INSOLVENCY AND BANKRUPTCY CODE, 2016

A welcome step and opportunities for practicing professionals

BY

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Well, to understand the code in depth first we need to understand the meaning of two terms namely **"Insolvency** and **Bankrupt"** these terms are used throughout the article.

Many Company Secretaries do not venture into the field. As is often jokingly said, topics of winding up are left for 'option' during student days, since who would remain ever with a company that is being wound up!

But time has come when Company Secretaries – more specifically those in practice – need to prepare for the immense opportunities being opened up. The Insolvency and Bankruptcy Code, 2016 was introduced in India to bring all matters relating to insolvency, liquidation, voluntary liquidation or bankruptcy of companies, LLPs, partnership firms and individuals under a single legislation.

The word **INSOLVENCY** refers to the situation where Individuals or Companies are unable to raise enough funds to meet out their obligations/liability or to pay its debts as they become due for payment. It may be resolved by changing the repayment plan of the loans, or writing off part of the debt. If insolvency cannot be resolved, assets of the debtor may be sold to raise money, and repay the outstanding debt.

BANKRUPTCY refers to a situation where a person voluntary declares him/her to be an insolvent and goes before the concerned Court and after due process of law the Court will liquidate him/her personal property and distribute the same among the creditors to the insolvent person.

Bankruptcy is the legal declaration of Insolvency. So the former is a financial condition and latter is a legal position. All insolvencies need not lead to bankruptcy. The new code has a sequential procedure of Insolvency resolution, failing which, it leads to Bankruptcy.

Before THE INSOLVENCY AND BANKRUPTCY CODE, 2016, there were multiple laws and adjudicating authorities at various levels to adjudicate an Insolvency and Bankruptcy matter. There were a hindrance towards resolution of recovery problems of creditors and declaration of insolvency, their revival plan and liquidation of corporate entities. There was a need to overcome this critical problem.

In erstwhile laws, **Debt Recovery Tribunal *("DRT")*** and SARFAESI were the exclusive forums for banks/financial institutions while BIFR Board and Companies Act had limited application for sick companies, their revival and/or liquidation.

NEED FOR IMPLEMENTING THE CODE

There were various reasons for implementing the aforesaid Insolvency and Bankruptcy Code, some of them are articulated below:

- Multiple Legislation on insolvency as well as adjudicating forum under various statutes;

- The erstwhile legal system does not aid lenders in an effective way and timely recovery of defaulted assets and causes undue strain on the Indian credit system.
- There was a need for improving the business environment and alleviating distressed credit markets;
- Promoting ease of doing business in India;
- Time-bound settlement of insolvency;
- Enabling faster turnaround of businesses and create a database of serial defaulters;
- Helping creditors to recover their loans much faster;
- The new code has replaced existing bankruptcy laws and it covers individuals, companies, limited liability partnerships and partnership firms;
- Setting up of Insolvency and Bankruptcy Board of India to act as a regulator of these utilities and professionals.

The Recovery of Debt Due to Banks & Financial Institutions Act, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Companies Act 2013 ***("Erstwhile Companies Act, 1956")*** etc are not providing speedy remedy to recover the loans and debts due from debtors and in a way it has failed to improve the recovery position and possibility from debtor by the creditor.

The position remain the same in case of Individuals, sole proprietorship and partnership firms where the laws governing the insolvency namely the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 were not providing proper solution to recover the loans and debts due from individual and partnership debtors.

Therefore, it is felt by the Government that there is a need to have a consolidated law or code to govern and regulate the matters of recovery of money from debtors who have borrowed and failed to repay debts even after it becomes due more particularly when those debts are not secured.

