INSOLVENCY & BANKRUPTCY CODE - 2016

GENESIS

- IBC intro in Lok Sabha on 21st Dec 2015 +Referred to Joint Committee for Modifications & Suggestions
- Overcome Shortcomings & Challenges of Existing laws
- Passed by Both Houses of Parliament & notified in May 2016 (for Jammu & Kashmir & Part III its N/A)

Relation in Bankruptcy, Insolvency & Liquidation (Insolvency is a State & Bankruptcy is a conclusion)

INSOLVENCY	BANKRUPTCY	LIQUIDATION
For individuals & organizations	Application to Authority declaring Insolvency	Winding up of entity
A Situation = Inability to pay debts	Legal Proceeding = Seeking Declaration as Bankrupt	Regulatory Bodies, Director, Shareholder & Unpaid Creditors of Company = Can initiate proceedings leading to Liquidation
For Corporate = Corporate Insolvency	For Individuals = Bankruptcy	
Insufficient assets to meet liability	Untreated Insolvency leads to Bankruptcy	
All Insolvencies not leads to bankruptcy	A Bankrupt is Conclusive Insolvent	
Options for it = Resolution or Recovery	Petition filed by Debtors/ Creditors	

DISTINGUISHING FEATURES

Comprehensive Law	Foresee/ expects & regulates processes of Insolvency & Bankruptcy
Withering Multiple Laws	Singular platform for all reliefs relating to debts & Insolvency Resolution
Low Time Resolution	Provides & defines fixed time frames for Insolvency Resolution
One Window Clearance	Applicant get appropriate relief by same Authority
Clarity in Process	Clear & unambiguous process to be followed by all Stakeholders
Shift of control	From shareholders & promoters to Creditors
One Chain of Authority	Not allow Civil Courts to interfere application pending before Adj. Authority
Less Litigation Multiplicity	NCLT for Co. & Debt Recovery Tribunal for Individual Insolvency Resolution
Protects Workmen Interest	Excludes workmen dues (PPF, PF & Gratuity) from Debtors asset on Liquidation
New Regulatory Authority	IB Board to regulate professionals & agencies & Info Utilities
Establish Info Utilities	Function as databank to collect, collate & spread widely Financial Information

NEED FOR NEW or DEMERIT OF EXISTING LAW

- Multiple Overlapping Law/ forums for Debt Resolution = Several loopholes; inadequate & not aligned with mkt. reality
- Multiple Adjudicating forums dealing with financial failure & insolvency of co. s = Delays & complexities in processes
- Individual insolvency laws dealt by century old Acts i.e. Presidency Towns Insolvency Act 1909; Provisional Insolvency Act 1920 & others acts like Partnership Act 1932; Co Act 1956; SICA 1985; Recovery of debts due to Banks & Financial Institution Act 1993; SARFAESI Act 2002; Co Act 13 & finally came IBC 2016
- Ease of Doing Bus Report of World Bank=Average 4-5 yr Insolvency Resolution Process in India
- Asymmetry of Info
- Parallel proceedings by different parties & conflicts in laws and over jurisdictions
- Framework of Existing Law failed to Resolve Insolvency Situations like: -
  - Financial Failure → Persistent mismatch in payments by co & receivables even if funds exists
  - Business Failure → Business model unable to generate sufficient funds to meet payments
  - Mgt Failure → Malfeasance & mismanagement by promoters

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PURPOSE OF ENACTENT OF IBC Code 2016 (as per its Preamble)

Consolidate, amend laws of reorganization & Insolvency Resolution	Stakeholders Enjoy availability of credit
Fix Time periods for execution of law in time bound manner	Creditors not to bear losses on default
Strike Right Balance of Stakeholders Interests	Increase Credit Availability
Establish Insolvency & Bankruptcy Board of India as Regulatory Body	Promote Entrepreneurship
Movement from Debtor in Possession to Creditor in Control	Maximize Value of Assets of Interested Persons
Overcome shortcomings & challenges of Existing laws	Alter order priority to pay Govt. Dues
Facilitate easy & time bound closure of businesses in India	Focus on Creditor driven Insolvency Resolution

