

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

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INSOLVENCY BANKRUPTCY CODE 2016

AUTHORED BY - SUBODH KUMAR SARKAR

ABSTRACT

Any business is an organization, the word organization is derived from the word organ which indicates that any organization has many properties of an organ. Like any organ, the organization has to either grow or decay. It can be seen from our articles in respect of Insolvency bankruptcy code 2016 how it is significant and playing vital role to bring sea changing to prevent corporate bodies from premature death although, it is organization is in nascent stage. There was no single law in India that dealt with insolvency and bankruptcy.

S.O.2618(E).-In exercise of the powers conferred by the proviso to sub-section (3) of section 1 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), the Central Government hereby appoints the 5th of August, 2016 as the date on which the provisions of sections 188 to 194 (both inclusive) of the said Code shall come into force.

The provisions of this Code shall apply to—any company incorporated under the Companies Act, 2013 or under any previous company law; any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act; any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008; such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf; and partnership firms and individuals, in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be.

The vision of law (as given in press release of Government of India) is to encourage entrepreneurship and innovation. Some business ventures will always fail, but they will be handled rapidly and swiftly. Entrepreneurs and lenders will be able to move on, instead of bogged down with decision taken past. Liquidation of corporate debtor is last resort, resolving corporate insolvency is primary objects and not recovery of money. Liquidation of corporate debtor should be matter of last option as Insolvency Code recognizes a wider public interest in

resolving corporate insolvencies and its objects not mere recovery of monies due and outstanding. Necessity has been raised to know and to study insolvency code, IBBI (Insolvency and Bankruptcy Board of India) board, procedure, eligibility, NCLT (National Company Tribunal) and its constitution power and function. It is to remember that Insolvency Code is not a substitute for recovery forum but a process within quick time bound programme need to supply oxygen on priority basis. It is very much significance to know the liquidation process when Corporate Resolution utterly failed. There are also introduction of Pre-packaged insolvency Resolution Process scheme and Limited Liability Partnership Act-2008 which has been meant for small business and professionals. These abovementioned topics have been necessities to know about Insolvency Bankruptcy code 2016.

A) INTRODUCTION:

This is a matter of critical importance: India is one of the youngest republics in the world, with a high concentration of the most dynamic entrepreneurs. Yet these game changers and growth drivers are crippled by an environment that takes some of the longest times and highest costs by world standards to resolve any problems that arise while repaying dues on debt. This problem leads to grave consequences: India has some of the lowest credit compared to the size of the economy. This is a troublesome state to be in, particularly for a young emerging economy with the entrepreneurial dynamism of India¹. Such dynamism not only needs reforms, but reforms done urgently. The Committee was seized of this, and focused on a two-phase mandate over its tenure. The first phase was to examine the existing bankruptcy framework, and whether there were policy and legal changes that could yield immediate effect. The focus here was on the problems of insolvency and bankruptcy under the Companies Act, 2013. The outcome of the deliberations of the Committee led to the Interim Report of the Committee that was put out for public comments at the end of February, 2015 (Ministry of Finance, 2015). The limited liability company is a contract between equity and debt. As long as debt obligations are met, equity owners have complete control, and creditors have no say in how the business is run. When default takes place, control is supposed to transfer to the creditors; equity owners have no say. This is not how companies in India work today. For many decades, creditors have had low power when faced with default. Promoters stay in control of the company even after default. Only one element of a bankruptcy framework has been put into place: to a limited extent, banks are able to repossess fixed assets which were pledged with them This approach

¹ <https://acrobat.abode.com/id/urn:aaidsc:AP:1eb3c7e0-4f9f-45fa-b741-ce146c849594> visited on 03-09-2024

has many strengths:- Asset stripping by promoters is controlled after and before default; the promoters can make a proposal that involves buying back the company for a certain price, alongside a certain debt restructuring; others in the economy can make proposals to buy the company at a certain price, alongside a certain debt restructuring; all parties know that if no deal is struck within the stipulated period, the company will go into liquidation. This will help avoid delaying tactics. The inability of promoters to steal from the company, owing to the supervision of the IP, also helps reduce the incentive to have a slow lingering death; the role of the adjudicator will be on process issues: To ensure that all financial creditors were indeed on the creditors committee, and that 75% of the creditors do indeed support the resolution plan. This was the primary object of Insolvency Bankruptcy code 2016

