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The Indian Insolvency and Bankruptcy Regime

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BACKGROUND

The Government has been looking to take adequate action to improve the “ease of doing business ranking”, in addition to making attempts to address the alarming rise of stressed assets in India. *Resolving Insolvency* being one of the criteria for World Bank’s ease of doing business (in which India ranks 136 among 185 countries), there was a need to address the issues surrounding insolvent and bankrupt entities. With the aim to address such issues, the Insolvency and Bankruptcy Code, 2016 (“**IBC**”) was introduced and enforced in December 2016. The IBC is intended to assist domestic and foreign lending by providing a uniform, comprehensive and efficient insolvency legislation, with an emphasis on revival as a first avenue for debt recovery.

KEY ATTRIBUTES

- A consolidated debt recovery and insolvency/ bankruptcy regime for companies, individuals and partnerships/ firms (other than for companies, the sections of IBC for other entities are yet to be notified);
- Inclusion of operational creditors in the insolvency regime – providing to all creditors an opportunity to claim;
- Framework for two stages – (i) insolvency resolution, *i.e.*, revival of the company if possible; and (ii) liquidation on failure to achieve such resolution;
- Strict timelines for expeditious recovery and adherence thereto, thereby preventing further losses to the creditors.

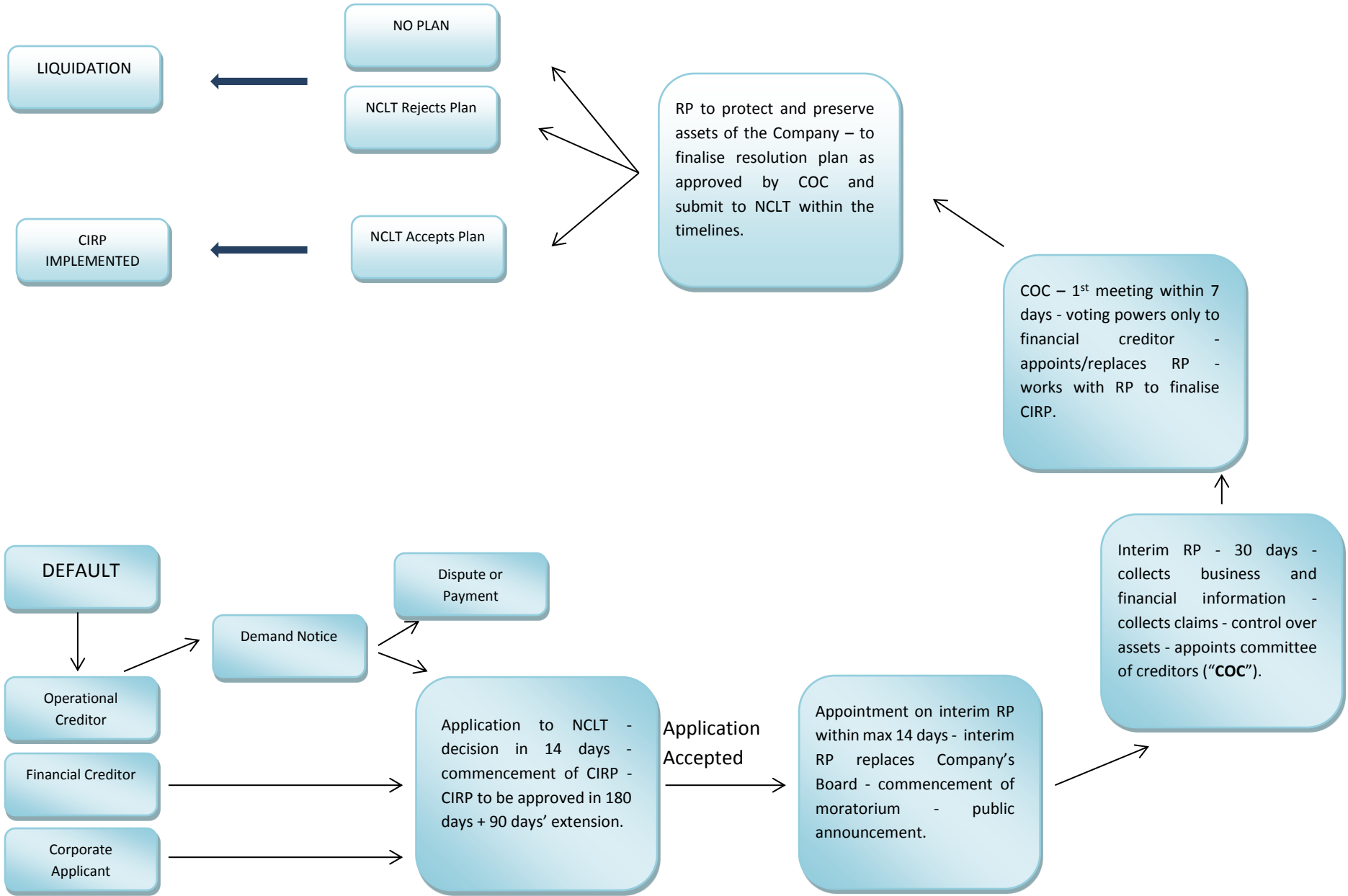
SNAPSHOT:

