

PROCEDURE TO INITIATE CORPORATE INSOLVENCY BY FINANCIAL CREDITOR

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India's banking industry is in the throes of a crisis. Bad debts are piling up at banks. Freeing up this money is crucial for the banking sector to go about its business. There were many laws dealing with insolvency for Companies as well as for individuals. But most of them were either dating from the British Raj or failing to recover loans. To set up a clear and unambiguous process to be followed by all the stakeholders in a time-bound manner, there was stout need of enforcement of Insolvency and Bankruptcy code to provide a commercial and satisfactory solution to all the recovery Issues. Hence, the Code was passed by parliament in May 2016 and became effective in December 2016.

As per Insolvency Bankruptcy Code, 2016, CIRP can be invoked by Financial Creditor, Operational Creditor and Corporate Debtor Itself. It can be initiated by Financial Creditor in case of default is committed by Corporate Debtor (COMPANY & LLPs) to pay whole or any part of Installment of an amount of debt or interest due, which must be at least INR 1 lakh. The Code Proposes two independent stages a) Insolvency resolution Process where Creditor can access whether the Company is facing financial failure or business failure and options for its rescue, b) if CIRP fails or Creditors are of the opinion that it is good to windup and distribute the assets among the stakeholders.

A Financial Creditor is defined as a person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred¹.

In order to ascertain whether a person is a financial creditor, the debt owed to such a person must fall within the ambit of financial Debt as defined, as below²:

A debt along with interest, if any, which is disbursed against the consideration for time value of money and includes Money borrowed against payment of interest, Any amount raised by acceptance under any acceptance credit facility or its de-materialized equivalent, Any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument.

¹ Section 5(7) Insolvency Bankruptcy Code, 2016

² Section 5(8) Insolvency Bankruptcy Code, 2016

The amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed.

Any amount raised under any other transaction, including, any forward sale or purchase agreement, having the commercial effect of borrowing or Any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution also fall under the definition of debt.

The Process for Initiating the Corporate Insolvency Resolution Process (CIRP) by a Financial Creditor has been provided under Section 7 of the IBC.

A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred. A default includes a default in respect of a financial debt owed not only to the applicant financial creditor but to any other financial creditor of the corporate debtor. The financial creditor shall make an application in such form and manner and accompanied with such fee as may be prescribed.

The financial creditor shall, along with the application furnish record of the default recorded with the information utility or such other record or evidence of default as may be specified, the name of the resolution professional proposed to act as an interim resolution professional, any other information as may be specified by the Board.

The Adjudicating Authority shall, within fourteen days of the receipt of the application, ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor.

Where the Adjudicating Authority is satisfied that, a default has occurred and the application under is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application or that a default has not occurred or the application is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application. The Adjudicating Authority shall, before rejecting the application, give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice from the Adjudicating Authority.

The corporate insolvency resolution process shall commence from the date of admission of the application under sub-section.

As per Section 7, a Financial Creditor can initiate proceeding against a Corporate Debtor. The process under Section 7 is as follows.

The Financial Creditor is required to file an application before the National Company Law Tribunal (NCLT) , along with the Demand Draft of Rs. 25,000/- in the favour of "Pay and Accounts Officer, Ministry of Corporate Affairs" payable at Delhi. The matter after being listed and on admission will be taken for Corporate Insolvency Resolution Process (CIRP).

The Financial Creditor needs to propose an Interim Resolution Professional (IRP) in an application filed with NCLT. Once the IRP is confirmed by the NCLT then he will act as Resolution Professional (RP). The fees payable to the IRP is initially payable by the Company (Financial Creditor). Once the IRP becomes the RP on the onset of the Resolution Process, i.e. within approximately 1-2 month of his appointment, that amount is paid back to the Financial Creditor.

The Resolution procedure has various stages. The Resolution professional will publish a notice in newspapers to call for filing claims against the Corporate Debtor by a stipulated deadline and after receiving all the claims will verify the same from the books of the Corporate Debtor.

Once the claims have been verified, a Memorandum containing all the information of the Corporate Debtor regarding his Assets and Liabilities will be prepared by the Resolution Professional. This Memorandum will be sent out to all the Financial Creditors of the Corporate Debtor, whose claims have been accepted.

After sending out such memorandum, meeting of Committee of Creditors will be held which includes the financial creditors only of the Corporate Debtor, to decide whether the information memorandum has been correctly prepared or not.

The Resolution Professional after formation of information memorandum will call/invite, by an advertisement in newspaper, for the resolution plans for the Corporate Debtor by the Resolution Applicants. After receiving the resolution plan, the Resolution Professional will conduct a meeting of Committee of Creditors to check the Resolution plan resulting in its acceptance or rejection. If 66% of voting is done in favour of a resolution process then it

will be adopted by Committee of Creditors. This is then submitted before NCLT for final consent.

The time duration for the completion of the CIRP is 180 days, however, If the Resolution Plan is not accepted by the Committee of Creditors within 180 days then they can extend the time duration for a period of not less than 90 days.

In case where a resolution plan is neither to the satisfaction of Committee of Creditors nor even voted with majority voting of 66% in favour of a resolution plan coupled with the fact of lapse of CIRP period to a maximum period of 270 days then Committee of Creditors will opt for liquidation of such a Corporate debtor.

In *Satyaprakash Aggarwal v. Vistar Metal Industries*³, The petitioners were financial creditors of the respondent company. They filed an application under Section 7 for initiating the insolvency resolution process. However, such an application was rejected by the Adjudicating Authority observing that the application did not disclose 'dates of default'. The petitioners were in appeal against the said order of the Adjudicating Authority. Order of the Adjudicating Authority rejecting the application filed by the petitioners under Section 7 of the Insolvency and Bankruptcy Code 2016, was set aside by a two-member bench comprising of S.J. Mukhopadhyaya, Chairperson and Bansi Lal Bhat, Judicial Member.

In *V.R. Hemantraj v. Stanbic Bank Ghana Ltd.*⁴, it was held that Section 7 is not a recovery proceeding or proceeding for determining of a claim on merit that can be decided only by a court of competent jurisdiction. An application under Sections 7, 9 or 10 of the Code not being a money claim or suit and not being an adversarial litigation, NCLT is not required to write a detailed decision as to which are the evidence relied upon for its satisfaction. NCLT is only required to be satisfied that there is a debt and default had occurred. In the present case, NCLT had held that a prima facie case was made out by the applicant. As such, NCLT expressed its satisfaction about existence of debt and default.

³ 2018 SCC OnLine NCLAT 264,

⁴ Company Appeal (AT) (Insolvency) No. 213 of 2018