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“Corporate Insolvency and Individual Insolvency: A Comparative Analysis”

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ABSTRACT

The Insolvency and Bankruptcy Code, 2016 (IBC) which was notified on 28th May, 2016 amended and consolidated the laws related to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a way to maximize the value of assets, promote entrepreneurship, to avail the credit and balance the interests of all stakeholders. The Code has changed the priority related to payment of dues. The payment to workers was given an edge as compared to the Government dues which are paid after the payment to the unsecured creditors.

The Insolvency and Bankruptcy Code, 2016 (IBC) aims to ensure the settlement of insolvency cases smoothly; it also assures to faster the business transactions and providing a database of Creditors.

The Insolvency and Bankruptcy Code, 2016 plays an important role in the economic system of our country as it deals with the foreign investments in order to ease the business and also it extends to the whole of Indian (except Part III which deals with Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms of the Code which shall not extend to the State of Jammu and Kashmir) country.

The researcher in the research paper tries to comprise the meaning of Insolvency and Bankruptcy and its classification into Corporate Insolvency and Individual Insolvency. It also contains the difference between the two in relation to their functions, procedure under the statute and the role of Corporate Insolvency Professionals Insolvency professionals who act as intermediaries for playing an important role in the efficient and effective working of the insolvency and bankruptcy process, under the Code as well as under the Foreign Jurisdictions especially of United States of America and United Kingdom.

The Researcher also aims to explain the concept of Fugitive Economic Offenders Bill, 2018 in presence of various laws dealing with the protection of companies and individuals from being insolvent is to avoid criminal prosecution in case of economic offenders.

CORPORATE INSOLVENCY AND INDIVIDUAL INSOLVENCY: A COMPARATIVE ANALYSIS

1. Introduction

“Insolvency” is a situation where the debtor cannot meet his obligations or repay the debts when become due for payment. Major factors of insolvency may be increase in cash expenses, or decrease in cash flow¹ or poor cash management etc. In order to resolve the insolvency, one must either change the repayment plan of the loans or by writing off a part thereof. If it cannot be resolved then in that case legal action must be taken against the insolvent and all its assets will be then sold off to pay the debts.

For the purpose of selling off the assets an official assignee/liquidator will be appointed by the Government of India who shall then allocates the same among the creditors of the insolvent².

There are chances that a business can be insolvent in cash flow but solvent in the balance sheet. Such cases include illiquid assets which will help the balance sheet solvency but not the cash flows³. Another way of dealing it would be negative net assets i.e balance sheet insolvency but positive cash flow. In such a case there is enough cash flow to pay off the debts even though the business entity has more liabilities than the assets.

A situation where after determination of the insolvency of the debtor the court has given the legal order of resolution is “Bankruptcy”. Under such condition the court may order to liquidate the personal property of the insolvent and distribute it among the creditors of the insolvent debtor. Thus a situation where the debtor is unable to meet his obligation is insolvency and the legal process through which the insolvent debtor seeks relief is the Bankruptcy⁴.

¹ J K Budhiraja, “Insolvency Resolution Process, Liquidation and Opportunities for CMAs under IBC, 2016”, *The Institute of Cost Accountants of India*, New Delhi, December 2016.

² Gayatri Athare Mohapatra, “Summarizing the Insolvency and Bankruptcy Code, 2016”, August 2, 2016.

³ *Overview of Insolvency Law in India including Corporate Insolvency*, retrieved from <http://www.caaa.in/Image/insolvency%20hb%201229.pdf>, last assessed on February 10, 2018.

⁴ Rajeswari Sengupta, Anjali Sharma, Susan Thomas, “Evolution of the insolvency framework for non-financial firms in India”, *Indira Gandhi Institute of Development Research, Mumbai*, June 2016.

1.1 Judicial Meaning of Insolvency

In context of corporate laws, the word "insolvency" has neither been used nor defined in India. However, Section 433 (e) of the Companies Act, 1956 covers a company, which is "unable to pay its debts", and thus constitutes a ground for winding up of the company. Inability to pay its debts would be a case where, a company's entire capital is lost in heavy losses and no accounts are prepared and filed and no business is done for one year. In such circumstances, the Registrar of Companies makes out a case of inability to pay debts. These debts however, would only include debts, incurred after the legal incorporation of the Company⁵.

