (a) early discharge; or
- (b) discharge on complete implementation of the repayment plan.







Discharge order only for the Debtor-

Discharge order under sub-section (3) shall not discharge any other person from any liability in respect of his debt.

PURCHASE OF ASSETS

Purchase of assets by certain persons- Restrictive, not prohibitory (Reg. 18)

The following persons **shall not purchase or acquire any interest** in the property of guarantor, **directly or indirectly, without permission of the Adjudicating Authority**

-  RP, partner/director of related IPE
-  Professional appointed by RP
-  **Any creditor**
-  Company where guarantor is a promoter/director
-  Company where a creditor is a promoter/director
-  Associate of guarantor/RP/creditor

The Adjudication Authority may set aside purchase or acquisition made contrary to the provisions of this regulation and may make such order as it may deem fit.

WITHDRAWAL OF APPLICATION

Rule 11(2)

The Adjudicating Authority may permit withdrawal of the application submitted under rule as the case may be-

(a) before its admission, on a request made by the applicant;

(b) after its admission, on the request made by the applicant, if **90%**

of the creditors agree to such withdrawal.

An application for withdrawal shall be in **Form D** appended to the Rules.

SITUATIONS DURING INSOVLENCY PROCESS

There may be various situations during insolvency period, such as-

If provided by Repayment Plan- same shall follow;

If not- most reasonably, shall continue to apply on the estate



Repayment Plan continues to work w.r.t. assets of the debtor

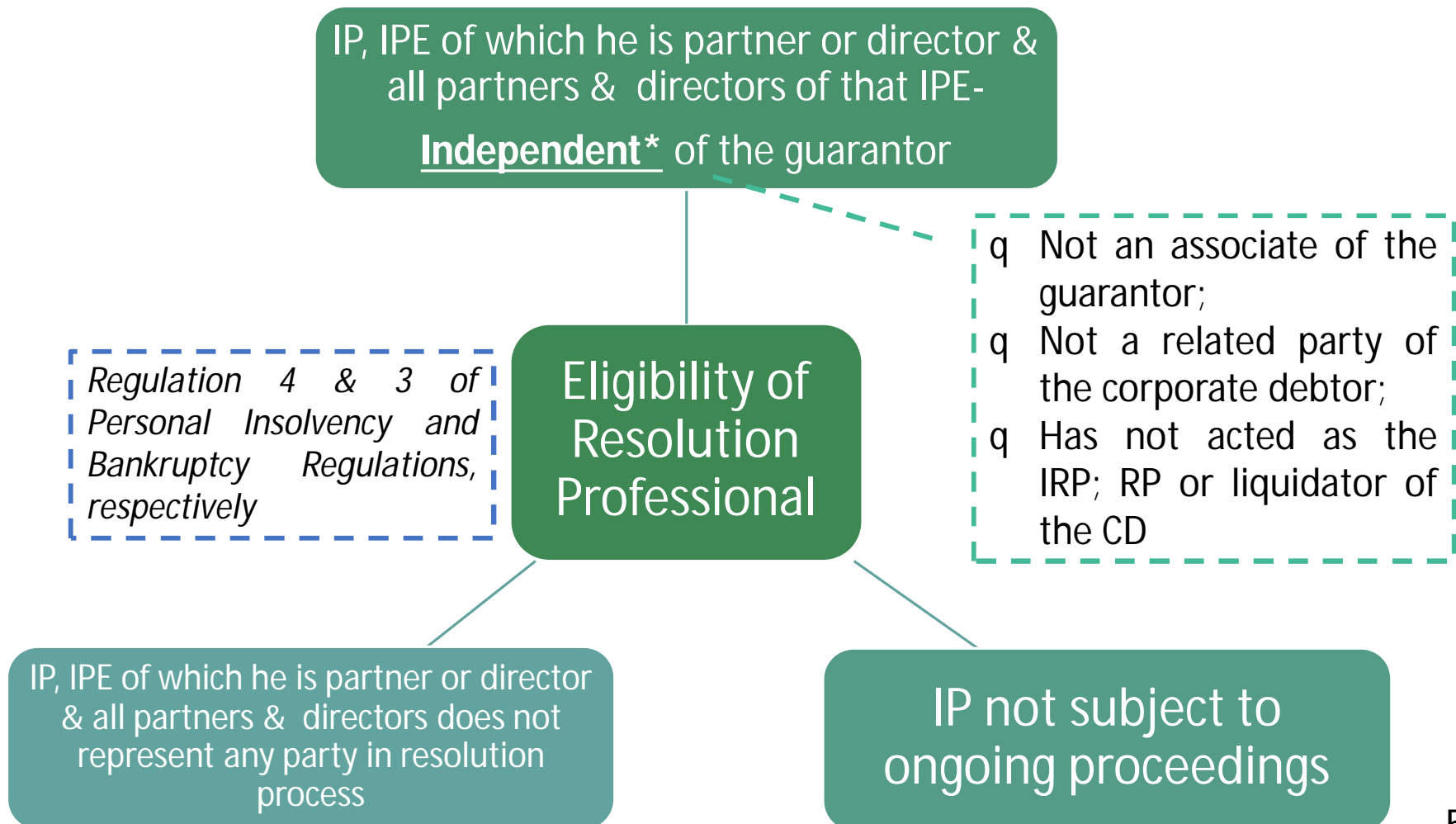
Impact of these may be on the cash-flows of the debtor to the extent the same were dependent on continued availability of the debtor