THE INSOLVENCY AND BANKRUPTCY CODE – LEGISLATIVE HISTORY

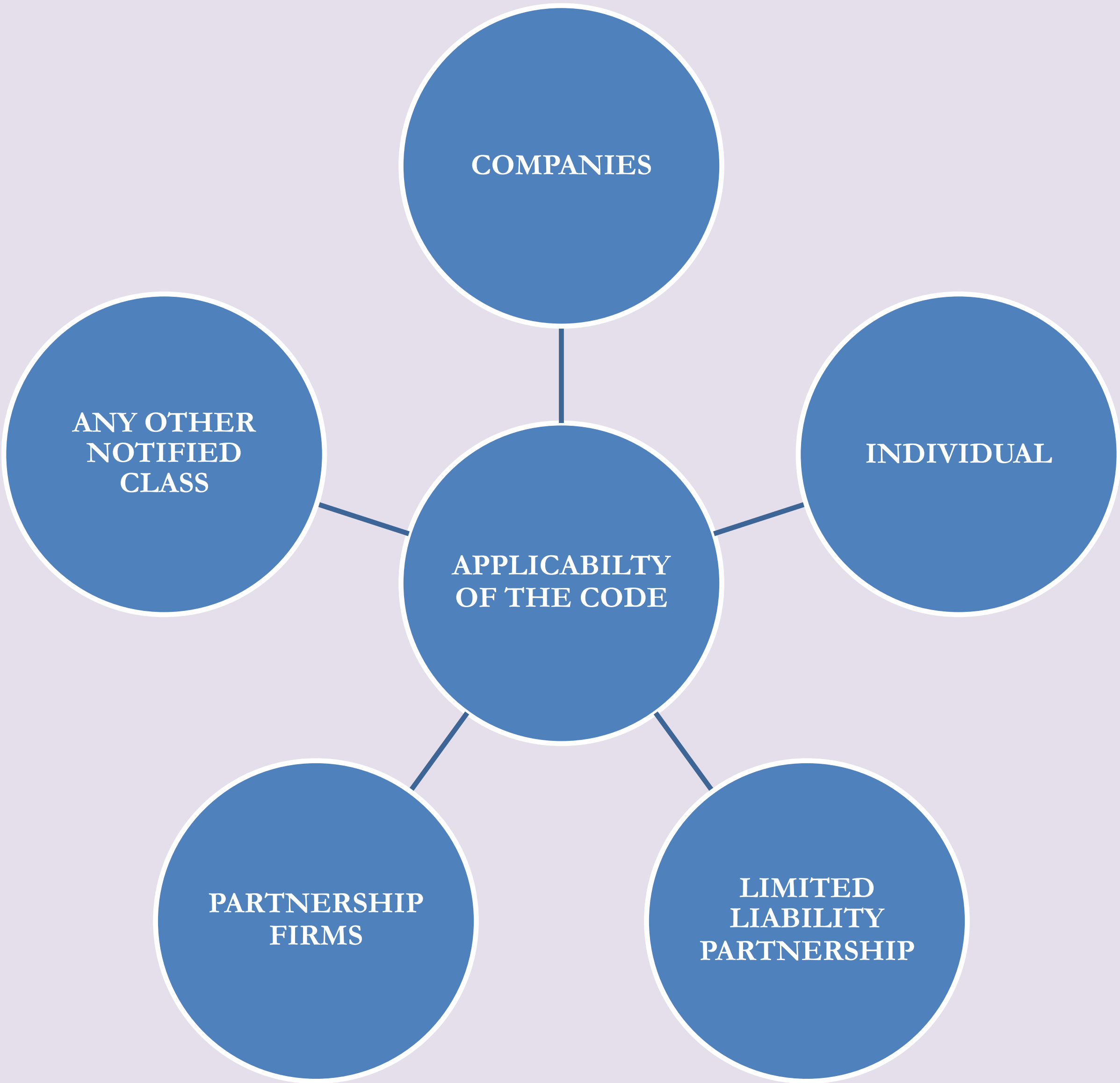
The Insolvency and Bankruptcy Code, 2015 was introduced in Lok Sabha on 21st December, 2015 and the same was referred to Joint Committee constituted on the Insolvency and Bankruptcy Code, 2015 for examination purpose. The report of the Joint committee was presented in the house and was laid down in Rajya Sabha on 28th April, 2016. The code has been passed by Lok Sabha on 05th May, 2016 and by Rajya Sabha on 11th May, 2016. Thereafter, it received the Presidential assent on 28th May, 2016 and was notified in the official gazette on the same day to be called the Insolvency and Bankruptcy Code, 2016.

If we look at the provisions in the Constitution of India, the item "Bankruptcy & Insolvency" is stated as Entry 9 in List III – Concurrent List, (Article 246–Seventh Schedule to the

Constitution) that is to say both Central and State Governments can make laws relating to this subject.

The Code creates a new institutional framework, consisting of a regulator, insolvency professionals, information utilities and adjudicatory mechanisms, that will facilitate a formal and time bound insolvency resolution process and liquidation.

APPLICATION OF INSOLVENCY AND BANKRUPTCY CODE, 2016 (I&BC):



It is to be noted that the I&BC, 2016 is not applicable on the companies which are providing financial services *e.g.* the NBFCs, investment companies etc.

OBJECTIVES OF THE I&BC, 2016

AN ACT TO CONSOLIDATE AND AMEND THE LAWS RELATING TO REORGANISATION AND INSOLVENCY RESOLUTION IN A TIME BOUND MANNER

TO IMPROVE EASE OF DOING BUSINESS IN INDIA AND ALSO TO SET UP A BETTER AND FASTER DEBT RECOVERY MECHANISM IN INDIA

TO CREATE A NEW INSTITUTIONAL FRAMEWORK, CONSISTING OF INSOLVANCY AND BANKRUPT BOARD, INSOLVANCY PROFESSIONAL AGENCIES, INSOLVENCY PROFESSIONALS, INFORMATION UTILITIES AND ADJUDICATING AUTHORITIES