From the time the IBC has been implemented (approximately eight months), over 1000 (one thousand) applications have been filed in the various tribunals, out of which corporate insolvency resolution process has been initiated and public notice has been issued for 242 (two hundred and forty two) corporate debtors as on August 30, 2017.

IBC PROCESS

Under IBC, both operational creditors and financial creditors (in addition to the debtor company (“**Corporate Debtor**”) itself) have been allowed to file an application, on occurrence of a ‘default’, with the adjudicating authority, *i.e.*, National Company Law Tribunal (“**NCLT**”). In case the NCLT approves the application, a corporate insolvency resolution process (“**CIRP**”) is initiated and moratorium is imposed over *inter-alia* proceedings and alienation of assets of the Corporate Debtor. The board of the Corporate Debtor is suspended and a resolution professional (“**RP**”) takes over the responsibility to run the company. There is a 180 day period (extendable once for a period of maximum 90 days) within which the committee of creditors has to approve a resolution plan. In case no resolution plan is approved or in case the same is rejected, then the Corporate Debtor is to be mandatorily liquidated.

IBC PROCESS FLOW CHART



IBC QUA FOREIGN (BEING NON-INDIAN) CREDITORS/LENDERS:

- Under the erstwhile regime for debt recovery, Indian banks and financial institutions retained the upper hand by having access to specific statutes and forums for recovery of their loans and for enforcement of their security. The restructuring and revival schemes for distressed debt introduced by the Reserve Bank of India (“RBI”), have been dominated by Indian banks/ financial institutions who hold the decision-making power. Foreign lenders and bond-holders have had no role to play.
- The IBC attempts to put lenders of all stripes on the same footing and create an equal opportunity for all creditors in case of a default by a Corporate Debtor. Any creditor (whether domestic/foreign, financial/operational, secured/unsecured) can now initiate an insolvency process in case of a default by the Corporate Debtor.
- Notable points:
 - Even foreign creditors will individually be able to initiate the insolvency process and thereby bring the Corporate Debtor and all other creditors to the table to finalise a resolution process.
 - A foreign creditor, being an applicant, will have a right to choose the interim resolution professional who will accept claims from all, form the committee of creditors and also organize for determination of ‘liquidation value’ for the Corporate Debtor.
 - All financial creditors (including foreign creditors) will form part of the committee of creditors and can participate and vote on all matters during the resolution process.
 - As a creditor and a claimant, the foreign creditor will be provided with the information memorandum and will therefore be privy to all information in relation to the Corporate Debtor, as available with all. The resolution professionals are prohibited from sharing information separately with any other individual entity.
 - The foreign creditor, as a resolution applicant, can also submit a resolution plan for the Corporate Debtor’s resolution.
 - For creditors who have provided external commercial borrowing or for any other transaction where terms have been reported to the RBI, any alteration of terms may require permission or additional filings. Accordingly, the creditor should be clearly participating in the discussions of the structure and terms of the resolution plan.
 - The moratorium, post initiation of corporate insolvency, is restricted to the assets of the Corporate Debtor only. In case the group companies have provided support (either as guarantor or security provider), it may be adequate indication to make demands on them

directly or initiate action against them.