1.2 Corporate Insolvency

There is a degree of risk in a society that encourages the use of credit by companies and because of this those entities which owed money by a firm will suffer because the firm has become unable to pay its debts on the due date. When a number of creditors owed money and if they all apply for their rights and remedies available to them a chaotic race to protect interests of such creditors would take place and this may lead to inefficiencies and unfairness. In such a situation huge costs would be spending in examining individual creditors' claims and those creditors who enforced their claim with the most vigour and expertise would be paid but latecomers would not⁶.

A main aim of Insolvency Law⁷ is to have a legal regime where all the rights and obligations of the creditors would be suspended and a free and fair procedure is established for the collection and realisation of debtors' assets along with the equal distribution in accordance with the creditors' claims.

Even though corporate insolvency and bankruptcy law have shared the historical roots still they are separate bodies of law. The structure of the modern corporate insolvency law is rooted from the past history and accidents of development as of design⁸.

⁵ *General Framework Of Insolvency Laws In India*, retrieved from http://www.iica.in/images/confdetailpaper/Country_Report_on_Corporate_Insolvency_laws.pdf, last assessed on February 18, 2018.

⁶ Vanessa Finc, "The Measures of Insolvency Law", *Oxford Journal of Legal Studies*, Vol. 17, No. 2 (Summer, 1997), pp. 227-251.

⁷ *The Insolvency and Bankruptcy Code*, 2016.

⁸ *Ibid.*

1.2.1 Functions of a Corporate Insolvency Regime

The various functions are⁹:

- (a) To identify the signs of insolvency in the earliest manner.
- (b) To quickly initiates the insolvency process.
- (c) In order to take decisions about the future of the distressed entity a collective platform of the stakeholders is created by them.
- (d) It helps in to reorganize the viable businesses.
- (e) It send the business into liquidation which is unviable in order to arrest any substantial loss in value.

1.2.2 Objectives of a Corporate Insolvency Regime

The following objectives were laid down¹⁰

- (a) To protect the interests of the creditors by liquidation of unfavorable business and reorganization of favorable business. Also in order to protect the interest of other stakeholders i.e. employees and shareholders¹¹ there must be early completion of the insolvency process.
- (b) For the growth of an economy through allocation of resources which otherwise remain in a closed entity it is necessary to promote corporate insolvency regime.
- (c) To improve the rights of the creditors and motivate them to increase the supply of credit in the market there is a need of an efficient corporate insolvency regime As a result not only the supply of credit in the market improves but also the cost of credit reduces thereby improving the viability and competitiveness of the businesses¹².
- (d) For an efficient business environment and improved investor confidence there is a need for an effective corporate insolvency regime which thus encourages entrepreneurship.

⁹ *Corporate Insolvency Resolution Process under the Bankruptcy Code and its impact on the Companies*, retrieved from https://www.thecompaniesact2013.com/uploads/1481524464_ibc%20Article%201.pdf, last assessed on February 18, 2018.

¹⁰John Armour, "The Law and Economics of Corporate Insolvency: A Review", *ESRC Centre for Business Research University of Cambridge*, March 2001.

¹¹ *Ibid.*

¹² *Ibid.*

1.2.3 Corporate Insolvency Resolution Process

(a) In case a default is committed by corporate debtor, a financial creditor (himself or jointly with other financial creditors), an operational creditor or the corporate debtor may initiate corporate insolvency resolution process by filing an application with the Adjudicating Authority i.e the National Company Law Tribunal(NCLT) , immediately upon the occurrence of the default¹³.

(b) A financial debt is a debt along with the interest, if any, which is disbursed against consideration for the time value of money. The scope what constitutes a financial debt under the code was considered by the National Company Law Appellate Tribunal (NCLAT) in *Nikhil Mehta and Sons v AMR Infrastructure Ltd*¹⁴, wherein it was held that liability towards assured returns in matters of booking commercial flats would not fail within the definition of a financial debt since it is not a debt disbursed against the consideration for the value of money or money borrowed against interest.

(c) A corporate debtor defaulting in making payment to any of its financial creditors, the corporate insolvency resolution process can be initiated against such corporate debtor by any one or more of its financial creditors. The right of a financial creditor to initiate corporate insolvency resolution process against a corporate debtor for default of the corporate debtor towards another financial creditor is available exclusively to financial creditors. The intention of the provision is to increase the likelihood of early detection of financial distress of corporate debtors, thereby aiming to increase the chances of successful resolution of corporate insolvency.

(d) A defining feature of the corporate insolvency resolution process for financial creditors is the right to initiate insolvency resolution proceedings without giving the corporate debtor/company prior notice or an opportunity to repay the debt. This is a paradigm shift from the process for initiating the winding-up process under the Companies Act, 1956 where a company was required to be given prior notice calling upon it to repay the debt within three

¹³ Section 7, *The Insolvency and Bankruptcy Code*, 2016.

