

The Insolvency and Bankruptcy Code, 2016: A uniform and comprehensive legislation covering corporates, partnerships, and individuals

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Abstract

The Insolvency and Bankruptcy Code, 2016 is one of the biggest economic reforms which provides a uniform and comprehensive insolvency legislation covering corporates, partnerships and individuals (other than financial firms). The Code gives both the creditors and debtors the power to initiate proceeding. It has helped India achieve a historic jump in the ease of doing business rankings by consolidating the law and providing for resolution of insolvencies in a time-bound manner. To ensure that the insolvency resolution is commercially viable, the Code separates the commercial aspects from the judicial aspects and thus limits the role of adjudicating authorities to ensuring due process rather than adjudicating on the merits of the insolvency resolution.

Keywords: Adjudicating authority, information utility, Insolvency and Bankruptcy Board of India, insolvency professional agencies, insolvency professionals

Introduction

In India, the legal and institutional machinery for dealing with debt default has not been in line with global standards. The recovery action by creditors, either through the Contract Act or through special laws such as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, has not had desired outcomes. Similarly, action through the Sick Industrial Companies (Special Provisions) Act, 1985 and the winding up provisions of the Companies Act, 1956 have neither been able to aid recovery for lenders nor aid restructuring of firms. Laws dealing with individual insolvency, the Presidential Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920, are almost a century old. This has hampered the confidence of the lender. When lenders are unconfident, debt access for borrowers is diminished. This reflects in the state of the credit markets in India. Secured credit by banks is the largest component of the credit market in India. The corporate bond market is yet to develop.

The Insolvency and Bankruptcy Code Bill were drafted by a specially constituted “Bankruptcy Law Reforms Committee” (BLRC) under the Ministry of Finance. The Insolvency and Bankruptcy Code was introduced in the Lok Sabha on 21 December 2015 and was subsequently referred to a Joint Committee of Parliament. The Committee submitted its recommendations, and the modified Code was passed by Lok Sabha on 5 May 2016. The Code was passed by Rajya Sabha on 11 May 2016 and it received the presidential assent on 28 May 2016.

The objective of the Code is to promote entrepreneurship, availability of credit, and balance the interests of all stakeholders by consolidating and amending the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner and for maximization of value of assets of such persons and matters connected therewith or incidental thereto.

Features and Applicability of the IBC, 2016

The salient features of the law are as follows:

1. Clear, coherent and speedy process for early identification of financial distress and resolution of companies and limited liability entities if the underlying business is found to be viable.
2. Two distinct processes for resolution of individuals, namely- “Fresh Start” and “Insolvency Resolution”.
3. Debt Recovery Tribunal and National Company Law Tribunal to act as Adjudicating Authority and deal with the cases related to insolvency, liquidation and bankruptcy process in respect of individuals and unlimited partnership firms and in respect of companies and limited liabilities entities respectively.
4. Establishment of an Insolvency and Bankruptcy Board of India to exercise regulatory oversight over insolvency professionals, insolvency professional agencies and information utilities.
5. Insolvency professionals would handle the commercial aspects of insolvency resolution process. Insolvency professional agencies will develop professional standards, code of ethics and be first level regulator for insolvency professionals’ members leading to development of a competitive industry for such professionals.
6. Information utilities would collect, collate, authenticate and disseminate financial information to be used in insolvency, liquidation and bankruptcy proceedings.
7. Enabling provisions to deal with cross border insolvency.

The Insolvency and Bankruptcy Code, 2016 extends to the whole of India.

Section 1 of the Code provides that the Central Government may appoint different dates for different provisions of this Code and any reference in any such provision to the commencement of this Code shall be construed as a reference to the commencement of that provision.

The Insolvency and Bankruptcy Code, 2016 consolidates the existing framework by creating a single law for

insolvency and bankruptcy. The Code applies to companies, partnerships, limited liability partnerships, individuals and any other body which the central government may specify. Section 2 of the Insolvency and Bankruptcy Code, 2016 provides that the provisions of the Code shall apply to

- a. any company incorporated under the Companies Act, 2013 or under any previous company law,
- b. any other company governed by any special Act for the time being in force,
- c. any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008,
- d. such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf,
- e. personal guarantors to corporate debtors,
- f. partnership firms and proprietorship firms; and
- g. individuals, other than persons referred to in clause (e) in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be.