There was no single law in India that dealt with insolvency bankruptcy. Provisions relating to insolvency and bankruptcy for companies could be found in the Sick Industrial Companies (special Provisions) Act, 1985, The Recovery of debt Due to Banks and Financial Institution Act, 1993, the Securitization Reconstruction of Financial Assets and Enforcement of security Interest Act 2002 and the companies Act, 2013. All said acts were not so effective to recover its due in time and creditor used to suffer with heap of burden of non-performing assets. This non-performing asset creates bad effect suffered with unwanted provision which eaten away the large amount profit, CAR (capital adequacy ratio) less than standard level many more factors lead to weak creditor. Dissertation, we shall see The Bankruptcy Law Reform Committee. Recommendations, Insolvency and Bankruptcy code 2016, Insolvency Resolution process and amendments, its sections rules regulation, related party, some important definitions and eligibility under this code and IBC has power to ride over other laws. Necessity has been raised to know and to study insolvency code, IBBI Insolvency Bankruptcy Board Of India) board, procedure, eligibility, NCLT (National Company Tribunal) and its constitution power and function. It is to remember that Insolvency Code is not a substitute for recovery forum but a process within quick time bound programme need to supply oxygen on priority basis. It is very much significant to know the liquidation process when Corporate Resolution utterly failed.

A) PREAMBLE OF THE CODE:

Section I Short title, extent and commencement.

1. This Code may be called the Insolvency and Bankruptcy Code, 2016.
2. It extends to the whole of India:
3. It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint: Provided that different dates may be appointed 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.

An Act to consolidate and amend the laws relating to: -

Recognition and insolvency resolution of

- a) corporate persons,
- b) partnerships firms and
- c) individuals in a time-bound manner for maximization of value of assets of such persons²,
 - to promote entrepreneurship, availability of credit and balance the interests of all stake holders including alteration in of in the order of priority payment of Government dues and
 - to establish an Insolvency and Bankruptcy Board of India, and
 - for matters connected therewith or incidental thereto

B) *SOME IMPORTANT DEFINITIONS:*

In this Code, unless the context otherwise requires, --

- (1) "Board" means the Insolvency and Bankruptcy Board of India established under sub-section (1) of section 188;
- (2) "bench" means a bench of the Adjudicating Authority;
- (3) "bye-laws" mean the bye-laws made by the insolvency professional agency under section 205
- (4) "charge" means an interest or lien created on the property or assets of any person or any of its undertakings or both, as the case may be, as security and includes a mortgage;
- (5) "Chairperson" means the Chairperson of the Board;
- (6) "claim" means--
 - (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured
 - (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;
- (7) "corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any

² Compendium on the Insolvency and Bankruptcy Code, 2016 forwarded by Dr Navrang Saini Chairperson, IBBI 4th edition 2022 Commercial Law publisher (india) Pvt. Ltd page no xxii.

other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider³;

(8) "corporate debtor" means a corporate person who owes a debt to any person;

(9) "core services" means services rendered by an information utility for--

(a) accepting electronic submission of financial information in such form and manner as may be specified (b) safe and accurate recording of financial information;

(10) "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;

(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;

(12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not ¹[paid] by the debtor or the corporate debtor, as the case may be;

3) "financial information", in relation to a person, means one or more of information,

(15) "financial product" means securities, contracts of insurance, deposits, credit arrangements including loans and advances by banks and financial institutions, retirement benefit plans, small savings instruments, foreign currency contracts other than contracts to exchange one currency (whether Indian or not) for another which are to be settled immediately, or any other instrument as may be prescribed;

(16) "financial service provider" means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator;

(17) "financial sector regulator" means an authority or body constituted under any law for the time being in force to regulate services or transactions of financial sector and includes the Reserve Bank of India, the Securities and Exchange Board of India, the Insurance Regulatory and Development Authority of India, the Pension Fund Regulatory Authority and such other regulatory authorities as may be notified by the Central Government;

(18) "insolvency professional" means 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;

(19) "insolvency professional agency" means any person registered with the Board under section 201 as an insolvency professional agency;

(20) "information utility" means a person who is registered with the Board as an information

³ <https://www.indiacode.nic.in/handle> visited on 05--2024

utility under section 210;

(21) "prescribed" means prescribed by rules made by the Central Government;

(22) "secured creditor" means a creditor in favour of whom security interest is created;

(23) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

(24) "specified" means specified by regulations made by the Board under this Code and the term "specify" shall be construed accordingly.

