Critique of the Insolvency & Bankruptcy Code, 2016

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This paper aims to examine the institutional framework contemplated by the Code, and highlight the opportunities and challenges posed in such framework. The same is segregated into – Adjudicating Authorities (for individuals, partnership firms, and corporate persons), Bankruptcy Trustees, Committee of Creditors, Insolvency Professional Agencies and Insolvency Professionals, Information Utility, and finally the Insolvency and Bankruptcy Board of India. The paper outlines the contemplated role and functions of each while providing a critique inline.

Introduction

Debt is a necessity in the modern day age, whether for individuals, corporates or even the government, as it fulfills the need to fund investments or

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expenses. Debt is good when it can be serviced and repaid as per the agreed terms, and it is within the means of the debtor to do so easily and conveniently. Debtors could default on their payment or repayment obligations, and in certain situations it may be because they are technically insolvent or bankrupt.

The statement of objects and reasons for the Insolvency & Bankruptcy Code, 2016 (the "Code") recognizes that:

> "(t)here is no single law in India that deals with insolvency and bankruptcy" and that there are several "statutes (that) provide for creation of multiple fora such as the Board for Industrial and Financial Reconstruction (the "BIFR"), the Debt Recovery Tribunal (the "DRT"), the National Company Law Tribunal (the "NCLT"), and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. Individual bankruptcy and insolvency is dealt with under the Presidential Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920 and is dealt with by the courts. The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, and therefore the proposed legislation."[1] (Emphasis supplied).

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[1] The full text of the Statement of Objects and Reasons is as follows:
"(t)here is no single law in India that deals with insolvency and bankruptcy. Provisions relating to insolvency and bankruptcy for companies can be found in the Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013. These statues provide for creation of multiple fora such as the Board for Industrial and Financial Reconstruction (BIFR), Debt Recovery Tribunal (DRT) and National Company Law Tribunal (NCLT) and their respective Appellate Tribunals. Liquidation of companies is handled by the High Courts. Individual bankruptcy and insolvency is dealt with under the Presidential Towns Insolvency Act 1909 and the Provincial Insolvency Act, 1920 and is dealt with by the courts. The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, and therefore the proposed legislation.

The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve ease of doing business, and facilitate more investments leading to higher economic growth and development."

The Code seeks to provide for designating the NCLT and DRT as the Adjudicating Authorities for corporate persons and firms and individuals, respectively, for resolution of insolvency, liquidation and bankruptcy. The Code separates commercial aspects of

Hence, resolving multiplicity of laws on the subject, streamlining the number of fora dealing with the subject, and finally, ensuring an adequate, effective and speedy resolution are the key objectives of the Code.

This paper aims to examine the institutional framework contemplated by the Code, and highlight the opportunities and challenges posed in such framework.

The institutional framework contemplated by the Code that has been analyzed and examined in this paper is segregated into – Adjudicating Authorities (for individuals, partnership firms, and corporate persons), Bankruptcy Trustees, Committee of Creditors, Insolvency Professional Agencies and Insolvency Professionals, Information Utility, and finally the Insolvency and Bankruptcy Board of India. The paper outlines the contemplated role and functions of each while providing a critique inline.

A. Adjudicating Authority

Section 78(3) of the Code states that the Adjudicating Authority for the purposes of Part III Insolvency Resolution and Bankruptcy For Individuals and Partnership Firms shall be the Debt Recovery Tribunal (DRT) constituted under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. This is in contrast to the district courts dealing with insolvency under the Provincial Insolvency Act, 1920 (other than cities governed by the Presidency Towns Insolvency Act, 1909, viz. Madras, Calcutta and Bombay where the respective High Courts have the jurisdiction).[2]

Constituting DRTs as the adjudicating authority for individuals and partnership firms will only add to the beleaguered status of DRTs that were set up primarily for aiding in summary proceedings for recovery of debts due to banks and financial institutions. The current DRTs set up across the country have huge pendency of recovery proceedings, and are already beset with

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insolvency and bankruptcy proceedings from judicial aspects. The Code also seeks to provide for establishment of the Insolvency and Bankruptcy Board of India ("Board") for regulation of insolvency professionals, insolvency professional agencies and information utilities. Till the Board is established, the Central Government shall exercise all powers of the Board or designate any financial sector regulator to exercise the powers and functions of the Board. Insolvency professionals will assist in completion of insolvency resolution, liquidation and bankruptcy proceedings envisaged in the Code. Information Utilities would collect, collate, authenticate and disseminate financial information to facilitate such proceedings. The Code also proposes to establish a fund to be called the Insolvency and Bankruptcy Fund of India for the purposes specified in the Code."

[2] Section 78(3), Insolvency and Bankruptcy Code, 2016.

inadequate infrastructure and staffing.[3] Whilst multiple benches have been set up, DRTs are largely set up and operating in state capitals. Apart from adjudicating on debt recovery proceedings, they also consider appeals made against actions taken under SARFAESI Act vide Section 17 of such Act.

DRTs are already viewed as not having delivered on their primary role effectively. Clearly, this creaking and overburdened framework is ill-equipped to deal with the role envisaged for resolution of insolvency and bankruptcy of individuals and partnership firms, and will be further inundated with both existing and new matters that make for significant hurdles in justice delivery (both for the primary role of DRTs and also for the role envisaged under the Code). In comparison or as an alternative, civil courts at the district level may have been better fora to act as the adjudicating authority, given the multitude of matters that can arise since the parties comprised are individuals and partnership firms, besides ensuring that the judicial forum is available at a place closest to where the individual resides or the partnership firm is constituted.

