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INSOLVENCY AND BANKRUPTCY LAWS IN INDIA

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Overview

- The Insolvency and Bankruptcy Code, 2016 ("Code/IBC") is the umbrella legislation for insolvency resolution of all entities in India—both corporate and individuals.
- The laws pertaining to the insolvency and liquidation of corporate persons took effect on December 1, 2016, while the provisions pertaining to the insolvency resolution and bankruptcy of personal guarantors of corporate debtors took effect on December 1, 2019.
- The Insolvency and Bankruptcy Code, 2016 was enacted as a critical building block in India's progression to a mature market economy. As a key economic reform, the Code has shifted the balance of power from the debtor/borrower to the creditor. It has instilled a significantly increased sense of fiscal and credit discipline to better preserve economic value.
- The Code overhauled the legal regime for corporate distress resolution in India and replaced it with a predictable, market-led, incentive-compliant and time-bound mechanism.
- The Insolvency and Bankruptcy Code, 2016 sets out three classes of persons who can trigger the corporate insolvency resolution process ("CIRP") – financial creditors, operational creditors and corporate debtors.
- The first objective of the Code is resolution. The second goal is to maximize the value of the corporate debtor's assets and the third goal is to promote entrepreneurship, credit availability, and interest balance.
- The Insolvency and Bankruptcy Code, 2016 (Code) provides for a specialized forum to oversee all insolvency and liquidation proceedings for individuals, small and medium enterprises and corporates.

Purpose behind the Insolvency and Bankruptcy Code, 2016

The 2016 Insolvency and Bankruptcy Code's true goals are as follows:

- **To help in restructuring the dues in a manner to not cause loss to any of the parties involved** - The Insolvency and Bankruptcy code helps in adding value to the entity and not just liquifying it for the limited purpose of fulfilling the dues owed.
- **The code provides a landscape of efficiency and growth for the entities** - The end goal of the Code is to do what is best for the business. It is not necessary to liquidate all the assets, but if it is felt that liquidation is in the best interest of the entity, the procedure will proceed in that manner.
- **Helps in providing a resolution for the insolvency in a timely, efficient and impartial manner**- The timeline for various processes that have to be carried out under its provisions has now been fixed.

The Insolvency and Bankruptcy Code, 2016 helps in providing not only the best possible solution and resolution but also does so speedily and efficiently. The essence of the Code is to ensure that no entity or creditor should face any loss or damage while at the same time keeping the best interest of the debtor in mind.

Present framework in India



In the current scenario, India's insolvency laws are governed by the Insolvency and Bankruptcy Code, 2016. The 2016 Code applies to organizations and people. It accommodates a period bound procedure to determine bankruptcy.

At the point when a default in reimbursement happens, creditors gain control over debtors' assets and should make choices to determine indebtedness within a 180-day time frame. To guarantee a continuous resolution process, the Code likewise gives immunity to borrowers from resolution claims of creditors during this period.

The Insolvency and Bankruptcy Code, 2016 additionally combines arrangements of the current authoritative system to create a common platform to address insolvency for debtors and creditors of all groups.

Various institutions are formed by the court to facilitate the purpose of insolvency. These institutions are insolvency professionals, information utilities, insolvency professional agencies, insolvency and bankruptcy boards, etc.

There are 3 steps mentioned in the code to resolve insolvency. They are:

- Initiation
- The decision to resolve insolvency
- Liquidation



Institutional framework

The Institutional Framework of the Insolvency and Bankruptcy Code, 2016 has 4 pillars.

- The Insolvency and Bankruptcy Board of the Republic of India
 - The National Company Law Appellate Tribunal ("NCLT")
 - Insolvency Professional ("IP")
 - Information Utilities
-
- The Central Government establishes the Insolvency and Bankruptcy Board of India, which has regulatory oversight over the insolvency professionals, insolvency professional agencies, and information utilities needed for the operation of the Code. It also writes and enforces rules for transactions, namely, corporate insolvency resolution, corporate liquidation, individual insolvency resolution, and individual bankruptcy under the Code.
 - The NCLT, is the adjudicating authority, hears cases involving this code under insolvency law. This authority serves as a venue for the settlement of insolvency proceedings. An appeal under the NCLT can be dismissed, or a stay of execution can be requested against the order. The ruling of the National Company Law Appellate Tribunal can be appealed to the Supreme Court, which is the highest court of authority.
 - The Code establishes a body of experts known as insolvency professionals, who are responsible for overseeing different parts of bankruptcy resolution. To govern the activities of the insolvency professionals, an extra corporate organization called the Insolvency Professional Agencies ("IPA") was formed. Individual practitioners must be enrolled with the IPA's scepter in order to control and enhance the function of insolvency professionals.
 - The information utilities make it feasible to acquire and transfer information from creditors to corporations. Currently, creditors' financial information may only be acquired through the income tax department.

