

CORPORATE INSOLVENCY RESOLUTION PROCESS – AN OVERVIEW

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Abstract

On May 11 2016, Rajya Sabha passed the major economic reform bill - insolvency and bankruptcy code 2016(IBC), putting an end to months of anxious wait of those who look forward to single law, that would replace a host of other laws governing individual and corporate bankruptcy and insolvency. Since then, IBC focuses on providing resolution in time bound manner for maximization of value of debtor's assets. The code has put forth an overarching framework to aid sick companies to either wind up their business or engineer a revival plan and aid the exit of investors. This paper sets out to offer a critical analysis on corporate insolvency resolution process (C. I. R. P) envisaged in the code. A critical approach is seen as essential here on the ground that it is impossible to evaluate areas of law or develop the law with a sense of purpose unless there is a clarity concerning the objectives and values sought. Sections 4 to 77 of Part II of the Insolvency and Bankruptcy Code, 2016 (IBC) contain provisions for Corporate Insolvency Resolution Process (CIRP) and liquidation of Corporate persons. Most important provisions as regards to initiation of CIRP and sanction of a resolution plan are contained in Sections 4 to 54. The National Company Law Tribunal [NCLT] is the Adjudicating Authority for CIRP. The paper's aims are threefold. The initial aim is to outline the need for an effective insolvency and bankruptcy regime. The second aim is to set out a critical analysis on corporate insolvency resolution process and liquidation process. Further, the objective is to move beyond mere analysis of the law and to see whether improvements have to be sought by adopting new perspectives. In addition to it, challenges to well- functioning of C. I. R. P has also been included. The paper also undertakes a comparison of corporate insolvency resolution framework in U. K and India, with underlying motive to highlight the similarities and differences across the law and procedures. The unified regime envisages a structured and time bound process for insolvency resolution and liquidation, which significantly improve debt recovery rates and revitalize the ailing Indian Corporate Bond markets.

Keywords: Insolvency and Bankruptcy Code, IBC, Corporate Insolvency Resolution Process, Corporate Insolvency Resolution Process, Liquidation Process

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Introduction

The terms ‘insolvency’ and ‘bankruptcy’ arises from a common feature i.e., inability to pay the debts. Insolvency can be simply defined as a situation where an entity cannot raise enough cash to meet its obligations or to pay debts as they become due for payment. Insolvency is essentially the state of being that prompts one to file for bankruptcy. Typically, those who become insolvent will take certain steps toward a resolution. Bankruptcy is one such most common solutions. Bankruptcy denotes a situation wherein a person voluntarily declares him as an insolvent and approaches the court. On declaring the person as ‘bankrupt’, the court is responsible to liquidate the personal property of the insolvent and distribute it among the creditors of the insolvent.

There are various factors that lead to insolvency. A company is hiring of inadequate accounting or human resources management may contribute to insolvency. Rising vendor costs may contribute to insolvency. Some companies become insolvent because their offerings do not evolve to fit consumers changing needs. Expenses exceed income and bills remain unpaid.¹

The debts and transactions contracted in ordinary course of business need to be discharged in a time bound manner and this is an essential lifeline of all business activities. Thus, if there is a default made by any of the parties in a business chain, which would have a cascading effect on various parties in the chain. The statutory dues may remain unpaid due to lack of liquidity. The employees as well as the investors and the depositors would suffer because of this. Hence, identifying and dealing with such acts at grass root level is the best strategy to prevent larger financial unrests.

The Insolvency and Bankruptcy Code, which was enacted by the government of India in 2016, aims to consolidate and amend the various laws relating to insolvency resolution of companies and limited liability entities, partnerships and individuals, which are contained in various enactments, into a single legislation. The ultimate objective of this legislation is at providing revival and resolution in a time bound manner for maximization of value of debtor’s assets. The code has succeeded in generating a comprehensive mechanism to aid sick companies to either wind up their functioning or to execute a revival plan, and for investors to exit. As per the Code, even the operational creditors (workman,

¹ See [http:// www. investopedia. com/terms/i/insolvency.asp#ixzz4vkDb5zQZ](http://www.investopedia.com/terms/i/insolvency.asp#ixzz4vkDb5zQZ)

suppliers etc.) are empowered to initiate the insolvency resolution process if default. The code is driven by the broad philosophy that insolvency resolution must be commercially and professionally driven. Thus the role of adjudicating bodies are thereby limited. The Code has taken the positives of US and UK Bankruptcy Laws such as moratorium during insolvency process, time bound insolvency process such as taking over of management, powers of creditors in the process etc. The Code introduces a regulator “The Insolvency and Bankruptcy Board of India”. It also introduces the concept of “Information Utility”, a data base of credit information that helps in the Insolvency Resolution Process, since one of the main hurdle in the current restructuring and liquidation process is non-availability of credit information.

