



## Opportunities for CMAs in Insolvency and Bankruptcy Code 2016



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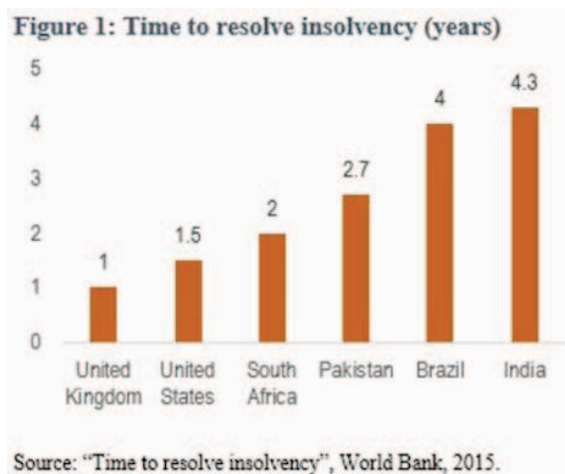
The Insolvency and Bankruptcy Code 2016 which has been notified by the Government on 28<sup>th</sup> May 2016 is the biggest economic reform next to GST. Before this Code, there was no single law dealing with insolvency and bankruptcy in India. Liquidation of Companies is handled by the *High Courts*, individual cases are dealt with under the *Presidency Towns Insolvency Act, 1909* and *Provincial Insolvency Act, 1920*. The other laws which deal with issue include *Sick Industrial Companies (Special Provisions) Act (SICA), 1985* Recovery of Debt Due to Banks and Financial Institution Acts, 1993, the *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002* and *Companies Act, 2013*. The Code consolidates the plethora of above insolvency laws in force in India and brings them under one overarching umbrella.

The Code will bring greater certainty and speed with regard to filing, processing and resolution of bankruptcy pleas in the banking sector which is in the grips of bad-loan crisis. It also addresses the concerns of both creditors and debtors by creating a level playing field. The code will also provide banks with much-needed muscle to deal with NPA accounts; enable them to realise the maximum value out of an asset once a firm is declared bankrupt.

According to the statement of **objects and reasons** of the bill tabled in **Lok Sabha by Finance Minister Arun Jaitley**: “An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship”. It further says that a new legislation is needed to deal with insolvency and bankruptcy as the existing framework is “inadequate, ineffective and results in undue delays in resolution. It would also improve investments leading to higher economic growth and development”

### Why New Law for Insolvency and Bankruptcy Required?

As per an article published, insolvency resolution in India took 4.3 years on an average. This is higher when compared to other countries such as United Kingdom (1 year) and United States of America (1.5 years). Figure 1 provides a comparison of the time to resolve insolvency for various countries. These delays are caused due to time taken to resolve cases in courts, and confusion due to a lack of clarity about the current bankruptcy framework.



According to the World Bank, establishing corporate insolvency in India takes more than four years, compared with just six months in Japan, eight months in Singapore, one year in UK, 1.5 years in the US and 1.7 years in China.

The recovery rate of creditors is also very low—only 25%, compared with 77% in high-income nations. India also ranks poorly in the World Bank’s insolvency ratings, 136<sup>th</sup> among 189 countries.

One reason for this is the lack of an overarching system for debt recovery; this forces different classes of creditors to pursue their claims through a range of processes as mentioned in the starting para of the article.

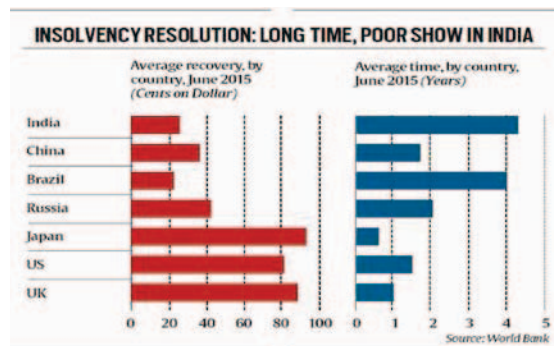
The failure to achieve swift restructuring has led to extensive erosion of the value of assets in distressed companies which,

in some cases, is exacerbated by the controlling shareholders transferring assets out of the business.

### Why Insolvency and Bankruptcy Code Required?

India’s banking industry is in the throes of a crisis. Bad debts are piling up at banks. According to central bank data, stressed assets (which include gross bad loans, advances whose terms have been restructured and written-off accounts) rose to 14.5% of banking sector loans at the end of December 2015. That’s almost Rupees 10 trillion of loans that are stuck. Availability of this money is crucial for the banking sector to go about its business.