¹⁴ MANU/NL/0124/2017.

weeks. It was only in the event the debtor company failed to repay the debt within three weeks that a creditor could present a petition for winding up the debtor company¹⁵.

Under the Insolvency and Bankruptcy Code, 2016, there is no provision or requirement for a financial creditor to provide prior notice for filing an application for initiating the corporate insolvency resolution process. A financial creditor is also not required to provide the corporate debtor with an opportunity to repay the debt before filing an application under section 7 of the Code for initiating the corporate insolvency resolution process. However if the corporate debtor fails to appear before the NCLT despite being given notice and an opportunity of hearing, the NCLT may proceed with hearing the application *ex parte*¹⁶.

(e) A financial creditor within fourteen days must file an application for initiation of the corporate insolvency resolution process against a corporate debtor under section 7(4) of the Code. Under section 7(2) of the Code, the Adjudicating Authority i.e the NCLT, is required to determine the existence of a default from the records of an information utility, or on the basis of other evidence furnished by the financial creditor under section 7(3) of the Code.

The role of the Adjudicating Authority i.e the NCLT in ascertaining the existence of the default by the corporate debtor was deliberated upon the NCLAT in the case of *M/s Innoventive Industries Ltd. v ICICI Bank and Anr*¹⁷ wherein it was held that the process to be followed by NCLT under section 7(4) of the Code is that of the “summary adjudication” limited to “ascertainment” and “satisfaction”.

(f) The first Directory and Mandatory time period in the corporate insolvency resolution process initiated by a financial creditor is that where the NCLT is required to ascertain the existence of the default on the part of the corporate debtor within fourteen days from the receipt of the application from the financial creditor. Further if there are any defaults in the application of the financial creditor the proviso of section 7(5)(b) of the Code required the NCLT to give notice

¹⁵ Jyoti Singh and Vishnu Sharma, *Insolvency and Bankruptcy Code, 2016*, Bloomsbury Publishing India Pvt. Ltd, New Delhi, 2017.

¹⁶ Order dated 12 May, 2015 of the NCLT, Principal Bench in *Indian Bank v M/s Athena Demwe Power Ltd* in Company Petition No.55 of 2017.

¹⁷ MANU/NL/0020/2017.

about the defects to the financial creditor within the period of seven days from the date of receipt of the notice of defects. This caused quite a lot of chaos in the adjudication of application for initiation of the insolvency process in the early days of the Code¹⁸.

The controversy whether such time period was absolute in nature was resolved in *JK Jute Mills Compound Limited v M/s Surendra Trading Company*¹⁹ wherein the NCLAT held that the time period of fourteen days from receipt of the application from the financial creditor within which the NCLT is to admit or reject the application is directory/procedural in nature and not mandatory. Also the receipt of the application in section 7(4) of the Code means the date on which the application is listed before the NCLT for admission/order and not the date of filing of the application.

(g) Under section 7(5)(a) of the Code, the NCLT may by an order admit an application for initiation of corporate insolvency resolution process filed by the financial creditor provided it is satisfied of the following:

- (i) there has been an event of default by the corporate debtor,
- (ii) there are no disciplinary proceedings initiated against the resolution professional suggested by the financial creditor for appointment as an interim resolution professional.

The NCLT is empowered to reject an application in the following circumstances:

- (i) if no event of default has occurred,
- (ii) the application of the financial creditor under section 7(2) of the Code is incomplete/defective provided the concerned financial creditor is given notice of the defects and a period of seven days from the receipt of such notice to rectify the defects in the application.

(a) Upon the admission of the application of the financial creditor the corporate insolvency resolution process shall stand commenced against the said corporate debtor from the date of such admission order. The time period for the completion of the insolvency process will begin from

¹⁸ *Supra* Note 15.

¹⁹ Judgement dated 1 May, 2017 of the NCLAT in Company Appeal (AT) (Insolvency) No. 09 of 2017.

the corporate insolvency resolution process commencement date, i.e the date of the order of admission passed under section 7(5) of the Code.

(b) A financial creditor may under Regulation 8²⁰ apply for withdrawal of its application for the initiation of the insolvency proceedings and the NCLT may permit the withdrawal of the application prior to the date of the admission of the application under section 7(5) of the Code.