NEED FOR A PROPER INSOLVENCY AND BANKRUPTCY REGIME

Business failures and downfalls which are a common and natural happening in a market economy affects all the stakeholders of a corporate enterprise including its lenders, shareholders, creditors, suppliers, customers, workers and the concerned governments very adversely. These may happen due to various reasons such as change in government policies, products becoming obsolete due to development of new products, setting up of new units by

competitors etc. During such period, sorting out of viable and unviable businesses and the reorganization of viable businesses to generate maximum outcome is essential. A question arises whether the un-viable businesses are to be pulled off at the earliest or to be deployed in other profitable areas. This question becomes complex if there persists a situation of corporate insolvency. An economy needs an effective insolvency and bankruptcy law to deal with such situations.

In the current scenario, when India, a major emerging economy is endeavoring to revive and sustain its high growth rate, it is imperative that financial constraints in any form be removed and a favorable environment be created for fostering business and competition. In this context, a well-functioning and orderly corporate insolvency framework consisting of well-defined rules, procedures and uniformity in application is essential for overcoming the obstacles in the smooth functioning and proper progress of markets.

In India, there were multiple laws like Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) and the Companies Act, 2013 dealing with

insolvency and bankruptcy of Companies, limited liability partnerships, partnership firms, individual and other legal entities in India. The jurisdiction to deal with the issues arising from functional aspect of such legislations were vested with various courts and tribunals in India which gave rise to systematic delays and complexities in the process. The civil courts deal with all types of civil suits including money disputes, property disputes, family disputes and so on which has resulted in large number of pending cases. There was no separate and exclusive courts dealing with insolvency.

The statistics show that, in India, total bad debts amount to 11% of the total lending and it is seen to be increasing. In India compared to any other progressive economy, the time taken for resolving insolvency. Corporate bad debts constitute 56% of the total bad debts of nationalized banks. In the current set up, records show that it takes on an average 4 years to wind up a company in India. From this data, it is clear that India is lacking appropriate institutional and legal framework to deal with debt defaults as per global standard which is considered as one of the primary reasons for its 130th position among 180 countries evaluated in World Bank's ease of doing business index.² The absence of a

well-functioning and effective corporate insolvency framework reflects in the state of credit markets in the country. Credit markets in India are small as a proportion of its gross domestic product. Recognizing that reforms in the bankruptcy and insolvency regime are critical for improving the business environment and alleviating distressed credit markets, the government introduced the Insolvency and Bankruptcy code bill which came into existence on May 2016. The new Act is aimed at consolidating and amending the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.³

A CRITICAL ANALYSIS ON CORPORATE INSOLVENCY RESOLUTION PROCESS

The Insolvency and Bankruptcy Code, 2016 aims to consolidate and amend the laws relating to insolvency resolution of

² Corporate Insolvency Resolution in India, Lessons from a Cross- Country comparison, Rajeswari Sengupta, Anjali Sharma, Economic and Political Weekly, Vol li no 15, April 9, 2016

³ Insolvency and Bankruptcy Code, 2016, Dr . Mahesh Thakar, FCS, Chartered Secetary, 2016

companies and limited liability entities, partnerships and individuals, which are contained in various enactments, into a single legislation. The main focus of this legislation is at providing resurrection and resolution in a time bound manner for maximization of value of debtor's assets. The Code has put forth an overarching framework to aid sick companies to either wind up their business or engineer a revival plan, and for investors to exit. Notably, the Code has also empowered the operational creditors (workmen, suppliers etc.) to initiate the insolvency resolution process if default occurs.⁴

Another important feature of the Code is that it does not make any distinction between the rights of international and domestic creditors or between classes of financial institutions. The Code has sought to balance the interest of all the stakeholders including alteration in the order of priority of payment of Government dues. The legislators have sought to bring in a law analogous to international standards which is guided by the broad philosophy that insolvency resolution must be commercially and professionally driven (rather than court driven). As such, the role of adjudicating authorities is limited to ensuring due process rather than adjudicating on the merits of the insolvency resolution.

