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THE INSOLVENCY AND BANKRUPTCY CODE, 2016

* EVOLUTION OF THE CODE :

Introduced in Loksabha on 21st Dec. 2015
↓
Passed by Parliament (Both house) in May 2016
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President's assent was received on 28/05/2016

* CONCEPT OF INSOLVENCY & BANKRUPTCY :

It is a state when an individual or company are not able to pay the debt and value of assets is less than value of liabilities.

Insolvency
- For individuals → known as Bankruptcy
- For Corporates/Organisation → Known as Corporate Insolvency

If Insolvency is untreated, it will lead to:

- For non-corporate → Bankruptcy
- For Corporate → Liquidation

Insolvency situation has 2 options (usually)

Resolution & Recovery OR Liquidation

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* RELATIONSHIP BETWEEN BANKRUPTCY, INSOLVENCY AND LIQUIDATION :

BANKRUPTCY	INSOLVENT	LIQUIDATION
It is a legal proceeding involving a person/business that is unable to repay debts.	If any person is unable to pay debts, then such person/entity is treated INSOLVENT.	It is winding up of a company.

∴ Insolvency is common to both bankruptcy and liquidation.

* PURPOSE BEHIND ENACTMENT OF THIS CODE :

As per the Preamble to the Code, the purpose of this Act is as under :

a) To consolidate and amend the laws regarding insolvency resolution process.

b) To fix time period for executive (execution) of law in a time bound manner.

c) To maximise the value of assets of interested persons.

d) To promote enterpreneurship

e) To increase availability of credit

f) To balance the interest of all stakeholders (including alteration in order of priority of payment of Govt. dues)

g) To establish an INSOLVENCY & BANKRUPTCY BOARD OF INDIA as a regulatory body for this law.

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* DISTINGUISHING FEATURES OF CODE:

Code for remembering this Answer:
One[2] New Established Law[2] Protects Process in Low Time.

(i) One - One chain of Authority
(ii) One - One window clearance.
(iii) New - New Regulatory Authority
(iv) Established - Establishment of Information Utilities (IU)
(v) Law - Comprehensive Law (All in 1 type)
(vi) Law - Withering away of Multiplicity of Laws.
(vii) Protects - Protects the Interest of workmen & Employees.
(viii) Process - Clarity in Process.
(ix) Low Time - Low Time Resolution.

* STRUCTURE OF CODE:

The Code has been divided into 5 parts, comprising 255 sections & 11 Schedules.

Part I	Part II	Part III	Part IV	Part V
(Sec 1-3)	(Sec 4-77)	(Sec 78-187)	(Sec 188-223)	(Sec 224-255)
Preliminary	Insolvency Resolution & liquidation for Corporates	Insolvency Resolution & Bank-ruptcy for Individuals & Partnership firms	Insolvency Professionals, Agencies & Information Utilities	Miscellaneous

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* REGULATORY MECHANISM :

Insolvency & Bankruptcy Code, 2016
- Insolvency & Bankruptcy Board of India (IBBI)
  - Insolvency Professional Agencies (IPA)
  - Insolvency Professionals (IP)
  - Information Utilities (IU)
- Adjudicating Authority
  - NCLT/ NCLAT/ SC
  - DRT/ DRAT

where NCLT - National Company Law Tribunal
NCLAT - National Company Law Appealate Tribunal
SC - Supreme Court
DRT - Dispute Resolution Tribunal
DRAT - Dispute Resolution Appealate Tribunal

- Insolvency and Bankruptcy Board of India :
- Board was established on 1st Oct. 2016
- Head office at New Delhi.
- Board is a body corporate, having perpetual succession and common seal.
- Purpose of formation of this Board :
  To perform functions with respect to IP, IPA, IU
- Composition of Board :
  - 1 Chairperson
  - 3 members from officers of CG to represent
    - Ministry of finance
    - Ministry of Corporate Affairs
    - Ministry of Law
  - 1 member nominated by RBI
  - 5 other members nominated by CG
    - Atleast 3 should be wholetime

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- Insolvency Professional Agencies :
Code provides for establishment of IPA to enroll & regulate IP as its members.
Its Principles :
- Promote professional development
- Promote services of IP to cater needs of debtor/creditor etc.
- Promote good professional & ethical conduct
- Protect interest of debtor/creditor etc.
- Promote growth of IPA for effective resolution under this code.