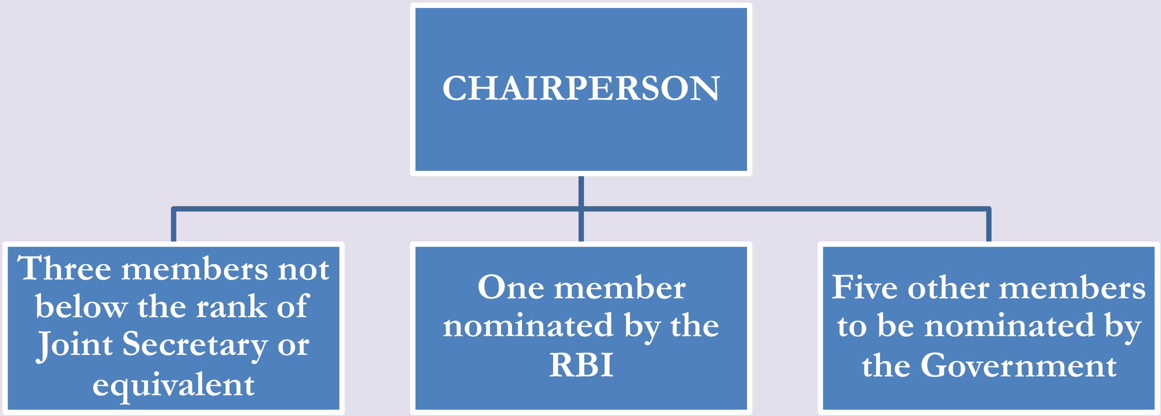
INSTITUTIONAL FRAMEWORK UNDER THE I&BC, 2016

(A) INSOLVENCY AND BANKRUPTCY BOARD (IBB)

Section 3 (1) of I&BC, 2016 provides for **"Insolvency and Bankruptcy Board"** of India: It states "Board" means the Insolvency and Bankruptcy Board of India established under sub-section (1) of Section 188.

Further, the Code provides for the establishment of the Board called Insolvency and Bankruptcy Board of India. The Board shall consist of the following members, who shall be appointed by the Central Government:

1. Chairperson
2. Three members amongst the officers of the Central Government not below the rank of Joint Secretary or equivalent, one of each to represent the Ministry of Finance, the Ministry of Corporate Affairs and Ministry of Law, ex officio.
3. One member nominated by the Reserve Bank of India, ex officio
4. Five other members to be nominated by the Central Government, out of which three shall be the whole-time members.



ROLE OF THE BOARD COMPRISES OF:

1. To regulate all matters related to Insolvency and Bankruptcy process;
2. To set out eligibility requirements of Insolvency Intermediaries *i.e.,* Insolvency Professionals, Insolvency Professional Agencies and Information Utilities;
3. To regulating entry, registration and exit of Insolvency Intermediaries;
4. Making model bye laws for Insolvency Professional Agencies;
5. To Set out regulatory standards for Insolvency Professionals;
6. To Specify the manners in which Information Utilities can collect and store data;
7. Overseeing the functioning of insolvency intermediaries and the resolution process.

(B) INSOLVENCY INTERMEDIARIES

(i) INSOLVENCY PROFESSIONAL AGENCIES (IPAs)

Section 3 (20) of I&BC, 2016 provides that **"Insolvency Professional Agency"** means any person registered with the Board under Section 201 as an insolvency professional agency. These agencies are required to get registered itself and obtain certificate of registration from the Board. The Board shall have regard to the following principles while registering the insolvency professional agencies, namely:

1. Promote the professional development of and regulation of insolvency professionals;
2. Promote good professional and ethical conduct amongst insolvency professionals;
3. Protect the interests of debtors, creditors etc;

4. Promote the services of competent insolvency professionals to cater to the needs of debtors, creditors etc;
5. Promote the growth of Insolvency Professional Agencies for the effective resolution of insolvency and bankruptcy processes under this Code.

(ii) INSOLVENCY PROFESSIONALS (IPs)

As per Section 3 (19) of I&BC, 2016, **"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.

Insolvency Professionals plays a key role in the efficient working of the insolvency and bankruptcy process. They need to get enrolled with the Insolvency Professional Agency as a member and registered with Board. The Board may specify the categories of professionals or persons possessing such qualifications and experience in the field of finance, law, management, insolvency or such other field, as it deems fit.

FUNCTIONS OF INSOLVENCY PROFESSIONALS:-

Every Insolvency Professional shall be abided by the following code of conduct:-

- To take reasonable care and diligence while performing his duties;
- To comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member;
- To allow the insolvency professional agency to inspect his records;
- To submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member;
- To perform his function in such manner and subject to such conditions as may be specified.

(iii) INFORMATION UTILITY

Section 3 (21) of IBC, 2016: "INFORMATION UTILITY" means a person who is registered with the Board as an information utility under Section 210.

A person shall obtain a certificate of registration by the Board to carry on its business as information utility under this Code. The purpose of this intermediary (Information utility) is to remove information dependency on the debtor's for critical information that is required to resolve insolvency and this information would be available to creditors, resolution professionals, liquidators and other stakeholders in insolvency and bankruptcy proceedings.

Obligations of Information Utility

- Collect, collate, authenticate and disseminate financial information of debtors in a universally accessible format;
- Get the information received from various persons authenticated by all concerned parties before storing such information;
- Provide access to the financial information stored by it to any person who intends to access such information;
- Have the ability to operate with other information utilities.

