



INSOLVENCY AND BANKRUPTCY CODE, 2016

INTRODUCTION

Insolvency and Bankruptcy Code, 2016 (“**Code**”) received the Presidential assent on May 28, 2016 and was notified in the official gazette on May 28, 2016 as well. The provisions of the Code will override the existing laws like the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Companies Act, 2013, the Limited Liability Partnership Act, 2008, Sick Industrial Companies (Special Provisions) Repeal Act, 2003 on matters pertaining to insolvency and bankruptcy Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The Code will further repeal the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. The Code comes at a very critical time when the situation of bad loans and Non Performing Assets with the banks and other financial institutions is on a rise.

The Code extends to the whole of India (except Part III which deals with Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms of the Code which shall not extend to the State of Jammu and Kashmir).

OBJECTIVE

To create new institutional network, consisting of Insolvency and Bankruptcy Board, Insolvency Professional Agencies, Insolvency Professionals, IU and Adjudicating Authorities (“**AA**”) thus offering a uniform and comprehensive legislation. The Code seeks to address insolvency issues of Companies, Limited Liability Partnership (“**LLPs**”), firms and individuals.

- To facilitate time bound insolvency resolution process and liquidation.
- To improve ease of doing business in India and also to set up a better and faster debt recovery mechanism.

APPLICABILITY IN CASE OF CORPORATE DEBTOR

- The minimum amount of the default has to be Rs. 1,00,000/- (Rupees One Lacs Only).
- The Corporate Insolvency Resolution process (“CIRP”) can be initiated by a financial creditor, operational creditor or by the corporate debtor himself.

Financial Creditor : Person to whom ‘Financial debt’ is owed, and includes a person to whom such debt may have been legally assigned or transferred in accordance with law (including a person residing outside India). Default may be in respect of financial debt owed to any financial creditor of the corporate debtor and not only the applicant financial creditor.

Operational Creditor: Person to whom ‘Operational debt’ is owed and includes any person to whom such debt may have been legally assigned or transferred.

Corporate Debtor: Shareholder of the entity, an individual who is in charge of managing the overall operations, a person who has the control, supervision or oversight of the financial affairs of the corporate debtor.

FEATURES

- AA will have exclusive jurisdiction in insolvency related matters. No injunction can be granted by any Court, Tribunal in respect to action taken by AA.
- The CIRP is a time bound process and has to be completed in one hundred and eighty (180) days and in case of an extension granted, the CIRP should be completed in two hundred and seventy (270) days.

CORPORATE INSOLVENCY RESOLUTION PROCESS

A financial creditor can initiate the CIRP without having to issue notice a notice of default of repayment to the corporate debtor, and merely by filing an application with the adjudicating authority, i.e the National Company Law Tribunal (“NCLT”) immediately after occurrence of a default under section 7 of the Code.

A default includes not only defaults in respect of a financial debt owed to the applicant financial creditor, but to any other financial creditor of the corporate debtor. Section 3(12) of the Code defines default as any non-payment of debt, whether whole or in part (including any instalment of the amount of the debt) that becomes due and payable and not repaid by the debtor or corporate debtor. Section 3(11) of the Code defines debt as a liability or obligation in respect of a claim which is due from any person, and includes a financial debt and operational debt.

Under section 7 of the Code, an application can be filed by the financial creditor himself or jointly for initiating CIRP against a corporate debtor before the AA in case of an occurrence of a default.

Under section 5(1) of the Code the NCLT constituted under section 408 of the Companies Act, 2013 will be the adjudicating authority for the purpose of insolvency proceedings relating to the corporate persons.

Under section 8 of the Code an operational creditor may upon occurrence of a default by a corporate debtor towards payment of an operational debt, initiate the corporate insolvency process by delivering a notice of the unpaid invoice upon the corporate debtor.

Within ten (10) days from receipt of the notice of the demand notice issued under section 8(1) of the Code of the Code, the corporate debtor may:

- Dispute the debt on the basis of evidence to that effect to that effect, if any, viz; a record of the pendency of a suit/arbitration proceedings in relation to the said dispute which was initiated prior to the receipt of the notice under section 8(1) of the Code;
- Repay the debt and send to the operational creditor evidence of an electronic funds transfer of the unpaid amount from the bank account of the corporate debtor;

- Repay the debt and send to the operational creditor an evidence of encashment of a cheque issued by the corporate debtor towards payment of operational debt referred to in the notice under section 8(1) of the Code.