Finally, it is submitted that a Judicial Impact Assessment should be especially undertaken in this respect. A Judicial Impact Assessment is a process where the Government anticipates the likely cost of and the infrastructure necessary for the implementation of a legislation to ensure the timely delivery of justice to litigants.[4] Stock must be taken of the pending matters under the Presidential Towns Insolvency Act and the Provincial Insolvency Act that would be transferred to the adjudicating authority that is finally designated, and for fresh matters that will arise, and the same should be taken

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[3] *See*, following website for data published by DRT/DRAT, which mentions that pending matters in April 2016 before DRT are 50511 matters (for original application pendency) and 19430 matters (for securitization application pendency) [Source: *http://drt.gov.in/Pendency.aspx?page=DRTOAMonthWiseDisposal*], whilst in the same month, the disposal of matters is 796 (for original applications) and 294 (for securitization applications) [Source: *http://drt.gov.in/OADisposal.aspx?page=DRTOAMonthWiseDisposal*]. Further following news articles: http://timesofindia.indiatimes.com/business/india-business/Forget-grounding-defaulters-DRTs-ill-equipped-for-recovery/articleshow/51386635.cms; http://www.dnaindia.com/money/report-average-annual-loan-recovery-rate-under-debt-recovery-tribunal-estimated-at-25-report-2188028; http://articles.economictimes.indiatimes.com/2016-03-10/news/71382272_1_drts-debt-recovery-lakh-crore; http://www.thehindubusinessline.com/economy/unsettled-cases-with-debt-recovery-tribunals-on-the-rise-economic-survey/article8286181.ece; http://www.livemint.com/Politics/hNLONGGdDhODVNmiRyxHlM/Pending-cases-pile-up-at-debt-recovery-tribunals.html.

[4] *See*, Report of the Task Force on Judicial Impact Assessment (June 15, 2008), *available at*: http://lawmin.nic.in/doj/justice/judicialimpactassessmentreportvol1.pdf, (Last visited on November 24, 2015) and N.R. Madhava Menon, *Judicial Impact Assessment and Timely Delivery of Justice*, The Hindu (June 27, 2008), *available at* http://www.thehindu.com/todays-paper/tp-opinion/judicial-impact-assessment-and-timely-delivery-of-justice/article1285106.ece (Last visited on November 23, 2015).

into account before bringing the law into force. Undertaking Judicial Impact Assessment may also be necessary for the Adjudicating Authority constituted for corporate persons, i.e. the NCLT and its appellate body, given the various references that would arise before it under the Companies Act, 2013 and the Code, and the transfer of matters from the various forums NCLT replaces, to ensure adequate staffing and constitution of multiple benches of NCLT.

B. Bankruptcy Trustee

Section 79(9) of the Code defines "bankruptcy trustee" to be the insolvency professional appointed as a trustee for the estate of the bankrupt under Section 125.[5] It is noted that the final report of the Bankruptcy Law Reform Committee states that the Bankruptcy Trustee is responsible for administration of the estate of the bankrupt and for distribution of the proceeds on the basis of priority.[6] The report does not dwell on the reason or logic for designating the administration and distribution role to a trustee.

The key legal concern around the concept of bankruptcy trustee is that the Code treats the insolvency professional so appointed as a 'trustee'. The law of trust (as contained in the Indian Trusts Act, and various case laws), and the role, responsibilities and duties of a trustee being imported into the Code (and hence operating in addition to the statutory responsibilities and duties specified in the Code), if unintended, can result in significant challenges to the mode and manner in which the insolvency professional is required to discharge the role, responsibilities and duties as a bankruptcy trustee. The unintended nature of designating the role as a trustee is discernable from the BLRC report, which has no mention made of the logic or reason for doing so. By way of illustration, any stakeholder could claim being a beneficiary for whom the bankruptcy trustee is responsible, and could prompt other stakeholders to raise rival demands. This would stall and indeed stymie the process that the bankruptcy trustee is charged with.

Designating the office as that of a bankruptcy administrator, who would be bound by the statutory responsibilities and duties specified in the Code (and also avoid unintended applicability of the law of trust), would be more appropriate and conducive towards the objectives envisaged.

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[5] Section 79(9), Insolvency and Bankruptcy Code, 2016.

[6] *See*, SUMMARY OF RECOMMENDATIONS OF THE BANKRUPTCY LAW REFORM COMMITTEE REPORT, *available at* http://finmin.nic.in/reports/BriefBLRCReport04112015.pdf (Last visited on November 16, 2015) and BANKRUPTCY LAW REFORM COMMITTEE REPORT VOLUME 1: RATIONALE AND DESIGN, *available at* http://finmin.nic.in/reports/BLRCReportVol1_04112015.pdf (Last visited on November 23, 2015).

C. Committee of Creditors

In case of corporate insolvency resolution process, the Committee of Creditors is constituted by the interim resolution professional vide Section 21 of the Code. The composition of the Committee of Creditors is required to be all the financial creditors of the corporate debtor, excluding related parties of the corporate debtor, and also the operational creditors. Financial creditors who are also operational creditors will be given representation on the committee of creditors only to the extent of their financial debts owed. Members are required to have the capability to assess the commercial viability of the corporate debtor and the willingness to modify the terms of the debt contracts in negotiations between the creditors and the corporate debtor. The Committee shall also have the power to call for information from the resolution professional. All decisions of the Committee shall be taken by a vote of not less than seventy-five per cent of the voting share.[7]

Exclusion of operational creditors has been explained in the Notes to Clauses of the Code as being on account of such creditors typically not being able to decide on matters relating to commercial viability of the corporate debtor, and their usual reluctance to take the risk of restructuring their debts in order to make the corporate debtor a going concern.[8] Nevertheless, in order to ensure that the financial creditors do not treat the operational creditors unfairly, a resolution plan is required to ensure that the operational creditors receive an amount not less than the liquidation value of their debt (assuming the corporate debtor were to be liquidated).