(C) ADJUDICATORY AND APPELLATE AUTHORITIES

- **Companies and LLPs**: All matters with regard to insolvency of Companies and Limited Liability Partnership Firms shall be adjudicated by National Company Law Tribunal (**NCLT**) and all Appeals against the order of NCLT lie to the National Company Law Appellate Tribunal (**NCLAT**) and thereafter to the Supreme Court of India.

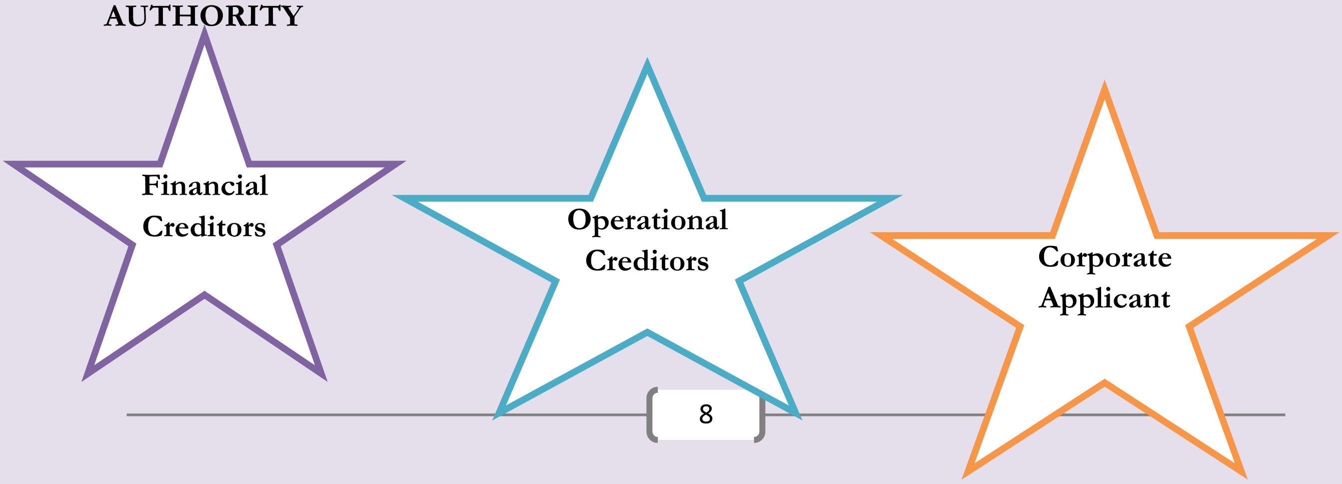
- **Insolvency Professional Agency or Insolvency Professional or Information Utilities**: The NCLAT shall also be the appellate authority to hear appeals arising out of the orders passed by the Insolvency and Bankruptcy Board of India (**Board**) in respect of Insolvency Professional Agency or Insolvency Professional or Information Utilities.

- **Individuals and Partnership Firms**: the Debt Recovery Tribunal (**DRT**) is the adjudicating authority to deal with the insolvency & bankruptcy matters of **Individual & Partnership Firms**. Appeals from DRT orders lie to the Debt Recovery Appellate Tribunal (**DRAT**) and thereafter to the Supreme Court of India.

CORPORATE INSOLVENCY RESOLUTION PROCESS

Part II of the I&BC, 2016 deals with matters relating to the insolvency and liquidation of Companies and Limited Liability Partnership Firms where the minimum amount of the default is Rupees one lakh and this amount can be increased up to Rupees one crore by the Central Government.

PERSON WHO MAY FILE AN APPLICATION TO THE ADJUDICATING AUTHORITY



1. **Financial Creditors** are the creditors to whom corporate debtor owes financial debt;
2. **Operational Creditors** are the creditors to whom corporate debtor owes operational debts such as claims for goods and services, employees, etc;
3. **Corporate Applicant** means corporate debtor or its shareholders, partner, management personnel or employees.

On receipt of an application, the Adjudicating Authority shall within 14 days by an order:

1. Admit the application, if it is complete; or
2. Reject the application, if it is incomplete.

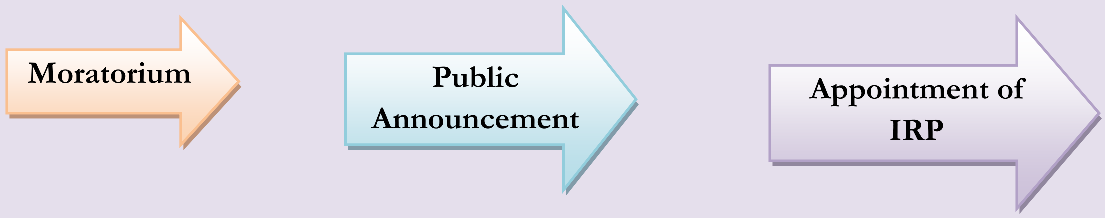
A notice shall be given by the Adjudicating Authority to the applicant to rectify the defect from the application within 7 working days of receipt of such notice from the Adjudicating Authority before rejecting the application.