In the event the corporate debtor does not avert the initiation of the CIRP in accordance with section 8(2) of the Code with ten (10) days of receipt of the demand notice under section 8(1) of the Code, the operational creditor may under section 9 (1) of the Code may file an application with the NCLT for initiation of the corporate insolvency process against the said corporate debtor.

Interim Resolution Professional/ Resolution Professional

Financial creditor and/or corporate applicant shall propose the name of an Interim Resolution Professional/ Resolution Professional (“IRP”/“RP”) in the application. It is optional for the operational creditor to propose the name of an interim IRP/RP. All powers of the board and management shall vest with the IRP/RP.

IRP is responsible to run the Company as a going concern during CIRP.

Resolution Plan

The resolution plan must provide for the following:

- Payment of insolvency resolution process costs;
- Repayment of the debts of operational creditors;
- Payment of dues of workmen/ employees;
- Payment of government dues;
- Management of the affairs of the borrower after the plan is approved;
- Implementation and supervision of the approved plan.

Committee of Creditors

- The Committee of Creditors (“CoC”) usually consists of financial creditors
- Operational creditors shall be part of CoC only when there are no financial creditors or all of them are related to corporate debtor.

The Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017 have now been notified.

Voting Power

- Only financial creditors have voting power in the CoC meetings in the ratio of debt owed, unless operational creditors are also part of CoC.
- All decisions of the CoC shall be approved by 75% of Financial Creditors/Operational creditors, as the case may be.