Functions of IPA :

1) Regulatory Functions- Drafting bye-laws for its members.

2) Executive functions-
(i) monitoring/inspecting/investigating members
(ii) gathering info. on their performance.
(iii) malfeasance in conduct of IP duties

3) Quasi-Judicial Functions -
Addressing grievances/hearing complaints/taking suitable action etc.

- Insolvency Professionals :
- They play a key role in efficient working of this process.
- During process, they verify the claims, run the debtor's business, act as a liquidator etc.
- Duties :
to take reasonable care while performing duties, comply with Terms & Conditions, allow IPA to

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inspect the records, submit copy of records to AA.

- **Information Utilities (IU):**
IU means a centralised electronic database about information on Debtors.
Such info would be available to financial institutions, creditors etc.

- **Adjudicating Authority (AA)**

NCLT / NCLAT / SC for Corporates, LLP.	DRT / DRAT for Individuals / Partnerships.

* **EXTENT & COMMENCEMENT OF CODE:**
As per section 1, this code applies to whole of India including Jammu & Kashmir.
However Part III ie process relating to Individuals & Partnership firm does not apply to J & K

* **APPLICABILITY OF CODE**
Provisions of the Code shall apply for Insolvency, liquidation, Voluntary Liquidation or Bankruptcy:
Effective date for applicability of Voluntary liquidation or bankruptcy is 1st April 2017.
Applies to following entities:
- Companies (2013 Act / Earlier Act / Special Act)
- LLP (under LLP Act 2008)
- Notified Entity (by CG)
- Partnership Firms
- Individuals.

Exception: Code not applicable to corporates who are regulated service providers (Eg: Banks / Insurance Co. / PFI)

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* CORPORATE INSOLVENCY RESOLUTION PROCESS (Sec. 4, 6-32)

Provisions relating to Insolvency Resolution and Liquidation Process for Corporate Persons are covered in Part II of the Code

This process starts only when there is a default of Rs 1 lakh or more. However, CG may by notification specify the default amount of higher value of maximum Rs 1 crore.

When Corporate Debtor commits a default, following persons may initiate the process:
(a) A Financial Creditor (financial debt)
(b) An Operational creditor (operational debt)
(c) Corporate Debtor, itself. (self-surrender)

(a) Application by Financial Creditor:

Application to AA (ie. NCLT) along with necessary information

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AA shall ascertain if there is a default:

↓

If default occured, then admit application

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If default not occured, then reject the application

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AA shall communicate in either ways to FC within 14 days of Receipt of the order

↓

If accepted, Insolvency Resolution Process commences.

(FC should also give name of IRP)

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(b) Application by Operational Creditor:

- Operational Creditor should first send demand notice to corporate debtor, as soon as default occurs.
- When corporate debtor receives such notice, he should intimate about the same to creditor within 10 days.

2 Possibilities:

Debtor will accept the existence of disputes & its pendency	Repayment of unpaid dues.

If still creditor doesnot receive the payment within 10 days of notice:

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OC shall file an application to AA (ie. NCLT) with required documents**

↓

OC may also give a name of IRP

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AA shall accept / reject within 14 days of receipt of application.

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If accepted, then Insolvency Resolution Process commences.

** Necessary documents:

- Copy of Demand Notice
- Certificate from financial institutions that no repayment has been done by Debtors
- Such other information.

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(c) Application by Corporate Debtor :

When the debtor has committed default, he may apply to AA (ie. NCLT)

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Along with necessary documents like : BOA, documents, name of IRP etc.

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AA shall pass an order either accepting or rejecting the application with 14 days

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If accepted, then Insolvency Resolution Process commences.

Note:

- In all the 3 types of Application, whenever AA rejects the application, AA gives a notice to rectify the defect in application within 7 days of receipt of notice from AA.
- All 3 applicants may withdraw the application by making a request to AA.
  However it can be withdrawn only befre the AA admits it.

* PERSONS NOT ENTITLED TO MAKE APPLICATION:

(a) A Corporate Debtor who is undergoing a Insolvency Resolution Process. OR

(b) A corporate Debtor having completed this process 12 months preceding the date of making application.

(c) A corporate Debtor / Financial Creditor who has violated terms of process which was approved 12 months before making application

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(d) A Corporate Debtor in respect of whom liquidation order has been made.