TIMELINES FOR COMPLETION OF INSOLVENCY RESOLUTION PROCESS:

The Corporate Insolvency resolution process shall be completed within one hundred and eighty days from the date on which application is admitted by the NCLT.

If the process cannot be completed within one hundred and eighty days then one time extension of ninety days subject to resolution passed at a meeting of the committee of creditors by a vote of seventy-five percent of the voting shares. Here, 'committee of creditors' means the committee which shall comprise of all the financial creditors of the Company or Limited Liability Partnership Firms. After admission of the application, NCLT shall by an order:

1. Declare a Moratorium;
2. Cause a public announcement;
3. Appoint an interim resolution professional.



MORATORIUM	PUBLIC ANNOUNCEMENT	APPOINTMENT OF INTERIM RESOLUTION PROFESSIONAL
The NCLT orders a Moratorium on the debtor's operations for the period of the Insolvency Resolution Process. This operates as a "calm period" during which no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets/legal rights/beneficial interest can take place against the debtors. This order of moratorium shall have effect till the completion of corporate insolvency process. The authority has to complete insolvency resolution process within a period of 180 days.	The public announcement shall contain the following information about the corporate debtor: • Name and address; • Name of the registrar within whose jurisdiction it is incorporated; • Last date for submission of claims; • Details of interim professionals • Penalties for false or misleading claims • Date on which the corporate insolvency resolution process shall close.	The adjudicating authority shall appoint an interim resolution professional within 14 days from the insolvency commencement date. Functions of interim professional are: • To take over the management of the affairs of the corporate debtor. • All officers and managers of the corporate debtor shall act on the instructions of the interim professionals. • Have access to all books of account, records and other relevant documents shall be managed by these professionals.

In case of Moratorium, the authority is empowered to declare moratorium for prohibiting the entire Moratorium as under:

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein.

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the SARFAESI Act, 2002. (d) the recovery of any property by an owner or lessee or where such property is occupied by or in the possession of the corporate debtor.

The order shall have effect from the date of order upto completion of corporate insolvency resolution process.

COMMITTEE OF CREDITORS

The Interim Professionals identify the financial creditors and constitute a committee of creditors. Operational creditors are allowed to attend the meetings of committee if their dues are not less than 10 % of the debt but they do not have voting power. Each decision of the committee requires a 75 % majority vote.

APPOINTMENT OF FINAL RESOLUTION PROFESSIONAL

The first meeting of the Committee shall be held within 7 days of the constitution of the committee of creditors where may:

Resolve to appoint the interim resolution professional as a final resolution professional	**Or**	**Replace the interim resolution professional by another resolution professional.**

The Final Resolution Professionals-

- Shall conduct the entire corporate insolvency process
- Manage operations of the corporate debtor
- Have the same powers as that of the interim professionals under the Code.

<u>RESOLUTION PLAN</u>:

- A resolution applicant may submit a resolution plan to the final resolution professional.
- Final resolution professional examine the plan.
- Then he shall present such plan to the committee of creditors for their approval.
- After obtaining approval from the committee of creditors, final resolution professional shall submit the approved plan to the Adjudicating Authority.
- If the Adjudicating Authority approves the plan, then this will be binding upon the employees, members, creditors and other stakeholders. And after approval of the plan, time period of moratorium ends here.

- If application gets rejected, then NCLT shall pass an order of liquidation of the corporate debtor and requires such order shall be sent to the registering authority.

TIME BOUND COMPLIANCE AND ACTION CHART: Winding up proceedings under the Companies Act and Insolvency Proceedings under the earlier laws had been victim of inordinate delays which virtually benefited the dishonest debtors. A meticulous care has, therefore, been taken in the new Code and various action points have been stipulated. The event chart is as under:

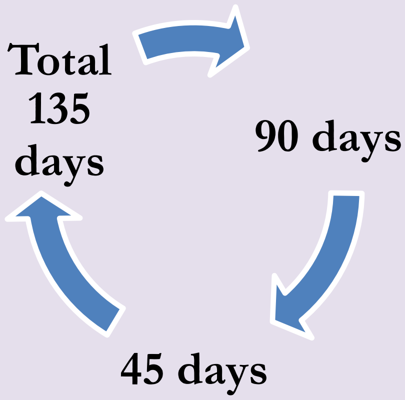
STAGE	TIME LIMIT (NO. OF DAYS)
Filing of application with requisite particulars.	Before the debt itself becomes time barred under the Limitation Act.
Adjudicating Authority deciding admission or rejection of application. Rectification of defect.	17 days.
Declaration of moratorium upon admission.	14 days from date of filing.
Appointment of insolvency resolution professional.	28 days from date of filing.
Constituting committee of creditors and appointment of Final resolution professionals.	38 days from date of filing.
Submitting resolution plan, cessation of moratorium in case of approval of plan. Alternatively – initiation of liquidation in case of rejection of resolution plan and insolvency resolution process completion.	194 days from the date of filing.
Extension of insolvency resolution process.	Upto 240 days from date of filing.