In *Lokhandwala Kataria Construction Pvt.Ltd. v Nisus Finance & Investment Manager LLP*²¹, the NCLAT held that under the Regulation 8 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016, the NCLT/NCLAT does not have the power to allow an application for initiation of corporate insolvency resolution process to be withdrawn once it has been admitted. Also the NCLAT suggested in this case that the inherent powers of the NCLT and NCLAT available to them under Regulation 11 of the National Company Law Tribunal Rules, 2016 and the National Company Law Appellate Tribunal Rules, 2016 respectively are not applicable to NCLT and NCLAT in its capacity as Adjudicating Authority or Appellate Authority respectively under the Code. The appeal was rejected by the NCLAT and it was then appealed before the Supreme Court wherein the Supreme Court prima facie agreed with the NCLAT's findings that the does not have the power to withdraw the application once it has been admitted under the Regulation 11 of the NCLAT Rules, the Supreme Court utilized its powers under Art 142 of the Constitution of India and allow the admitted application for initiation of corporate insolvency resolution process by taking consent terms on record.

(c) A much publicized feature of the process of the Code is that the corporate insolvency process is a time bound process. As per section 12(1) of the Code the corporate insolvency resolution process is required to be completed within the period of one hundred eighty days from the date of the order of the NCLT admitting an application for the initiation of the corporate insolvency resolution process.

²⁰ *Insolvency and Bankruptcy (Application to Adjudication Authority) Rules, 2016.*

²¹ MANU/SCOR/26439/2017.

The committee of creditors of the corporate debtor may instruct the interim resolution professional conducting the corporate insolvency resolution proceedings to seek an extension on time period by filing an application under section 12(2) of the Code with the NCLT. Upon receiving the instruction from the committee of creditors the interim resolution professional is required to make an application to the NCLT under Regulation 40 of the Insolvency and Bankruptcy Board of India Rules, 2016. If the NCLT get satisfied by the application for the extension of time, the same will be extended under section 12(3) of the Code for a period not more than ninety days in addition to the limit of one hundred and eighty days imposed by section 12(1) of the Code²².

In *JK Jute Mills Compound Ltd. v M/s Surendra Trading Co.*²³ the NCLT held that time period for completion of corporate insolvency resolution process under section 12 of the Code is mandatory.

(d) The NCLT is required to declare a moratorium by order as per section 14 of the Code on the date the NCLT admits an application for initiation of corporate insolvency resolution process i.e on the insolvency commencement date. The continuation period of such moratorium shall be till the passing of an order of liquidation of the corporate debtor by the NCLT under section 33; or till the approval of the insolvency resolution plan by the NCLT under section 31; or as the case may be.

(e) The NCLT shall cause a public announcement of the corporate insolvency resolution process under section 15 of the Code after the appointment of the interim resolution professional by the NCLT which shall not extend three days from the date of appointment.

(f) Once the appointment of interim resolution professional is made under section 16²⁴ of the Code, he must under section 17 of the Code:

(i) affairs of the corporate debtor to be managed.

²² *Supra* Note 15.

²³ *Supra* Note 13.

²⁴ The Adjudicating Authority shall appoint an interim resolution professional within fourteen days from the insolvency commencement date.

- (ii) suspension of the powers of the partners of the corporate debtor or board of directors or, as the case may be and it shall then be exercised by the interim resolution professional.
- (iii) the interim resolution professional can have the access of documents and records of the corporate debtor by the officers and the managers of the corporate debtor who shall be liable to report them.
- (iv) on the instructions of the interim professionals the accounts of the corporate debtor are maintained by the financial institutions. The interim resolution professional are entitled to all information about the corporate debtor through resolution professionals.

(g) The committee of creditors of the corporate debtor is formed under section 18(1)(c) by the interim resolution professional . The committee has to be constituted according to the section 21²⁵ of the Code not beyond twenty one days from the date of interim resolution professional's appointment. As per section 22(1)²⁶ of the Code after the formation of the committee its 1st meeting to be held within seven days of its formation. A resolution professional for the corporate insolvency resolution process is to be appointed in the first meeting of the committee by a vote of minimum seventy five per cent.

Committee of Creditors:

It consists of the financial creditors of the corporate debtor but does not include the related parties from whom the corporate debtor owes financial debt. They shall not have any right of participation, voting in the meeting and representation. The operational creditors do not constitute the part of the committee in the event of having financial debt of the corporate debtor. Even when the operational debt is assigned to the financial creditor by the operational debtor even in that case the operational creditor would not form the part of the committee.

(h) The resolution professional may be either the existing interim resolution professional a different insolvency professional as appointed by the committee of creditors. The chairperson for

²⁵ The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.