Corporate failure may be due to business or financial failure. Business failure is breaking down of business model and inability to generate enough revenues. Financial failure is due to mismatch between payments and receivables of an enterprise. A sound bankruptcy process helps the creditors and debtors to come to a platform that brings remedy for business or financial failure. It is not necessary that the defaulting companies go for liquidation. There may be situations in which a viable mechanism can be found through which the companies may be protected as a going concern. Thus, an efficient corporate insolvency resolution procedure is indeed an essential for the proper functioning of a business and also for the progress in the economy.

The insolvency resolution mechanism that was prevalent in the country till the enactment of the IBC in 2016 was very much complex and fragmented. The legal and institutional framework didn't help the lenders in effective and timely recovery of assets and caused undue strain on the Indian credit system. However, the Code makes a significant departure from the existing resolution regimen by shifting the responsibility on the creditor to initiate the insolvency resolution process against the corporate debtor. If the default is above Rs.1

⁴ The Insolvency and Bankruptcy Code, 2016, G. Sriram, ACS, Chartered Secretary, September 2016

lakh, the creditor may initiate the insolvency resolution process. Under the legal framework that prevailed earlier, the primary onus to initiate a resolution process lies with the debtor, and the creditor may pursue separate actions for recover, security enforcement and debt restructuring.

Sections 4 to 77 of Part II of the Insolvency and Bankruptcy Code, 2016 contains the provisions for Corporate Insolvency Resolution Process and liquidation for corporate persons.

- The Financial Creditor / Operational Creditor or Corporate Debtor as the case may be, initiate the CIRP by application to NCLT under section 7, 8 and 10 respectively.
- 1 Financial Creditor on Default and operational Creditor after ten days from the date of delivery of demand notice can initiate CIRP
- 1 A Financial Creditor and Corporate Debtor shall propose the name of IRP and Operational Creditor may propose the name of IRP
- NCLT within 14 days of receipt of application by order admit or reject application (before rejecting* give notice to rectify the defect within 7 days of receipt of notice)
- Intimation of admission or rejection to be given by NCLT within seven days of admission or rejection.
- NCLT to declare Moratorium, appoint Interim Resolution Professional (IRP) for a term not exceeding thirty days from the date of appointment and cause public announcement
Public announcement shall contain the information, such as - name and address of the corporate debtor under the CIRP, name of the authority with which corporate debtor is registered, the last date for submission of claims and date on which CIRP will be closed etc.
- Insolvency Commencement date** starts from the date of admission of application and is to be completed within 180 days of commencement which can be extended to ninety days (one time) by NCLT Interim Resolution Professional to constitute Committee of Creditors comprising all financial creditors .
- Management of affairs of corporate debtor as a going concern, powers of Board of Directors or the partners of debtor shall stand suspended and

- exercised by the Interim Resolution Professional (IRP).
- Committee of Creditors within 7 days of its constitution either to resolve to appoint IRP as Resolution Professional(RP) or replace IRP with another RP.
 - All decisions of committee of creditors shall be taken by vote of not less than 75% of voting share ***of financial creditor.
 - Preparation of information memorandum by RP for formulation of Resolution Plan by Resolution Applicant.
 - Resolution Applicant prepares the Resolution plan based on information memorandum.
 - Submission of Resolution Plan by Resolution Applicant to be examined by RP and to be approved by 75% of voting share of financial creditor.
 - RP to submit approved Resolution Plan to NCLT, which shall approve or Reject/Order for Liquidation.
 - The approved plan shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

- Appeal may be made to NCLAT on Rejection Moratorium ends on the date of approval.