If the abovementioned schedules are strictly adhered to and no dilatory tactics are entertained, then the impact of or rather the positive impact of the Code can be seen within two years or thereabout. It appears the higher judiciary also will have to exercise self restraint in entertaining writ petitions or Special Leave Petitions filed purely for the purpose of circumventing the vigors of the new law.

FAST TRACK CORPORATE INSOLVENCY RESOLUTION PROCESS: Chapter IV of Part II of I&BC, 2016 deals with the fast track insolvency resolution process. An application for fast track corporate insolvency resolution process may be made in respect of the following corporate debtors, namely:-

(a) a corporate debtor with Assets and income below a level as may be notified by the Central Government; or	(b) a corporate debtor with such class of creditors or such amount of debt as may be notified by the Central Government; or	(c) such other category of Corporate persons as may be notified by the Central Government.

DEADLINE FOR COMPLETION OF FAST TRACK CORPORATE INSOLVENCY RESOLUTION PROCESS:



INSOLVENCY RESOLUTION PROCESS FOR INDIVIDUALS/ UNLIMITED PARTNERSHIPS: Part III of the Code deals with matters relating to the insolvency and liquidation of Individuals and Unlimited Partnership Firms where the minimum amount of the default is INR 1000/- and this amount can be increased up to INR 1 Lakhs by the Central Government.

FRESH START PROCESS: Under this process, eligible debtors as specified in the Code can apply to the Debt Recovery Tribunal for a fresh start for discharge of his qualifying debt. After filing an application, an interim- moratorium shall commence on the date of filing of the said application.

The insolvency resolution process consists of a repayment plan by the debtor, for approval of creditor. If approved, the Debt Recovery Tribunal passes an order binding the debtor and creditors to the repayment plan. If rejected, the debtor or creditors may apply for bankruptcy order.

Sections 80-93 deal with fresh start process and sections 94-120 deal with Insolvency resolution process.

BANKRUPTCY CODE - FROM THE VIEWPOINT OF A DEBTOR

Certain assets have been excluded to be claimed by lenders. These are dealt with by section 79(13) speaking about the definition of "excluded assets". Accordingly, it excluded debts which include–

(a) Unencumbered tools, books, vehicles and other equipment as are necessary to the debtor or bankrupt for his personal use or for the purpose of his employment, business or vocation.

(b) Unencumbered furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his immediate family.

(c) Any unencumbered personal ornaments of the debtor or his immediate family which cannot be parted with, in accordance with religious usage.

(d) Any unencumbered life insurance policy or pension plan taken in the name of debtor or his immediate family.

(e) An unencumbered single dwelling unit owned by the debtor of such value as may be prescribed. Though these assets are excluded, lenders can claim other properties belonging to the debtor. However, if the debtor has designed his transaction merely with intent to defeat the rights of the creditor, then the Trustee gets a right to examine and cancel such transactions. There are instances where debtors, expecting a tight liquidity position, transfer all assets to their family members. But it is to be understood that such transactions will be verified, to know if the assets transferred exceed the bare minimum required for the maintenance of the debtor and his family.

BANKRUPTCY CODE- FROM THE VIEWPOINT OF A CREDITOR

If there is an evidence of default on payments, a single creditor or several creditors can jointly trigger insolvency. There should be an actual default. A resolution professional can be appointed by the creditor and trigger the insolvency process, by filing an application.

The bankruptcy process can be initiated, if it has been found that the insolvency resolution process was initiated to defraud the creditors, or if the insolvency resolution process fails, due to non-disclosure of information by debtors, or rejection of repayment plan by creditors, or repayment plan not fully implemented.

If an individual is unable to pay his debts or in the event of his committing a default, he himself can trigger an insolvency process. If the individual's income and assets is less than the specified limits, he would be eligible for a discharge from the "**qualifying debts**".

Qualifying debts include all unsecured debts except certain debts incurred due to fine or penalty imposed by the Court or a debt incurred in the past 3 months before filing a Fresh Start Process application.

The Insolvency Resolution Professional will examine and prepare a final list of all qualifying debts within 180 days or 6 months from the date of application. At the expiry of this period, the Adjudicating Authority will pass an order on discharge of the debtor from the qualifying debts, thus giving him an opportunity to start afresh, financially. At this juncture, it would be worthy to note that since all the information will become public any foreign travel would require the approval by the Adjudicating authority, and hence, the fresh start process in fact should not be triggered, unless an individual is in a really tight situation.

EVENTS THAT WOULD TRIGGER FILING OF INDIVIDUAL BANKRUPTCY: An individual can file an application for bankruptcy in the following events:-

S. No.	EVENTS
(a)	When the gross annual income of the debtor is not more than INR 60,000.
(b)	If the aggregate value of debtor's assets is not more than INR 20,000.
(c)	If the debtor does not own a dwelling unit.
(d)	If the total value of the qualifying debts does not exceed INR 35,000.
(e)	If the debtor is not an undischarged bankrupt.
(f)	If no previous order under this Code has been made in relation to debtor in the preceding 12 months of the date of application.