²⁶ The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.

every meeting of the committee of creditors shall be the resolution professional and the meeting to be conducted in accordance with the Regulation 24 of the CIRP Regulations²⁷.

(i) A resolution applicant is any person who submits resolution plan to the resolution professional on the basis of which the information memorandum is prepared by the resolution professional. Then the resolution plan is sent for the approval before the committee of creditors’.

(j) The committee has to decide about the restructuring process either by repayment of loan by the company or by liquidation of the assets of the company. If the committee fails to arrive upon any decision then the debtor’s assets will be liquidated to repay the debt.

(k) The resolution plan will be implemented once approved by the NCLT.

1.3 Individual Insolvency Resolution Process

(a) According to section 94²⁸ of the Code, upon the commission of the default by the debtor either personally or through the resolution professional, the insolvency proceedings shall be initiated by filing an application before the DRT²⁹. The aforesaid application is to be in prescribed form accompanied with the relevant fees.

(b) a debtor cannot make an application if he is:

- (i) undergoing a bankruptcy process
- (ii) undergoing an insolvency resolution process
- (iii) undergoing a fresh start process
- (iv) undischarged bankrupt

²⁷ *Insolvency And Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016*, retrieved from http://ibbi.gov.in/webadmin/pdf/legalframework/2017/Oct/CIRP%20Regulations%20-%20after%202nd%20Amendment_2017-10-24%2017:32:27.pdf, last assessed on February 19, 2018.

²⁸ A debtor who commits a default may apply, either personally or through a resolution professional, to the Adjudicating Authority for initiating the insolvency resolution process, by submitting an application. Where the debtor is a partner of a firm, such debtor shall not apply under this Chapter to the Adjudicating Authority in respect of the firm unless all or a majority of the partners of the firm file the application jointly.

²⁹ The Debts Recovery Tribunals have been established by the Government of India under an Act of Parliament, The Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 (51 Of 1993) for expeditious adjudication and recovery of debts due to banks and financial institutions.

(c) It is pertinent to note that under corporate insolvency resolution process, the pre-condition for filing an application before the NCLT is different for the financial and operational creditor, but in case of individual insolvency resolution process there is no distinction between the operational and financial creditor³⁰.

(d) According to section 95(1) of the Code, an application can be filed before the DRT either by the creditor (independently or jointly) or through the resolution for the initiation of corporate insolvency process.

(e) The interim moratorium in relation to all debts shall commence on the date of filing of the application before the DRT for the initiation of the insolvency process according to section 96 of the Code and according to section 100 of the Code the same application on the date of admission shall cease to have effect.

The interim moratorium is not available to corporates under the corporate insolvency resolution and this concept has been introduced by the Code for individuals. The logic behind this is of having interim protection while the scrutiny of the application is pending is that the information furnished by the debtor or by the creditor needs to be verified and the same is time consuming as it is not mandatory for individuals debtors and individuals friendly creditors to register themselves with the Information Utility³¹.

(f) Upon the receipt of the application filed by the debtor or creditor himself, as the case may be, DRT shall within seven days of its receipt direct the Board to nominate a resolution professional for the insolvency resolution process. In this case the Board shall nominate the resolution professional within ten days of the receipt of such request from the DRT. Whereas in case of application filed by the resolution professional the Board is required to respond within seven days of the receipt of the confirmation from the DRT either confirming the appointment of

³⁰ *Supra* Note 15.

³¹ *Supra* Note 15.

resolution professional or nominating another while rejecting the appointment of referred resolution professional³².

(g) Upon the application filed by the debtor or by the creditor and within ten days of being so appointed, the resolution professional shall submit its report to the DRT, recording reasons for recommending approval or rejection of such application by the DRT or recommending that the debtor requires a fresh start under Chapter II of the Code. In case of admission of the application, to arrive at a repayment plan negotiations shall be conducted between the debtor and the creditor on the instructions of the DRT. In case of rejection of the application, DRT according to the report of the resolution professional pass an order that the application was filed by the debtor to defraud his creditors or the resolution professional.

(h) Once the admission order is passed by the DRT under section 100³³ the moratorium in connection to all the debts shall remain for one hundred eighty days starting from the admission of application filed under section 94 or 95 or on the date DRT passes an order on repayment plan under section 114 of the Code³⁴, whichever is earlier. This provision is there to give time to the debtors or creditors to amicably resolve their issues and decide the repayment plan.

(i) A public announcement of the insolvency resolution process within seven days of the passing of the admission order under section 100 of the Code is made by DRT.