The provisions under the code can be summarized as follows:

INITIATION OF CIRP PROCESS

Sections 6 to 11 of the Code deals with the procedural requirements for the initiation of CIRP process. Under the new Code, the financial creditor, the operational creditor, as well as a corporate applicant can initiate the resolution process. As per Section 5(7) of IBC, “financial creditor” means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. It includes secured creditors. This is because of the fact that the definition of financial debt cover security interest also

Section 5(20) defines an “operational creditor” as a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred; According to 5(21) of the Code, “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority. All unsecured creditors are not operational creditors; whereas all

operational creditors are unsecured creditors, as money borrowed against the payment of interest without security interest is also included in the definition of financial debt and thus considered as financial creditors.

As per Section 5(5) of IBC “corporate applicant” means — (a) corporate debtor; or (b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or (c) an individual who is in charge of managing the operations and resources of the corporate debtor; or (d) a person who has the control and supervision over the financial affairs of the corporate debtor; As per section⁵ 3(8) of the IBC “corporate debtor” means a corporate person who owes a debt to any person.

The Financial Creditor/Operational Creditor or Corporate Debtor as the case may be, initiate the CIRP by application to NCLT under section 7,8 and 10 respectively. Financial Creditor on Default and operational Creditor after ten days from the date of delivery of demand notice can initiate CIRP. A Financial Creditor and Corporate Debtor shall propose the name of IRP and Operational Creditor may propose the name of IRP. NCLT within 14 days of receipt of

application by order admit or reject application (before rejecting give notice to rectify the defect within 7 days of receipt of notice). Intimation of admission or rejection to be given by NCLT within seven days of admission or rejection.

TIME LIMIT FOR COMPLETION OF PROCESS

The whole process is to be completed within the time bound period of 180 days. On application of the resolution professional, the period of 180 days may be extended by NCLT by further period not exceeding of 90 days. As per section 55, in respect of the following corporate debtors application can be made for fast track corporate insolvency resolution process:-

- 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

⁵ Insolvency and Bankruptcy Code, 2016

MORATORIUM

As per section 13 of the IBC the NCLT shall by an order declare moratorium that imposes a stay for the actions referred under section 14 (1) of the IBC. The following shall be prohibited by declaring moratorium, namely;

- 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- d. the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

The order of moratorium shall have effect from the date order accepting the application

till the completion of the corporate insolvency resolution process.

CONCEPT OF RESOLUTION PROFESSIONAL IN CIRP

The CIRP involves appointment of interim resolution professional by NCLT and appointment of Resolution Professional by Committee of Creditors. Section 5(27) states that “resolution professional”, for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional; Section 2(19) “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; Such professionals are required to pass the qualifying examination as stated under Section 196. The name of Interim Resolution Professional is proposed by applicant of Insolvency process and appointed by NCLT. The Resolution Professional is appointed by the committee of creditors (with 75% of voting share of financial creditor). The committee of creditors may appoint Interim Resolution Professional as resolution professional or any other resolution professional. After the appointment of the interim resolution professional, NCLT shall cause a public announcement of the initiation of corporate insolvency resolution process

and call for the submission of claims in such manner as may be specified by the Board and containing the information specified in section 15.

CONSTITUTION OF COMMITTEE OF CREDITORS AND APPOINTMENT OF RESOLUTION PROFESSIONAL

The interim resolution professional shall, after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a Committee of Financial Creditors of the corporate debtor. Within 7 days of the constitution of the Committee of Creditors, the first meeting of the committee shall be held at which either the interim resolution professional shall be appointed as resolution professional or where someone else is proposed to be so appointed, proposal shall be sent to NCLT for obtaining confirmation of the appointment of the new resolution professional from the Board. All decisions of the committee shall be taken by a vote of not less than 75% of voting share of the financial creditors. The resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period. It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor

including the continued business operations of the corporate debtor. While taking decisions involving financial aspects etc. the resolution professional shall obtain approval of the Committee.

FORMULATION OF RESOLUTION PLAN AND ITS ACCEPTANCE BY THE NCLT

After this, the resolution professional shall prepare an information memorandum in such form and manner containing information required by a resolution applicant to make the resolution plan for the corporate debtor which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified by the Board. A resolution plan is also formulated and is submitted to the Committee of Creditors for their approval. The Committee may approve a resolution plan by a vote of not less than 75% of voting share of the financial creditors. The plan approved by the Committee shall be submitted by the resolution professional to NCLT for approval. If the NCLT is satisfied that the resolution plan as approved by the Committee of Creditors meets the requirements as detailed in the preceding sub-para, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees,

members, creditors, guarantors and other stakeholders involved in the resolution plan. Where the resolution plan does not meet the requirements, NCLT shall, by order, reject the same.

