

Heralding a Positive Change – Repeal of SICA, Dawn of New Era of Restructuring & Insolvency under the IBC 2016

India is heading towards a new era of dealing with insolvencies and bankruptcies, whether corporate or individual, by promulgating a comprehensive Insolvency & Bankruptcy code at par with global standards to facilitate ease of doing business in India.

The Government has synchronized the demise of Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) (SICA) on 30th November 2016 perfectly with putting in place all the enabling structures required to commence the implementation of the restructuring process under the Insolvency and Bankruptcy Code, 2016, (IBC) to provide a viable alternative process for resolving their issues to the concerned stakeholders, w.e.f. 1st December, 2016. Accordingly, the Board for Industrial and Financial Reconstruction (BIFR) and the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) have been dissolved and as such any reference made or inquiry pending to or before the Board or Appeal or any proceeding of whatever nature pending before the Appellate Authority or the Board under the SICA shall stand abated.

However, the SICA Repeal Act provides that a company in respect of which such appeal or reference or inquiry under SICA stands abated, may make reference to the National Company Law Tribunal under the IBC within one hundred and eighty days from the commencement of the IBC in accordance with the provisions of the IBC.

Background

Shri. Arun Jaitley in his Budget speech in 2015 had stressed on reforms of the bankruptcy law as a key priority area for improving the ease of doing business in India. Accordingly, Bankruptcy Law Reforms Committee (BLRC) under the able leadership of Mr. T. K. Viswanathan was set up and its report formed the basis of promulgation of the Insolvency and Bankruptcy Code 2016 (IBC) in May 2016.

Dr. M.S. Sahoo was appointed as the first Chairman of the Bankruptcy Board on 1st October, 2016 and within two months with the support of Mr. Tapan Ray, Secretary, Ministry of Corporate Affairs and Mr. A. S. Bhatia, Joint Secretary, Ministry of Corporate Affairs has been able to operationalize the process of IBC by formulating the notifications and registering 3 Insolvency Professional Agencies and 21 Insolvency Professionals by 30th November, 2016 to enable its implementation from 1st December, 2016.

Impact of the Code

The Code provides that in cases of a default by the corporate debtor, any concerned creditor, be it the financial creditor, the corporate debtor or the operational creditor (after mandatory 10 days demand notice) can file a Corporate Insolvency Resolution Process (CIRP) and recommend its own proposed Insolvency Professional (IP) to be appointed with respect to the corporate debtor.

The Code is drawn on the lines of the UK insolvency laws, envisaging an automatic takeover of management by the Insolvency Professionals (IP) at the inception of the Corporate Insolvency Resolution Process (CIRP) so that during the resolution process the 'creditor is in possession' of the assets of the defaulting borrowers as against the old regime of 'debtor in possession'. The Code proposes the setting up of the Information Utilities as the structured entities to record and certify the existence of debts/defaults for the initiation of the process of restructuring and revival, which is yet to be operationalized. However the non operationalization of the Information utilities would not be a road block in commencing the restructuring process under the IBC.

On admission of the CIRP by the National Company Law Tribunal (NCLT) which is the Adjudicating Authority (AA) under the Code, the Insolvency Professional would take over the affairs of the company by replacing the management, finalize list of creditors and call for meeting of creditors. The IP will have to consider the restructuring schemes formulated by any Resolution Applicant who may desire to put up a resolution proposal for takeover/ revival of the corporate debtor. If the scheme is approved by 75% of the majority of creditors in the meeting of the Committee of Creditors (wherein only the financial creditors have voting rights), then it stands approved, otherwise the corporate debtor would mandatorily go into liquidation.

The Code provides for a statutory period of 180 days (extendable by 90 days) for completion the Insolvency Resolution Process failing which the corporate debtor will mandatorily go into the liquidation process. During the CIRP, complete moratorium is provided to the corporate debtor against recovery proceedings, attachments, SARFAESI etc. to give breathing time to the said corporate debtor to facilitate its restructuring.

The Road Ahead

The new regime is premised on the commercial wisdom of the creditors as the determining factor for restructuring of the Corporate debtor. This places great responsibility on the creditors to act in a pragmatic manner, estimate the real value recoverable from the securities held by them and recognize erosion in value of their debt so that a viable restructuring proposal can be worked out. In case they fail to do so, the case will proceed to liquidation where they may have to suffer greater loss in value.

As such the code is both a threat and an opportunity to the stake holders. Corporate Debtors cannot hold on to the assets in distress while keeping the creditors at bay. Equally the creditors have to take quick and pragmatic decisions to determine erosion in value of their assets and recover their dues to the extent possible, failing which they will suffer further loss in value. The code provides a platform to bonafide borrowers and pragmatic creditors to sit together and prepare a restructuring plan to the benefit of both parties. In case the company cannot be revived, it would go into liquidation and its promoters / Guarantors would have to face Bankruptcy proceedings which will provide them an exit route and after the cooling off period, they may restart their commercial lives.

