

Note on the Insolvency and Bankruptcy Code, 2016

According to the World Bank's Ease of Doing Business report, it takes more than four years on an average to resolve insolvency in India. A person on the ground would confirm that it takes much more time than that. The proposed insolvency and bankruptcy law seeks to cut down the time to less than a year. This will not only improve the ease of doing business in India, but also facilitate a better and faster debt recovery mechanism in the country. It is widely believed that this legislation will change the negative perception of recovery and litigation associated with India.

The Government has formulated a plan to refurbish the prevailing bankruptcy laws and replace them with one that will facilitate stress-free and time-bound closure of businesses. The draft legislation, since the report issued in November 2015 by a panel headed by former law secretary Mr. T.K. Viswanathan, has gone through various changes, including changes recommended by the Joint Parliamentary Committee in April 2016. The Insolvency and Bankruptcy Code, 2016 ("**Code**") has now been passed by the Lok Sabha and would be presented to Rajya Sabha shortly.

The proposed bankruptcy legislation seeks to address the issues faced currently in the context of insolvency and winding up. The provisions of the Code are applicable to companies, limited liability entities, firms and individuals (i.e. all entities other than financial service providers).

This note sets out certain key changes introduced by the Code, which are summarized below:-

- 1) Insolvency and Bankruptcy Board of India ("Board")**
The Board will be set up as the regulator under the Code.
- 2) Insolvency Professionals:** The Bill proposes to regulate insolvency professionals and insolvency professional agencies. Under the oversight of the Board, these agencies will develop professional standards, codes of ethics and exercise a disciplinary role. Three sets of **Resolution Professionals** are sought to be appointed – Interim Resolution Professional, Final Resolution Professional and Liquidator.
- 3) Insolvency Information Utilities:** The Code proposes for information utilities which would collect, collate, authenticate and disseminate financial information from listed companies as well as financial and operational creditors of companies. An individual insolvency database is also proposed to be set up for the purpose of providing information on the insolvency status of individuals. It is not clear whether this will dovetail into the existing Central Registry of Securitisation Asset Reconstruction and Security Interest of India ("**CERSAI**") and/or Central Repository of Information on Large Credits ("**CRILC**") or end up adding to the plethora of registries in India.
- 4) Insolvency Adjudicating Authority:** The adjudicating authority will exercise jurisdiction over cases by or against the debtor.

- (a) The Debt Recovery Tribunal (“**DRT**”) shall be the adjudicating authority (“**Adjudication Authority**”) with jurisdiction over individuals and partnership firms other than Limited Liability Partnerships (“**LLPs**”). Appeals from the order of the DRT will lie to the Debt Recovery Appellate Tribunal (“**DRAT**”);
- (b) The National Company Law Tribunal (“**NCLT**”) shall be the Adjudicating Authority with jurisdiction over companies, other limited liability entities (including LLPs.). Appeals from the order of NCLT shall lie to the National Company Law Appellate Tribunal (“**NCLAT**”); and
- (c) NCLAT shall be the appellate authority to hear appeals arising out of the orders passed by the Regulator in respect of insolvency professionals or information utilities.

5) Timelines (As stipulated in the Code):

Particulars	Timelines (in days)
Filing of Insolvency application – Details of what needs to be mentioned in the application has been specified	X
Adjudicating Authority- admission or rejection of application - Before rejecting an application, the Adjudicating Authority shall give a notice to the applicant to rectify the defect in the application within 7 days. If admitted, Adjudicating Authority to declare moratorium upon admission	X+14
Insolvency Resolution Professional appointment	(X+14) + 14
<ul style="list-style-type: none"> ▪ Constitution of Committee of Creditors ▪ Appointment of final resolution professional 	(X+14) + 14 + 10
Submission of Resolution plan <ul style="list-style-type: none"> ▪ If approved- Moratorium ceases to have effect ▪ If rejected- Initiation of Liquidation Insolvency Resolution Process Completion	(X+14) + 180
Insolvency Resolution Process Extension	(X+14) + 180 +90

- 6) Moratorium:** One of the most significant features of the Code is the grant of moratorium during which creditor action will be stayed. This is not automatic and has to be granted by the Adjudicating Authority on the recommendation of the Resolution Professional.
- 7) Corporate Liquidation:** The commencement of liquidation process takes place on:
 - a) recommendation of the resolution plan;

- b) on account of failure to submit the resolution plan within the prescribed period or contravention of the resolution plan; and
- c) Based on vote of majority of the creditors.

8) Liquidation Estate: To the extent assets held by the debtor belong to it, then will form part of the liquidation estate. Assets will be distributed by the liquidator in the manner of priorities laid in the law. Individual claimants or those claiming to have any special rights on assets of the debtor will form part of the liquidation process.

9) Priority:

The following debts will be paid in priority given below:

1	Insolvency Resolution cost and liquidation cost
2	Debts to secured creditor (who have relinquished their security interest) and workmens' dues (for 24 months before commencement)
3	Wages and unpaid dues to employees (other than workmen) (for 12 months before commencement)
4	Financial debts to unsecured creditors and workmen's dues for earlier period
5	Crown debts and debts to secured creditor following enforcement of security interest
6	Remaining debts
7	Preference shareholders
8	Equity Shareholders or partners

The priority being given to secured creditors relinquishing security needs specific attention, especially on account of the same having the potential to be misused, especially if the debtor and the secured creditor can collide and impair the collateral.

10) Cross border insolvency

Given that many corporate transactions and businesses involve an international element, the Code attempts to address this by including provisions for cross border insolvency. The Code provides that the Central Government 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. Further, assets of the debtor located outside India (in countries with whom India has reciprocal arrangements) may also be included for the purpose of the insolvency resolution process and/or liquidation before the Adjudicating Authority. It is also relevant to note that the definition of 'property' under the Code includes '*money, goods, actionable claims, land and every description of property situated in or outside India*'.

The intention of the Code is to do away with the antiquated existing laws covering aspects of insolvency and bankruptcy. Though the Code sets out certain provisions to amend and override the existing laws to avoid future litigation, a clear provision needs to be introduced to explicitly

state the exiting laws being repealed by the introduction of this legislation. The Code has received the consent of the Lok Sabha (lower house of Parliament) on 5th May 2016. The Code will now be presented before the Rajya Sabha for its consent.

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Contact us:

MUMBAI OFFICES

Corporate Office

902, Tower 2, Indiabulls Finance Centre,
S. B. Marg, Elphinstone Road (West),
Mumbai - 400 013, India
Tel: +91 22 6720 5555 / +91 22 4057 5555
Fax: +91 22 2421 2547

Dispute Resolution Office

802, Raheja Chambers,
Free Press Journal Marg, Nariman Point,
Mumbai - 400 021, India
Tel.: +91 22 4920 5555
Fax: +91 22 2204 3579

DELHI OFFICE

H-17, Lower Ground Floor, Kailash Colony,
New Delhi - 110 048, India
Tel: +91 11 4175 1889
Fax: +91 11 4108 4175

BENGALURU OFFICE

Kheny Chambers, Upper Ground Floor,
4/2 Cunningham Road,
Bengaluru – 560 052, India
Tel: +91 80 4669 8200
Fax: +91 80 2226 6990

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