FASTRACK INSOLVENCY RESOLUTION PROCESS

The aim of the Insolvency and Bankruptcy code is to conclude the procedure within half of the default time period specified under the Code. The person or entity seeking the fast relief will have onus on the process at set-off and that person or entity that sets-off the Fast-track process must support that the case is fit for the Fast-track. Therefore, whosoever fills the application for fast track process under Chapter IV (Section 55) of the Insolvency and Bankruptcy Code will have to file the application along with the proof of the existence of default as evidenced by records available with an information utility or such other means as may be specified by the Board to establish that the corporate debtor is eligible for fast track corporate insolvency resolution process. The procedure can be summarized as follows.

- The fast track corporate insolvency resolution process shall be completed within a period of ninety days (90) from the insolvency commencement date and there can be only one extension of forty-five days (45).

- The adjudicatory authority will have the power to extend the process only if an application is filed by the resolution professional on the instructions of the creditors by a resolution passed at a meeting with seventy-five percent votes of the committee of creditors.
- The application can be filed in respect of corporate debtors with assets and income below a level or corporate debtors with such class of creditors or such amount of debt, which will be notified by the Central Government after enforcement of the I&B Code. Central government is at liberty to include such other category of corporate persons to have application of the fast track process by notification.
- Fast-track corporate insolvency resolution process and the procedure for conducting a corporate insolvency resolution process are more or less similar under this Code. Interim Resolution Professional is in charge of collection of claims, monitoring the entity and the creation of a creditors committee. Once the creditors committee is formed, the Resolution Professional verifies the submitted liabilities. The Resolution Professional has the same responsibilities as in default

procedure but the only difference is that the Resolution Process is for a shorter time period.

- The NCLT under Chapter II, Section 7 of the Insolvency and Bankruptcy Code appoints the Resolution Professional to administer the IRP, whose main function is to take over the management of the corporate borrower and operate its business as a going concern under the broad directions of a committee of creditors.
- Resolution Professional identifies the financial creditors and The new code aims at speedy winding up of insolvent companies, relocating capital profitably and lowering the Non- Performing Assets. Considering the bad-loan crisis in the banking sector, the Insolvency and Bankruptcy code will prove to be a powerful reform that will be beneficial to all the sectors of the society.⁶

LIQUIDATION PROCESS

The Code provides for the NCLT to order liquidation of the corporate debtor in a number of situations that are enumerated in section 33 of the Code. It provides that the

NCLT shall pass an order of liquidation when

- (i) prior to the completion of 180 days as prescribed under section 12 of the Code, it does not receive a resolution plan or rejects the plan so given under section 31⁷;
- (ii) if the committee of creditors do not approve of the resolution plan and decide to liquidate the corporate debtor; and
- (iii) where the corporate debtor⁸ contravenes the approved resolution plan, upon which an aggrieved party makes an application for liquidation.

It may be noted that there is no discretion for the NCLT as to whether an order for liquidation may be passed or not. Once any of the grounds mentioned in section ⁹ are satisfied, the NCLT 'shall' be required to pass an order liquidating the corporate debtor. Once a liquidator is appointed, then the mechanism set forth by the Code in Chapter III shall take over. The provisions in this Chapter are akin to the powers of the liquidator under the Companies Act, 1956 and Companies Act, 2013, with only a few notable differences. Primarily, once an order

⁶ Insolvency and Bankruptcy Code, 2016- Fast Track Corporate Insolvency Resolution Process, Hemant K Sharma, Advocate, Partner, Sastra Legal, New Delhi, CHARTED SECRETARY, SEPTEMBER 2016

⁷Section 33(1), the Code

⁸ Section 33(1)b, the Code

⁹ Section 33(1)c, the code

under section 33 is made, appointing a liquidator, then an appeal against such order shall only be on limited grounds of material irregularity or fraud in relation to the liquidation order¹⁰. It is settled law that once the grounds of appeal are limited, then there can be no grounds beyond what is provided for in the statute for the purpose of appeal, owing to which, the corporate debtor, once subjected to liquidation may be constrained with limited grounds to appeal. Further, in relation to appointment of liquidator under the Companies Act, 2013, for the grounds mentioned in the amended section 271, the Companies Act now provides that there cannot be any stay of the winding up order once it is made and the liquidator is appointed¹¹. Further, the Code introduces the concept of a liquidation estate wherein all the assets mentioned in section 36(3) of the Code shall form a part of the liquidation estate with respect to the corporate liquidator. The liquidator shall, while dealing with the liquidation estate, act as a fiduciary to the creditors as a whole.