Multiplicity of laws has been a problem in the way of banks failing to recover their loans. For example, DRTs are dealing with a backlog of Rupees 4 trillion worth of cases. For the last three financial years, less than 20% of cases taken up by various channels such as DRTs, Lok Adalats and SARFAESI courts have been successfully resolved.



### What is Insolvency and Bankruptcy mean?

“**Insolvency**” means the situation where an entity cannot raise enough cash to meet its obligations or to pay debts as they become due for payment. “**Bankruptcy**” means when a person voluntarily declares him as an insolvent and goes to 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.

### What exactly does bankruptcy amount to India?

Being bankrupt is a state of inability to repay debts to creditors. Under the proposed law, a bankrupt entity is a debtor who has been adjudged as bankrupt by an adjudicating authority that has passed a bankruptcy order. The adjudicating authority under the Code is “**National Company Law Tribunal (NCLT)**” for companies and limited liability partnerships, and the “**Debt Recovery Tribunal (DRT)**” for individuals and partnership firms.

## How does the present Code different and salient features of Code?

The present Code is different from all laws dealing with the insolvency process in India as follows:

1. The Code consolidates all existing laws as mentioned in the starting para above.

2. It specifies a timeframe – 180 days after the process is initiated, plus a 90-day extension – for resolving insolvency. The insolvency Process is to be done through the following machinery:

a. **Insolvency Professionals (Cost Accountants can enrol and registered as “Insolvency Professionals” with Insolvency Professional Agency and Board of Insolvency and Bankruptcy Code of India (“Board”) as per Section 206 and 207 of the Code. The functions and obligations of Insolvency Professionals can be seen in Section 208 of the Code);**

b. “**Insolvency Professional Agencies**” will examine, regulate and certify the insolvency professionals. As per Section 199 of the Code, the Institute of Cost Accountants of India can establish an Insolvency Professional Agency to enrol Cost Accountants and other Professionals as its members before these members are registered by the Board as “*Insolvency Professionals*”;

c. “**Information Utilities**”, which will collect, collate and disseminate financial information related to debtors. Creditors will report financial information of the debt owed to them by the debtor. Such information will include records of debt, liabilities and defaults;

d. “**Insolvency and Bankruptcy Board of India**”, a regulator that will oversee these new entities: insolvency professionals, insolvency professional agencies and information utilities set up under the Code;

3. To ensure an uninterrupted resolution process, the Code provides immunity to debtors from resolution claims of creditors during the resolution process;

4. Code provides for two categories of Creditors: financial

creditors and operational creditors. The Code provides different process for recovery of debts by these creditors;

5. The Code deals separately for Corporate Insolvency (Part II of the Code) and Individual and Partnership Bankruptcy (Part III of the Code);

6. Some of the persons as per section 11 of the Code are not entitled to initiate insolvency resolution process;

7. The proceedings of the resolution process are to be adjudicated by the National Companies Law Tribunal (NCLT), for companies; and the Debt Recovery Tribunal (DRT), for individuals. The duties of the authorities will include approval to initiate the resolution process, appoint the insolvency professional, and approve the final decision of creditors.

8. When Insolvency Process starts, Adjudicating Authority (NCLT) shall declare “*Moratorium*”. Then no suit or other legal proceeding shall be instituted by or against the corporate debtor, restrict transferring the assets of corporate debtors and recovery of any property by an owner or lessor where such property is occupied or in possession of the corporate debtor.

9. Where insolvency process fails, the Adjudicating Authority (NCLT) will pass an order under section 33 of the Code. Subject to section 52 (*Secured Creditors in Liquidation Proceedings*), when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor;

10. Section 52 (*Secured Creditors in Liquidation Proceedings*) is unique provision in the Code that allows the Secured creditor to relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in section 53; or realise its security interest in the manner specified in this section.