(j) In order to protect the value of the assets of the debtor, the resolution professional must consult the debtor before preparing a repayment plan.

³² *Supra* Note 15.

³³ The Adjudicating Authority shall, within fourteen days from the date of submission of the report under section 99 pass an order either admitting or rejecting the application referred to in section 94 or 95, as the case may be.

³⁴ The Adjudicating Authority shall by an order approve or reject the repayment plan on the basis of the report of the meeting of the creditors submitted by the resolution professional under section 112: Provided that where a meeting of creditors is not summoned, the Adjudicating Authority shall pass an order on the basis of the report prepared by the resolution professional under section 106. (2) The order of the Adjudicating Authority approving the repayment plan may also provide for directions for implementing the repayment plan. (3) Where the Adjudicating Authority is of the opinion that the repayment plan requires modification, it may direct the resolution professional to re-convene a meeting of the creditors for reconsidering the repayment plan.

(k) Pursuant to the receipt of the repayment plan it is the duty of the resolution professional to submit the repayment plan along with his report before the DRT. Under section 112 of the Code.

(l) Pursuant to the receipt of the report DRT shall either approve the repayment plan and issue directions for the implementation of the same or orders to modify the repayment plan or rejects the repayment plan in which case the debtor and the creditor shall be entitled to file an application for bankruptcy.

1.4 Role played by the Insolvency Professionals in India as well as in Foreign Jurisdictions

1.4.1 Role played by Insolvency Professionals in India³⁵

- (a) the assets of the corporate debtor to be preserved and protected which includes the continued business operations of the corporate debtor;
- (b) the assets of the corporate debtor to be taken in immediate custody and control including the business records;
- (c) on the approval of the Committee of Creditors the interim finances to be raised;
- (d) Appointment according to the manner given by the Board of the accountants, legal or other professionals;
- (e) updated list of claims to be maintained;
- (f) meetings of Committee of Creditors to be convened and attended ;
- (g) according to section 29 of the Code, preparation of the information memorandum;
- (h) in order to put forward resolution plans invitation to all the prospective , investors, lenders and other persons to be given;
- (i) at the meeting of the Committee of Creditors presentment of all the resolution plans;
- (j) for avoidance of undervalued transactions in accordance with Chapter III , if any of the Code an application to be filed ; and
- (k) any such other actions as may be specified by the Board.

Alongside the duties, an IP is also obligated and subjected to a code of conduct, in respect of which he has to:

- (a) To discharge of his duties act in good faith

³⁵ Section 25, *Supra* Note 13.

- (b) The value of the assets of the debtor to be encouraged to be maximized
- (c) Utmost integrity and objectivity in discharge of the functions.
- (d) To be impartial and independent
- (e) Highest standard of professional competence and ethics to be used in order to discharge his functions.
- (f) Professional expertise to be continued to be upgraded
- (g) Quickly and efficiently performance of the duties
- (h) In performance of his duties applicable laws to be complied
- (i) In course of his professional activities confidentiality of information to be maintained unless law tells to disclose such information

1.4.2 Role played by Insolvency Professionals in United States of America

Six basic types of bankruptcy cases are provided under the Bankruptcy Code in USA . The details of two main bankruptcy cases along with the role of the trustees or Insolvency Professionals in these cases are enumerated below:

(a) Chapter 7 of the Bankruptcy Code in USA (bankruptcy leading to liquidation):

A type of bankruptcy where after the liquidation of the assets its proceeds are paid to the creditors by a court-appointed trustee or administrator. Such trustee or administrator shall be responsible for all the received property and has the right to investigate the financial affairs of the debtor. The accounts of the administration of the estate are to be filed with the United States Trustee and the Court. The trustee under this Chapter is authorized to employ, attorneys, appraisers, accountants, auctioneers and other professionals, whenever the need arises for their assistance, while carrying out his or her duties³⁶.

(b) Chapter 11 of the Bankruptcy Code in USA (Reorganization):

Court-approved plan of reorganization is a plan where reorganization is done by enterprises who wish to continue operating their business. The functions of the trustee of operating business and other functions are performed by the debtor, as “debtor in possession.” In a case where the court

³⁶ *Chapter 7- Bankruptcy Basics* retrieved from <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics>, last assessed on February 19, 2018.

is satisfied that repayment plan is done by fraud, dishonesty, incompetence, gross mismanagement or where such an appointment will be in the interest of creditors, any equity security holders, and other interests of the estate, the Court shall pass an order for appointment of a trustee. The trustee is required to file a plan “as soon as practicable” or, alternatively to file a report in accordance to section 1106 of the Bankruptcy Code explaining why a plan will not be filed or to recommend that the case be converted to another chapter or dismissed³⁷.