REGULATORY MECHANISM

→ 5 Pillars = {IPs (Discussed Later), IPAs, IUs, IBBI & AA}

- **IPAs**
  - IP Agencies = Enroll & regulate insolvency professionals as its members
- **Info Utilities (IUs)**
  - Facilitate Insolvency Resolution
  - Reduce Risk of credit in economy
  - Collect, authenticate & spread Debtors financial info in Central E Database
  - Data on Debts & Cr. of bus houses & create Auto Trigger on debtor default
  - Remove info asymmetry & dependency on Debtors mgt for Critical Info
  - Useful Info to IPs, RPs, Liquidators & Stakeholders in Insolvency proceedings
- **IBBI**
  - Established on 01.10.16 & HO located at New Delhi
  - Regulator, Oversee 4 pillars & perform Legislative, Executive & Judicial fn
- **(AA) Adj. Authority**
  - NCLT = AA for Corporate Insolvency & DRT = AA for Individuals & others
  - Appeals of NCLT to NCLAT, DRT to DRAT & finally to Supreme Court
  - Civil Court interference Prohibited

STRUCTURE OF CODE

→ 5 Parts, 255 Section & 11 Schedules

PART - I	Preliminary (Section 1 - 3)
PART - II	Insolvency Resolution & Liquidation for Corporate Persons (Sec 4 - 77)
PART- III	Insolvency Resolution & Bankruptcy for Individual & Partnership firms (Sec 78 - 187)
PART- IV	Regulation of IPAs & IUs (Sec 188 - 223)
PART- V	Miscellaneous (Sec 224 - 255)

Part -II (Process of Insolvency Resolution Framework)

Commitment Default → CIRP Application → Moratorium → Public Announcement → COC Meeting → Resolution Plan

Part -II (Liquidation Process for Corporate Debtor)

Initiation of Liquidation → Liquidation Estate → Consolidation of Claims → Realize Security Creditors → Dissolution of CD → Priority Waterfall

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DEFAULT BY CORPORATE DEBTOR (CD)

- CIRP triggered on Default i.e. non-payment of due debt (whole/ part installment) if more than Equal to Rs. 1 Lac

Application for CIRP initiate by : -

- **Financial Creditor** → On Default of CD = file **Application + Records to AA** to Initiate CIRP
- **Corporate Applicant**
- **Operational Creditor (OC)**
  - → OC to **Serve Demand Notice to repay** default + Invoice copy to CD
  - → CD in **10 days of Receipt** of it bring to notice OC about:- Payment proof/ Pending Suit/ Notice of Dispute
  - → If OC not get Payment/ Notice of Dispute = OC apply to AA for CIRP
  - → Furnish = Copy of Invoice +Demand Notice +Affidavit that no Notice of dispute by CD given +Certificate Copy from FI that no payment got

- Also furnish = **Name of RP proposed** to act as Interim RP (IRP)
- AA **in 14 days of Application Receipt = Ascertain Existence of Default** from IUs records & info in application
- **AA satisfied Default Occurred + Application Complete + No disciplinary proceeding** pending against proposed IRP = by order Admit Application (In OC case additional = if No repayment + No dispute + D Notice & Invoice)
- AA satisfied Default not Occurred/ Application Incomplete/ Proceeding against IRP (Additional for OC = Dispute Notice received/ Repayment done/ Invoice or D. Notice not delivered) = **May by order reject application**
- AA before rejecting application give notice to applicant to rectify defect in **7 days of Notice Receipt**
- Commence CIRP from Date of Admit of application & **communicate Rejection/ Acceptance Order in 7 days**

Persons not Entitled to make CIRP Application

- CD/ Corporate Applicant undergoing a CIRP
- CD/ Corporate Applicant in respect of whom liquidation order made
- CD/ Corporate Applicant having completed CIRP 12 months before making application
- CD/ Corporate Applicant/FC violated term of Resolution Plans approved 12 month before Application

TIME LIMIT TO COMPLETE CIRP: - In 180 days from Date of Admission of Application of CIRP
= RP to file Application to AA to extend 180 days time (if instructed by COC by more or equal 75% votes
= AA satisfy CIRP can't be completed in 180 days = Order to extend max 90 days (not more than once)