Corporate insolvency resolution process

In this economic scenario, debt repayment has become such a big issue. The Corporate Insolvency and Bankruptcy Code, 2016 has come as a relief. This Code provides the provisions for an application for insolvency and bankruptcy of startups, individuals, partnership firms, limited liability partnerships, and companies. The Code has specified a slab default amount in every category. The final amount is to be notified by the government as the trigger point to initiate the proceeding by keeping in view the fluctuation of the economy. However, the process of insolvency and liquidation of corporate debtors under the Insolvency and Bankruptcy Code, 2016 applies where the minimum default amount is Rs. 1 crore only.

Initiation of the Corporate Insolvency Resolution Process

The process of insolvency resolution starts with the filing of the application before the adjudicatory authority, i.e., the National Company Law Tribunal.

An application for the corporate insolvency resolution process can be filed by:

- i) Financial creditor
- ii) Operational creditor and
- iii) Corporate debtor

Time period for the completion of the insolvency resolution process:

The insolvency resolution process commences from the day the application is accepted for the insolvency resolution and ends when NCLT approves the resolution plan put forward by the committee of creditors. It takes about 180 days to complete the resolution process of insolvency, but the time period can be extended for more than 90 days. When the application is put forward by the financial creditors, operational creditors, and corporate debtor, they need to give the proof of debt to the NCLT.

Documents required to be submitted by the financial creditor:

The financial creditor has to submit the record of debt registered with the information utility or such other documents or evidence of default. A financial creditor also has to submit the name of the insolvency resolution professional along with other information mentioned by the board.

Documents required to be submitted by the operational creditor:

The operational creditor has to give the demand notice or copy of the invoice demanding payment to the corporate debtor. In *Macquarie Bank Limited v. Shilpi Cable Technologies Ltd.*, the Supreme Court resolved a legal proposition under the Insolvency and Bankruptcy Code, 2016, holding that Section 9(3) (c) of the Code is advisory rather than mandatory. Under Section 9(3), along with the application, certain other information is also to be furnished. If there is a dispute between the operational creditor and the debtor, then the debtor has to give notice of the dispute. And if there is no notice of dispute given by the corporate debtor to the operational creditor, then the operational creditor has to submit an affidavit in that regard.

Documents need to be submitted by the corporate debtor:

A corporate debtor has to submit the details of the books of accounts and other documents showing his financial condition or such other documents as specified by the board. Another thing is that shareholders of the corporate debtor have to pass a resolution, and the resolution should be adopted by the majority of three-fourths of the partners of the corporate debtor, approving the application filed by the corporate debtor. The corporate debtor has to give the name of the insolvency resolution professional to the NCLT.

The National Company Law Tribunal will pass an order within fourteen days of either admitting or denying the Corporate Insolvency Resolution Process application. The Corporate Insolvency Resolution Process will commence from the admission date of the application by the National Company Law Tribunal. The Corporate Insolvency Resolution Process completion period is 180 days from the admission date of the Corporate Insolvency Resolution Process application.

After the admission of the Corporate Insolvency Resolution Process application, the National Company Law Tribunal will pass an order-

- declaring a moratorium to prohibit certain actions and transactions
- causing a public announcement of initiating the Corporate Insolvency Resolution Process and a call for the submission of claims.
- appointing an interim resolution professional.



Declaration of moratorium and public announcement

National Company Law Tribunal orders on the corporate insolvency resolution process commencement date declaring the moratorium for prohibiting the following-

- continuation or institution of suits or proceedings against the corporate debtor.
- encumbering, transferring, disposing of or alienating by the corporate debtor of its assets or beneficial interest or legal right.
- any action to recover, foreclose or enforce any security interest created by the corporate debtor relating to its property, including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.
- the recovery of any property by a lessor or owner is impossible where the property is in possession or occupied by the corporate debtor.

The public announcement of the corporate insolvency resolution process should contain the following information:

- name and address of the corporate debtor.
- name of the authority under which the corporate debtor is registered or incorporated.
- last date for the submission of claims.
- details of the interim resolution professional who will be responsible for receiving claims and taking over the management of the corporate debtor.
- penalties for misleading or false claims.
- the date of closure of the Corporate Insolvency Resolution Process, i.e., the 180th day from the admission date of the Corporate Insolvency Resolution Process application.

The interim resolution professional appointed will have the following powers relating to the corporate debtor from the date of his appointment:

- management of the affairs of the corporate debtor.
- exercise the powers of the board of directors or partners of the corporate debtor and suspend the powers of the director or partner of the corporate debtor.
- the officers and managers of the corporate debtor will have to report to the interim resolution professional and give access to the corporate debtor's records and documents.
- the financial institutions having and maintaining accounts for the corporate debtor will act on the instructions of the interim resolution professional and furnish all available information relating to the corporate debtor.