1.4.3 Role played by Insolvency Professionals in United Kingdom under United Kingdom Insolvency Laws

Other than liquidation of a company there are other possibilities as well which are discussed below along with the Insolvency Practitioners’ role in each of the cases³⁸:

(a) **Administration:** It is a time period during which the creditors are restrained from taking any action against the company. In this period licensed insolvency Practitioner after the appointment from the court lays down the proposals to face the financial difficulties of the company.

(b) **Administrative Receivership:** For the repayment of secured debts a receiver is appointed by certain creditors with the permission of the Administrative Receivership. There must be breach of the terms by the company for the appointment and after the appointment the assets of the company are sold off by the administrative receiver to protect the debenture holder due after meeting the amount for costs and claims of the creditors.

(c) **Company Voluntary Arrangement:** It is a formal agreement signed between the debtors and creditors upon the manner to be taken during the financial distress of the company. Though the company is under the direct control of the director but an insolvency professional shall conduct the arrangement pays off the claims of the creditors.

³⁷ *Role & Responsibility of Insolvency Professionals under The CODE-An Analysis*, retrieved from <http://icsiipa.com/Portals/0/Articles%20%28Sep%2C%202016%29.pdf>, last assessed on February 19, 2018.

³⁸ *Insolvency in brief- A guide to insolvency terminology and procedure*, retrieved from <https://www.pwc.co.uk/assets/pdf/insolvency-in-brief.pdf>, last assessed on February 19, 2018.

(d) Informal Arrangement: It is an agreement which has no legal binding and it is not an obligation on the part of the parties to honor such agreement. Such agreement is less expensive as compared to the insolvency proceedings and the insolvency practitioner has mere role of advising.

1.5 Conclusion

The introduction of a bill named “Fugitive Economic Offenders Bill, 2018”³⁹ in presence of various laws dealing with the protection of companies and individuals from being insolvent is to avoid criminal prosecution in case of economic offenders.

The aforesaid bill has eliminated an individual to present or defend any civil claim who is announced as a fugitive economic offender⁴⁰. Also the Bill has laid down provisions for civil court or tribunal to disallow a limited liability partnership or a company to present or defend any civil claim if:

- (a) an individual is declared a fugitive economic offender at the time filing application on company’s behalf; or
- (b) when majority shareholder of the company, person having controlling interest in the limited liability partnership, company’s key managerial person or promoter has been announced as a fugitive economic offender

The parties who had no idea about the properties they were interested in are actually considered as ‘proceeds of crime’ will now have a burden to proof that such properties they acquired *bona fide*. Further it is a difficult task for the third parties who are not the residents of India and allegedly have links with the criminal activity to prove.

³⁹ On March 12, 2018, the Indian government introduced the Fugitive Economic Offenders Bill, 2018 in the Lok Sabha, after receiving approval from the Cabinet, to address the issue of such economic offenders avoiding criminal prosecution.

⁴⁰ ‘Fugitive economic offender’ as any individual against whom a warrant for arrest in relation to economic offences, under various statutes, listed in a schedule to the Bill (“Scheduled Offence”) has been issued, on or after the enactment of this Bill, by any Indian court, and who:

- Has left India to avoid criminal prosecution, or
- Being abroad refuses to return to India to face criminal prosecution.