Key Objectives of the Insolvency and Bankruptcy Code, 2016

The objects clause of the Insolvency and Bankruptcy Code lays down the following key objectives:

1. To consolidate and amend the laws relating to re-organisation and insolvency resolution of corporate persons, partnership firms and individuals to provide for a time bound insolvency resolution mechanism;
2. To ensure maximisation of value of assets;
3. To promote entrepreneurship;
4. To increase availability of credit;
5. To balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues;
6. To establish an Insolvency and Bankruptcy Board of India as a regulatory body; and
7. To provide procedure for connected and incidental matters.

Organisation of the IBC, 2016

The Insolvency and Bankruptcy Code, 2016 consists of total 255 sections organised in five Parts. Part II deals with insolvency resolution and liquidation for corporate persons whereas Part III lays down procedure for insolvency resolution and bankruptcy for individuals and partnership firms. Part IV of the Code makes provisions for regulation of Insolvency Professionals, Agencies and Information Utilities and Part V includes provisions for miscellaneous matters. The Code also has eleven Schedules which amends various statutes.

Part I Preliminary (Sections 1 to 3)

Part II Insolvency Resolution and Liquidation for Corporate Persons

- Chapter I Preliminary (Sections 4 to 5)
- Chapter II Corporate Insolvency Resolution Process (Sections 6 to 32)
- Chapter III Liquidation Process (Sections 33 to 54)
- Chapter III A Pre-Packaged Insolvency Resolution Process (Section 54A-54P)
- Chapter IV Fast Track Corporate Insolvency Resolution Process (Sections 55 to 58)

- Chapter V Voluntary Liquidation of Corporate Persons (Section 59)
- Chapter VI Adjudicating Authority for Corporate Persons (Sections 60 to 67)
- Chapter VII Offences and Penalties (Sections 68 to 77).

Part III Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms

- Chapter I Preliminary (Sections 78 to 79)
- Chapter II Fresh Start Process (Sections 80 to 93)
- Chapter III Insolvency Resolution Process (Sections 94 to 120)
- Chapter IV Bankruptcy Order for Individuals and Partnership Firms (Sections 121 to 148)
- Chapter V Administration and Distribution of the Estate of the Bankrupt (Sections 149 to 178)
- Chapter VI Adjudicating Authority for Individuals and Partnership Firms (Sections 179 to 187).

Part IV Regulation of Insolvency Professionals, Agencies and Information Utilities

- Chapter I The Insolvency and Bankruptcy Board of India (Sections 188 to 195)
- Chapter II Powers and Functions of the Board (Sections 196 to 198)
- Chapter III Insolvency Professional Agencies (Sections 199 to 205)
- Chapter IV Insolvency Professionals (Sections 206 to 208)
- Chapter V Information Utilities (Sections 209 to 216)
- Chapter VI Inspection and Investigation (Sections 217 to 220)
- Chapter VII Finance, Accounts and Audit (Sections 221 to 223).

Part V Miscellaneous (Sections 224 to 255)

- The First Schedule (Section 245) amendment to the Indian Partnership Act, 1932
- The Second Schedule (Section 246) amendment to the Central Excise Act, 1944
- The Third Schedule (Section 247) amendment to the Income-Tax Act, 1961
- The Fourth Schedule (Section 248) amendment to the Customs Act, 1962
- The Fifth Schedule (Section 249) amendment to the Recovery of Debts Due to Banks and Financial Institutions Act, 1993
- The Sixth Schedule (Section 250) amendment to the Finance Act, 1994
- The Seventh Schedule (Section 251) amendment to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
- The Eighth Schedule (Section 252) amendment to the Sick Industrial Companies (Special Provisions) Repeal Act, 2003
- The Ninth Schedule (Section 253) amendment to the Payment and Settlement Systems Act, 2007
- The Tenth Schedule (Section 254) amendment to the Limited Liability Partnership Act, 2008
- The Eleventh Schedule (Section 255) amendments to the Companies Act, 2013
- The Twelfth Schedule (Section 29A(d)) Act for the purposes of clause (d) of Section 29A.

Pillars of Insolvency and Bankruptcy Code, 2016

1. Insolvency and Bankruptcy Board of India (IBBI)

The Insolvency and Bankruptcy Code, 2016 provides for the constitution of a new insolvency regulator i.e., the Insolvency and Bankruptcy Board of India (IBBI). The Insolvency and Bankruptcy Board of India was established on 1st October 2016. It is a unique regulator which regulates a profession as well as processes under the Code. Its role includes overseeing the functioning of insolvency intermediaries i.e., insolvency professionals, insolvency professional agencies and information utilities. The Board is responsible for implementation of the Code that consolidates and amends the laws relating to insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner. The Board is empowered to frame and enforce rules for various processes under the Code, namely, corporate insolvency resolution, corporate liquidation, individual insolvency resolution and individual bankruptcy.

