

FEATURES AND PROCEDURES OF THE INSOLVENCY AND BANKRUPTCY CODE

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Insolvency is a situation where individuals or companies are unable to repay their outstanding debt. This may be taken care by changing the repayment plan of loans, writing off some debt or making changes in the management of a company. If insolvency cannot be taken care of, the assets of the person who owes money may be sold to raise money for repayment of debt.

The Insolvency and Bankruptcy Code, 2016 (IBC) is the bankruptcy law of India which seeks to combine the existing laws by creating a single law for insolvency and bankruptcy. The bankruptcy code is a simple solution for resolving insolvencies which is a long process and does not offer an economically practical arrangement. A strong insolvency law where the cost and the time spent is minimised during liquidation has been needed in India for a long time.. The code will be able to protect the interests of small investors and make the process of doing business a less burdensome process.

The Following are the features of the Code:

A specialised set of skilled professionals known as insolvency professionals (IPs) will be created to handle insolvency resolution. These Insolvency Professionals will conduct the insolvency resolution process, take over the management of a company, help creditors to collect relevant information, and manage the liquidation process.

The Insolvency Professionals will be registered with insolvency professional agencies (IPAs). The Insolvency Professional Agencies will make examinations, certify Insolvency Professionals, and enforce a code of conduct for their functioning. Also, an Insolvency Professional Agency will provide a performance bond to the Bankruptcy Board in the beginning of insolvency resolution by a member Insolvency Professional. This bond will act as a surety against any misconduct by the Insolvency Professional during the resolution process.

Information utilities will be set up to collect, assemble and spread financial information related to debtors. Such information will be collected from creditors and include records of debt,

liabilities and defaults of a debtor. The information available with these utilities will be used as evidence to start insolvency resolution, and help creditors in forming a plan to resolve insolvency.

The Insolvency and Bankruptcy Board of India will be set up as a supervisor to oversee operation of entities created under the Code, including Insolvency Professionals, Insolvency Professional Agencies and information utilities. The Code provides that until the Board is set up, a financial sector regulator (such as RBI, SEBI, IRDA and PFRDA) will act as an temporary regulator and carry out functions of the Board.

The Code proposes two adjudicating authorities to: (i) assess applications for initiating insolvency proceedings, (ii) approve appointment of Insolvency Professionals, and (iii) approve resolution plans. These authorities are:

- National Company Law Tribunal (NCLT) will adjudicate cases for companies and limited liability partnerships. Appeals against its orders will be heard by the National Company Law Appellate Tribunal.
- Debt Recovery Tribunal (DRT) will adjudicate cases for individuals and partnership firms. Appeals against its orders will be heard by the Debt Recovery Appellate Tribunal.

However, regardless of the various beneficial features, there are a few deficiencies in the code that needs to be taken care of.

- The Code has given the time frame work for resolution process, fast track process, giving of notice, confirmation of creditors etc. however, the Code has not said in how much time the Liquidator has to complete the process of liquidation. There is also no time frame within which the Liquidator has to report final decision to Adjudicating Authority. The Code states a time of 180 days to 270 days for resolution process but no such time frame is given within which the liquidator has to complete his job. The Government should review this point and necessary amendment be made in the code.

- There are no rules for corporate debtors, whose cases are already registered with High Court or SICA or other agencies where Liquidator has already been appointed, for transfer or for shifting of such cases under new Code.

When it comes to the procedure of insolvency, The Code provides similar insolvency resolution processes for companies and individuals. The steps are as follows:

- **Initiation:** When a default occurs, the creditors or debtor may apply to the tribunal (NCLT or DRT) for starting the resolution process. Once the application is approved, the resolution process will have to be completed within 180 days. This time limit may be extended by up to 90 days. During this period, the debtor will be protected against creditors' claims and lawsuits.
- **Appointment of interim Insolvency Professional:** When the resolution process begins, a temporary Insolvency Professional will be appointed by the creditors or tribunal. The Insolvency Professional will: (i) take control of the debtor's assets and company's operations, (ii) collect financial information of the debtor from information utilities, and (iii) form the creditors committee.
- **Creditors committee:** A committee made up of financial creditors will be formed for taking decisions regarding insolvency resolution. Financial creditors may either be: (i) secured creditors, whose loans are backed by security, or (ii) unsecured creditors whose loans are not backed by any security. The creditors committee will take decisions by a 75% majority. It will oversee management of the debtor's assets and appoint a permanent Insolvency Professional to conduct the resolution process.
- **Resolution:** The creditors committee will decide to: (i) restructure the debtor's debt by preparing a resolution plan (such as revising the repayment plan), or (ii) sell the debtor's assets to repay loans. If no decision is made during the resolution process, the debtor's assets will be liquidated to repay the debt.
- **Approval of plan:** On the approval of a resolution plan by the creditors committee, the Insolvency Professional will submit it to the tribunal for final approval. The tribunal will approve the plan based on conditions which includes ensuring that operational creditors have

received as much as they would have received during liquidation. The resolution plan will then be implemented.

- Liquidation: In case of liquidation, proceeds from the sale of the debtor's assets will be used to repay unpaid debts. A secured creditor may choose to not join in the process, and enforce his security under any other law. The financial obligations of the debtor will be repaid in the following order: (i) fees of the Insolvency Professional and other costs related to the resolution process, (ii) secured creditors (if he chooses not to enforce his security) and worker dues (up to 12 months), (iii) employee wages (up to 12 months), (iv) unsecured creditors, (v) dues to government and remaining debt owed to secured creditors (residual amount if the creditor enforces his security), (vi) any remaining debt, and (vii) shareholders.

The Supreme Court in *Lokhandwala Kataria Construction Private Limited v. Nisus Finance and Investment Managers LLP*¹ considered whether National Company Law Appellate Tribunal ("NCLAT"), the appellate body under the Code, could allow withdrawal of insolvency application after admission based on agreed consent between the parties. The Law allows the parties to withdraw the application prior to admission of the application by National Company Law Tribunal ("NCLT"), the adjudicating authority under the Code². However, there is no provision for withdrawal of application after admission. The Supreme Court held that NCLAT cannot invoke its power to allow the parties to withdraw the application after admission. However, Supreme Court invoked its own power under Article 142³ of the Constitution and allowed the parties to withdraw the application.

¹ Civil Appeal No. 9279 OF 2017

² Rule 8, Insolvency and Bankruptcy (Application to Adjudicating Authority Rules 2016) Rules

³ Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc

(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself

In *Surendra Trading Company Vs. Juggilal kamlapat jute mills Company Limited and others*⁴. The question before the Court was whether time limit of 7 days prescribed under the Code for rectifying or removing defects in the application filed by an operational creditor for initiating corporate insolvency resolution is mandatory or not. The Court held that making the period of seven days as mandatory does not serve any purpose. The Court observed that in a given case there might be weighty, valid and justifiable reasons for not able to remove the defects within seven days. Accordingly, the provision of removing the defects within seven days is directory and not mandatory in nature.

⁴ Civil Appeal No. 8400 of 2017 decided on September 19, 2017