MORATORIUM

- After commencement of CIRP = **Moratorium period of 180 days** declared by order in which All Suits & Legal proceedings against CD are kept in abeyance (waiting) i.e. by prohibiting following acts: -
  1. Institution of Suits/ proceedings against CD & execute Judgment/ Court order before any Authority
  2. T/f or dispose by CD Assets, Legal rights or Beneficial interests
  3. Close, Recover or Enforce Security Interest by CD of its Property & action under SARFAESI Act
  4. Recovery of Property by Owner or Lesser where property is occupied or in possession with CD
- In Moratorium Period = **Supply of Essential G & S to CD not be terminated / suspended or interrupted**
- Order of Moratorium = **effective from Date of Order to Completion of CIRP**
- AA **Approve Resolution plan or pass CD Liquidation order = then Moratorium Period ceases effect**

ROLE & POWERS OF IRP (Interim Resolution Professional)

ROLE	POWERS
Issue of Public Notice of CIRP	Mgt of affairs of CD
Collation & verification of Claims received	Office/ Mgr of CD reports to IRP & provide access of docs & records
Help Creditors reach consenus for Revival Plan	Instruct Financial Institution(FI) managing CD A/c
As Liquidator & Bankruptcy Trustee	Exercise of BODs/ partners powers as theirs stand suspended
Constitute COC & conduct its 1st Meeting	
Adhere procedure of law, a/c & finance fn	

APPOINTMENT & TENURE OF IRP

AA to **appoint IRP in 14 days from CIRP** Commence Date

If application by FC/ CD/ OC = **IRP proposed in Application appointed** if no disciplinary proceeding pending

If Application by OC but no proposal for IRP = **AA refers Board to recommend IRP = Board in 10 days** of Receipt of Reference from AA recommend IRP Name having no pending proceeding

Term of IRP **not more than 30 days from appointment**

IRP to make PUBLIC ANNOUNCEMENT in 3 days of his appointment including: -

Last date for Submission of Claims	Date on which CIRP Ends
Name of Authority with which CD is incorporated or registered	
Details of IRP to manage CD bus & responsible for receiving Claims	
Penalties for False & Misleading Claims	Name & address of CD under CIRP

COMMITTEE OF CREDITORS(COC)

Constitution

- 1st Meeting of COC = In 7 days of Constitution (comprising all Financial Creditors of Corporate Debtor)
- Related Party to whom CD owes a Financial Debt = no right to representation, participate & vote at meeting
- CD owe debt to 2 or more FCs by agreement = Each FC to be part of COC & voting share as per debts owed
- OC assigned or legally t/f any Operational Debt to Financial Creditor, assignee or transferee = OC to its extent
- Board may specify manner of determining voting shares in respect of financial debt issued as securities
- If A person is both FC & OC = FC with voting right to extent Financial Debt owed to him by CD & included in COC & be considered OC to extent of Operational Debt owed to him by CD
- FC may assign voting right to agent/ trustee to act on his behalf or appoint IRP at own cost (jointly/ severally)
- COC Right = to require IRPs to furnish any financial info during CIRP & that to be given in 7 days

Meeting

- Members of COC may meet in Person or E means & All meetings conducted by RPs
- Directors/ partners & 1 Representative of OCs = may attend meeting without vote & absence not invalidate it
- RP to determine voting rights assigned in manner as per Board & each Creditor vote as per it only
- RP to give **Notice of each COC meeting to: -** o COC Members o Members of Suspended BODs/ Partners o OCs or their representatives if amt of their Dues Aggregate is not less than 10% of Debt

RESOLUTION PROFESSIONAL (RP)

Appointment & Functions of RP	Replacement of RP by COC
COC in 1st meeting by majority not less than 75 % votes resolve to Appoint IRP as RP or Replace him by other RP	
RP to conduct entire CIRP & mg CD affairs	Forwarding Name to AA by COC of such IP
RP exercise powers & duties vested with IRP & IRP to provide all Info, Docs & Records of CD to RP	Further forwarding Name to Board for its confirmation
Take over mgt of CD & operate its bus as Going Concern under Broad Directions of COC	Any disciplinary proceeding pending against proposed RP = RP already appointed to continue office till replacement

Approval of COC for Certain Actions of RP during CIRP: - If not taken then = Void action

Make changes in appointment/ terms of contract of personnel as per COC or of statutory/ internal auditors	
Create any security interest over assets of CD	Raise interim finance in excess of decided in COC meeting
Amend Cnstitutinal documents of CD	Dispose or permit disposal of shares of shareholders of CD
Change in mgt of CD or subsidiary	T/f rights or financial/ operational debts under contracts
Delegate authority to other person	Instruct FI for amt from A/c in excess of COC decision
Undertake Related party transaction	Record any change in ownership interest of CD
Change capital structure of CD by issue additional/ create new class of securities, buy back or redemption	

