**PROCESS FOR INSOLVENCY**

**Initiation**

Inability to pay back the amount to its creditors or investors or lenders on time and also for a very long time by any corporate or business entity, makes a company to be insolvent and this state is called as insolvency for which the application of insolvency is submitted to the National Company Law Tribunal (NCLT) by anyone of Financial Creditor or Operational Creditor or Corporate Debtor himself. In case of corporate debtor himself, the operational creditor has to send a prior notice of demand for 10 days to the corporate debtor before the initiation of insolvency resolution process.

**Insolvency Resolution process**

* Financial creditor either by himself or jointly shall initiate filing of application before NCLT against the corporate debtor for insolvency proceedings.
* The proof of default and the name of the proposed insolvency professional to be appointed shall be submitted along with the application
* NCLT may reject the application if it is of the opinion that the corporate debtor is not default or if there is any proceeding pending against the proposed resolution professional.
* Within fourteen days of making application to it, NCLT has to entertain the application.
* An operational creditor will have to serve 10 days of prior notice to the corporate debtor asking him to pay back the dues before initiating insolvency resolution process.
* In the event of corporate debtor not paying back the amount in that time period and doesn’t bring to the notice of operational creditor about any dispute or any arbitration proceeding pending against it then the operational creditor can file application for insolvency resolution.

**Insolvency Resolution by the Corporate Debtor**

As per provisions contained in Chapter- II of the Code, where a corporate debtor has defaulted on the payment of dues to a financial or operational creditor, the corporate debtor or any applicant (i.e. the financial or operational creditor) can file the application for the initiation of insolvency resolution process along with the books of accounts and other financial documents of the business. Furthermore, as per Section 10 (3) (b) the corporate debtor shall also file the name of the proposed resolution professional along with the application.

Time period for the completion of the insolvency resolution process

As per Section 12 of the IBC the insolvency process must be completed within 180 days from the date of initiation in the National Company Law Tribunal. The claims of the Creditors shall be frozen for a period of six months on admission of application by NCLT. No legal claim shall be sought against the corporate debtor in any other forum or court unless liquidation process is initiated or a resolution plan is made. In all the above situations the application for initiation of insolvency resolution must be admitted or rejected by NCLT within 14 days of application before it. Further as per section 16 of the Code NCLT shall appoint the interim insolvency professional with the permission of insolvency and bankruptcy board within 14 days of admitting the application.

Upon the admission of insolvency resolution application before it, NCLT will make a public announcement for the submission of claims by the creditors. Also, NCLT appoints the interim resolution professional.

**Moratorium**

The moratorium will be declared by the NCLT for prohibiting the following:

* Institution of any suit or pending suit including execution of any judgement or decree against the corporate debtor.
* Transferring, encumbering, alienating or disposing of any property or right or beneficial interest.
* Any action to foreclose, recover or any security interest created by the corporate debtor in respect of his property.
* Recovery of any property by the owner or lessor which is under the possession of the corporate debtor.
* Terminate the supply of goods and services to the corporate debtor.

On the date on which the resolution process is approved or on the date of liquidation order the moratorium shall cease to have effect. Insolvency resolution professional or Committee of creditors do not have any powers, conferred by the Code, to invalidate / withdraw or cancel any of the pending actions or proceedings involving the corporate debtor. There will be no impact on the proceedings which are pending before the imposition of moratorium except that during moratorium period, such proceedings or actions will be adjourned sine die.

In case of Canara Bank V. Deccan Chronical Holdings Ltd[[1]](#footnote-0). the National Company Law Tribunal (Hyderabad) held that the power of the Hon’ble Supreme Court Article 32 of the Constitution of India and Hon’ble High Courts under Article 226 of Constitution of India cannot be curtailed by any provision of an Act or a Court. Therefore the moratorium under IBC excludes these proceedings under the Constitution.

