

## The Insolvency and Bankruptcy Code, 2016: Professional Opportunities for Indian CAs



*One of the most remarkable changes in the present body of Indian jurisprudence has been the recent transition from a fragmented legal system dealing with the commercial demise of enterprises to a unified Insolvency and Bankruptcy Code in 2016 (IBC). This is dubbed as one of the most important reforms in the annals of Indian history, that has also opened a big window of new opportunity of Indian CA as an Insolvency Professional.*

*India's low global ranking of 130 on "Ease of Doing Business" index (2017) was also a consequence of its 136<sup>th</sup> position on Insolvency Rankings - the worst for a BRICS member country. This has since jumped 53 places (World Bank Report: 2019) backed by a strong performance under IBC which catapulted India to the 77<sup>th</sup> rank in 2019 tables - a remarkable achievement by any standards! In this backdrop, it is interesting to note that today more than 60 per cent of the Insolvency Professionals of the country are Chartered Accountants. This may well be due to the extensive exposure garnered by these professionals as compared to others who cater to narrower specialisations. Read on to know more...*

The Insolvency and Bankruptcy Code consolidates the earlier framework of multiple legislations by

creating a single law for insolvency and bankruptcy of corporations, partnerships and individuals. It seeks to achieve resolution of financial stress and, failing that, liquidation of the concerned entity. The Code makes some fundamental changes to the

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insolvency resolution process, procedurally as well as substantively, by focusing on the following two objectives:

1. Equal, expeditious and economic distribution of assets of the debtor, and
2. Liberation of the enterprise from the demands of the creditor.

The Code itself has various innovative provisions including the concept of 'Creditor-in-Control' as against the norm of 'Debtor-in-Possession.' The adjudicating authority is NCLT while NCLAT is the appellate authority. The single insolvency and bankruptcy framework provides powerful enablers for commercial solutions to commercial issues. It allows genuine business failures a second chance and instils confidence in lenders about their rights and their enforceability.

The Code repeals the Presidency Towns Insolvency Act, 1909, and Provincial Insolvency Act, 1920 and amends 11 legislations. It has an overriding effect over all other laws and bars the civil courts from jurisdiction over issues relating to IBC. However, Financial Corporates are excluded from its purview and presently only the Chapters relating to Corporate Insolvency Resolution Process (CIRP) have been notified.

The background against which the metamorphosis has taken place is necessary to be evaluated in order to appreciate the impact of the Code. The average time taken for restructuring in 2002 was 7 years and 6.5 years were generally required for winding up by the court. Only about 20% out of 4,636 and 30% out of 545 of court decreed cases and voluntary winding up cases respectively, as on 31 October 2015, had been resolved within 5 years, with 27% and 38% pending for more than 20 years. Consequently, the average time taken for insolvency proceedings in India was about 4.3 years in 2017, while it was only 1.7 years in high-income OECD countries. The recovery rate, which correlates with resolution time, was 71.9% in high-income OECD countries as opposed to 25.7% in India.

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It may bear repetition to specify that the implementation framework of this Code rests on four Pillars, viz.,

- Insolvency Regulator,
- Insolvency Professional,
- Adjudicating Authority, and
- Information Utility.

It is interesting to note that Chartered Accountants (CAs) contribute to the bulk of the Insolvency Professionals. This may well be due to the extensive exposure garnered by these professionals as compared to others who cater to narrower specialisations. It is not surprising to find CAs in key functions ranging from Finance to Advisory and Management to Audit. This wide-ranging engagement available to the CA Professionals provides the breadth and depth of experience necessary for successfully addressing multifarious issues relating to CIRP.

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The position of the Insolvency Professional (IP) is most significant in the insolvency proceedings as evident from the fact that one of the unique features of this Code is the vesting of entire management and operations of the company undergoing the CIRP with an IP. These professionals are duly enrolled by Insolvency Professional Agencies (IPAs) and registered for licencing with the regulatory body, i.e., the Insolvency and Bankruptcy Board of India (IBBI). The code clearly specifies functions and obligations of the Insolvency Professionals. Where any insolvency resolution, liquidation or bankruptcy process has been initiated, only an Insolvency Professionals shall be authorised to take such actions as may be necessary in the manner provided in the Code.

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corporate & branch offices and operating units, taking over of the management of the company, control and custody of the assets of the corporate debtor, receiving and processing claims - which may run into hundreds or even thousands, etc. The IP, accordingly, must necessarily be well-equipped with a multi-disciplinary capability. Given the scope of their responsibilities, an IP's role has expanded manifold to include expertise in finance, law, management and business administration.