Committee of Creditors ("COC")

A committee of creditors will be formed by the interim resolution professional once they have compiled all claims made against the corporate debtor and assessed its financial situation. All of the corporate debtor's financial creditors will be represented on the committee of creditors.

Within seven days after the committee's formation, the committee of creditors must convene for the first time. A majority vote of at least 66% of the financial creditors with voting rights must be present for the committee of creditors to decide whether to elect or remove the temporary resolution specialist at their initial meeting.

The committee of creditors can decide at any time (before confirmation of the resolution plan by NCLT) that the corporate debtor cannot be continued as a going concern and should be liquidated.

Appointment of a resolution professional:

When the committee of creditors decides to continue with the interim resolution professional appointed by the National Company Law Tribunal as the resolution professional, it should communicate its decisions to the National Company Law Tribunal, the interim resolution professional, and the corporate debtor. When the committee of creditors decides to replace the interim resolution professional, it should file an application to the National Company Law Tribunal to appoint the proposed resolution professional along with his/her written consent.

The National Company Law Tribunal should forward the name of the proposed resolution professional submitted by the committee of creditors to the Insolvency and Bankruptcy Board of India ('Board') for its confirmation. The National Company Law Tribunal shall appoint the proposed resolution professional after receiving confirmation from the Board.

The resolution professional will conduct the entire corporate insolvency resolution process and manage and control the operations of the corporate debtor during the corporate insolvency resolution process.

Preparation of Information Memorandum:

The resolution professional should prepare an information memorandum in the form and manner containing the relevant information as specified by the Board to formulate a resolution plan. A resolution applicant should submit a resolution plan prepared on the basis of the information memorandum to the resolution professional.

The resolution applicant is the person who submits a resolution plan either individually or jointly with any other person. The resolution professional will examine each resolution plan submitted to him to confirm that each resolution plan-

- provides for the payment of the insolvency resolution process costs as specified by the Board, prioritizing the payment of all other debts of the corporate debtor.
- provides for the payment of debts of the operational creditors as specified by the Board.
- provides for managing the affairs of the corporate debtor after approval of the resolution plan.
- supervision and implementation of the resolution plan.
- it does not contradict the provisions of the law(s) in force.
- confirms to such other requirements specified by the Board.

The resolution professional will present the resolution plan after its examination to the committee of creditors for its approval. The committee of creditors can approve the resolution plan by a vote of not less than 66% of the voting share of the financial creditors.





Approval of Resolution Plan:

The resolution professional shall have to examine every resolution plan submitted by eligible applicants to ensure that the plan provides for the payment of debts of the corporate debtor in addition to providing for the costs of the corporate insolvency resolution process. The plans shall then be presented to the creditors' committee for approval. The approval will require a vote of at least 66 percent of financial creditors with voting rights. The resolution professional must then submit the resolution plan to the adjudicating authority. This plan must be approved within 180 days from the beginning of CIRP by the financial creditors. However, the adjudicating authority can extend this period up to 90 days.

In the event a resolution plan is approved within the period mentioned above and is sanctioned by NCLT, the plan would be binding on the corporate debtor and its members, employees, guarantors, creditors, and other stakeholders, including the Central or State Government or any local authority involved in the resolution plan.

The National Company Law Tribunal can pass an order to reject the resolution plan if it is satisfied that the resolution plan does not meet the requirements laid down under the Insolvency and Bankruptcy Code. When the National Company Law Tribunal passes the order of rejection of the resolution plan, it will pass an order of liquidation of the corporate debtor.

After the approval of the liquidation of the corporate debtor, the committee of creditors will appoint the liquidator to sell the corporate debtor's assets and share them among the stakeholders. The distribution of the assets will be made as per the provisions of the Insolvency and Bankruptcy Code.

Practical aspects in Insolvency and Bankruptcy Code, 2019

- The Indian Parliament passed the Insolvency and Bankruptcy Code (Amendment) Act, 2019 to clarify and include some practical changes to the corporate insolvency resolution process.
- The Amendment clarifies that a "resolution plan" may include provisions for restructuring by way of merger, amalgamation, or demerger. This clarification can be seen as legitimizing existing practices being used to arrive at a commercial resolution.
- The Amendment introduces judicial discipline in this respect by making it mandatory for the NCLT to pass an order admitting or rejecting a Resolution Application within 14 days from the date of its receipt.
- The Supreme Court in the case of J.K. Jute Mills Co. Ltd. v/s Surendra Trading Co. had concurred with the opinion of the National Company Law Appellate Tribunal (NCLAT) that this time limit of 14-days is directory rather than mandatory.