* TIME LIMIT FOR COMPLETION OF PROCESS :

- Process shall be completed within a period of 180 days from date of admission of application.
- IRP can file an application to AA to extend such period beyond 180 days, only after it gets 75% voting in favour from Committee of Creditors.
- If AA is satisfied, then it may extend beyond 180 days, but not exceeding 90 days.
- This shall be a 1-time extension.

* FAST TRACK INSOLVENCY RESOLUTION FOR CORPORATE PERSONS :

This is the process, where Insolvency Resolution process shall be completed in an expeditious manner ie. within 90 days of commencement of process. AA may grant extension if it is satisfied. Maximum extension of 45 days & this shall be a 1-time extension.

Application for this process can be done only by the following CORPORATE DEBTOR :

- Corporate Debtor with assets/income below the level specified by CG OR
- Corporate Debtor as notified by CG OR
- Such other category of Corporate Debtors as notified by CG.

* MORATORIUM :

After commencement of process, a calm period of 180 days is declared. During this period, suits / cases / legal proceedings shall cease, so as

to give time to entity to resolve its status.
This is called as Moratorium Period.
Following Acts shall be prohibited during this period:
- suits, pending proceedings, judgements, passing of any order in court of law
- Transferring, selling, dealing in, disposing off of any assets by such corporate debtor or his beneficiary.
- Recovery of any property by any owner/lessor, when such property is occupied by corporate debtor. etc.

However, supply of goods/services shall not be terminated.

* APPOINTMENT, TERM AND POWERS OF INTERIM RESOLUTION PROFESSIONAL (IRP)
- AA shall appoint IRP within 14 days of commencement of process.
- Appointment of IRP:
  - In case of Corporate Debtor's/Financial Creditor's Application
    → Name suggested in the application shall be considered, if no disciplinary proceedings are pending against him.
  - In case of application by Operational Creditor
    - If no proposal was made → Procedure (next page)
    - If name was suggested → Name suggested in the application shall be considered, if no disciplinary proceedings are pending against him.

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Procedure, if no name was suggested by OC

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AA shall make a reference to IBBI for recommendation of a name of IRP.

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Within 10days, IBBI should recommend a name of IRP, against whom disciplinary proceedings are not pending.

Period of Appointment :

Term of IRP shall not exceed 30days from date of appointment.

Powers of IRP :

Code to remember : MERI (my) Powers

M - Management of affairs of corporate debtor

E - Exercise of Powers of BoD / Partners. (as their powers would be suspended)

R - Reporting of Officers/Managers to IRP

I - Instructions to Financial Institutions (Financial Institutions must provide information and access to records relating to Debtor

Key Roles of IRP :

- Issuance of Public Notice (about process)
- Collation (cross-check) of claims received
- Constitution of Committee of Creditors.
- Conduct of 1st meeting of committee of creditors.

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* APPOINTMENT OF RESOLUTION PROFESSIONAL : (RP)

- One of the functions / role of IRP was to conduct the 1st meeting of Committee of Creditors. (CoC)
- In such meeting, CoC shall appoint the RP by majority vote of atleast 75% share of Financial Creditors.

2 possibilities :

CoC may resolve to appoint IRP as RP	OR	CoC may replace the IRP by another RP.

If IBBI doesnot confirm the name of proposed RP, within 10days, AA shall direct that IRP shall continue as RP till IBBI confirms name of proposed RP.

Role of RP :

Primary Function : To take over the Corporate Debtor's management & operate its business as a going concern under directions of CoC

The thrust of the code is to allow a shift of control from defaulting debtor's management to its creditors.

Important / Key tasks to be performed :
- Obtaining Valuation of Entity.
- Preparation of Information Memorandum.
- Preparation of Resolution Plan.
- Obtaining consent of CoC for plan
- Periodic Reporting to IBBI.

Eligibility of an Insolvency Professional to be appointed as a Resolution Professional :

An IP shall be eligible to be appointed as a RP

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if he and all his partners and directors of IP entity of which he is a partner/director are totally independent of Corporate Debtor.

Other points of eligibility :

- He is eligible to be appointed as an Independent Director of Corporate Debtor u/s 149 of Companies Act, 2013 (where corporate debtor is a company)
- He is not a related party of corporate debtor.
- He is not an employee/proprietor/partner of firm of auditors or company secretary in practice or cost auditors of corporate debtor in last 3 FY's.
- He is not an employee/proprietor/partner of a legal/consulting firm that has/had transaction with Corporate Debtor amounting to $\geq 10\%$ of Turnover of such firm in last 3 FY's.