The Code also recognises the concept of beneficial interest and trust ownership amongst others, which are excluded from the purview of the liquidation estate assets¹². Further, in addition to the powers held by the

liquidator under the previous regime, the Code provides for special informational powers, wherein, the liquidator shall have access to any information system, for the purpose of admission and proof of claims and identification of the liquidation estate assets¹³. It is submitted that this is a welcome development in the law, which empowers the liquidator to have access to necessary information for the purpose of determining claims, which would ensure that unwarranted claims are not granted or at the least, time is not wasted in trying to refute unwarranted claims. While doing so, to safeguard the interests of the creditors, the Code provides for a statutory appeal to the NCLT, against orders of the liquidator rejecting their claims, which is a marked difference from the previous regime where no special appeal existed for this purpose¹⁴. Finally, the liquidator is also empowered to make applications to avoid extortionate credit transactions, either financial or operational, made within two years preceding the insolvency commencement date¹⁵. Where the NCLT is convinced that a transaction so made is extortionate in nature, it shall be required to pass orders restoring status quo ante or to set aside the whole transaction or to modify the terms of the transactions or to require any person to return sums of money

¹⁰ Section 61(3), the Code

¹¹ Section 289, Companies Act, 2013 per clause 15 of schedule 7 of the Code

¹² Section 36(4) of the Code

¹³ Section 37, the Code

¹⁴ Section 42, the Code

¹⁵ Section 50, the Code

received or to create any security interest with respect to such sums. It is submitted that this power ought to be used sparingly by the court as it is drastic in nature and would impede into otherwise arm's length transactions, which shall fall within the exclusive domain of party autonomy and freedom of trade.

CHALLENGES TO CORPORATE INSOLVENCY RESOLUTION PROCESS AND

LIQUIDATION PROCESS IN INDIA

The Insolvency and Bankruptcy Code, 2016 (IBC) replaces a fragmented legal Framework and a broken institutional set-up that has been delivering poor outcomes for Years for creditors and distressed businesses seeking an exit. The IBC offers a time bound resolution process aimed at maximizing the value of distressed business. This will benefit not just the creditor and debtor companies, but also the overall economy because capital and productive resources will get redeployed relatively quickly. The consolidation of the entire insolvency regime under a single code is a daunting task, Because, on one hand the code has to provide effective and quick measures to check Corporate insolvency in particular along with other types of insolvency and on the other hand it has to maintain the balance between the rights of the corporate debtors and of the creditors. The manner in which the law is currently being implemented seems to focus more on expeditious operationalization rather than

effective implementation. Hence, there exist many challenges in well functioning of the insolvency and Bankruptcy code. The new law will require total transformation of mind-sets and well established norms and practices on the part of business enterprises, mercantile community, the lenders and the judiciary as well. Here in this paper challenges faced by the insolvency professionals while carrying out corporate insolvency resolution process and liquidation process is been detail explained as follows:

- a. The time bound process of corporate insolvency resolution process: the 180 days' time bound process for CIRP would be a major challenges calling for speedier process in collating credit information, preparation of information memorandum by resolution professionals, setting up of information utilities that provide credit information, establishment of full benches of NCLT to handle the workload of pending cases, availability of insolvency professionals, process involved in taking over of management by insolvency professionals, time for adjudicating authority in evaluation of the resolution plan etc.
- b. No timeline for disposal of appeals: while section 12 provides a period of 180 days for CIRP there are no timelines prescribed with in which

the NCLT is required to approve or reject a resolution plan. Similarly there are no timelines prescribed for disposal of appeals. Therefore, the ultimate resolution could still be along drawn process.