The role of the IP is critical for a successful CIRP as he has to manage the business of the corporate debtor as a going concern, interact and lead the management, tackle legal issues, including proceedings in National Company Law Tribunal (NCLT), prepare periodic reports for NCLT & Committee of Creditors (CoC), identify prospective Resolution applicants, provide data rooms, get due diligence organised, evaluate Resolution Proposals, meet with the Creditors in CoC apart from attempting to evolve a consensus on resolution proposals, etc. In the said background, a multi-disciplinary team of high-quality professionals would be desirable and a result-oriented approach to execute the tasks within the shortest time-frame would be most productive.

The new insolvency professional will have to take up the challenging role of addressing the various demands within the specified timelines. S/he occupies a pivotal role and works as an intermediary between the corporate debtors/financial creditors and the Adjudicating Authorities regulated by IBBI.

While the role of the IP is complex and challenging, it can broadly be divided into

- A. Managing the Process, and
- B. Managing the Corporate

For Managing the Process, the IRP/RP needs to have a full understanding of her/his role under CIRP, including compliance and applicable legal requirements, reporting periodicity and quality, adherence to Code of Conduct and an ethical framework, etc. For Managing the Corporate, s/he is required to collate financial facts regarding the debtor, assess/verify the claims of the creditors, constitute a committee of creditors based on their credit exposure of the various creditors carry on the business administration of the debtor and facilitate a comprehensive resolution plan.

Under liquidation, the IP assumes the role of the Liquidator, wherein the assets of the insolvent company are accumulated and sold off to facilitate payment to its creditors.

## Insolvency and Bankruptcy Code 2016 – Role of Professionals under the Code

The Bankruptcy Code (“Code”) offers a market determined, time bound mechanism for orderly resolution of insolvency, wherever possible, and orderly exit, wherever required. Considering the powers and duties of the IPs imparted under the Code, they steer the insolvency resolution process in every way. This provides a host of professional and business opportunities for Insolvency Professionals with tremendous growth potential. Insolvency and Bankruptcy services are possibly the most demanding career option a professional can undertake. It is certainly one of the most challenging, involving and rewarding assignment. A noteworthy development of recent times has been the evolution of Insolvency Professionals as a distinct profession with well-defined practices and a clearly accepted code of conduct.

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Insolvency practitioners can find themselves running businesses, constructing and negotiating deals or investigating and advising on the viability of a business and its restructuring (and, sometimes, the integrity of its directors). The work of the insolvency practitioner affects the lives, prospects and livelihoods of both creditors and debtors. Insolvency work is as much about people as it is about figures. Insolvency practitioners need the skills to deal with creditors, anxious directors, concerned employees and a range of other stakeholders in the business.

The insolvency scene is always changing. Even in these cases, often regarded as the ‘end of the line’ for businesses, imagination and determination are still needed to preserve as much of the business (and its associated jobs) as possible, or as a last resort to get the best possible price for its assets. Even where

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a formal insolvency procedure is necessary, in many cases a positive approach to the rescue of businesses and jobs can be taken through the application of administrations, administrative receivership and voluntary arrangements.

In the current environment, with personal debt at record levels, it is vitally important individuals get the correct advice about the options open to them to resolve their difficulties. As insolvency practitioners are trained in all aspects of the law and procedure, they are best placed to provide that advice and only they can act as supervisors of individual voluntary arrangements or as trustees in bankruptcies. The profession will be able to rescue increasing numbers of jobs and businesses in recent years, both because of legislative changes and the changing attitudes of creditors. Overall, it is seen globally that some 20 per cent of insolvent businesses are rescued in part or in full and one in every six insolvent individuals enters a voluntary arrangement as an alternative to bankruptcy.

## Opportunities in Corporate Insolvency and Restructuring

Not unlike an ailing person who requires treatment to cure his affliction, a sick company also requires some form of treatment to overcome its problem of financial stress. This treatment may be in the form of restructuring of a company, where possible or liquidation, failing that. Restructuring is the corporate management term for the act of reorganising the legal, ownership, operational, or other structures of a company for the purpose of making it more profitable, or better organised for its present needs.

The reasons for restructuring include a change of ownership or ownership structure, de-merger, or a response to a crisis or major change in the business such as bankruptcy, re-positioning, or buyout. Restructuring may also be classified as corporate restructuring, debt restructuring and financial restructuring. **There are a broad range of opportunities that arise from corporate insolvency and financial restructurings. Normally, Chartered Accountants would find a strong resonance with these requirements due to their deep understanding of the financial aspects of an enterprise's operations and their implications.**

It may have been observed that with an increasing number of CIRPs finding their way to resolution through the M&A / takeover route, the IP needs to have the ability to prepare detailed Information Memorandum (IM), often with the help of financial

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experts, investment bankers, technical and legal consultants, along with other related professionals. The target companies not only have to undergo deep and incisive due diligence by teams from the prospective acquirers, but also the transaction structures must be devised and validated by lawyers, accountants and examined from the regulatory aspects. To achieve all this within a prescribed time limit, the MoUs and definitive documents will have to be prepared at all stages of the transaction well before the proposed M&A / takeover. Again, Chartered Accountants, particularly those with exposure to Investment Banking and Merchant Banking functions would be well equipped to take the lead in these areas.