In the event there are no financial creditors for a corporate debtor, the composition and decision-making processes of the corporate debtor shall be specified by the Insolvency and Bankruptcy Board.

Section 22 provides that one of the main functions of the Committee of Creditors is the appointment of the resolution professional, and provides that at the first meeting of the Committee of Creditors, the Committee may decide to either appoint the interim resolution professional as the resolution professional or propose the name of another insolvency professional to be appointed as the resolution professional.[9] The Notes to Clauses recognize that the Committee of Creditors is likely to be most incentivized to select the person who is best suited for the task. As the fees payable to the resolution professional will in all probability be taken out of the company's

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7 Section 21, Insolvency and Bankruptcy Code, 2016.
8 *See*, Clause 21(2) in the Notes on Clauses appended to the Bill.
9 Section 22, Insolvency and Bankruptcy Code, 2016.

assets (which will eventually affect the final repayment to the creditors), the committee tends to choose a person who is familiar with the company's business, activities or assets, or has skills, knowledge or experience in handling the particular circumstances of the case.[10]

The role of the Committee of Creditors is also enunciated by requiring the resolution professional to take actions only with the prior approval of the committee as per the terms of section 28.[11] Finally, it is the resolution plan that the Committee of Creditors receives through the resolution professional and determines whether to approve of the same or not,[12] or makes a determination to liquidate the corporate debtor.[13] The resolution professional notifies the Adjudicating Authority accordingly, for necessary orders.

In case of insolvency resolution and bankruptcy process for individuals and partnership firms, the Committee of Creditors is constituted by the bankruptcy trustee under Section 134.[14] The provisions in this behalf are not *in parimateria* with the provisions governing Committee of Creditors in the corporate insolvency resolution process.

There are several key differences between the two. For starters, the composition of the Committee is determined solely by the Bankruptcy Trustee and the provisions thereat clearly mention that a creditor shall not be entitled to vote in respect of a debt for an unliquidated amount, or any debt the value of which is not ascertainable, except where the Bankruptcy Trustee

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[10] *See,* para 2 under Clause 22 in the Notes on Clauses appended to the Bill.

[11] Section 28(1), Bankruptcy and Insolvency Code, 2016. This is required on items such as: "(a) raising any interim finance in excess of the amount as may be decided by the committee of creditors in their first meeting; (b) creating any security interest over the assets of the corporate debtor; (c) changing the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company; (d) record any change in the ownership interest of the corporate debtor; (e) giving instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their first meeting; (f) undertaking any related party transaction; (g) amending any constitutional documents of the corporate debtor; (h) delegating its authority to any other person; (i) disposing of or permitting the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties; (j) making any change in the management of the corporate debtor or its subsidiary; (k) transferring rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business; (l) making changes in the appointment or terms of contract of such personnel, as specified by the committee of creditors; or (m) making changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor."

[12] Section 30, Bankruptcy and Insolvency Code, 2016.

[13] Section 33(2), Bankruptcy and Insolvency Code, 2016.

[14] Section 134, Bankruptcy and Insolvency Code, 2016.

agrees to assign a value to such debt for the purposes of entitling the creditor to vote, and that the following creditors shall not be entitled to vote under this section, namely :– (*a*) creditors who are not mentioned in the list of creditors under Section 132 and those who have not been given a notice by the bankruptcy trustee; (*b*) creditors who are associates of the bankrupt.

Even in terms of oversight, the Bankruptcy Trustee is required to convene a meeting of the Committee of Creditors on completion of the administration and distribution of the estate of the bankrupt in accordance with the provisions of Chapter V. The Bankruptcy Trustee is to provide the Committee of Creditors with a report of the administration of the estate of the bankrupt in the meeting of the said committee. The Committee of Creditors shall approve the report submitted by the Bankruptcy Trustee under sub-section (2) within seven days of the receipt of the report and determine whether the Bankruptcy Trustee should be released under Section 148.

Whilst there is an element of control specified in Section 153 of the Code,[15] what is also noteworthy is that the Code proceeds to recognize the ability of the Bankruptcy Trustee to make decisions without requiring approval, wherein the Committee of Creditors may then ratify the actions of the Bankruptcy Trustee, only where the Bankruptcy Trustee has acted due to an urgency and has sought ratification without undue delay. This provision is absent in the corporate insolvency resolution process.

All these end up not providing the same level confidence and credibility for an effective role of creditors in case of insolvency resolution process for

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[15] The section provides that:
"The bankruptcy trustee for the purposes of this Chapter may after procuring the approval of the committee of creditors,— (*a*) carry on any business of the bankrupt as far as may be necessary for winding it up beneficially; (*b*) bring, institute or defend any legal action or proceedings relating to the property comprised in the estate of the bankrupt; (*c*) accept as consideration for the sale of any property a sum of money due at a future time subject to certain stipulations such as security; (*d*) mortgage or pledge any property for the purpose of raising money for the payment of the debts of the bankrupt; (*e*) where any right, option or other power forms part of the estate of the bankrupt, make payments or incur liabilities with a view to obtaining, for the benefit of the creditors, any property which is the subject of such right, option or power; (*f*) refer to arbitration or compromise on such terms as may be agreed, any debts subsisting or supposed to subsist between the bankrupt and any person who may have incurred any liability to the bankrupt; (*g*) make compromise or other arrangement as may be considered expedient, with the creditors; (*h*) make compromise or other arrangement as he may deem expedient with respect to any claim arising out of or incidental to the bankrupt's estate; (*i*) appoint the bankrupt to— (*i*) supervise the management of the estate of the bankrupt or any part of it; (*ii*) carry on his business for the benefit of his creditors; (*iii*) assist the bankruptcy trustee in administering the estate of the bankrupt."

individuals and partnership firms that the Code has recognized and provided expressly *vis-à-vis* insolvency resolution process for corporates.