Fees of RP :

Fees payable & Cost incurred by RP :

These shall be included in insolvency resolution process cost & shall have priority over other costs while winding up of Corporate Debtor.

Replacement of RP :

- If a debtor/creditor opines that RP should be replaced, he may apply to AA for the same.
- AA within 7 days shall refer to IBBI.
- CoC may replace the RP by passing a resolution by a vote of 75% of voting share of creditors.
- CoC shall forward new name to AA.
- After confirmation by IBBI, new RP shall be appointed in the same manner as IRP was appointed.

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* PUBLIC ANNOUNCEMENT :

- IRP was supposed to make this announcement immediately after his appointment
- Immediately, here, means maximum within 3 days from his date of appointment.
- Public announcement shall include :

a) Name/Address of Corporate Debtor
b) Name of Authority with which such debtor is registered.
c) Details of IRP (himself)
d) Last date for submission of claims.
e) Penalties for false / misleading claims.
f) Date when such process will end.

Note: Expenses of public announcement shall be borne by applicant; which may be reimbursed by CoC. (to the extent it ratifies them)

* COMMITTEE OF CREDITORS (COC)

- After collation of claims received against debtors, IRP shall form CoC.
- Composition of CoC

1. Where financial creditors exist :
   All financial creditors except related parties of corporate debtor shall form part of CoC.
2. Where financial creditors don't exist :
   (ie when there is no financial debt or all financial creditor are related parties of debtor)
   Here, COC shall be formed as follows :-
   (a) 18 largest operational creditors (by value)
   (b) 1 representative elected by all workmen
   (c) 1 representative elected by all employees

Where there are less than 18 OC, all OC shall form part of COC.

Voting in Meeting :

All decisions of COC shall be taken by voting of minimum 75% of voting share of FC.

$$\text{Voting share} = \frac{\text{Value of Debt}}{\text{Total Debt}}$$

First meeting of Creditors :

It shall be held within 7days of forming of COC.

In the 1st meeting, COC may either appoint IRP as RP or resolve to appoint new RP.

Notice of the meeting :

RP shall give notice of meeting of COC to:

(a) Members of COC
(b) Members of suspended BOD/Partners of Debtor
(c) Operational Creditor / their representative if amount of their dues is $\geq$ 10% of total debt (operational)

Note: Operational Creditors donot have a right to vote in meeting of COC. However they may attend the meeting of COC.
A related party to whom debtor owes a financial debt shall have no right of representation, participation, voting in the meeting of COC.

Quorum for the meeting :

- A meeting of COC shall quorate if members of COC of atleast 33% of voting rights are present either in person or by Audio/Visual means.
- If quorum not available, then meeting shall stand adjourned, at same time/place on next day.

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* RESOLUTION PLAN :

It is a resolution plan that is agreed by Debtor and Creditor in a collective manner & in a time bound manner to resolve the situation of insolvency.

Formulation of Resolution plan :

- The RP shall prepare an Information Memorandum which shall contain details for preparing plan.
- The RP shall provide access of following to the applicant, so as to enable him to prepare the plan :
  - Financial position of Corporate Debtor
  - Info. required by applicant for preparing plan
  - Other matters relating to Debtor.

∴ Applicant will prepare the resolution plan, forward it to RP & who shall then submit to COC for further consideration.

Submission of Resolution Plan :

- RP should be approved by COC with atleast 75% of voting. (each decision requires such voting)
- Such decision shall be binding on all.
- Finally, Resolution professional shall submit this approved plan to AA.

Appeal against Approval of Resolution Plan :

An appeal against an order of AA for approving the plan, may be filed on following grounds:-

- Approved plan is in contravention of law.

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- If there is material irregularity by resolution professional during insolvency period
- If debts owed to Operational Creditor is not considered.
- Insolvency resolution process cost have not been provided for repayment in priority.
- Resolution plan doesnot comply with any other criteria specified by IBBI.

* CONSEQUENCES OF NON-SUBMISSION OF PLAN:

If resolution plan is not submitted within 180 days or such other extended period (90days), then AA may pass order for liquidation of debtor.