11. The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

## Corporate Insolvency Process

Part II of the Code deals with matters relating to the insolvency and liquidation of companies and limited liability partnership firms where the minimum amount of the default is Rupees one lakh and this amount can be increased up to Rupees one crore by the Central Government. The financial creditors, operational creditors or corporate debtors may file the application to the

Adjudicating Authority (NCLT):

**Financial Creditors are the creditors to whom corporate debtor owes financial debt**

**Operational Creditors are the creditors to whom corporate debtor owes operational debts such as claims for goods and services, employees, etc.**

**Corporate Applicant means corporate debtor or its shareholders, partner, management personnel or employees.**

#### **Appointment and Tenure of Interim Resolution Professional**

Section 16 of Code provides appointment of "Interim Resolution Professional" by the Adjudicating Authority. Where the application for corporate insolvency resolution process is made by a financial creditor or the corporate debtor, as the case may be, the resolution professional, as proposed respectively in the application under **section 7** (Initiation of corporate insolvency resolution process by financial creditor) or **section 10** (Initiation of corporate insolvency resolution process by corporate applicant) shall be appointed as the interim resolution professional, if no disciplinary proceedings are pending against him. The term of the interim resolution professional shall not exceed thirty days from date of his appointment.

#### **Management of affairs of corporate debtor by interim resolution professional (Section 17)**

From the date of appointment of the interim resolution professional,—

- a. the management of the affairs of the corporate debtor shall vest in the interim resolution professional;
- b. the powers of the board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional;
- c. the officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional;
- d. the financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available with them to the interim resolution professional.

#### **Corporate Insolvency Resolution Process and Time Limit**

Chapter II of Part II of the Insolvency and Bankruptcy Code, 2016 deals with corporate insolvency process in normal course. It should be completed within 180 days from the commencement of insolvency process extendable by 90 days by Adjudicating Authority (NCLT) on basis of resolution passed by the creditors having 75% voting share. The same provision exists in other Chapter for individual and partnership firm bankruptcy.

#### **Fast Track Corporate Insolvency Resolution Process and Time Limit**

Chapter IV of Part II of the Insolvency and Bankruptcy Code, 2016 deals with the fast track insolvency resolution process. The Fast Track corporate insolvency resolution should be completed within 90 days from the commencement of insolvency process extendable by 45 days by Adjudicating Authority (NCLT) on basis of resolution passed by the creditors having 75% voting share. The same provision exists in other Chapter for individual and partnership firm bankruptcy.

#### **Committee of Creditors**

The Interim Professionals after collation of all claims received against corporate debtor and determination of financial position of the corporate debtor shall constitute a Committee of Creditors. The committee comprises of all financial creditors of the corporate debtors. Operational creditors are allowed to attend the meetings of committee if their dues are not less than ten percent of the debt but they do not have voting power. Each decision of the committee requires a seventy five per cent majority vote.

#### **Resolution Plan (Section 30)**

The Insolvency Resolution Professional (IRP) within the prescribed time i.e. 180 days or in case of extension 270 days, where Fast Track Resolution within 90 days or in case of extension 135 days, is required to submit his Resolution Plan to Adjudicating Authority (NCLT) prepared by him on the basis of information memorandum. *The Resolution Plan should provide for: (i) payment of insolvency resolution costs; (ii) repayment of the debts to operational creditors; (iii) management of affairs of the Company after approval of the resolution plan; (iv) implementation and supervision of the resolution plan; (v) does not contravene provisions of the law for the time being in force; and (vi) conforms to such other requirement as may be specified by the Board.*

#### **Liquidation Process (Section 33)**

**Section 33** of the Code provides:

1. Where the Adjudicating Authority, —
  - a. before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate

insolvency resolution process does not receive a resolution plan; or

**b.** rejects the resolution plan for the non-compliance of the requirements specified therein, it shall—

**i.** pass an order requiring the corporate debtor to be liquidated in the manner as laid down in Code;

**ii.** issue a public announcement stating that the corporate debtor is in liquidation; and

**iii.** require such order to be sent to the authority with which the corporate debtor is registered.

**2.** Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order.

**3.** Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order.

**4.** On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order.

**5.** When a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor.

**Insolvency Professional Agencies (IPAs)**

Section 3 (20) Code 2016 defines: *insolvency professional agency means any person registered with the Board under section 201 as an insolvency professional agency.*

The *Insolvency Professional Agency* can be set by the Institute of Cost Accountants of India including by other Professional Institutes and other bodies as will be defined in the Regulations. The Agency is to be registered under section 199 of the Code to carry out the functions and responsibilities as per provision of the Code. The Board shall have regard to the following principles while registering the insolvency professional agencies, namely:

**1.** Promote the professional development of and regulation of

insolvency professionals.