**Insolvency Professional**

* Interim resolution professional(IRP) is appointed by NCLT within 14 days from the insolvency commencement date and the term of his appointment shall not exceed 30 days from the date of appointment.
* Manages the operation of the corporate Debtor as a going concern and protect and preserve the value of property and also take control and custody of assets which the Corporate Debtor has the ownership.
* Receive and collate claims from creditors.
* The officers and managers of the Corporate Debtor shall report to the Interim resolution professional (IRP) and provide access to all the documents and records pertinent to the Corporate Debtor.
* Accounts of Corporate Debtor maintained by the financial institutions shall be furnished to the IRP. Also, IRP shall have access to the records and documents of corporate debtor available with government authorities, statutory auditors, accountants etc.
* IRP shall have access to the electronic records of the corporate debtor.

**Formation of Creditors’ Committee**

Insolvency professional after submission of claims by all the creditors shall form a creditor’s committee and all the creditors who have submitted the claims shall be a part of creditors’ committee. As per Section 21 (2) of the Code, the creditors’ committee shall consist of only financial creditors. Any resolution plan can be implemented only if it has the approval of 75% of the creditors with voting right in accordance with the voting share assigned.

As per Section 24 (3) (c) of the Code, operational creditors having aggregate dues of at least 10% of the total debt are only given the notice of the meeting. Operational creditors cannot be the members of the committee and it is irrespective of the claim size.

The decision of the Creditors’ Committee with respect to the reason of inability of the corporate debtor to pay back the debts, whether it is a business or financial crisis, shall pave the way to the committee to either go for restructuring plan to the creditors or for liquidation process.

Creditors committee shall hold their first meeting within seven days of appointment and may appoint a final insolvency resolution professional or may give affirmation to the interim insolvency professional to be appointed as insolvency professional with the approval of 75% votes of the creditors of the creditors committee.

The partners, directors will not have voting rights but they shall attend the meeting.

Operational creditors shall have one representative joining the meeting on behalf of them but the representative shall not have the voting right.

To enable the resolution applicant to form a resolution plan, the resolution professional shall prepare an information memorandum. Resolution professional shall, if satisfied by the restructuring of repayment plan submitted by the resolution applicant, present the plan to the Creditors’ committee for approval. The plan will be confirmed based on the 75% of votes of the creditors of the Creditors’ committee in favour.

If the approval is obtained then NCLT will order the execution of the restructuring plan in a prescribed manner.

The moratorium shall cease to have effect after the approval by NCLT and the resolution professional will forward all the records and documents to the board of directors to conduct the insolvency resolution process effectively.

In M/s Innoventive Industries Ltd. v. ICICI Bank[[2]](#footnote-1) the Court expounded the legislative intent behind enactment of the Insolvency and Bankruptcy Code, 2016. The Court in the case explained the paradigm shift in Law to render guidance to Courts and Tribunals while dealing with cases under the Code. The Court stated that the moment initiation of the corporate insolvency resolution process takes place, a moratorium is announced by the adjudicating authority under the Code by which institution of suits and pending proceedings etc. cannot be proceeded with which continues until the approval of a resolution plan as required by the Code. In the interim, an interim resolution professional (IRP) is appointed to manage the affairs of corporate debtors.

In PR. Commissioner of Income Tax v. Monnet Ispat and Energy[[3]](#footnote-2) the Supreme Court has categorically held that the provisions of the Insolvency and Bankruptcy Code, 2016 (Code) will override any enactment which is inconsistent with the provisions of the Code. The Apex Court while referring to statutory provision under Section 238 of the Code held that the Code will override anything inconsistent contained in any other enactment, including the Income-Tax Act.

1. Company Appeal No.147/2017 [↑](#footnote-ref-0)
2. CIVIL APPEAL NOs. 8337-8338 OF 2017 [↑](#footnote-ref-1)
3. Special Leave to Appeal (C) No(s). 6483/2018 [↑](#footnote-ref-2)