- The Amendment of 2019 provides that a resolution plan will also be binding on the central government, state governments, or any local authority to whom a debt in respect of payment of dues is owed.
- The Amendment provides that payments to financial creditors who do not vote in favour of a resolution plan will be determined in accordance with regulations framed by the Insolvency and Bankruptcy Board of India but will not be less than the amount that would have been paid to such creditors in the event of liquidation of the corporate debtor.
- The committee of creditors may take the decision to liquidate the corporate debtor at any time after the committee of creditors is constituted and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.



How the insolvency law helping the Creditors?

The Insolvency and Bankruptcy Code, 2016 in India is a developed step toward resolving the legal situation with regard to financial failures and insolvency.

The insolvency code has great value for all stakeholders, including various government regulators, because it offers an easy exit with a smooth method in cases of insolvency of individuals as well as companies.

Prior to the enactment of the Insolvency and Bankruptcy Code, there were numerous agencies responsible for handling issues connected to debt, defaults, and insolvency, which typically caused delays, complexity, and higher expenses during the resolution of insolvency.

The Indian Contract Act of 1872 included provisions for creditors to pursue recovery action. Special laws including the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act of 2002 and the Recovery of Debts and Bankruptcy Act of 1993, did not produce the desired results.





Overarching benefits of the insolvency laws for creditors

- **Initiation of proceedings by creditors:** An insolvency system empowers the creditor to initiate either liquidation or reorganization proceedings against a debtor in financial distress, which brings discipline to the debtor-creditor relationship that is essential for sustainable relations. This discipline is of significant importance to emerging economies like India, where the enforcement of creditor claims is subject to considerable delay and uncertainty. An insolvency system establishes the rules that allocate the risk of failure in a predictable manner. Thus, it can make a crucial contribution to the health of the credit system of an economy by fostering the availability of credit.
- **Increased assurance by creditors:** In an efficient insolvency regime, creditors are more willing to lend to companies because they are assured of recovering their loans. Besides, the failure rate of businesses may be reduced in such economies, thereby helping to maintain a higher overall level of entrepreneurship in the economy and preserving employment. The code allows creditors to assess the viability of a debtor as a business decision and agree upon a plan for its rehabilitation or speedy liquidation.
- **Voluntarily settlement of debt:** There have been several instances where debtors have settled their debts voluntarily or have settled debts after filing an application for CIRP with the Adjudicating Authority but before the application is admitted. There are also cases of settlements after an application is admitted. The Code has thus brought in significant behavioural changes and thereby redefined the debtor-creditor relationship. With the Code in place, non-repayment of loans is no more an option, and ownership of the firm is no more a divine right, and equity is no more the only route to owning a firm.
- **Declining of Non-performing assets-** The performing assets of the banks started turning into Non-Performing Assets (NPAs). The banking sector of India has been marred for a long time by the problem of a large number of NPAs. Under the previous existing insolvency and bankruptcy laws, the banks got entangled in long years of tedious litigation when trying to recover their money from the defaulting debtors, which proved to be a failure in the majority of the cases. Therefore, recognizing that reforms in the insolvency and bankruptcy laws are crucial for improving the business environment and credit markets in India, the Indian government introduced a comprehensive code for dealing with individual and corporate insolvency and bankruptcy-the Insolvency and Bankruptcy Code of India 2016, (IBC).

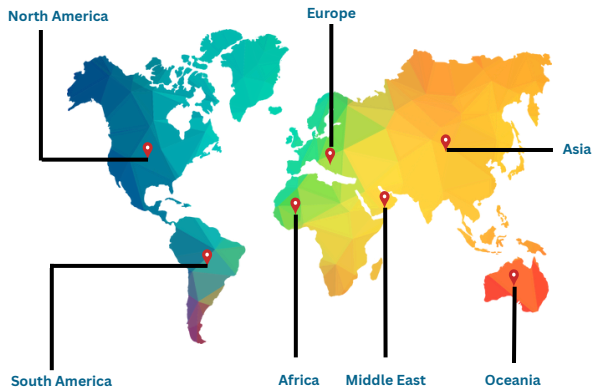


How can we help?

- Our professionals advise on the large and complex restructurings of distressed assets along with contingency planning, debt restructuring, distressed acquisitions/sales, credit bidding, formal insolvency proceedings, out-of-court refinancing, and distressed debt trading.
 - We advise lenders and investors at all levels of the capital structure as well as corporates/directors, central banks, insolvency officeholders/trustees, and government institutions.
- We have an experienced team in dealing with bankruptcy and insolvency issues and can serve clients seeking relief as lender, creditor, debtor, investor or in any other capacity.
 - We advise on exit strategies, refinancing, debt restructuring, distressed debt trading, and investment in distressed assets.
 - We appear before the National Company Law Tribunal and other courts of law and have represented clients.



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