A further aspect which the Code omits *vis-à-vis* the Committee of Creditors is in the case of liquidation of corporate persons when an insolvency professional is appointed as the liquidator. The role is intrinsically driven by the Adjudicating Authority, and can become beset with the same issues one has seen in the current regime governing winding up and liquidation. The interest of creditors when the corporate person has to be liquidated cannot be understated, after all it is the release of economic value that is embedded in the assets comprising the enterprise which repays the creditor, besides releasing such assets for more productive use.

That the liquidator is required to only consult all stakeholders – which would include the creditors – is articulated in the following manner: *The liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds under section 53: Provided that any such consultation shall not be binding on the liquidator.*[16] There is a provision that empowers the creditors to require the liquidator to provide them any financial information relating to the corporate debtor in such manner as may be specified, and the liquidator is required to provide information to such creditors who have requested for such information within a period of three days from the date of such request. However, he has also been given the power to refuse to provide such information by providing reasons for the same.[17]

There will undoubtedly be situations where the liquidator needs to be independent of the creditors,[18] and in those limited instances the Adjudicating Authority can be the final word. But for the day-to-day management and disposal of assets, the Committee of Creditors can indeed play an important and essential role in the overseeing and functioning of the liquidator.

In a similar manner, the Code omits the role that the Committee of Creditors can play in respect of insolvency resolution for individuals. The creditors are expected to provide information and receive information including in the resolution plan (except those who have initiated the insolvency process), while the resolution professional and the Adjudicating Authority drive the process.

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[16] Section 35(2), Insolvency and Bankruptcy Code, 2016.

[17] Sections 37(2) and (3), Insolvency and Bankruptcy Code, 2016.

[18] A couple of instances that frequent arise are: avoidance being sought of extortionate credit transactions under Section 50 of the Code or rejection of claim of a person being a creditor under Section 40.

One particular item that is reiterated in this context is that the Notes on Clauses which recognize that – *the committee of creditors are likely to be most incentivized to select the person who is best suited for the task — as the fees payable to the resolution professional will in all probability be taken out of the company's assets (which will eventually affect the final repayment to the creditors), they will often choose a person who is familiar with the company's business, its activities or assets or has skills, knowledge or experience in handling the particular circumstances of a case*[19] – holds true for insolvency resolution process for individuals and partnership firms too, as well as for the Bankruptcy Trustee and the liquidators of corporate persons. It is recommended that the provisions be aligned in the chapter dealing with insolvency resolution process for individuals and partnership firms with that of corporate insolvency resolution process in respect of the Committee of Creditors, and the omissions outlined above be addressed.

D. New set of professionals underpinning the resolution, insolvency and bankruptcy framework contemplated by the Code

As per Section 3(20), "insolvency professional agency" means any person registered with the Board under Section 201 as an Insolvency Professional Agency.[20]

Sections 199 prohibits any person from carrying on its business as an Insolvency Professional agency and enroll Insolvency Professionals as its members except under and in accordance with a certificate of registration issued in this behalf by the Board. Section 200 lays down the principles governing registration of Insolvency Professional Agencies. It provides that the Board must have regard to the following principles: a) to promote the professional development of and regulation of Insolvency Professionals; b) to promote the services of competent Insolvency Professionals to cater to the needs of debtors, creditors and such other persons as may be specified; c) to promote good professional and ethical conduct amongst Insolvency Professionals; d) to protect the interests of debtors, creditors and such other persons as may be specified; e) to promote the growth of Insolvency Professional Agencies for the effective resolution of insolvency and bankruptcy processes under the Code.[21]

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[19] *See*, para 2 under Clause 22 in the Notes on Clauses appended to the Bill.
[20] Section 3(20), Insolvency and Bankruptcy Code, 2016.
[21] Section 199, Insolvency and Bankruptcy Code, 2016.

As per Section 3(19) of the Code, an "insolvency professional" means a person enrolled with an Insolvency Professional Agency as its member and registered with the Board as an Insolvency Professional under Section 207.[22]

Section 207 prohibits any person from rendering his services as an Insolvency Professional under this Code without being enrolled as a member of an Insolvency Professional Agency. It states that every Insolvency Professional shall, after obtaining the membership of any Insolvency Professional Agency, register himself with the Board within such time, in such manner and on payment of such fee, as may be specified.[23]

Section 208 lays down the functions and obligations of Insolvency Professionals. An Insolvency Professional must take action with respect to the following matters: (a) a fresh start process under Chapter II of Part III; (b) individual insolvency resolution process under Chapter III of Part III; (c) corporate insolvency resolution process under Chapter II of Part II; (d) individual bankruptcy process under Chapter IV of Part III; and (e) liquidation of a corporate debtor firm under Chapter III of Part II.[24]

In essence, the various roles contemplated in the Code *viz*., Resolution Professional (for individuals and partnership firms,[25] and for corporate persons[26]), Bankruptcy Trustee (for individuals and partnership firms[27]), and Liquidator (for corporate persons[28]) are to be played by the Insolvency Professional.

This makes the Insolvency Professional a cornerstone and a very essential player within the various resolution and insolvency processes contemplated by the Code.

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[22] Section 3(19), Insolvency and Bankruptcy Code, 2016.

[23] Section 207, Insolvency and Bankruptcy Code, 2016.

[24] Section 208, Insolvency and Bankruptcy Code, 2016.

[25] As per Section 79(20), a "resolution professional" means insolvency professional appointed under this Part (Part III) as a resolution professional for conducting the fresh start process or insolvency resolution process.

[26] As per Section 5(27), a "resolution professional", for the purposes of this Part (Part II Insolvency Resolution and Liquidation for Corporate Persons), means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim-resolution professional.

[27] As per Section 79(8), a "bankruptcy trustee" means the insolvency professional appointed as a trustee for the estate of the bankrupt under section 125.

