

PROFESSIONAL PROGRAMME

INSOLVENCY — LAW AND PRACTICE

Insolvency occurs when an individual, company, or other organization cannot meet its financial obligations for paying debts as they become due. Bankruptcy is not exactly the same as insolvency. Bankruptcy is a determination of insolvency made by a court of law with resulting legal orders intended to resolve the insolvency. Insolvency describes a situation where the debtor is unable to meet his/her obligations. Bankruptcy is a legal scheme in which an insolvent debtor seeks relief.

The Companies Act, 2013 and the Insolvency and Bankruptcy Code, 2016 includes provision for determination of sickness, application for revival, appointment of interim/Company administrator, time bound revival process and if revival is not possible, liquidation process through single regulator 'National Company Law Tribunal'.

The Companies Act, 2013 provides for regulation of insolvency, including revival, winding-up and liquidation of companies in time bound manner. It incorporates international best practices based on models suggested by the United Nations Commission on International Trade Law (UNCITRAL). The powers and jurisdiction of Company Law Board, Board of Industrial and Financial Reconstruction and High Court in this regard, is being exercised by National Company Law Tribunal and Appellate Tribunal. The purpose of creation of the Tribunal is to avoid multiplicity of litigation before various courts or quasi-judicial bodies or forums regarding revival or rehabilitation or merger and amalgamation, and winding up of companies.

Before the enactment of the Insolvency and Bankruptcy Code, there was no single law in the country to deal with insolvency and bankruptcy. There were multiple overlapping laws and adjudicating forums dealing with financial failure and insolvency of companies and individuals in India. The framework for insolvency and bankruptcy was inadequate, ineffective and resulted in undue delays in resolution. The legal and institutional framework did not aid lenders in effective and timely recovery or restructuring of defaulted assets and causes undue strain on the Indian credit system.

The objective of the Insolvency and Bankruptcy Code 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. An effective legal framework for timely resolution of insolvency and bankruptcy will not only encourage entrepreneurship but will also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development.

The Insolvency and Bankruptcy Code, 2016 consolidates the existing framework by creating a single law for insolvency and bankruptcy. The Code applies to companies, partnerships, limited liability partnerships, individuals and any other body which the central government may specify.

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 (SARFAESI Act) empowered banks or financial institutions with a presence in India or which have been notified by the Government of India to recover on non-performing assets without court intervention. SARFAESI Act provides three alternative methods for recovery of non-performing assets, including taking possession, selling and leasing the assets underlying the security interests such as movable property (tangible or intangible, including accounts receivable) and immovable property without the intervention of the courts.

Recovery of Debts and Bankruptcy Act, 1993 is an Act to provide for the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto. The Act provides a procedure that is distinct from the existing Code of Civil Procedure in order to ensure a speedy adjudication. The Act also provides for the setting up of a separate set of tribunals to hear such matters and these tribunals are termed as Debt Recovery Tribunals (DRTs).

The Insolvency Law Committee constituted by the Ministry of Corporate Affairs submitted second part of its Report in October 2018 after deliberating on the existing provisions of cross-border insolvency in the Insolvency and Bankruptcy Code, 2016 (sections 234 and 235) and the UNCITRAL Model Law on Cross Border Insolvency. The Committee noted that the existing provisions in the Code do not provide a comprehensive framework for cross-border insolvency matters. The Committee provided a comprehensive framework for this purpose based on the UNCITRAL Model Law on Cross-Border Insolvency, 1997. The Committee has proposed a draft Part on Cross Border Insolvency which could be made a part of the Code by inserting a separate part for this purpose.

Company Secretaryship being a professional course, the examination standards are set very high, with emphasis on knowledge of concepts, applications, procedures and case laws, for which sole reliance on the contents of this study material may not be enough. Besides, as per the Company Secretaries Regulations, 1982, students are expected to be conversant with the amendments to the laws made upto six months preceding the date of examination. The material may, therefore, be regarded as the basic material and must be read along with the original Bare Acts, Rules, Regulations, Case Law, Student Company Secretary e-bulletin and Chartered Secretary published by the Institute as well as recommended readings.

This Study Material is based on the provisions which are notified under Insolvency and Bankruptcy Code, 2016 and Companies Act, 2013. The amendments made up to August, 2021 have been incorporated in this study material. However, it may so happen that some developments might have taken place during the printing of the study material and its supply to the students. The students are therefore, advised to refer to the website of the Institute for updation of the study material.

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