C)- SECTION-4 .APPLICATION OF THIS PART.

This Part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one crore rupees, provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees. Provided further that the 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 prepackaged insolvency resolution process of corporate debtors under Chapter III-A.

Notification 24-3-2020: The Central government hereby specifies one crore rupees as minimum amount default for the purposes of said section⁴.

SECTION-6; PERSONS WHO MAY INITIATE CORPORATE INSOLVENCY RESOLUTION PROCESS.

Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter⁵.

D) -SECTION-7. INITIATION OF CORPORATE INSOLVENCY RESOLUTION PROCESS BY FINANCIAL CREDITOR.

⁴ Compendium on the Insolvency and Bankruptcy Code,2016 forwarded by Dr Navrang Saini Chairperson, IBBI 4th edition2022 Commercial Law publisher (india) Pvt. Ltd page no2.1.21

⁵ Compendium on the Insolvency and Bankruptcy Code,2016 forwarded by Dr Navrang Saini Chairperson, IBBI 4th edition2022 Commercial Law publisher (india) Pvt. Ltd page no2.1.40

(1) A financial creditor either by itself or jointly with ¹[other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government,] may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Explanation. --For the purposes of this sub-section, a default 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 debtor.

(2) The financial creditor shall make an application under sub-section (1) in such form and manner and accompanied with such fee as may be prescribed.

(3) The financial creditor shall, along with the application furnish--

(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 an interim resolution professional; and

(c) any other information as may be specified by the Board.

(4) The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

Case Law: Urban Infrastructure Trustee limited VS Neelkanth Township and construction pvt, Ltd. C P NO 69/IBP/NCLT/ Mail MAH?2017-01/03/2017

Uniformity between amount of default and amount claimed: NCLT, Mumbai Bench observed that in the application filed by financial creditor, the amount claimed was Rs226+ crores and the default occurred Rs 51 crores. The Bench held that, there should be parity between “the amount of default occurred and amount claimed to be in default hence dismissed the application with leave to the fresh application restricting the claim to Rs 51 crore to which record is available⁶.

E) SECTION -8 INSOLVENCY RESOLUTION BY OPERATIONAL CREDITOR:

(1) An operational creditor may, on the occurrence of a default, deliver a demand notice of

⁶ Compendium on the Insolvency and Bankruptcy Code,2016 forwarded by Dr Navrang Saini Chairperson , IIBI 4th edition2022 Commercial Law publisher (india) Pvt. Ltd page no2.1.40

unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed⁷.

(2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor

a) existence of a dispute, [if any, or] record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;

(b) the [payment] of unpaid operational debt

(i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or

(ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

Explanation: For the purposes of this section, a "demand notice" means a notice served by an operational creditor to the corporate debtor demanding [payment] of the operational debt in respect of which the default has occurred.

F) SECTION- 9 INITIATION OF CORPORATE INSOLVENCY RESOLUTION PROCESS BY CORPORATE APPLICANT.

(1) Where a corporate debtor has committed a default, a corporate applicant thereof may file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.

(2) The application under sub-section (1) shall be filed in such form, containing such particulars and in such manner and accompanied with such fee as may be prescribed.

¹ [(3) The corporate applicant shall, along with the application furnish the information relating to--

(a) its books of account and such other documents relating to such period as may be specified;
and

(b) the resolution professional proposed to be appointed as an interim resolution professional.

(c) the special resolution passed by shareholders of the corporate debtor or the resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, approving filing of the application.]

⁷ Compendium on the Insolvency and Bankruptcy Code, 2016 forwarded by Dr Navrang Saini Chairperson, IBBI 4th edition 2022 Commercial Law publisher (india) Pvt. Ltd page no 2.1.54

(1) The Adjudicating Authority shall, within a period of fourteen days of the receipt of the application, by an order-(a) admit the application, if it is complete; ²[and no disciplinary proceeding is pending against the proposed resolution professional]; or (b) reject the application, if it is incomplete: ²[or any disciplinary proceeding is pending against the proposed resolution professional:]

Provided that Adjudicating Authority shall, before rejecting an application, give a notice to the applicant to rectify the defects in his application within seven days from the date of receipt of such notice from the Adjudicating Authority⁸.