[28] As per Section 5(18), a "liquidator" means an insolvency professional appointed as a liquidator in accordance with the provisions of Chapter III or Chapter V of this Part (Part II Insolvency Resolution and Liquidation For Corporate Persons), as the case may be.

What is also noteworthy is the role of the Insolvency Professional Agency contemplated by the Code. Section 204 provides that an Insolvency Professional Agency shall perform the following functions:

(a) Grant membership to persons who fulfil all requirements set out in its bye-laws on payment of membership fee;

(b) Lay down standards of professional conduct for its members;

(c) Monitor the performance of its members;

(d) Safeguard the rights, privileges and interests of Insolvency Professionals who are its members;

(e) Suspend or cancel the membership of Insolvency Professionals who are its members on the grounds set out in its bye-laws;

(f) Redress the grievances of consumers against Insolvency Professionals who are its members; and

(g) Publish information about its functions, list of its members, performance of its members and such other information as may be specified by regulations.[29]

Section 205 provides for the subject matter of the bye-laws of Insolvency Professional Agencies. It states that every Insolvency Professional Agency, after obtaining the approval of the Board, shall make bye-laws to provide for:

(a) the minimum standards of professional competence for its members;

(b) the standards for professional and ethical conduct of its members;

(c) requirements for enrolment of persons as its member which shall be non-discriminatory;

(d) the manner of granting membership to persons who fulfill its requirements;

(e) setting up of a governing board for its internal governance and management in accordance with the regulations specified by the Board;

(f) the information required to be submitted by its members including the form and time for submitting such information;

(g) the specific classes of persons to whom services shall be provided at concessional rates or for no remuneration by its members;

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[29] Section 204, Insolvency and Bankruptcy Code, 2016.

(h) the grounds on which penalties may be levied upon its members and the manner thereof;

(i) a fair and transparent mechanism for redressal of grievances against its members;

(j) the grounds under which the Insolvency Professionals may be expelled from its membership;

(k) the quantum of fee and the manner of collecting fee for inducting persons as its members;

(l) the curriculum for enrolment of persons as its members which shall not be less than the curriculum specified by the Board;

(m) the manner of conducting examination of the curriculum specified by the Board for enrolment of Insolvency Professionals;

(n) the manner of monitoring and reviewing the working of Insolvency Professionals who are its members;

(o) the duties and other activities to be performed by its members;

(p) the amount of registration bond and performance security to be furnished by an Insolvency Professional for the performance of his duties, and the form and manner in which such registration bond and performance security shall be furnished to the Insolvency Professional agency;

(q) the manner of conducting disciplinary proceedings against its members and imposing penalties; and

(r) the manner of utilizing the amount received as registration bond or performance security in case where penalty imposed against any Insolvency Professional remains unpaid.[30]

The exposition of these makes clear that the Insolvency Professional Agency is contemplated on lines akin to how a stock exchange operates (in having stockbrokers as its members and regulating their activities and conduct of business), with Insolvency Professionals becoming members of such an agency and being governed by its bye-laws on the matters specified.

Some thoughts and concerns for consideration are as under:

- The draft of the rules and norms governing registration and functioning of Insolvency Professional Agencies and Insolvency Professionals and the draft byelaws (or model byelaws to ensure uniformity of

[30] Section 205, Insolvency and Bankruptcy Code, 2016.

approach amongst Insolvency Professional Agencies) should hence be issued for public comments.

- The interest of persons interested in establishing such agencies or becoming such professionals should be duly assessed and encouraged, or else the framework may lack sufficient number of such agencies and professionals.
- An additional concern would be that an Insolvency Professional should not gravitate towards only one role (among the four contemplated), and should be required to undertake each of such roles, regardless of whether such diversity is ensured continually or periodically (semi-annually or annually)and fresh mandates/roles should be barred in roles which are disproportionate/excessive to required norms.
- The final concern is regarding a major disincentive for persons to become Insolvency Professionals or an Insolvency Professional Agency – the concept of performance bond/security that is contemplated in the Code. Whilst the Bill in Section 206 provided for posting of a performance bond/security, following the report of the Joint Parliamentary Committee, this requirement has been eliminated.[31]

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[31] The provision as it stood under the Bill, stated that:

"On the commencement of an insolvency resolution process, where an insolvency resolution professional is appointed:

(a) the insolvency professional agency where such insolvency professional is registered as a member, shall post a performance bond with the Board in such form and manner as may be specified; and

(b) the insolvency professional shall deposit with the insolvency professional agency a performance security of an amount and in a manner as specified.

The performance bond so posted shall provide for:

(a) the concerned insolvency professional agency to act as a surety for the obligations of the insolvency professional and to be jointly and severally liable for losses in relation to any person whose interests are prejudicially affected by any act of fraud or gross misconduct of the insolvency professional; and

(b) the payment of claims in respect of losses mentioned in (a), which shall be equal in amount, to at least the value of the assets of the corporate debtor or the debtor as on the insolvency commencement date or the insolvency commencement date of the debtor, as the case may be.

This creates three levels of issue: firstly, the performance bond (from the insolvency professional agency) is in favour of the Insolvency & Bankruptcy Board. This could have been fashioned as being in favour of the Adjudicating Authority, since any accusation made of fraud or gross misconduct are bound to arise before the Adjudicating Authority, which would also adjudicate over such accusations.

Secondly, the insolvency professional agency is made into a surety and jointly and severally liable, rather than such liability being that of the insolvency professional. It adds an unnecessary layer within a chain of direct accountability, and also can be a disincentive for formation and establishment of insolvency professional agencies.