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- ¹ Gayatri Athare Mohapatra, “Summarizing the Insolvency and Bankruptcy Code, 2016”, August 2, 2016.
- ¹ *Overview of Insolvency Law in India including Corporate Insolvency*, retrieved from <http://www.caaa.in/Image/insolvency%20hb%201229.pdf>, last assessed on February 10, 2018.
- ¹ Rajeswari Sengupta, Anjali Sharma, Susan Thomas, “Evolution of the insolvency framework for non-financial firms in India”, *Indira Gandhi Institute of Development Research, Mumbai*, June 2016.
- ¹ *General Framework Of Insolvency Laws In India*, retrieved from http://www.iica.in/images/confdetailpaper/Country_Report_on_Corporate_Insolvency_laws.pdf, last assessed on February 18, 2018.
- ¹ Vanessa Finc, “The Measures of Insolvency Law”, *Oxford Journal of Legal Studies*, Vol. 17, No. 2 (Summer, 1997), pp. 227-251.
- ¹ *The Insolvency and Bankruptcy Code*, 2016.
- ¹ *Ibid.*
- ¹ *Corporate Insolvency Resolution Process under the Bankruptcy Code and its impact on the Companies*, retrieved from https://www.thecompaniesact2013.com/uploads/1481524464_ibc%20Article%201.pdf, last assessed on February 18, 2018.
- ¹ John Armour, “The Law and Economics of Corporate Insolvency: A Review”, *ESRC Centre for Business Research University of Cambridge*, March 2001.
- ¹ *Ibid.*
- ¹ *Ibid.*
- ¹ Section 7, *The Insolvency and Bankruptcy Code*, 2016.
- ¹ MANU/NL/0124/2017.
- ¹ Jyoti Singh and Vishnu Sharma, *Insolvency and Bankruptcy Code, 2016*, Bloomsbury Publishing India Pvt. Ltd, New Delhi, 2017.
- ¹ Order dated 12 May, 2015 of the NCLT, Principal Bench in *Indian Bank v M/s Athena Demwe Power Ltd* in Company Petition No.55 of 2017.
- ¹ MANU/NL/0020/2017.
- ¹ *Supra* Note 15.
- ¹ Judgement dated 1 May, 2017 of the NCLAT in Company Appeal (AT) (Insolvency) No. 09 of 2017.
- ¹ *Insolvency and Bankruptcy (Application to Adjudication Authority) Rules*, 2016.
- ¹ MANU/SCOR/26439/2017.
- ¹ *Supra* Note 15.
- ¹ *Supra* Note 13.
- ¹ The Adjudicating Authority shall appoint an interim resolution professional within fourteen days from the insolvency commencement date.
- ¹ The interim resolution professional shall after collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors.
- ¹ The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.
- ¹ *Insolvency And Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016*, retrieved from http://ibbi.gov.in/webadmin/pdf/legalframework/2017/Oct/CIRP%20Regulations%20-%20after%202nd%20Amendment_2017-10-24%2017:32:27.pdf, last assessed on February 19, 2018.
- ¹ A debtor who commits a default may apply, either personally or through a resolution professional, to the Adjudicating Authority for initiating the insolvency resolution process, by submitting an application.
- Where the debtor is a partner of a firm, such debtor shall not apply under this Chapter to the Adjudicating Authority in respect of the firm unless all or a majority of the partners of the firm file the application jointly.

- ¹ The Debts Recovery Tribunals have been established by the Government of India under an Act of Parliament, The Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 (51 Of 1993) for expeditious adjudication and recovery of debts due to banks and financial institutions.
- ¹ *Supra* Note 15.
- ¹ *Supra* Note 15.
- ¹ *Supra* Note 15.
- ¹ The Adjudicating Authority shall, within fourteen days from the date of submission of the report under section 99 pass an order either admitting or rejecting the application referred to in section 94 or 95, as the case may be.
- ¹ The Adjudicating Authority shall by an order approve or reject the repayment plan on the basis of the report of the meeting of the creditors submitted by the resolution professional under section 112: Provided that where a meeting of creditors is not summoned, the Adjudicating Authority shall pass an order on the basis of the report prepared by the resolution professional under section 106. (2) The order of the Adjudicating Authority approving the repayment plan may also provide for directions for implementing the repayment plan. (3) Where the Adjudicating Authority is of the opinion that the repayment plan requires modification, it may direct the resolution professional to re-convene a meeting of the creditors for reconsidering the repayment plan.
- ¹ Section 25, *Supra* Note 13.
- ¹ *Chapter 7- Bankruptcy Basics* retrieved from <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics>, last assessed on February 19, 2018.
- ¹ *Role & Responsibility of Insolvency Professionals under The CODE-An Analysis*, retrieved from <http://icsiipa.com/Portals/0/Articles%20%28Sep%2C%202016%29.pdf>, last assessed on February 19, 2018.
- ¹ *Insolvency in brief- A guide to insolvency terminology and procedure*, retrieved from <https://www.pwc.co.uk/assets/pdf/insolvency-in-brief.pdf>, last assessed on February 19, 2018.
- ¹ On March 12, 2018, the Indian government introduced the Fugitive Economic Offenders Bill, 2018 in the Lok Sabha, after receiving approval from the Cabinet, to address the issue of such economic offenders avoiding criminal prosecution.
- ¹ 'Fugitive economic offender' as any individual against whom a warrant for arrest in relation to economic offences, under various statutes, listed in a schedule to the Bill ("Scheduled Offence") has been issued, on or after the enactment of this Bill, by any Indian court, and who:
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