Section 188 (2) of the Code provides that the Board shall be a body corporate having perpetual succession and a common seal, with power, subject to the provisions of this Code, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued. As per section 189 (4), the term of office of the Chairperson and members (other than ex officio members) shall be five years or till they attain the age of sixty-five years, whichever is earlier, and they shall be eligible for reappointment.

2. Insolvency Professionals (IPs)

The Code provides for Insolvency Professionals (IPs) to act as intermediary in the insolvency resolution process. Insolvency professionals are a class of regulated but private professionals having minimum standards of professional and ethical conduct. Section 3(19) of the Code defines an “insolvency professional” as a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under section 207.

An insolvency professional plays a very important role under the Code. He acts as an “interim resolution professional” and/or as a “resolution professional” in the corporate insolvency resolution process (specified in Part II of the Code which deals with corporate persons) as well as Part III of the Code (which deals with Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms) for conducting the fresh start process or insolvency resolution process.

3. Insolvency Professional Agencies (IPA)

Section 3(20) of the Code defines “insolvency professional agency” as any person registered with the Board under section 201 as an insolvency professional agency.

Insolvency Professional Agencies are designated to regulate Insolvency Professionals. These agencies enrol Insolvency Professionals, provide pre-registration educational course to its enrolled members and enforce a code of conduct for their functioning. They also issue ‘authorisation for assignment’ to the IPs enrolled with them. In exercise of powers conferred by the Insolvency and Bankruptcy Code, 2016, the Insolvency and Bankruptcy Board of India (IBBI) has framed the following regulations to regulate the working of Insolvency Professional Agencies (IPAs):

- The Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, and
 - The Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016.
- Following are the Insolvency Professional Agencies (IPAs) registered under the Code:
- The Indian Institute of Insolvency Professionals of ICAI;
 - ICSI Institute of Insolvency Professionals; and
 - Insolvency Professional Agency of Institute of Cost Accountants of India.

4. Adjudicating Authority (AA)

Section 5(1) of the Code provides that the “Adjudicating Authority” for insolvency resolution and liquidation for corporate persons means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013. Section 60(5) of the Code further provides that notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of-

- a. any application or proceeding by or against the corporate debtor or corporate person;
- b. any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and
- c. any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

Section 63 of the Code excludes the jurisdiction of the civil courts. It provides that no civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal (NCLT) or the National Company Law Appellate Tribunal (NCLAT) has jurisdiction under this Code.

Similarly, in case of individuals and partnership firms, section 79(1) of the Code provides that the “Adjudicating Authority” for insolvency resolution and bankruptcy for individuals and partnership firms is the Debt Recovery.

Tribunal constituted under sub-section (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

5. Information Utility (IU)

Section 3(21) of the Code defines an “information utility” as a person who is registered with the Board as an information utility under section 210.

While the Insolvency professionals assist in the insolvency resolution proceedings envisaged in the Code, the Information Utility, on the other hand, collect, collate, authenticate and disseminate financial information. The purpose of such collection, collation, authentication and dissemination financial information of debtors is to facilitate swift decision making in the resolution proceedings. The Insolvency and Bankruptcy Board of India oversees the functioning of such information utilities. The Insolvency and Bankruptcy Board of India has framed the IBBI (Information Utilities) Regulations, 2017. These regulations are amended from time to time by the Insolvency and Bankruptcy Board of India.

Disentitlement Under the IBC, 2016

Section 11 of the Code disentitles the following persons to make an application to initiate corporate insolvency resolution process:

- a. a corporate debtor undergoing a corporate insolvency resolution process; or
- (aa) a financial creditor or an operational creditor of a corporate debtor undergoing a pre-packaged insolvency resolution process; or
- b. a corporate debtor having completed corporate insolvency resolution process twelve months preceding the date of making of the application; or
- (ba) a corporate debtor in respect of whom a resolution plan has been approved under Chapter III-A, twelve months preceding the date of making of the application; or
- c. a corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the date of making of an application under this Chapter; or
- d. a corporate debtor in respect of whom a liquidation order has been made.