E. Creation of an Information Utility by the Code

As per section 3(21), "information utility" means a person who is registered with the Board as an information utility under Section 210.[32]

Section 210 provides that the form and manner of an application for registration of an information utility may be specified. It puts a time limit of 7 days for acknowledgement of the application. On receipt of the application, the Board may, grant a certificate of registration to the applicant, or reject, by order, such application. It provides that no order rejecting the application shall be made without giving the applicant an opportunity of being heard, and that every such order shall be communicated to the applicant within a period of fifteen days. If the application is accepted, the Board may issue a certificate of registration to the applicant in such form and manner and subject to such terms and conditions as may be specified. The Board may renew such certificate from time to time in such manner and on payment of such fee as may be specified.[33]

It further provides that the Board may, by order, suspend or cancel the certificate of registration granted to an information utility on any of the following grounds: (a) if it has obtained registration by making a false statement or misrepresentation or by any other unlawful means; (b) if it has failed to comply with the requirements of the regulations made by the Board; (c) if it has contravened any of the provisions of the Code, or the rules made thereunder; (d) any other ground as may specified. It provides that no order shall be made under this sub-section without giving the information utility concerned a reasonable opportunity of being heard. It also provides that no

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Finally, the extent of moneys to be secured by the performance bond has been specified as being equal in amount to at least the value of assets of the corporate debtor or the debtor. This extent of security having to be furnished will result in a very high entry barrier, if not discourage entry itself - for persons desirous of being insolvency professionals or insolvency professional agencies. The financial implications of requiring such extent of security need to be reconsidered, given that corporates (or even individuals), faced with prospects of debt that is rendering them insolvent or bankrupt or requiring resolution can have very high quantum of assets on their books/balance sheet.

While the objective of requiring direct accountability of the insolvency professional for fraud or gross misconduct cannot be denied, it is submitted that the current mode and manner of specifying the same renders the keystone/cornerstone of the insolvency, bankruptcy and resolution framework in form of insolvency professional and insolvency professional agency an unviable proposition and hence one should not expect persons to enter this activity as a reasonable prudent business decision with the current requirements remaining in place."

[32] Section 3(21), Insolvency and Bankruptcy Code, 2016.

[33] Section 210, Insolvency and Bankruptcy Code, 2016.

such order shall be passed by any member except whole-time members of the Board.[34]

The role and responsibility of an information utility is provided in Section 214, which states that an information utility has the following obligations:

(a) Create and store financial information in a universally accessible format;

(b) Accept electronic submissions of financial information from persons who are under obligation to submit financial information under sub-section (2) of Clause 215, in such form and manner as may be specified;

(c) Accept, in specified form and manner, electronic submissions of financial information from persons who intend to submit such information;

(d) Meet such minimum service quality standards as may be specified;

(e) Get the information received from various persons authenticated by all concerned parties before storing such information;

(f) Provide access to the financial information stored by it to any person who intends to access such information in such manner as may be specified;

(g) Publish such statistical information as may be specified.[35]

Section 215 provides that any person who intends to submit financial information to the information utility or access the information from the information utility shall pay such fee and submit information in such form and manner as may be specified. It also provides that a financial creditor or, as the case may be, an operational creditor shall submit financial information and information relating to secured assets in such form and manner as may be specified.[36]

Section 216 provides for the rights of persons submitting financial information to an information utility. They shall have the following rights: (a) to correct errors or update or modify any financial information so submitted in such manner and within such time as may be specified; and (b) to demand the information utility to remove from its records the information

[34] Section 210, Insolvency and Bankruptcy Code, 2016.
[35] Section 214, Insolvency and Bankruptcy Code, 2016.
[36] Section 215, Insolvency and Bankruptcy Code, 2016.

so submitted, with the concurrence of all counterparties to any contracts or agreements, in such manner and within such time as may be specified.[37]

The information utility envisaged as above and in the Code adds to the number of repositories of information that are already present, and does not serve to consolidate, or in essence become a super-repository.

Specifically, under the Companies Act, the Registrar of Companies is already a key repository of vital and important records that companies are required to file. In terms of limited liability partnerships (LLPs), a similar registrar of LLPs plays a similar role especially within the register of charges that records security interest. For pledge of shares, the depositories established under the Depositories Act, 1996 are the repository of information on such pledges (apart from being a repository of ownership of securities). In the financial services sector, there are the credit information bureaus registered and regulated by the Credit Information Companies Act, 2005, a central registry for recording security interest (presently equitable mortgages in favour of banks but proposed to be expanded for a variety of assets that are secured) established under the Securitisation and Asset Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), and the Central Repository of Information on Large Credits (CRILC)[38] constituted by the Reserve Bank of India, which capture security or credit facility details. Finally, there are various registries under the laws governing civil aviation,[39] maritime activities,[40] motor vehicles,[41] and so on that both record ownership and security interest (and hence relevant for secured financing transactions involving such assets) as also the Sub-registrar of assurances in every state under the Inspector General of Stamps & Registration,[42] that record ownership of land, buildings, property and security interest therein (and hence relevant when security is taken in the form of English mortgage or registered mortgage and in some states filings made for equitable mortgages).

By adding the Information Utility as a further repository, without requiring the existing repositories to pool the available information and records

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[37] Section 216, Insolvency and Bankruptcy Code, 2016.

[38] See, *Master Circular - Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances* bearing number RBI/2015-16/101 DBR.No.BP. BC.2/21.04.048/2015-16 dated July 1, 2015, *availableat* https://rbi.org.in/Scripts/BS_ViewMasCirculardetails.aspx?id=9908#25 (Last visited on November 24, 2015).

[39] *See*, Aircraft Act, 1934.

[40] *See*, Merchant Shipping Act, 1958.

[41] *See*, Motor Vehicles Act, 1988.

[42] *See*, Registration Act, 1908.

with them and thereby consolidate such information, is a very big missed opportunity.