No explicit restriction- finances must be controlled by the RP

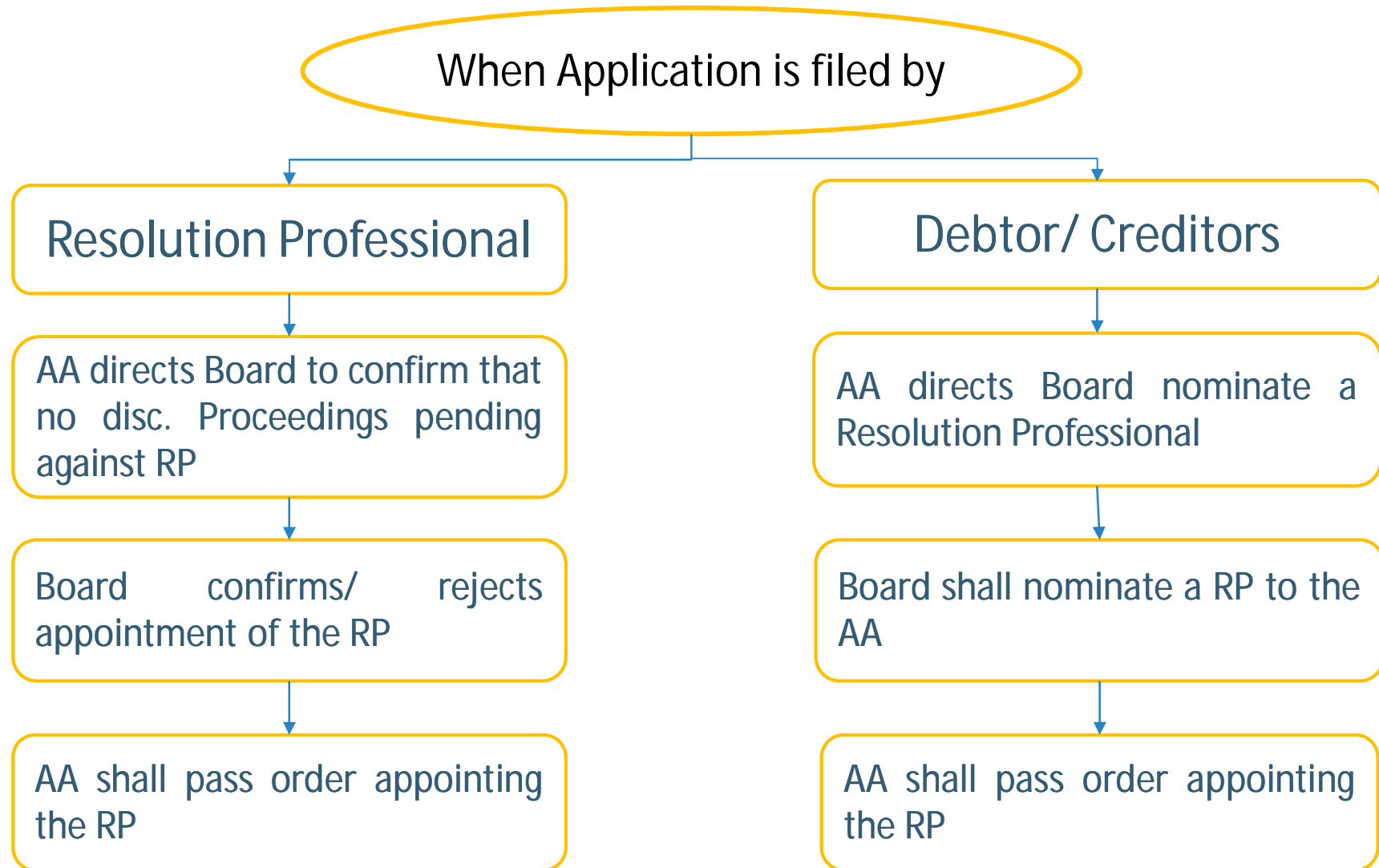
ROLE OF RP

ELIGIBILITY FOR APPOINTMENT

Eligibility of RP/ Bankruptcy Trustee



APPOINTMENT OF RP DURING INSOLVENCY



DUTIES OF RP

Duties of the RP in case of personal insolvency process:

§ Report on application u/s 99

RP is required to submit a report within 10 days of his appointment, w.r.t. the Application filed by the debtor (sec 94) or a creditor (sec 95).