With the expected notification of the relevant sections of the Code and Regulations for Bankruptcy for Firms and Individuals, the likelihood of a sharp increase in the number of transactions referred thereunder is incontestable. This may also be the case with the notification of the relevant provisions of Bankruptcy of Personal Guarantors for Corporate Debtors. The awaited roll-out of the Insolvency Law relating to Cross Border defaults is also expected to provide a new avenue for Insolvency Professionals. The February 2018, circular of RBI, closing the other avenues available for stressed asset restructuring, viz., S4A, CDR, SDR, etc., has also brought greater emphasis to bear on the IBC route for NPA resolution, with professional implications for IPs. As this profession gains acceptance and establishes its competence, newer avenues are also emerging as seen from the recent decision by SEBI to use the services of IPs as Administrators for recovery and refund.

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Some of the areas where Chartered Accountants may find opportunities within the ambit of IBC are:

1. Assisting IP in preparing for pre-CIRP preparation.
2. Reviewing the various risks involved in restructuring.
3. Developing risk mitigation strategies.
4. Working out a detailed bankable financial structure of the business.
5. Working out a detailed plan for restructuring the business from all angles.
6. Assessment of distressed assets, cash position, due diligence and turnaround feasibility.

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7. Advice on optimum utilisation of resources.
8. Corporate Applicant Insolvency.
9. Assessing Cross Border Insolvency transactions.
10. Representation before the Debt Recovery Tribunals – particularly after notification of individual/firm bankruptcies.
11. Representation before the NCLT or NCLAT, High Courts or Supreme Court.
12. Negotiating settlements.
13. Advisory in relation to a merger or acquisition or takeover.
14. Advisory services to management on an on-going basis.
15. Bankruptcy of Personal Guarantors, Firms and Individuals.
16. Handling the Liquidation Process.
17. Managing Interim Finance.
18. Spotting and evaluating distressed companies for restructuring and rescue planning.

## Conclusion

The Government has provided a mechanism in the Code for resolving Insolvency and Bankruptcy through Insolvency Professionals subject to the supervision and control of the Adjudicating Authority and regulation by Insolvency Bankruptcy Board of

India (IBBI) and Insolvency Professional Agency (IPA). Only a Registered IP can act as Resolution Professional or Trustee and Liquidators under the Companies Act, as well as under the Code. For the purpose of the quality of the services required to carry on the business of debtors as an on-going concern and to maximise the value of the corporate debtor, the entry norms for the IPs are strict, requiring professional standing for not less than 10 years for CA/CS/CWA & Advocates and 15 years for candidates from the Management Stream, subject to passing of an examination and completing a 50-hour Pre-Registration Course.

The IP occupies a pivotal position and acts as an intermediary between the debtor/creditors on the one hand and the Adjudicating Authority on the other hand and functions under the watchful eyes of the Agency and the Board. Newspapers have recently been replete with references to the Insolvency Law and the role of IPs. It will be interesting to see how, going forward, its implementation impacts the strategic opportunity matrix for existing and new entrepreneurs, while throwing up new areas of business and management opportunities.

### About Indian Institute of Insolvency Professionals of ICAI

The Insolvency and Bankruptcy Code, 2016 (Code) provides that no entity shall carry on its business as Insolvency Professional Agencies under this Code and enrol insolvency professionals as its members except under and in accordance with a certificate of registration issued in this behalf by the Insolvency and Bankruptcy Board of India (IBBI). Against this backdrop of the Code and the IBBI (Insolvency Professional Agencies) Regulations, 2016 (IPA Regulations), the Institute of Chartered Accountants of India (ICAI) has formed the Indian Institute of Insolvency Professionals of ICAI (IIPI), a section 8 company to enrol and regulate insolvency professionals as its members in accordance with the Insolvency and Bankruptcy Code, 2016 read with regulations. IIPI has been registered with IBBI to act as Insolvency Professional Agency under the IBBI (Insolvency Professional Agencies) Regulations 2016. IIPI is the first Insolvency Agency to have been registered with IBBI, the certificate of which was handed over by Hon'ble Union Finance Minister Shri Arun Jaitley on 28<sup>th</sup> November 2016. More of 60 per cent of total insolvency professional of the country are currently enrolled with IIPI. ■