- Regulations for cross border insolvency have been notified. However, the government has to finalise agreements with reciprocal territories. This will help tackle the assets of Indian companies in various jurisdictions.
- The clear intent of the judiciary to adhere to timelines suggested in the IBC, being duly implemented, will provide a huge boost to investor sentiment and provide a clarity *qua* enforcement timelines.

ARE YOU IBC READY?

In light of the above issues and situations being faced by the advent of the IBC, it is important that all stakeholders formulate procedures and modify their operations to ensure that they are ready to tackle situations under the IBC.

- For all cases where the insolvency process is initiated, it is imperative that the creditors file their claims with the resolution professional. Until the creditor lodges its claim, it cannot be part of the committee of creditors.
- The IBC requires a public notice to be provided on initiation of insolvency process, which will specify a timeline within which claims are to be submitted. The public notice will be published in newspapers, on the Corporate Debtor's website and on the website of the Insolvency and Bankruptcy Board of India ("IBBI"). There is no mandatory requirement to separately provide a notice to creditors. Accordingly, it would be imperative for the creditor to keep track of insolvency proceedings of its debtors.
- As a result of the IBC, transaction documents are required to be modified to add information covenants, alter certain representations and some of the events of default.
- It would be important for creditors to ensure that all relevant information *qua* the transactions are updated with the relevant repositories.
- In light of several companies entering the revival phase, there is definitely a heightened search for entities that are willing to provide a cash injection, whether through debt, equity or mezzanine structures.

INTERPRETATION OF THE IBC THROUGH ORDERS:

Keeping up with the tight timelines under the IBC, the judicial response has been swift and the relevant adjudicating authorities have been active. Some of the prominent takeaways and notable interpretations of the IBC, from the orders passed by the adjudicating authorities are listed below:

(i) Adherence to timelines:

The National Company Law Tribunal (“NCLAT”) has held that the, “*time is the essence of the IBC and all the stakeholders, including the Adjudicating Authority, are required to perform its job within the time prescribed under the IBC except in exceptional circumstances if the National Company Law Tribunal, for one or other good reason, fails to do so*”. They have also held that the 270 day time period (180 +90 days’ extension) is a mandatory timeline and in case no resolution is reached within this period the liquidation process for the Corporate Debtor has to be initiated. [*JK Jute Mills Company Limited v. Surendra Trading Company NCLAT, dated May 01, 2017.*]

(ii) Interpretation of “Debt” under the IBC:

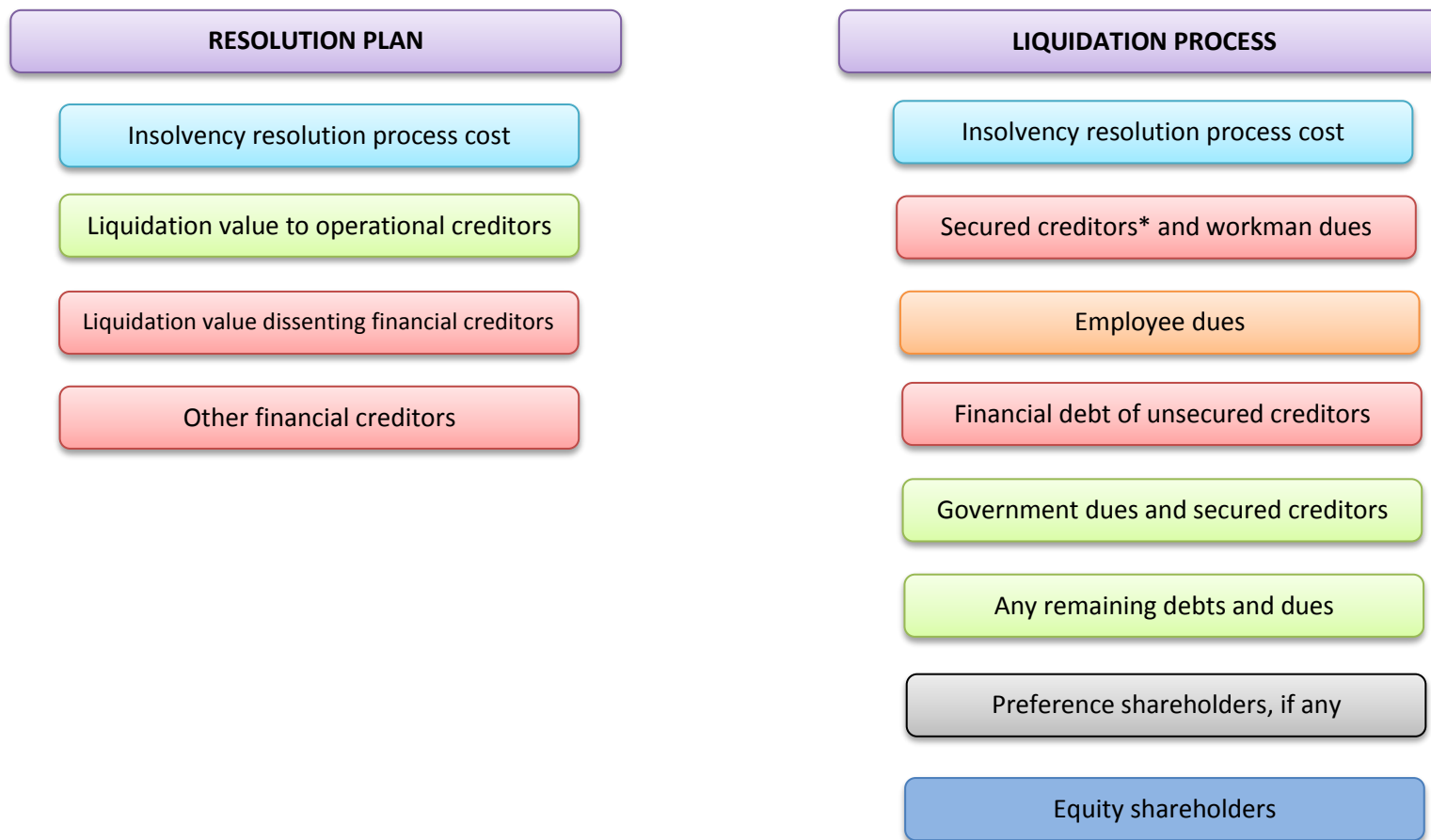
The IBC envisages a distinction between financial and operational classes of creditors, especially in relation to the application filing procedure and the rights and powers of such creditor under the IBC.

- (a) Interest payment due on foreign currency convertible bonds (“FCCBs”) was considered to be a financial debt and the application was accordingly admitted. [*Peter Beck v. Sharon Bio-Medicine- NCLT Mumbai, dated April 11, 2017.*]
- (b) Introduction of claim form for a creditor not being a financial or operational creditor - the IBC has been amended on August 16, 2017 to allow a residual class of creditors to file claims with the resolution professional. This was especially in pursuance to a case where a real estate developer had entered the insolvency process. The home owners of under construction projects were not falling under either class of creditors, though their claim was the majority claim.
- (c) Amounts due as a ‘principal borrower’ and as a ‘guarantor’ were considered for the amount due and the insolvency application was admitted. [*IDBI Bank v. Asian Natural Resources - NCLT Ahmedabad, dated May 23, 2017.*]
- (d) Default in the repayment of “committed returns/assured returns” by the builder to unit purchasers till the time the actual physical possession of the units will fall within the purview of the definition of “financial debt”. [*Nikhil Mehta and Sons v. AMR Infrastructure Ltd. - NCLAT, dated July 21, 2017.*]

- (e) Consideration payable in cash and with immovable property. Amount involved in default in providing immovable property can be claimed under IBC. [*TV 18 Broadcast Ltd. v. Amrapali Media Vision - NCLT Principal Bench, dated May 13, 2017.*]

- (iii) Provisions of Limitation Act, 1963 is not applicable to IBC applications. [*Neelkanth Township and Constructions Pvt Ltd. v. Urban Infrastructure Trustees Ltd. - NCLAT, dated August 11, 2017.*]
- (iv) In case of settlement post admission of application, adjudicating authorities have no right to allow withdrawal of application. [*Parker Hannifin v. Prowess International - NCLT, Kolkata, dated May 29, 2017.*]
- (v) Beyond examining whether there has been a default in payment of a debt and compliance with the provisions of IBC, for admission of application, the adjudicating authority is not required to look into any other factor, including whether permission or consent has been obtained from the joint lenders' forum - [*Innoventive Industries v. ICICI Bank and Anr. - NCLAT, dated May 15, 2017.*]
- (vi) A situation wherein application has been made to take advantage of the moratorium period was considered as frivolous and costs were imposed. [*Unigreen Global Pvt Ltd - NCLT, Principal Bench, dated May 08, 2017.*]
- (vii) Fresh authorizations to be executed after implementation of IBC to allow initiations of proceedings under the IBC. [*ICICI Bank v. Palogix Infrastructure - NCLT, Guwahati, dated March 30, 2017.*]
- (viii) A demand notice is required to be issued by an operational creditor individually and therefore the insolvency application is required to be filed by the operational creditor individually and not jointly. [*Uttam Galva Steels Limited v. DF Deutsche Forfait AG & Anr. - NCLAT, dated July 28, 2017.*]