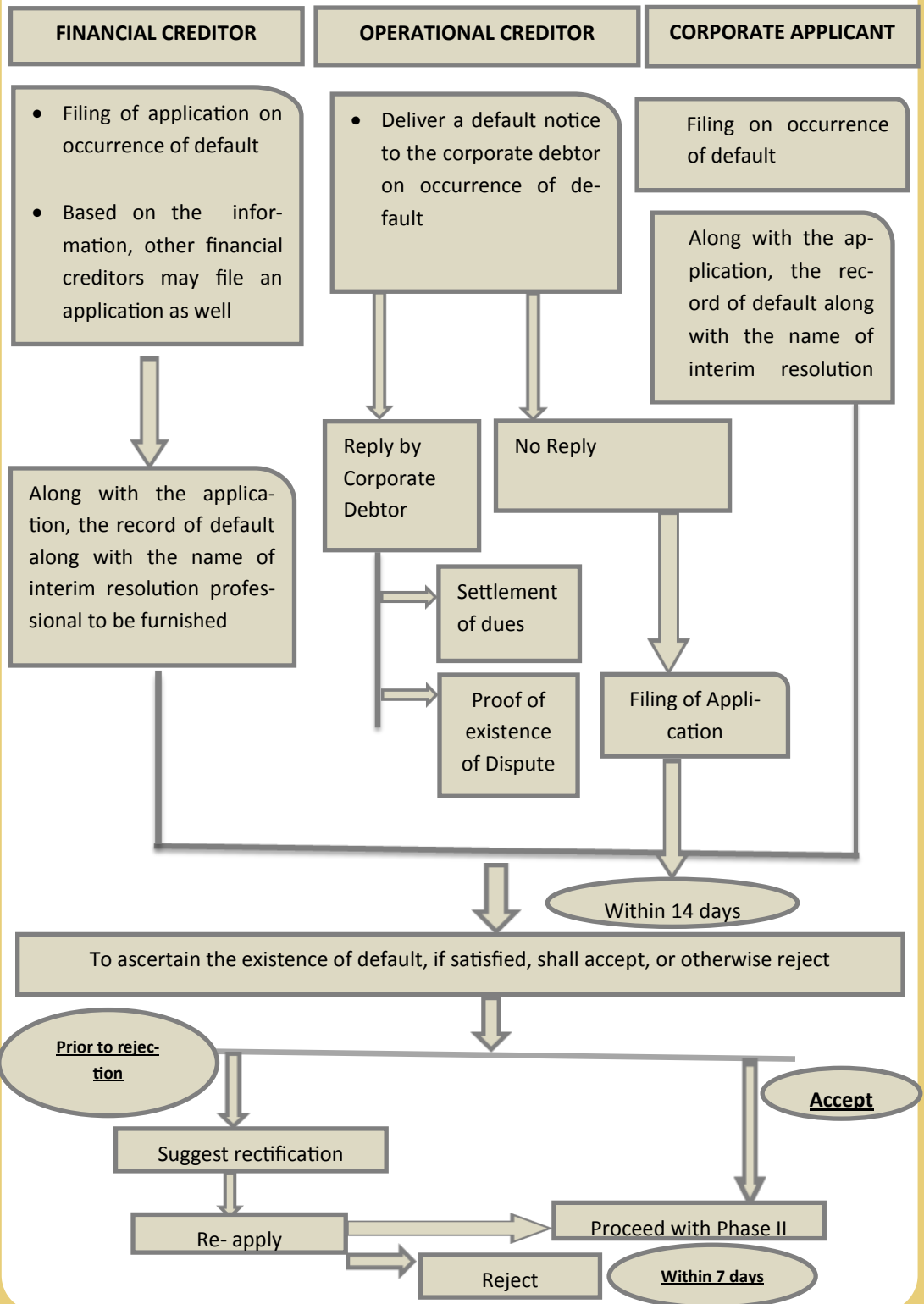
CHALLENGES

- Section 12 of the Code provides a period of one hundred and eighty (180) days for the CIRP, however there are no timelines prescribed within which the AA 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 a long drawn process.
- The absence of information utilities can also cause inordinate delays especially if the AA gets involved in evaluating whether a default has indeed taken place.

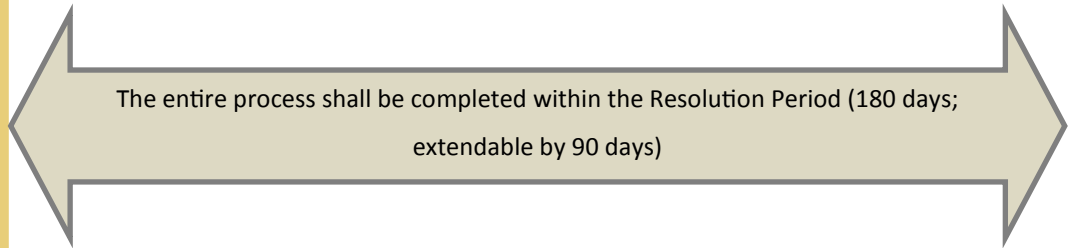
- A resolution plan submitted by the IRP/RP to the CoC needs to be approved by a vote of 75% of the financial creditors. If no resolution plan is approved and submitted to the AA within the period of 180 days (or 270 days if extended), the AA shall order the liquidation of the corporate debtor. The Code therefore vests a lot of power on the lenders. Past experience demonstrates lack of willingness and consensus on the part of banks at arriving at a consensus in such matters. The implementation of the Code is therefore dependent on the lenders acting in a timely manner and adopting a holistic approach of turnaround and revival rather than focussing merely on minimising provisioning.

The Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 have now been notified.

CIRP: PHASE I



CIRP: PHASE II



- Order of admission by NCLT;
- Declaration of moratorium
- Public announcement as per the order of NCLT;
- Appointment of interim resolution professional

Committee of Creditors ("CoC")

- First meeting of creditors;
- CoC may accept the IRP appointed by the NCLT or may appoint a new IRP
- For any option, the NCLT is required to be communicated

- CoC to approve plan and submit to NCLT
- NCLT may accept/reject plan;
- Implementation of plan
- Moratorium ceases here;
- IRP to submit the records to IU

- IRP to appoint Resolution Applicant;
- RA to submit Resolution plan
- IRP to examine and approve the Resolution Plan and submit to CoC for approval.

- IRP to conduct the CIRP;
- As many number of CoC meetings can be convened as necessary;
- IRP shall prepare information memorandum

If plan rejected

If contravention on implementation of the resolution

Liquidation

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