§ Invitation for and collation of claim

Sec 102 requires the RP to issue a public notice within seven days of admission, to invite claims from all creditors within 21 days of the public notice.

§ Consulting debtor on repayment plan

While making of this Repayment Plan, the RP must endeavour to ensure the following: The RP must provide consultancy taking into account the personal circumstances of the debtor and the nature of the debtor's finances; To ensure full and accurate disclosure by the RP; Explain the consequences of the Repayment Plan, for which the debtor may be liable.

§ Report on Repayment Plan

Section 106 of the Code calls for the RP to submit repayment plan within 21 days from the last day of submission of claims of the creditors

FRESH START –SEC 80

(1) A debtor, who is unable to pay his debt and fulfils the conditions specified in sub-section (2), shall be entitled to make an application for a fresh start for discharge of his qualifying debt under.

(2) A debtor may apply, either personally or through a RP, for a fresh start in respect of his qualifying debts to the AA if -

(a) the gross annual income of the debtor does not exceed Rs. 60,000;

(b) the aggregate value of the assets of the debtor does not exceed Rs. 20,000;

(c) the aggregate value of the qualifying debts does not exceed Rs. 35,000;

(d) he is not an undischarged bankrupt;

(e) he does not own a dwelling unit, encumbered or not;

PENALTIES

184. Punishment for false information etc. by creditor in insolvency resolution process.

(1) If a debtor or creditor provides information which is false in any material particulars to the RP, he shall be punishable with imprisonment which may extend to one year, or with fine which may extend to Rs. 5 lakh, or with both.

(2) If a creditor promises to vote in favour of the repayment plan dishonestly by accepting any money, property or security from the debtor, he shall be punishable with imprisonment which may extend to 2 years, or with fine which may extend to three times the amount or its equivalent of such money, property or security accepted by such creditor, as the case may be, or with both:

Provided that where such amount is not quantifiable, the total amount of fine shall not exceed five lakh rupees.

PUNISHMENT FOR CONTRAVENTION OF PROVISIONS - SEC 185

If an insolvency professional deliberately contravenes the provisions of this Part, he shall be punishable with imprisonment for a term which may extend to six months, or with fine, which shall not be less than one lakh rupees, but may extend to five lakhs rupees, or with both.

RULES

Regulation	Particular(in brief)
1.	Short title and commencement
2.	Application.
3.	Definitions.
4.	Relatives.
5.	Excluded assets.
6.	Application by guarantor.
7.	Application by creditor.
8.	Confirmation or nomination of insolvency professional.
9.	Copy of application.
10.	Filing of application and documents
11.	Withdrawal of application.
Form A	Application by Guarantor to Initiate Insolvency Resolution Process
Form B	Form of Demand Notice
Form C	Application by Creditor to Initiate Insolvency Resolution Process
Form D	Application for Withdrawal of Insolvency Resolution Process

REGULATION...

Regulation	S.no	Particular(in brief)
Preliminary	1. 2. 3.	Short title and commencement Application. Definitions.
General	4. 5. 6.	Preservation of records. Eligibility of resolution professional. Debt counselling.
Registration of Claims	7. 8. 9. 10.	Submission and verification of claim. Transfer of debt due to creditors. List of creditors. Statement of affairs.
Meetings of Creditors and Voting	11. 12. 13. 14. 15. 16	Meeting of creditors. Contents of the notice for a meeting. Quorum Conduct of meeting. Voting by creditors. Voting by proxy.

REGULATION

Regulation	S.no	Particular(in brief)
Repayment Plan	17. 18. 19. 20. 21. 22.	Contents of repayment plan. Purchase of assets by certain persons. Filing with the Adjudicating Authority. Breach of repayment plan by the guarantor. Application for discharge order. Non-cooperation by guarantor.
Forms A		Written Consent to Act as Resolution Professional
Form B		Claim with Proof by a Creditor
Form C		Proxy Form

जय हिन्द

धन्यवाद

Jai Hind

Thanks

Madhusudan Sharma

Advocate, Insolvency Professional,

FCMA, FCS

madhusudan.ip@outlook.com; M 9868872918

Website: www.madhusudansharma.in