PRIORITY OF CLAIMS - A COMPARISON:



* These would be the secured creditors who have relinquished their security. In case they have not relinquished their security and are enforcing them separately, for any outstanding amount post such enforcement, they will rank along with government dues.

DEVELOPMENTS UNDER THE REGIME:

- RBI has referred 12 companies against whom the lenders were mandated to initiate insolvency proceedings under IBC. These companies include the likes of Essar Steel Limited, Bhushan Steel Limited etc.
- On August, 30, 2017 RBI has issued an additional list of 26 companies to the commercial banks suggesting that such stressed accounts should be restructured by December 13, 2017, failing which they will be mandatorily referred to insolvency under IBC.
- Securities Exchange Board of India (“SEBI”) has exempted the requirement for making an open offer under the takeover regulations for acquisitions under the IBC process.
- The first case for which the resolution plan has been filed and approved was in the case Synergies-Dooray Automotive Limited, which was approved by NCLT, Hyderabad. The resolution plan includes amalgamation of the Corporate Debtor with another company. It will be important to understand as to how the implementation of the resolution plan is monitored.
- First week of October will be completion of the 270 day period for the first case admitted under IBC, which is the case of Innoventive Industries.
- The tribunal has stopped Resolution Professionals from taking over the management of over two Corporate Debtors, especially where they have been dealing with Corporate Debtors with large debt exposures. The appointment was rejected by the adjudicating authority in the case of Lanco Infratech Ltd.
- The government is yet to notify the provisions for insolvency of individuals, partnerships, firms etc. Financial institutions are excluded from the application of IBC and a separate legislation is proposed for them.

INSOLVENCY AND BANKRUPTCY PRACTICE AT ELP:

ELP has earned a reputation for its lawyers uniquely positioned and successfully arguing matters across all High Courts in India, Supreme Court, regulators and various tribunals. Our multidisciplinary approach and core insolvency team comprising of talent from litigation, tax, banking, corporate and regulatory backgrounds, makes ELP well positioned to help our clients on most complex restructurings. This includes operating creditors, banks and other financial investors and steering committees, insolvency practitioners, and their directors/officers. The experience of the team in debt restructuring, recoveries, equity capital raising and restructuring, open offers, distressed M&A activity and related advisory work has helped in steering through the issues and challenges faced under the new code.



MUMBAI

109 A, 1st Floor
Dalamal Towers
Free Press Journal Road
Nariman Point
Mumbai 400 021
T: +91 22 6636 7000
F: +91 22 6636 7172
E: mumbai@elp-in.com

PUNE

202, 2nd Floor
Vascon Eco Tower
Baner Pashan Road
Pune 411 045
T: +91 20 49127400
E: pune@elp-in.com

DELHI

801 A, 8th Floor
Konnectus Tower
Bhavbhuti Marg
Opp. Ajmeri Gate Railway Station
Nr. Minto Bridge
New Delhi 110 001
T: +91 11 4152 8400
F: +91 11 4152 8404
E: delhi@elp-in.com

BENGALURU

6th Floor, Rockline Centre
54, Richmond Road
Bangalore 560 025
T: +91 80 4168 5530/1
E: bengaluru@elp-in.com

AHMEDABAD

801, 8th Floor
Abhijeet III
Mithakali Six Road,
Ellisbridge
Ahmedabad 380 006
T: +91 79 6605 4480/8
F: +91 79 6605 4482
E: ahmedabad@elp-in.com

CHENNAI

No. 6, 4th Lane
Nungambakkam High Road
Chennai 600 034
T: +91 44 4210 4863
E: chennai@elp-in.com

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Published on September 01, 2017