PROCESS CHART OF BANKRUPTCY ORDER FOR INDIVIDUALS AND PARTNERSHIP FIRMS

1. • **Application to be filed.**
2. • **Apply to the Board for appointing Bankruptcy Trustee.**
3. • **Adjudicating Authority will pass Bankruptcy order.**
4. • **Complying with procedures like publishing in newspapers, statement of affairs, registration of claims, meeting the claimants, distributing the estate of the bankrupt.**
5. • **Completing the administration or discharge order.**
6. • **If the insolvency resolution process fails, the individual concerned can be taken to bankruptcy, if the creditor so wishes**

CHALLENGES IN IMPLEMENTATION OF INSOLVENCY AND BANKRUPTCY CODE

BORROWERS: The borrowers of the Banks and FIs need to note that the new law empowers the Insolvency Practitioners to repossess assets and take-over management of the Enterprise of the borrower, in the event of default in repayment of any loan instalment or interest without any notice and the law is very stringent as compared to the SARAFESI Act, 2002. The borrowers, therefore, need to devise a cash flow management policy to ensure that there are no defaults and adopt a Code of Conduct in regard to repayment of all liabilities.

As a matter of policy, ensure that all commitments to pay irrespective of the quantum, for goods purchased or services availed or loan repayment shall be honoured on or before the due date; and if for any reason funds cannot be arranged for payment, inform the Bank well in advance with reasons for delay in payment. Also indicate the date by which payment will be made and whether subsequent payments due will be made on time. If there is any other long-term problem such as defect in the product which will take some time to correct or lack of orders or inability to sell, lenders will have to be kept informed.

If there are any remedial measures such as restructuring the debt, further finance to correct defects in machinery / or change in manufacturing process etc. bring it to the notice of the lenders at the earliest opportunity. As a matter of policy ensure that there is no concealment of facts or diversion of funds or any action / conduct which is contrary to loan sanction terms; Extend full co-operation to the lenders in the matter of preparation of Resolution Plan and obtain approval of Adjudicating Authority with the consent of the lenders.

LENDERS: The banks and FIs have to formulate new policies for dealing with defaults for different categories of loans and borrowers. Since, initiation of insolvency resolution process may results in Liquidation of the Enterprise after 180 days, Reserve Bank and the lenders need to address following policy issues:

(1) The Bankruptcy Code provides that Insolvency Resolution Process can be initiated by a financial creditor or operational creditor or the corporate debtor, in the event of default. The term default means non-payment of whole or any part or instalment amount of debt which has become due and payable and is not paid. If there is a default in payment of instalment of a loan, the bank / FI will have to recall the entire loan before filing for Insolvency Resolution. Hence, in the event of default, the Bank will have to assess whether default is on account of some temporary problems or there is probability of further default and whether to recall the entire loan outstanding and file Insolvency Resolution Petition;

(2) If default is likely to be corrected shortly, it may not be worthwhile to start Insolvency Resolution Process;

(3) Banks & FIs will also have to decide the categories of loan accounts in which the action for recovery will be by filing Insolvency Resolution Process. In cases of loans to micro and small enterprises, it would be physically impossible to take possession of defaulting enterprises and ask Insolvency Practitioners to manage them. In such cases, Banks will have to examine feasibility of restructuring the debt and if need be recover the debts by resorting to Debt Recovery Laws. But if the Debtor itself files for insolvency resolution, the lender will have no option to ensure that Insolvency Resolution Practitioner appointed will protect the interest of lenders.

(4) If default is not likely to be corrected, file Insolvency Resolution Petition (**IRP**) which will compel the borrower to prepare Insolvency Resolution Plan acceptable to 75% in value of all creditors within 180 days.

(5) If after notice the Defaulter corrects the default is the status quo ante to be restored or the Defaulter should be made to obtain approval of Resolution Plan inspite of repayment of defaulted loan instalments, on the basis that total loan has been recalled.

BUSINESS COMMUNITY: One crucial change which is introduced under the Insolvency and Bankruptcy Code, 2016 is the power to file insolvency petition against a debtor company immediately on default without any notice and the power of NCLT to pass orders for insolvency resolution within 14 days after verification of default.

The new law calls for introducing new culture for the entire mercantile community as well as all purchasers of goods and services of honouring commitments to pay on due dates. The present practice is to delay payments as long as possible and do business availing credit from bank and also from suppliers of goods and services. Such delayed payments have been the problem, the MSME sector is grappling with for past many years.

All the Government authorities, local and other public authorities, PSUs and other business entities under the control of the Government have to ensure that all commitments made or obligations undertaken are honoured on due dates.

Such new culture will facilitate trade and industry to honour their own commitments for payment of borrowed funds and other payments for goods and services. The business community needs to adopt a Code of Conduct for itself in the matter of utilization of loans and meeting payment obligations, as under: Utilize the Loans for the purpose for which they are granted and ensure that there is no diversion of funds and the cash flows and other realizations.