* ORDER OF LIQUIDATION:

AA may pass order of liquidation in following cases:

a) When AA doesnot receive the resolution plan with 180 (+90)days.
b) When COC intimate that they have passed an order for liquidation (ie. before the process is completed)
c) When plan approved by AA is contravened by corporate debtor / other person whose interest are affected, may make an application to AA for liquidation.

Note: Once AA passes an order of liquidation, moratorium is imposed & all assets of debtor vests in liquidation estate.

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* LIQUIDATION ESTATE :

The liquidation estate shall comprise of all liquidation estate assets as follows :-

Includes :
- Assets which are owned by Corporate Debtor
- Assets issued as collateral security, over which creditors have relinquished rights.
- All proceeds of liquidation, as & when realised.

Excludes :
- Assets owned by 3rd party but which are in debtor's possession.
- Personal assets of SHS / partner of Debtor
- Assets of Indian / Foreign subsidiary of Debtor

* CONSOLIDATION OF CLAIMS :
- Liquidator will collect the claims within 30 days of start of liquidation process.
- He shall then verify the claims, before discharging.
- Creditor may withdraw / vary his claim within 14 days of its submission.
- Liquidator may accept / reject the claim & communicate his decision within 7 days.
- Against such rejection, appeal can be filed by creditor, before AA.

* PRIORITY OF CLAIMS :

The proceeds from sale of liquidation assets shall be distributed in following order of priority :

① Insolvency resolution process cost and liquidation cost in full.

② Following debts which shall rank equally and

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among the following:
a) workmen's dues for 24 months preceding the liquidation commencement date. AND
b) Debts owed to a secured creditor where secured creditor had relinquished his security.
③ Wages and other unpaid dues to employees (excl. workmen) for 12 months preceding the liquidation commencement date.
④ Financial Debts of Unsecured Creditors.
⑤ Following dues shall rank equally and among the following:
a) Amount due to CG and SG in last 2 years preceding the liquidation commencement date.
b) Debts owed to secured creditor for any unpaid amount
⑥ Any remaining debts and dues
⑦ Preference SHS, if any
⑧ Equity SHS / Partners, as the case may be.

* DISSOLUTION OF CORPORATE DEBTOR:

Where assets have been completely liquidated, the liquidator shall make an application to AA for dissolution.
Date of Dissolution = Date of order (passed by AA)
This order copy is to be submitted / forwarded to the authority which was regulating the Corporate Debtor, within 7 days from date of order.

* VOLUNTARY LIQUIDATION OF CORPORATE PERSONS:

A corporate person who intends to liquidate itself and has not committed any default, may initiate voluntary liquidation proceedings.

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Conditions of initiation of Voluntary Liquidation proceedings :

(a) Declaration from majority of directors stating that :
- they have made full inquiry in state of affairs & opined that no debt is payable or they will be able to pay after selling assets in liquidation AND
- company is not being liquidated to defraud any person.

(b) Above declaration shall be accompanied by following documents :
- Audited FS and record of business operation of last 2 years or from date of incorporation (whichever is later)
- A report of registered valuer regarding valuation of assets.

(c) Within 4 weeks of declaration, there shall be-
- Special Resolution should be passed by members requiring voluntary liquidation (+) appointment of Insolvency Professional, who shall act as a Liquidator. OR
- Resolution to be passed by members requiring liquidation as the period fixed by Articles has expired OR
- On occurence of any event, for which Articles provide that company be dissolved & to appoint Insolvency Profession to act as Liquidator.

Note: If company owes any debts, then the above resolution must be approved by 2/3rd creditors (in value) within 7 days of such resolution.

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The Company shall notify to ROC & IBBI about the resolution of liquidation within 7 days of Resolution / Approval as the case may be.

Date of Resolution = Date of Commencement of Liquidation proceedings.

When affairs of company have been completely wound & assets are liquidated, liquidator shall make an application to AA for dissolution.

AA, on being satisfied, shall pass an order.

Date of Order = Date of Dissolution.

Copy of above order must be passed to authority with which corporate person is registered, within 14 days of date of order.

* GENERAL NOTE :

Where one Financial Creditor has made an application for Insolvency process, another Creditor cannot again apply for that process.
Logic :- If one has made, and if the application is accepted, moratorium will begin, IRP will be appointed, COC will form (where all creditors will put down their claims)