**2.** Promote good professional and ethical conduct amongst insolvency professionals.

**3.** Protect the interests of debtors, creditors etc.

**4.** Promote the services of competent insolvency professionals to cater to the needs of debtors, creditors etc.

**5.** Promote the growth of insolvency professional agencies for the effective resolution of insolvency and bankruptcy processes under this Code.

**As per the provisions of Section 204 of the Code:** *An insolvency professional agency shall perform the following functions, namely:—*

**i.** grant membership to persons who fulfil all requirements set out in its byelaws on payment of membership fee;

**ii.** lay down standards of professional conduct for its members;

**iii.** monitor the performance of its members;

**iv.** safeguard the rights, privileges and interests of insolvency professionals who are its members;

**v.** suspend or cancel the membership of insolvency professionals who are its members on the grounds set out in its bye-laws;

**vi.** redress the grievances of consumers against insolvency professionals who are its members; and

**vii.** publish information about its functions, list of its members, performance of its members and such other information as may be specified by regulations.

**Insolvency Professionals (IPs)**

Section 3 (19) of IBC, 2016 defines: *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.*

As mentioned under salient features of Code as above, the Cost Accountants can enrol themselves to act as “*Insolvency Professionals*” and registered with Insolvency and Bankruptcy Board of India (Board) subject to meeting of eligibility conditions as prescribed in the Regulations being notified by the Government



in due course.

The insolvency professionals as intermediaries would play a key role in the efficient working of the insolvency and bankruptcy process. In addition to members of three professional institutes, the Board may specify the categories of other professionals or persons possessing such qualifications and experience in the field of finance, law, management, insolvency or such other field, as it deems fit that may be registered by the Board.

#### **As per the provisions of Section 208:**

1. Where any insolvency resolution, fresh start, liquidation or bankruptcy process has been initiated, it shall be the function of an insolvency professional to take such actions as may be necessary, in the following matters, namely:—

- a. a fresh start order process under Chapter II of Part III;
- b. individual insolvency resolution process under Chapter III of Part III;
- c. corporate insolvency resolution process under Chapter II of Part II;
- d. individual bankruptcy process under Chapter IV of Part III; and
- e. liquidation of a corporate debtor firm under Chapter III of Part II.

2. Every insolvency professional shall abide by the following code of conduct:—

- a. to take reasonable care and diligence while performing his duties;
- b. to comply with all requirements and terms and conditions specified in the bye-laws of the insolvency professional agency of which he is a member;
- c. to allow the insolvency professional agency to inspect his records;
- d. to submit a copy of the records of every proceeding before the Adjudicating Authority to the Board as well as to the insolvency professional agency of which he is a member; and
- e. to perform his functions in such manner and subject to such conditions as may be specified.

#### **Information Utilities (IUs)**

The Code also provides for Information Utilities to collect, collate, authenticate and disseminate financial information of debtors in centralised electronic databases. The Code requires creditors to provide financial information of debtors to multiple utilities on an ongoing basis. Such information would be available to creditors, resolution professionals, liquidators and other stakeholders in insolvency and bankruptcy proceedings.

The purpose of this is to remove information asymmetry and dependency on the debtor's management for critical information that is needed to swiftly resolve insolvency.

#### **Adjudicatory authorities**

The adjudicating authority for corporate insolvency and liquidation is the NCLT. Appeals from NCLT orders lie to the National Company Law Appellate Tribunal and thereafter to the Supreme Court of India.

For individuals and other persons, the adjudicating authority is the DRT, appeals lie to the Debt Recovery Appellate Tribunal and thereafter to the Supreme Court.

#### **Constitution of Insolvency and Bankruptcy Board of India**

**Section 188** provides: For the purposes of the Code, the Central Government is to establish a Board by the name of "Insolvency and Bankruptcy Board of India", which is body corporate and head office of the Board will be place in National Capital Region. The Board may also establish its office at other places in India.

**Section 195** of the Code provides for "**Powers and Functions of the Board**" which inter-alia provides for:

- i. registration of "insolvency professional agencies"; "insolvency professionals"; "information utilities" and renewal, withdrawal, suspension or cancellation such registrations;
- ii. specify the minimum eligibility criteria for the above agencies;
- iii. specify by regulations standards for the functioning of the above agencies;
- iv. laying down by regulations the minimum curriculum for the examination of the insolvency professionals for their enrolment as members of the insolvency professional agencies;
- v. carrying out inspections and investigations on these agencies and pass such orders as may be required for compliance of the provisions of this Code and the regulations;
- vi. monitoring the performance of insolvency professional agencies, insolvency professionals and information utilities and pass any directions as may be required for compliance of the provisions of this Code and the regulations issued under the Code.
- vii. call for any information and records from the insolvency professional agencies, insolvency professionals and information utilities; etc.