It may be noted that a corporate debtor falling under the above clauses can initiate corporate insolvency resolution process against another corporate debtor.

Time Bound Insolvency Resolution Process

The Code provides for a time bound Insolvency Resolution Process for companies and individuals, which is required to be completed within 180 days (subject to a one-time extension by 90 days) and mandatorily be completed within 330 days from the insolvency commencement date. Corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process and the time taken in legal proceedings in relation to such resolution process of the corporate debtor. If the resolution plan does not get finalised or is rejected by NCLT or DRT on technical grounds, then assets of the debtor are sold to repay his outstanding dues.

Priority of Claims

The Code makes significant changes in the priority of claims for distribution of liquidation proceeds. In case of liquidation, the assets will be distributed in the following order: (i) fees of insolvency professional and costs related to the resolution process, (ii) workmen's dues for the preceding 24 months and secured creditors, (iii) employee wages, (iv) unsecured creditors, (v) government dues and remaining secured creditors (any remaining debt if they enforce their collateral), (vi) any remaining debt, and (vii) shareholders.

Before the enactment of the Insolvency and Bankruptcy Code, the Government dues were immediately below the claims of secured creditors and workmen in order of priority. Now the Central and State Government's dues stand below the claims of secured creditors, workmen dues, employee dues and other unsecured financial creditors.

Insolvency and Bankruptcy Fund

The Code provides for the creation of Insolvency and Bankruptcy Fund. Section 224 of the Code provides that the following amounts shall be credited to the fund

- the grants made by the Central Government for the purposes of the Fund;
- the amount deposited by persons as contribution to the Fund;
- the amount received in the Fund from any other source; and
- the interest or other income received out of the investment made from the Fund.

Section 224(3) further provides that a person who has contributed any amount to the Fund may, in the event of proceedings initiated in respect of such person under the Code before an Adjudicating Authority, make an application to such Adjudicating Authority for withdrawal of funds not exceeding the amount contributed by it, for making payments to workmen, protecting the assets of such persons, meeting the incidental costs during the proceedings or such other purposes as may be prescribed.

Repeal and Amendments to Acts

The Code repeals the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920.

In addition, it amends the following 11 Acts:

- The Indian Partnership Act, 1932
- The Central Excise Act, 1944
- The Income-Tax Act, 1961
- The Customs Act, 1962
- The Recovery of Debts Due to Banks and Financial Institutions Act, 1993
- The Finance Act, 1994
- The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
- The Sick Industrial Companies (Special Provisions) Repeal Act, 2003
- The Payment and Settlement Systems Act, 2007
- The Limited Liability Partnership Act, 2008
- The Companies Act, 2013.

Conclusion

The Insolvency and bankruptcy Code, 2016 offers a uniform, comprehensive insolvency legislation covering all companies, partnerships and individuals. Financial service providers are not included in the ambit of the Insolvency and Bankruptcy Code, 2016. 2. To ensure a formal and time bound insolvency resolution process, the Code creates a new institutional framework consisting of the Insolvency and Bankruptcy Board of India (IBBI), Adjudicating Authorities (AAs), Insolvency Professionals (IPs), Insolvency Professional Agencies (IPAs) and Information Utilities (IUs).

The Code proposes two Tribunals to adjudicate insolvency resolution cases. In the case of insolvency of companies and Limited Liability Partnerships (LLPs), the Adjudication Authority is the National Company Law Tribunal (NCLT), while the cases involving individuals and partnership firms are handled by the Debts Recovery Tribunals (DRTs). The insolvency proceeding will be initiated by NCLT or DRT, as the case may be, after verification of the claims of the initiator. Appeals from NCLT orders lie to the National Company Law Appellate Tribunal (NCLAT) and thereafter to the Supreme Court of India. For individuals and other persons, the Adjudicating Authority is the DRT. Appeals from DRT orders lie to the Debt Recovery Appellate Tribunal (DRAT) and thereafter to the Supreme Court.

To initiate an insolvency process for corporate debtors, the default should be at least INR 1, 00, 00,000. Central Government may, by notification, specify such minimum amount of default of higher value, which shall not be more than one crore rupees, for matters relating to the pre-packaged insolvency resolution process of corporate debtors under Chapter III-A. Central government vide Notification S.O. 1543(E) dated 9th April 2021 specified ten lakh rupees as the minimum amount of default for the matters relating to the pre-packaged insolvency resolution process of corporate debtor under Chapter III-A of the Code.

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