

A NEW REGIME: THE INSOLVENCY AND BANKRUPTCY CODE, 2016

The new Insolvency and Bankruptcy Code, 2016 (the "**Code**") radically alters the procedure for dealing with insolvency, liquidation and bankruptcy in India. The Code has recently been passed by both Houses of Parliament and received the President's assent. **The Code is not yet operational, but is likely to be made effective within the financial year.**

The Code applies to all companies, LLPs, partnership firms and individuals, as it completely changes the insolvency and bankruptcy procedure for all these persons:

- The insolvency procedure for companies, which is currently governed by the Companies Act, 1956 (the "**Companies Act**") and the Sick Industrial Companies (Special Provisions) Act, 1985 (the "**SICA**"), will be replaced by the procedure under the Code.
- Proceedings pending under the Companies Act for winding up of companies for failure to repay debt will be transferred to the new adjudicating authority under the Code. Proceedings pending under the SICA will abate, but the company with respect to which such proceedings are pending may make a reference to the new adjudicating authority under the Code.
- Any orders already made or actions already taken in winding up proceedings will remain valid and any orders for sanction of schemes or actions already taken under SICA will remain valid. [\[1\]](#)
- The insolvency of individuals, which was previously dealt with only under the antiquated Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920, has also been brought within the scope of the Code (although proceedings pending under these Acts will continue).

FUNDAMENTALS OF THE CODE

Applicability: The Code is divided into separate parts. Part II deals with the insolvency and liquidation of companies and LLPs ("**corporate persons**") and Part III deals with the insolvency and bankruptcy of individuals and partnerships.

Not applicable to financial service providers: The Code is not applicable to the insolvency of companies or LLPs that are financial service providers, such as banks and insurance companies.

Insolvency professionals: The Code creates a new profession of insolvency professionals, who are to be appointed as liquidators, trustees etc. at various stages of the insolvency proceedings.

New regulator: The Code also creates a new regulator, the Insolvency and Bankruptcy Board of India (the "**Board**"), to regulate insolvency matters and insolvency professionals. The Board is to be made up of Central Government appointees.

New adjudicating authorities: Under the Code, all corporate insolvency and liquidation matters are to be adjudicated by the newly constituted National Company Law Tribunal (the "**NCLT**"). All individual / partnership insolvency and bankruptcy matters are to be adjudicated by the Debt Recovery Tribunal.

Information utilities: The Code envisages the creation of information utilities, which are to collect, verify, store and provide access to financial information with respect to different companies and individuals, in order to expedite insolvency proceedings.

Strict time prescriptions: The Code imposes strict deadlines for each step of the insolvency, liquidation and bankruptcy proceedings; even the adjudicating authorities are bound by these deadlines.

INSOLVENCY RESOLUTION PROCESS

Minimum default: Insolvency proceedings can only be initiated under the Code if the default is not less than Rs. 1 lakh (for corporate persons) and not less than Rs. 1000 (for individuals / partnerships).

Insolvency resolution: With respect to both corporate persons and individuals / partnerships, the Code provides that creditors must first pursue an insolvency resolution process against a defaulting debtor before the debtor can be liquidated or declared bankrupt.

Creditors or debtor may apply: Either a creditor or a debtor may apply to initiate an insolvency resolution process. With respect to corporate insolvency, the Code specifically states that either a financial creditor (who has given a loan) or an operational creditor (any other creditor, including an unpaid employee) may apply.

Insolvency resolution professional: Once an insolvency resolution process is initiated, the management of the corporate person or the estate of the individual is to vest in the insolvency professional appointed for that particular process.

Moratorium: No legal action can be taken against the debtor during the insolvency resolution process and the debtor cannot transfer, encumber etc. any of their assets.

Secured creditors: To encourage secured creditors to participate in the insolvency resolution process, they are not allowed to enforce their security during the corporate insolvency resolution process or to file or pursue legal proceedings with respect to their debt during the individual insolvency resolution process.

Committee of creditors: The resolution professional is to ascertain claims and form a committee of creditors to take important decisions during the resolution process. In corporate insolvency resolution, only financial creditors can vote in committee meetings. The committee of creditors (with a 75% majority) must finally approve any resolution / repayment plan, although the insolvency professional must ensure that the plan meets certain basic criteria.

LIQUIDATION AND BANKRUPTCY

No indefinite resolution process: Unlike the long-winded revival proceedings under the SICA, the insolvency resolution processes under the Code have to be completed within 180 days (with a possible extension of 90 days for corporate persons). After this, the liquidation (for corporates) or bankruptcy (for individuals and partnerships) proceedings may be commenced and the debtor's assets sold to repay debt.

Status of debtor / estate during liquidation or bankruptcy: The management of the corporate debtor / estate of the bankrupt individual or partnership vests in the liquidator or bankruptcy trustee. No legal proceedings may be pursued against the debtor for recovery of debts, except by secured creditors seeking to enforce their security.

Priority of payment: The Code sets out a new order of priority with respect to payments to debtors on liquidation / bankruptcy. Employees (especially workmen) are high up in the order of priority. Financial creditors are given priority over other unsecured creditors during corporate liquidation.

OTHER INSOLVENCY PROCEEDINGS

Voluntary liquidation and fresh start process: Besides the insolvency resolution, liquidation and bankruptcy processes for failure to repay debts, the Code also provides a procedure for the voluntary liquidation of corporate persons (which it consequently removes from the scope of the Companies Act), as well as a fresh start process (limited debt forgiveness) for certain low-income and low net worth individuals.

IN CONCLUSION

The Code is extremely ambitious in the scope of its revisions to the insolvency and bankruptcy regime in India and seeks to align the Indian regime with international standards. However, making the Code operational, particularly setting up the institutional infrastructure under the Code, is likely to be a challenging task.

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[\[1\]](#) The Sick Industrial Companies (Special Provisions) Repeal Act, 2003 - not notified as on date

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