RP to convene meeting of COC & seek vote of 75% of Creditors prior taking actions above

COC to report to Board to take necessary actions against RP for actions undertaken above without approval

RESOLUTION PLAN

- RP to make a Info Memorandum which shall contain Info for preparing Resolution Plan
- A Resolution applicant may submit a Resolution Plan to RP prepared on basis of Info Memorandum
- RP examine each Plan received confirms to: -
  - Provides for pay of CIRP Costs in manner specified by Board in Priority to repayment of Debts
  - Provides for repay of Debts of OC in manner by Board not be less than amt to be paid to OC
  - Provides for mgt of affairs of CD after approval of Resolution Plan
  - Implement & Supervise of Resolution Plan & other requirements as may be specified by Board
  - Doesn't contravene any of provisions of Law for time being in force
- COC may approve Resolution Plan by vote not less than 75% of voting shares of Financial Creditors
- Resolution applicant may attend = but can't vote unless being a FC at COC meet where plan of Applicant considered
- RP to submit Resolution Plan as approved by COC to AA
- AA is satisfied Resolution Plan as approved meets requirements = order its Approval or by order Reject it (binding on CD and employees, members, creditors, guarantors & other stakeholders involved in Resolution Plan)

INITIATION OF LIQUIDATION

- If Corporate Debtor CIRP fails then = Liquidation provisions are triggered
- Order passed requiring CD be liquidated if: -
  - No plan is presented or if presented plan isn't approved by AA
  - COC not approve Resolution Plan in 180 days (90 further days)
  - 75% Majority of COC resolves to liquidate CD
  - NCLT rejects Resolution Plan on Technical grounds
- RP any time during CIRP but before Confirm of Resolution Plan= Intimate AA decision ordering liquidate CD
- Resolution Plan if contravened by CD = Person except CD affected by it = Apply to AA (NCLT) for Liquidation order
- On receipt of application if AA determines CD contravened provisions of Resolution plan = pass Liquidation Order
- Liquidation Order passed = No suit or Other Legal proceeding be instituted by or against CD
- Liquidation Order = Deemed Notice of discharge to officers, employees & workmen of CD except if bus of CD continued during liquidation process by Liquidator
- NCLT pass Liquidation Order = Moratorium is imposed on pending legal proceedings against CD
- Assets of Debtor & Liquidation proceeds = Vests in Liquidation Estate

APPOINTMENT OF LIQUIDATOR

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Where AA pass order for liquidation of CD, RP appointed for CIRP = act as Liquidator (unless replaced by AA)

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Powers of BODs/ KMP/ Partners vested with Liquidator

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Personnel of CD extend all assistance & cooperation to Liquidator by managing affairs of CD

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AA by order replace RP if: -
- Resolution plan submitted is rejected due to not meeting requirements
- Personnel of CD extend all assistance & cooperation to Liquidator by managing affairs of CD

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Resolution Plan rejected as not met requirements=AA direct Board to propose name of RP be appointed as Liquidator

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Fee for conduct of Liquidation proceedings be paid to Liquidator from proceeds of Liquidation Estate

POWERS & DUTIES OF LIQUIDATOR

- Take in custody or control all Assets, property, effects & actionable Claims of CD
- Perform other functions as may be prescribed by Board
- Take out in official name, letter of admin to deceased contributory & do in official name any act to get payment of money due &payable from contributory or his estate
- Take all such actions, steps, or to sign, execute and verify any paper, deed, receipt document, application, petition, affidavit, bond or instrument & to use common seal for liquidation, discharge of A & L & his functions thereon
- Sell immovable/ movable property & actionable claims of CD by Auction or private contract & t/f such property
- Draw/ accept/ make/ endorse negotiable instruments, B/E or promissory note in name & on behalf of CD for liability
- Obtain any professional assistance in discharge of duties, obligations & responsibilities
- Invite & settle claims of Creditors & claimants and distribute proceeds as per Code provisions
- Defend any suit, proceedings or prosecution civil or criminal in name of on behalf of CD
- Investigate financial affairs of CD to determine undervalued preferential transactions
- Apply to AA for orders or directions necessary for Liquidation & report progress of Liquidation
- Consult stakeholders entitled to distribution of proceeds & such consultation not binding on Liquidator
- Records of such consultation made available to all other stakeholders not consulted in manner of Board
- Verify claims of all creditors
- Evaluate & make report of assets & property of CD
- Take measures to protect/preserve CD assets/ properties
- Carry on business of CD for its Beneficial Liquidation