It is noteworthy that the obligation is cast on the financial creditors and operational creditors to submit financial information and information relating to assets in relation to which any security has been created against payment of fees. The debtor in question, whether a corporate person or an individual or a partnership firm, is not enjoined with any obligation, and in reality, the creditors can have information only as pertains to their credit facility and security, if any, obtained, but not necessarily the financial or asset information of the corporate person or the individual/partnership firm – unless tendered by them at the time of availing the credit facility or thereafter as part of contractual terms governing the credit facility (which many times suffer from being delayed in submission, and ascertaining the veracity or authenticity of which is beyond the ability of the creditor, who necessarily has to rely on the auditors certification if any made on such information).

In the course of resolution, insolvency or bankruptcy process, the critical information, apart from the credit facilities and the security for such facility, is really the knowledge of unencumbered assets, (i.e. assets that have not been secured to any creditor), assets under hire purchase but possession of the debtor, details of encumbrances such as leases, unpaid taxes of the properties or assets, the status of the debtors' properties and assets, and so on. These have unfortunately not been made a mandatory part of the information to be furnished or maintained by the Information Utility.

Taking the above into account, the utility of the Information Utility to the resolution, insolvency or bankruptcy process as envisaged in the Code is highly debatable.

F. Insolvency and Bankruptcy Board of India

Section 188 establishes the Insolvency and Bankruptcy Board of India. It provides that the board will be a body corporate having perpetual succession and a common seal. The Board will have its head office in Mumbai, and have the power to establish offices at other places in India.[43]

Section 189 provides for the constitution of the Insolvency and Bankruptcy Board. It provides that the Board shall consist of members who shall be appointed by the Central Government. It shall have one chairperson, three ex-officio members from the Central Government (one each to represent the

[43] Section 188, Insolvency and Bankruptcy Code, 2016.

Ministry of Finance, the Ministry of Corporate Affairs and the Ministry of Law), one member nominated by the RBI (ex-officio), and five other members of whom at least three shall be whole-time members. It further provides that every appointment made under this clause (other than for the ex-officio members) shall be made after the recommendation of a selection committee. The term of office of the Chairperson and the members (other than ex-officio members) shall be five years or till they attain the age of sixty five years, whichever is earlier. The salaries and allowance, and the terms of conditions of service of all members (other than the ex-officio members), shall be such as may be prescribed.[44]

Among the innovative approaches adopted in the Code is the establishment of the Insolvency and Bankruptcy Board. With the envisaged resolution, insolvency and bankruptcy framework creating new types of entities such as the Insolvency Professionals, the Insolvency Professional Agencies [*which in turn are to undertake four different roles – Resolution Professional (for individuals, partnership firms, and corporate persons), Bankruptcy trustee (for individuals and partnership firms), Liquidator (for corporate persons), to be played by the insolvency professional*] and the information utility, the need for a regulatory body cannot be overstated and hence deserves commendation.

The key test for the success of the Insolvency and Bankruptcy Board is in being open and transparent in terms of specifying the norms for registration and regulation of the entities, including publishing drafts for public comments (which is enshrined in the articulation of its functions), and ensuring it involves all the stakeholders in rolling out the new regime for resolution, insolvency and bankruptcy.

A brief snapshot of the role and functions are outlined here:[45]

(a) "Register insolvency professional agencies, insolvency professionals and information utilities and renew, withdraw, suspend or cancel such registrations;

(b) Specify the minimum eligibility requirements for registration of insolvency professional agencies, insolvency professionals and information utilities;

(c) Levy fee or other charges for the registration of insolvency professional agencies, insolvency professionals and information utilities;

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[44] Section 189, Insolvency and Bankruptcy Code, 2016.

[45] Extracts from Section 196, Bankruptcy and Insolvency Code, 2016.

(d) Specify by regulations standards for the functioning of insolvency professional agencies, insolvency professionals and information utilities;

(e) Lay down by regulations the minimum curriculum for the examination of the insolvency professionals for their enrolment as members of the insolvency professional agencies;

(f) Carry out inspections and investigations on insolvency professional agencies, insolvency professionals and information utilities and pass such orders as may be required for compliance of the provisions of this Code and the regulations issued hereunder;

(g) Monitor the performance of insolvency professional agencies, insolvency professionals and information utilities and pass any directions as may be required for compliance of the provisions of this Code and the regulations made thereunder;

(h) Call for any information and records from the insolvency professional agencies, insolvency professionals and information utilities;

(i) Publish such information, data, research studies and other information as may be specified by regulations;

(j) Specify by regulations the manner of collecting and storing data by the information utilities and for providing access to such data;

(k) Collect and maintain records relating to insolvency and bankruptcy cases and disseminate information relating so such cases;

(l) Constitute such committees as may be required including in particular the committees laid down in section 197;

(m) Promote transparency and best practices in its governance;

(n) Maintain websites and such other universally accessible repositories of electronic information as may be necessary;

(o) Enter into memorandum of understanding with any other statutory authorities;

(p) Issue necessary guidelines to the insolvency professional agencies, insolvency professionals and information utilities;

(q) Specify mechanism for redressal of grievances against insolvency professionals, insolvency professional agencies and information utilities and pass orders relating to complaints filed against the aforesaid for compliance of the provisions of this Code and the regulations made thereunder;

(r) Conduct periodic study, research and audit the functioning and performance of the insolvency professional agencies, insolvency professionals and information utilities at such intervals as may be specified by the Board;

(s) Specify mechanisms for issuing regulations, including the conduct of public consultation processes before notification of any regulations;

(t) Make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code; and

(u) Perform such other functions as may be prescribed."