JUDICIARY: The law of insolvency as it stands is interpreted by courts and insolvency orders are passed in extreme cases. The Bankruptcy Law is a major change and departure from the existing law, which is interpreted by the Courts in favour of debtors. Courts have held that winding up is a discretionary relief which the Court should grant if existence of the company will cause immense prejudice to all concerned. The order of winding up should be made in rarest of rare cases.

Any **resolution plan** proposed by the company should be approved or not is for the creditors committee to examine and decide. If such plan is not approved by the creditors the company is to be liquidated and such liquidation order is as a result of creditors' decision not to support the company.

There is no exercise of judicial discretion in deciding whether liquidation order needs to be passed on rejection of Resolution Plan. If plan is not approved by Creditors, the company is to be wound up.

Adoption of new norms for honouring commitments to pay and implementation of the I&BC based on new principles are major challenges.

OPPORTUNITIES FOR COMPANY SECRETARIES UNDER THE CODE:

Winding up of companies has for long been a matter of concern in India. The Companies Act 1956 (Now Companies Act, 2013) govern the provisions of winding up of companies but as experience would reiterate, it is a long and cumbersome process with little expertise available on the subject.

Many Company Secretaries do not venture into the field. As is often jokingly said, topics of winding up are left for 'option' during student days, since who would remain ever with a company that is being wound up!

But time has come when Company Secretaries – more specifically those in practice – need to prepare for the immense opportunities being opened up. The Insolvency and Bankruptcy Code, 2016 was introduced in India to bring all matters relating to insolvency, liquidation, voluntary liquidation or bankruptcy of companies, LLPs, partnership firms and individuals under a single legislation.

This Code has repealed the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 and amended eleven other laws including Indian Partnership Act, 1932, Central Excise Act, 1944, Customs Act, 1962, Finance Act 1994, Companies Act, 2013, Limited Liability Partnership Act, 2008, Sick Industrial Companies (Special Provisions) Repeal Act, 2003, Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), Income- tax Act, 1961 and Payment and Settlement Systems Act, 2007.

The Code does not specify which persons can act as insolvency professionals. However, it does say that the Board may specify the categories of professionals or persons possessing such qualifications and experience in the field of finance, law, management, insolvency or such other field, as it deems fit.

Company Secretaries have experience in the field of law, and management. There are many Company Secretaries who currently act as liquidators in voluntary winding up. The scope has now been widened manifold under the Code.

Company Secretaries can act as an Insolvency professionals for all types of winding up, insolvency, bankruptcy – be it for corporates, individuals or firms. Further, since the adjudicating authority except for individuals and firms is the NCLT, Company Secretaries can appear before such authority and represent their clients.

This has opened a new avenue of practice for professionals who would like to work with financial institutions on debt restructuring projects, one time settlements and the like. It will also give a chance to work for the society by helping the poor and marginalized sections.

CONCLUSION

The full benefits of the Code will be obtained in a situation where all the stakeholders collectively contribute in creating an ecosystem conducive to an effective, fair and expedient implementation of the Code. For the common man, it is clearly a win-win situation.

The Code promises to bring about far-reaching reforms with a thrust on creditor driven insolvency resolution. It aims at early identification of financial failure and maximising the asset value of insolvent firms.

The Code also has provisions to address cross border insolvency through bilateral agreements and reciprocal arrangements with other countries. The unified regime envisages a structured and time-bound process for insolvency resolution and liquidation, which should significantly improve debt recovery rates and revitalise the ailing Indian corporate bond markets.

India has completed 25 years of its economic reforms. The economic reforms can be successful if the country keeps pace with the global trends and maintains parity with important economic and finance sector legislations in other countries.

The biggest challenge is hence to create efficient, well integrated and transparent machinery. The role of professionals has been given prominence and there will be greater and unprecedentedly high expectations from them. The use of information technology for cross comparison of information also will prove to be of great help. The dubious practice of defrauding the creditors and enjoying others money needs to be curbed because it is ultimately detrimental to the society at large.

From the above, it can be seen that the Code aims to regulate, streamline and fast-track the process of winding up and liquidation in India. A major cause of concern for companies investing in India has been that getting out or closing down is very difficult.

With the 'Make in India' initiative of the Government, it is imperative that such concerns of the industry are taken into account and acted upon. Introduction of the Code is one such step in the right direction. If the Code actually is implemented in the manner in which it is drafted, it will make India a business friendly place.

Investors will not be concerned over the period it takes to wind up its affairs. Concerns over long and arbitrary recovery procedures will abate. They will have a say in the restructuring and its interests will be protected in time bound manner. Debtors will not be able to run away easily.

Since professionals will manage the insolvency and winding up processes, law will be followed in true letter and in spirit. The scope of the Code is far reaching. **Even persons with annual income of less than a lakh of rupees are covered in the Code**. This will include even small and marginal farmers who are indebted and are losing their lives for not being able to repay the debt and interest thereon. This will have a very wide social impact. Thus, the Code is a welcome step in the Indian context. Professionals like Company Secretaries have immense opportunities under the Code to prove their mettle and contribute in helping the businesses to survive and grow. It is time to diversify into new fields and make an impact.

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