- c. Establishment of infrastructure at the offices of adjudicating authorities: The IT and other infrastructure at the offices of adjudicating authorities is required to be strengthened to handle the CIRP and liquidation cases that are being filed with them.
- d. Specification, creation and capacity building of insolvency professionals : As per section 244 which deals with transitional provisions relating to treating such categories of persons with such qualification and experience as insolvency professional agencies and insolvency professionals, capacity building of such professionals would be a challenges in the code is new.
- e. Expiration of Tenure of IRP Professional: Regulation 17(1) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 provides that the IRP shall file a Report certifying constitution of the committee to the adjudicating authority on or before the expiry of 30 days from the date of

his appointment. Regulation 17(2) provides that the IRP shall convene the first meeting of the committee within 7 days of filing the report under regulation 17(1). Under section 16, the tenure of the IRP shall not exceed 30 days from the Date of his appointment. Therefore, there could be instances where the Tenure of IRP has already expired at the time of convening the first Meeting of the committee of creditors.

- f. Shortage of NCLT benches: The NCLT has only 11 benches and limited judicial and technical members, which is highly inadequate compared to the huge number of cases already pending at BIFR and DRT which are expected to be transferred to NCLT. Until there are dedicated benches to hear insolvency cases, better management of transition and effective and expeditious disposal will remain as a distant dream.
- g. High Cost of Bankruptcy Resolution Process: The IBC adopts the UK bankruptcy regime. Studies conducted in the UK on their bankruptcy regime reveal that while adoption of the IRP model resulted in higher realizations, they also correspondingly increased costs of

bankruptcy and may not materially improve creditor recoveries.

- h. Cross Border Insolvency: The Code at present does not explicitly deal with issues and text related to cross border insolvency. the implications of cross border insolvency cannot be ignored for too long if India is to have a comprehensive and long lasting insolvency law as the Code aims to achieve. Not incorporating this will lead to an incomplete Code.
- i. Chances of fraudulent initiation of CIRP by competitors: The Code has created somehow a very harsh law, and there are so many easy ways available to the competitors to start frivolous insolvency proceedings against the competitive corporate entities on the frivolous grounds and cause reputation loss to them. It is a major challenge to see through this misuse of the code while initiating CIRP.

However, as they say "The law may be harsh but it is still the laws as expressed in the Legal maxim *dura lex sed lex*. Loss of control over the management of company and appointment of insolvency professional may be detrimental to the growth of the corporate entity. The corporate entities take years to grow and nurture Corporate discipline in themselves, and suddenly handing over of the

Management in the hands of the IRP s may cause serious loss to the reputation and working and structuring of the entity, which may, in the end, be Detrimental to them.

The present insolvency regime it seems is the strictest of all. It carries with it the Elements of threat and deterrence. For instance, if there is a company, which is facing the rough weather due to international or domestic market compulsions, non-payment of the amounts leads to a situation of appointment of the Resolution Professional and suspension of the existing management with a threat that if in next 6-9 months the resolution or settlement is not possible, the company may face liquidation.

This leads to a situation of lack of lucrativeness in future to act as an entrepreneur and take on huge liabilities and risks including a threat to lose all personal belongings, since historically in India, the banker stake personal guarantees in addition to the collaterals. However, since the era of corporate insolvency resolution has just begun, hopefully these all may be the teething problems of the code and situations might change as the corporates adapt themselves to the code and ensure that no default takes place in order to prevent the effective management and control of the company slipping away from their hands.

COMPARATIVE ANALYSIS OF INSOLVENCY LAWS – INDIA AND THE UNITED KINGDOM

The insolvency and bankruptcy code, 2016 is obviously a reformatory move by the Indian government as prior to its implementation, the then existed bankruptcy framework in India was unclear and was overlapping with many acts and laws. There was no certain law to regulate insolvency or restructuring of companies in India. The lenders were unconfident with laws in India related to the recovery or restructuring of the defaulted assets. To regain the confidence of the creditors and to promote entrepreneurship, availability of credit, and balance the interests of all stakeholders for maximization of value assets, the new code is introduced. Experts in the field are in the opinion that the code assented by the president on May 28, 2016, closely mirrors the UK insolvency regime. It may be a fact to agree, that there were a couple of laws, which were formed at the time of British rule in India, were in practice prior to the launch of the new code. The outdated laws and overlapping laws planted India in the rank of 136 on resolving insolvency. Insolvency resolution in India took 4.3 years on an average in India is self-explanatory for the worst conditions experienced by creditors.