LIQUIDATION ESTATE (LE)

Liquidator to form & hold Estate of Assets w.r.t. CD = LE for all Creditors benefit & Liquidation purpose

INCLUDE	EXCLUDE
Movable & immovable Tangible Assets	Personal Assets of Shareholder or partner of CD
Assets CD has ownership rights as per B/S of CD	Other Assets as specified by Board
Encumbered assets	Assets set off on A/c of Mutual deal in CD & Creditor
Assets may/ mayn't be in CD possession	Assets owned by 3rd Party in possession of CD: - o Assets held in trust for 3rd party o Bailment Contract o All sums due to Workmen or employees o Contractual arrangements of only Asset use not Title o Assets CG notify in consult with Financial Regulator
Liquidation proceeds as & when realized	Assets of Indian/ Foreign Subsidiary of CD
Property belong to/ vest in CD at CIRP Commence Date	Assets in Security/ Collateral held by Financial Service Provider with set off of Trading & clearing transaction
CD Assets of which Creditor relinquished Security Interest	
Assets/ its Value recovered by proceedings	
Assets determining ownership by Court/ Authority	
Intangible Asset, Intellectual property, Security Financial Instruments, Insurances & Contractual Rights	

CONSOLIDATION OF CLAIMS

- **Collection of Assets by Liquidator in 30 days** from start of Liquidation Process
- Submission of Claims by Financial creditor to Liquidator with records of claim with IUs
- OC may submit claim to Liquidator with supporting docs prescribed by Board
- Creditor who is partly FC & OC to submit claims to Liquidator to extent of Financial debt owed
- **Creditor may withdraw or Vary his claim in 14 days of Submission**
- Liquidator verifies claims submitted & may require any person to produce docs necessary to verify claim
- **After verification = Admit or Reject claim in whole or part & record reasons in writing why if so rejected**
- Liquidator to determine Value of claims in manner as specified by Board
- Creditor may **appeal to AA against Liquidator decision rejecting claim in 14 days** of it

DISSOLUTION of Corporate Debtor	→ Assets of CD completely Liquidated, Liquidator to make application to AA for Dissolution of CD
	→ AA on app by Liquidator = order CD to be dissolved from order Date & CD dissolved accordingly
	→ A copy of Order in 7 days from Order date = Forwarded to Authority with which CD is Registered

Secured Creditors (SCs) in Liquidation Proceedings may : -

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Relinquish its Security Interest to LE & receive proceeds by Sale of Assets by Liquidator
Realize Security Interest in manner specified
Inform Liquidator about realization of Security Interest
Verify & permit Security Interest by Liquidator before realization & existence proved by records or other means
SC = May enforce, realize, settle, compromise or deal with Secured Assets by law for Security Interest
SC apply to AA to Facilitate Realization of Security Interest if Restricted by CD/ others
AA on such application pass order = Permit SC realize Security Interest
Realized Security Interest in excess of Debts due i.e. Yield of surplus= SC to provide it to Liquidator
CIRP costs & Dues from SCs who realized their Security Interest = deducted from realization proceeds by SC
Realization amt of Secured Assets not adequate to repay debts owed to SC = Unpaid debts paid by liquidator

PRIORITY WATERFALL TO DISTRIBUTE LIQUIDATION PROCEED/ ASSET/ SETTLE CLAIM

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CIRP Costs & Expenses & Liquidation costs = Paid in Full

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Debts ranking Equally in: -
= Workmen dues for 24 months before Liquidation Commencement (LC)
= Debts owed to/ Dues of Secured Creditors if Relinquished Security

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Wages/ Unpaid dues to Employees (except workmen) = For 12 months before Liquidation Commencement

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Financial Debts owed to Secured creditors

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Dues ranking equally in: -
= Due of CG/ SG & amount of Consolidated Fund for 2 years before LC
= Debts owed to secured creditor for amount unpaid after Security interest

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Remaining Debts & Dues

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Preference Shareholders

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Equity Shareholders/ Partners