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Compendium on The Insolvency and Bankruptcy Code, 2016

Foreword by
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Key features:

- Text of each section with relevant rules, regulations, schedules, case law and provisions of other referred laws
- Overview of the Code
- Procedures under the Code
- Enforcement status with text of all Notifications and Removal of Difficulties Order
- Text of SICA Repeal Act as amended up-to-date
- Text of Banking Regulation (Amendment) Ordinance, 2017 along with RBI circular
- Text of the Recovery of Debts Due to Banks and Financial Institutions, Insolvency Resolution and Bankruptcy of Individuals and Partnership Firms Act, 1993
- Text of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
- Reports of BLRC and Joint Committee of Parliament
- Ready Referencer

Foreword



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FOREWORD

Business is important. It provides goods and services as well as livelihood to people and consequently determines their economic wellbeing. Sound business regulations generally yield more business, which usually translates to higher economic wellbeing. It is, therefore, endeavour of every economy to have such business regulations which make it easier to do business. The World Bank measures the conduciveness of business regulations of nearly 200 economies and ranks them on their ease of doing business, in terms of ten topics, which include resolving insolvency. India ranked at 142nd position in World Bank's "Ease of Doing Business" rankings for 2015. In terms of insolvency resolution, she ranked at 137th position. This called for deep institutional reforms, including an overhaul of insolvency framework, to provide for more conducive business regulations.

The overhaul came through the Insolvency and Bankruptcy Code, 2016 (Code). The preamble to the Code states its objectives: *"An Act to consolidate and amend the law relating to re-organisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders...."* While disposing of the matter of DF Deutsche Forfait AG and Anr vs. Uttam Galva Steel Ltd. [C. P. No. 45/I&BP/NCLT/MAH/2017], Hon'ble National Company Law Tribunal observes: *"If we start looking at this draconian law gobbling up the companies and branding orders as harsh, then we remain where we are, perhaps will go down further, yes one can understand to get conversed to new law and to see the fruits of it, it will take time, but for the sake of this reason, we cannot wish away the mandate of this nation come through Parliament."* The Code is thus the mandate of the nation.

The 1926 novel, *'The Sun Also Rises'* by Ernest Hemingway, carries a dialogue: *"How did you go bankrupt?" "Gradually and then suddenly"*. The Code has been coming gradually and then it came suddenly in early 2016. The implementation of the Code has been very swift thanks to the Government and all stakeholders. Almost the entire regulatory framework and the ecosystem relating to corporate insolvency are in place. Debtor and creditors alike are undertaking corporate insolvency transactions. Rich jurisprudence is evolving fast from orders of the National Company Law Tribunal and the National Company Law Appellate Tribunal. Given the progress in implementation of the Code, it seems, it is a reform by the stakeholders, of the stakeholders and for the stakeholders.

The Code centres around default, which is the state of insolvency. A default generally arises if a firm fails to operate, for whatever reason, at the efficiency level of the most efficient firm in the industry. It indicates under-utilization or less efficient use of resources with the firm and impacts the macroeconomy in multiple ways and, therefore, needs to be addressed expeditiously. Let me take this opportunity to explain briefly how the Code addresses this.

Like any other modern economic law, the Code has strong focus on prevention. A default entitles the stakeholders to trigger insolvency resolution process and if triggered, the management as well as the assets of the corporate vest in an independent resolution professional. The possible consequences of a default deter the management and promoter of the firm from operating below the optimum level of efficiency and motivate them to make the best efforts to avoid default. The scheme of incentives and disincentives under the Code would bring in behavioural changes on the part of stakeholders of a firm which would minimize the incidence of default. The best use of the Code would be not using it at all.

Despite the best endeavour, it may not always be possible to prevent insolvency for valid, obvious reasons. Where prevention is not possible, as stated in the preamble to the Code, the insolvency needs to be resolved as under:

- (a) The stakeholders must endeavour to resolve the insolvency of the firm rather than liquidate it. The creditors should get their default amounts from future earnings of the firm rather than from sale of its assets. The Code prohibits any action to foreclose, recover or enforce any security interest during the resolution period and thereby prevents a creditor from rushing in to recover his dues.
- (b) The Code envisages a collective mechanism to resolve the insolvency rather than recovery of dues by a creditor which may make the prospects of resolution difficult. It, therefore, enables any financial creditor to trigger the resolution process even when the firm has defaulted to another financial creditor.
- (c) The Code provides for resolution within the firm as a going concern, as closure of the firm destroys organisational capital and renders resources idle till reallocation to alternate uses.
- (d) It needs to be resolved at the earliest, preferably at the very first default, to prevent it from ballooning to un-resolvable proportions. A stakeholder is entitled to trigger resolution process as soon as there is a default of the threshold amount. He is, however, not obliged to do so at the first available opportunity if he has reasons for the same.
- (e) It needs to be resolved in a time bound manner as undue delay is likely to reduce the organizational capital of the firm. When the firm is not in pink of its health, prolonged uncertainty about its ownership and control may make the possibility of resolution remote, impinging on economic growth. In fact, timeline is the USP of the Code. *Let's not squander time, for that is, in the words of Benjamin Franklin, the stuff life is made of.*
- (f) It needs to be resolved by the stakeholders, who stand to gain from resolution and to suffer if it is not resolved. The Code envisages the creditors with 75% voting power to decide the fate of the firm. It does not leave the dissenting creditors in lurch; permits them to exit, if they wish, with the liquidation value.
- (g) It needs to be resolved in the best possible manner. The Code envisages anybody and everybody, including the promoters and the firm, to propose resolution plans and empowers the Committee of Creditors to choose the best of them. It envisages limitless possibilities of resolution - turn-around, buy-out, merger, acquisition, takeover, and what not.
- (h) The resolution process needs to be completed in a calm environment. The Code envisages moratorium on institution or continuation of suits or proceedings against the firm during the resolution period.

(i) The Code segregates commercial aspects of insolvency resolution from judicial aspects and empowers stakeholders and adjudicating authority to decide matters within their domain expeditiously. It empowers and facilitates the stakeholders to go ahead with the best resolution.

Where resolution is neither possible nor desirable, the firm needs to exit with the least disruption and cost, and release the resources for fresh allocation. The Code thus: (a) endeavours to prevent insolvency; (b) provides a market determined and time bound mechanism for resolution of insolvency, wherever possible, along with facilitators for quick and effective resolution; and (c) promotes ease of exit, wherever required. It enables the optimum utilisation of resources, all the time, either by (a) ensuring efficient resource use within the firm through resolution of insolvency; or (b) releasing unutilised or under-utilised resources for efficient uses through closure of the firm. It is believed that if the resources, that are currently unutilised or underutilized for whatever reason, can be put to more efficient uses, the growth rate may well go up by a few percentage points, other things remaining unchanged.

The mainstream economic thought, as believed by *Lionel Robbins*, is that at any point of time, human wants are unlimited while the resources to satisfy them are limited and such resources have alternate uses. The central economic problem, therefore, is insufficiency of resources vis-à-vis unlimited ever-increasing needs and wants. The solution has been to do more from less - optimum utilization of resources, all the time. The Code enables this and thereby addresses the central economic problem.

The mainstream legal thought, as believed by *Jean Rossueu*, is that as a person moves from natural state to social state, his freedom reduces. This equally applies to economic freedom. A firm faces several restrictions when it starts, continues or discontinues a business. The central legal problem, therefore, is inadequacy of freedom to pursue economic interests meaningfully. The solution has been to allow optimum freedom subject to minimum regulations to address market failure. The economy witnessed freedom of entry in the 1990s and freedom to continue business in the 2000s. The Code now provides the ultimate economic freedom, freedom to exit and thereby addresses the central legal problem in economic sphere. It enables a firm to get in and get out of business with ease, and thereby unleashes and realises the full potential of every firm and promotes inclusive growth.

The Code improves ease of doing business, promotes entrepreneurship, develops corporate debt market, increases options for corporate financing, reduces cost of funds, balances interests of stakeholders and does much more. For the potential to improve growth, and promote inclusive growth, and for addressing central economic and legal problems, the Code constitutes the biggest economic reform in the recent years.

I am pleased to note that the team at Corporate Professionals comprising *Mr. Pavan Kumar Vijay*, *Mr. Vinod Kumar Aggarwal*, *Mr. Ankit Singhi*, *Mr. Manoj Kumar*, *Ms. Deepika Vijay Sawhney*, *Mr. Chander Sawhney*, *Ms. Anjali Aggarwal*, *Mr. Karan Gandhi* and *Mr. Shivam Singhal* have put in hard work to come up with this elaborate compendium on the Code. I find this compendium extremely user friendly as it links each section of the Code with the relevant rules, regulations, forms, schedules, text of other referred laws and case laws. I am sure, it will

be a great resource for practitioners, policy makers, researchers and academics to understand in detail the change that is in the offing. I am certain that this compendium will motivate more inquisitive minds to delve deeper into various aspects of the Code from an interdisciplinary perspective, enriching the Indian literature on insolvency and bankruptcy in the days ahead. It will also help build institutional capacity in the economy to implement the insolvency and bankruptcy reforms in letter and spirit. I complement the authors for their work.

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