Adopting a successful and proven regime could be the best choice made them think that UK regime can be a better reference. As

per World Bank, recovery in the UK is at a rate of 88.6 cents per dollar and that too within a period of 1 year on average, compared to 25.7 cents per dollars in India. However, the Indian code 2016 cannot be exact as those of UK's, certain key aspects of the UK legalizations may not work in Indian scenario and thus are customized to fit for Indian climate.

Adopted

Control: As per the new Code, now a creditor or group of creditors can initiate the insolvency process by filing an application to the Adjudicating Authority when a borrower is in default. However, the legalisation vested with the debtors has not been lifted, a borrower or debtor can still initiate the process by filing an application in the respective authority. The regime was adopted from the UK laws, which is considered to be the most internationally recognized system.

Professionals: The appointment of a licensed professional is another key aspect adopted from the UK regime. As per the new code, the consortiums of creditors on regulatory clearances appoints an interim Insolvency professional to oversee the insolvency process. Three sets of Resolution Professionals are sought to be appointed.

Priority: The new Code adopted distribution of payments in priority as outlined in UK regime, during the liquidation of the company. Based on the vote of the majority of the creditors, on failure of the submission

of resolution plan within the prescribed period, the liquidation process is initiated.

Cross-border: As per the provision of the code, the Government of India can enter into agreements with any country outside India for enforcing provisions of the Code and notify applicability of the same from time to time.

Amended or Added

Control: During the insolvency process in India, the insolvency professional appointed shall obtain approval from the creditors on various matters related to the insolvency process. Section 28 of the Code detailed such matters which require creditor approval. Whereas, in UK regime, generally the approval is required only at the time of appointment of such professional.

Professionals: In India, an individual or a group of agencies can act as an Insolvency Professional upon approval from the creditor's committee. However, in the UK only licensed individuals are eligible to become an Insolvency professional. Also, in India, an Insolvency Professional is not required to provide a surety bond or professional insurance whereas the counterpart demands so. There are distinctions in the licence renewal though both demands a licensing or examination process to become an Insolvency Professional. The licences obtained in India are of life membership in nature whereas in UK it should be renewed annually.

Freeze: As per the Code on failure of the submission of resolution plan within the prescribed period or if it is not approved by the creditors within 180 days, the liquidation process would automatically be initiated. However, in UK, no such timeline has been specified under the law and is valid for the entire period until plan is approved, if rejected only the liquidation process shall be initiated.

As per the Code, In India, the remuneration paid to the liquidator could be decided by the creditors and would be decided based on the scale of realization and distribution. However, in UK regime the remuneration is fixed on consensus of creditors and the insolvency professional appointed, in default the court may intervene to fix the remuneration.

CONCLUSION

Insolvency and bankruptcy code 2016 was brought into effect from 1-12-2016, which though deals with various aspects of insolvencies and recoveries, has a significantly specious focus on all sorts of corporate insolvencies. It is indeed a historic development for a country like India, which has for the first time, post-independence, seen a historic move wherein all the issues of financial distress are brought under the same roof and are to be captured through a single code. The code as it has been drawn aims at immediate resolution of debts and intends to break the shackles of delay and non-

payments on one or the other pretext by the corporate and where there is a serious financial distress, the intent to handover the management to the insolvency professionals and from there to the guillotine of liquidation if resolution of debt is not possible.

The present code is a paradigm shift from 'Debtor in possession' to a 'Creditor in control'. the idea of giving debtor innumerable chances to survive with the fond hope that will revive and rise as a phoenix from the ashes is done away with. Through timely insolvency resolution process, it helps businesses that don't perform well gets perish faster, making resources available for other entrepreneurs, than merely prolonging the inevitable death, which drags.

The unified regime envisages a structured and time bound process for insolvency resolution process and liquidation, it is hoped that the challenges and hurdles attached to it can be stamp down with the passage of time. The paper stipulated an insight to corporate insolvency procedures of U. K to enlighten the readers with the similarities and uniqueness Indian procedures own. Finally, The Code is in its formative days, thus, it is essential to not let it lose its objective. With the passing of time success of the code is been expecting. The questions which need timely answers for effective functioning of the code has to be done right away.