There are many powers and functions of the Board, the readers are requested to refer Section 188 of the Code.

#### **Coverage for some of the areas left**

Many areas of the "Insolvency and Bankruptcy Code 2016"

have not been covered in the article due to paucity of space in the Management Accountant Journal. If required, in future these areas and other relevant matters connected with the Insolvency, Bankruptcy and Liquidation will be touched upon in detail.

**Opportunities for CMAs under Insolvency and Bankruptcy Code**

The Companies Act 1956 and now Companies Act 2013 govern the provisions of winding up of companies but as experience it is seen that many CMAs did not venture into this field. The following are areas listed from the Companies Act 2013 where the CMAs may practice or be engaged:

- i. Certification of the scheme of Merger and Amalgamation of companies [Section 232(7)]
- ii. Appointment as administrator [Section 259(1)]
- iii. Appointment as Company Liquidator [Section 275(2)]
- iv. Appointment as professional Assistant to company Liquidator [Section 291(1)]
- v. Appearance before Tribunal under section 432 in case of examination of Promoters & Directors [Section 300(4)(b)]
- vi. Appointment of Technical member of the Tribunal [Section 409(3)] and
- vii. Legal representative of a person before the tribunal or Appellate Tribunal [Section 432]

There may be some CMAs who are currently acting as liquidators in voluntary winding up. The scope for CMAs is now widened manifold under the Insolvency and Bankruptcy Code, which is given below even though the scope for CMAs have been discussed in this article at many places above:

CMAs can act as **Insolvency professionals:**

- a. As *Interim Resolution Professionals* (Section 16) and manage the affairs of the Corporate Debtors as “going concern” during the insolvency resolution process in interim period of 30 days;
- b. As *Resolution Professional* (Section 22), the creditors committee may either appoint the same “interim resolution professional” for preparing the “Resolution Plan” and managing the affairs of the Corporate Debtor as “going concern” during the insolvency resolution process or may appoint other Professional (CMA) in his place;
- c. As Liquidator (Section 33) to be appointed by Adjudicating Authority (NCLT) on the grounds explained in this article under “Liquidation Process”;
- d. As Voluntary Liquidator (Section 59) to be appointed by

Corporate Debtors;

e. Insolvency Resolution Professional (Section 82) by Adjudicating Authority in case of “*Insolvency and Bankruptcy for individuals and Partnership Firms*”;

f. As Insolvency Resolution Professional (Section 97) by Adjudicating Authority for initiating the insolvency resolution process by debtor in case of “*Insolvency and Bankruptcy for individuals and Partnership Firms*”

g. As *insolvency professional as bankruptcy trustee* (Section 125) by Adjudicating Authority in case of “*Insolvency and Bankruptcy for individuals and Partnership Firms*”

h. As valuer of properties and assets of liquidation estate under the Code and Regulations being framed under the Insolvency and Bankruptcy Code 2016;

**Transitional Provisions and Opportunities for CMAs**

**Section 244(1)** of the Code provides: “*Until the Board is constituted or a financial sector regulator is designated under section 195, as the case may be, the powers and functions of the Board or such designated financial sector regulator, including its power to make regulations, shall be exercised by the Central Government*”.

In view of above powers, the Central Government is considering to allow the *Cost Accountants in Practice* along with other practicing professionals of the other Institutes having post qualification experience to be engaged as “*Insolvency Professionals*” during the transitional phase. Similarly the three Institutes along with other agencies, who meet the prescribed qualification criteria as per the Regulations being notified by the Central Government in due course, can constitute their “*Insolvency Professional Agencies*” to functions and work as per the provisions of the Insolvency and Bankruptcy Code 2016 during the transitional phase. On constitution of “*Insolvency and Bankruptcy Board of India*” the “*Insolvency Professional Agencies*” and “*Insolvency Professionals*” will be required to register with Board. **MA**

**Reference:**

1. *The Insolvency and Bankruptcy Code 2016;*
2. *Financial Express dated 17<sup>th</sup> August 2016;*
3. [www.prsindia.org/theprsblog/?p=3642](http://www.prsindia.org/theprsblog/?p=3642)

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