(2) The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (4) of this section.

LIQUIDATION PROCESS:

G) SECTION -33. INITIATION OF LIQUIDATION. —

(1) Where the Adjudicating Authority⁹, —

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or

(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein, it shall—

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors ¹[approved by not less than sixty-six per cent. of the voting share] to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i),

(ii) and (iii) of clause (b) of sub-section (1).

⁸ Compendium on the Insolvency and Bankruptcy Code, 2016 forwarded by Dr Navrang Saini Chairperson, IBBI 4th edition 2022 Commercial Law publisher (india) Pvt. Ltd page no 2.1.57

⁹ Compendium on the Insolvency and Bankruptcy Code, 2016 forwarded by Dr Navrang Saini Chairperson, IBBI 4th edition 2022 Commercial Law publisher (india) Pvt. Ltd page no 2.1.165

2[Explanation. —For the purposes of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.]

(3) Where the resolution plan approved by the Adjudicating Authority 3[under section 31 or under sub-section (1) of section 54L,] is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

(6) The provisions of sub-section (5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(7) The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

NCLT

H)-NATIONAL COMPANY LAW TRIBUNAL:

"The Central Government has constituted National Company Law Tribunal (NCLT) under section 408 of the Companies Act, 2013 (18 of 2013) w.e.f. 01st June 2016. In the first phase the Ministry of Corporate Affairs has set up eleven Benches, one Principal Bench at New Delhi and ten other Benches at New Delhi, Ahmedabad, Allahabad, Bengaluru, Chandigarh, Chennai, Guwahati, Hyderabad, Kolkata and Mumbai. These Benches are headed by the President Chief Justice (Retd.) Ramalingam Sudhakar and comprises of sixteen Judicial Members and nine Technical Members at different locations. Subsequently, more Benches at Cuttack, Jaipur,

Kochi, Amravati, and Indore have been setup and new members have joined"¹⁰.

At present, Chief Justice (Retd) Ramalingam Sudhakar, Hon'ble President

The **National Company Law Tribunal (NCLT)** is a quasi-judicial body in India that adjudicates issues relating to Indian Companies The tribunal, established under the Companies Act 2013 was constituted on 1 June 2016 by the government of India and is based on the recommendation of the V Balakrishna Eradi committee on law relating to the insolvency and the winding up of companies.

All proceedings under the Companies Act, including proceedings relating to arbitration, compromise arrangements, reconstructions and winding up of companies, are to be before the National Company Law Tribunal (NCLT). The NCLT bench is chaired by a Judicial member, who is to be a serving or retired High Court Judge, and a technical member, who must be from the Indian Corporate Law Service (ICLS) cadre.

The National Company Law Tribunal is the adjudicating authority for the insolvency resolution process of companies and Limited Liability Partnership under the Insolvency Bankruptcy Code 2016¹¹.

No criminal court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal.

CONCLUSION:

The insolvency Bankruptcy code at its nascent stage and still is evolving. It has been navigating uncharted waters for the past seven years. In this journey, many milestones have been achieved and a lot many things to be earned. Failure of business of the firm has various reasons but success takes a big flight and sets an example to others. This code helping entrepreneurs to come out from imminent danger and giving safe landing. Factors, that is risk in business it with uncertainty. This code helps creditors, stake holders, even corporate debtor to identify the reason and comes out from danger. This code is time bound and helps not only corporate debtor but it also takes care of all kind of creditors and contributory of business firm. In compare to the previous recovery policies it is much more effective and keep pace for further amendment

¹⁰ <https://nclt.gov.in> visited on 06-8-2024

¹¹ https://en.wikipedia.org/wiki/national_company_tribunal visited 06--92024

to the code to have more effectiveness. Already this code improved upon on recovery which resulted good flow of fund financial market that positiveness of economy. This code by helping corporate body helping society from unemployment. However, one of the excellence works is performing.