More importantly, the ability of the Insolvency and Bankruptcy Board to act with the speed and the timelines the Code contemplates as being one of the key roles of the Insolvency and Bankruptcy Board within the resolution, insolvency and bankruptcy process is critical. That is, if such a role is indeed desired – ideally, what is outlined below, could be done away with and this paper proceeds to outline the issues and possible alternatives:

Take for example, Section 82 that deals with appointment of a resolution professional (which provision is part of chapter applicable to individuals or partnership firms governed by the resolution, insolvency and bankruptcy process) that states:

> "(1) Where an application under section 80 is filed by the debtor through a resolution professional, the Adjudicating Authority shall direct the Board within two days of the date of receipt of the application and shall seek confirmation from the Board that —
>
> (a) there are no disciplinary proceedings against the resolution professional who has submitted the application; and
>
> (b) such resolution professional has relevant expertise or is suitable to act as a resolution professional for the fresh start process.
>
> (2) The Board shall communicate to the Adjudicating Authority in writing either —
>
> (a) confirmation of the appointment of the resolution professional who filed an application under sub-section (1); or
>
> (b) rejection of the appointment of the resolution professional who filed an application under sub-section (1) and nominate a resolution professional suitable for the fresh start process.

> (3) Where an application under section 80 is filed by the debtor himself and not through the resolution professional, the Adjudicating Authority shall direct the Board within two days of the date of the receipt of an application to nominate a resolution professional for the fresh start process.
>
> (4) The Board shall nominate a resolution professional within ten-days of receiving the direction issued by the Adjudicating Authority under sub-section (3).
>
> (5) The Adjudicating Authority shall by order appoint the resolution professional recommended or nominated by the Board under sub-section (2) or sub-section (4), as the case may be.
>
> (6) A resolution professional appointed by the Adjudicating Authority under sub-section (5) shall be provided a copy of the application for fresh start.
>
> (7) The resolution professional appointed by the Adjudicating Authority shall furnish a performance security in accordance with section 206."[46]

The approach outlined where there is back and forth between the Adjudicating Authority and the Insolvency and Bankruptcy Board on the status and qualification of the Insolvency Professional (here designated as a resolution professional) makes redundant the fact of the Insolvency and Bankruptcy Board having created and established a registration and regulatory regime governing Insolvency Professionals.

It is akin to a situation where a court desires a bank guarantee to be furnished, and its writing to RBI seeking confirmation that the bank is licensed, can issue such a guarantee, and honour the guarantee. It is also akin to professionals governed by self-regulated statutory bodies such as the Institute of Chartered Accountants of India or the Bar Council of India being asked to vouchsafe the credentials of the chartered accountant or a lawyer and their expertise, and is a mark of either being over-cautious to a fault or not anticipating the benefit of the Insolvency Professional being duly registered and regulated.

The approach in Section 82 is by no means unique. It also finds a place in Sections 16(3)(a) and 16(4) (*Appointment of interim resolution professional*), Section 22(4) (*Appointment of resolution professional*), Sections

[46] Section 82, Insolvency and Bankruptcy Code, 2016.

34(4)(b) and 34(6) (*Appointment of liquidator*), Section 97 (*Appointment of Resolution professional*), Section 125 (*Appointment of insolvency professional as bankruptcy trustee*), as well as provisions governing replacement of such professionals whether on account of resignation or removal sought by the Committee of Creditors or the Adjudicating Authority or the Insolvency and Bankruptcy Board itself. It is also noteworthy that whilst all the provisions cited above capture the role of the Insolvency and Bankruptcy Board, the specification of its functions in Section 196 do not even dwell on the same, including the procedure it would specify and adhere to for such situations.

One particular situation – namely, when the debtor has filed the application himself and not through an Insolvency Professional – requiring the regulator to recommend and nominate an Insolvency Professional appears to be an over-reach, and could lend itself to accusations of favoritism and arbitrariness.

It is submitted that for the former situation, where the application has been filed through an Insolvency Professional, the professional can append the certificate of registration and self-attest the lack of a disciplinary proceeding and affirm having due expertise. In the latter situation, just as a court identifies a lawyer for indigent litigant, Insolvency Professionals can be identified and appointed by the Adjudicating Authority, and following the constitution of the Committee of Creditors, either the continuance can be affirmed or the professional can be changed. Similarly, should the credentials of the Insolvency Professional be challenged, the website of the Insolvency and Bankruptcy Board can be utilized or specific confirmation can be sought. Finally, should an Insolvency Professional resign or be removed, the onus of identifying the replacement can be placed on the Committee of Creditors.

Having said that, it is reiterated that the process underpinning the resolution, insolvency and bankruptcy process should be one which is clear and smooth so as to be able to meet the objectives of the Code, and which explicitly recognizes that the regime currently operating (which the Code seeks to replace) is "*inadequate, ineffective and results in undue delays in resolution*", and that it would be incumbent to ensure we do not repeat or indeed create fresh procedures which would result in the same conclusions being drawn from the resolution, insolvency and bankruptcy process contemplated by the Code.

CONCLUSION

The overarching objects as set forth in the statement of objects and reasons are laudatory and indeed much needed for reform of the resolution, insolvency and bankruptcy regime governing corporate persons as well as individuals and partnership firms.

One fundamental aspect that the statement of objects and reasons also touches upon, and could potentially shape judicial decisions, is that the Code aims to separate the commercial aspects of insolvency and bankruptcy proceedings from the judicial aspects. In India, as with everything, it is mainly the procedures and the institutional infrastructure that hold back the substantive reforms, and it is borne out in the institutional framework contemplated by the Insolvency and Bankruptcy Code as analyzed and examined above.

The lawmakers are urged to attend urgently to making this infrastructure and institutional framework efficacious. Not addressing the issues identified could plague the corporate sector and the common man alike. Duly addressing the issues can further the objectives of development of the credit markets, encouraging entrepreneurship, improving the ease of doing business and facilitating investments leading to higher economic growth and development.