

SAMVĀD: PARTNERS

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INSOLVENCY AND BANKRUPTCY CODE COMES INTO EFFECT FOR CORPORATE PERSONS

On December 1, 2016, the Insolvency and Bankruptcy Code, 2016 (the “**Code**”), came into effect with respect to the insolvency resolution process for corporate persons.¹ With effect from the same date, the Sick Industrial Companies (Special Provisions) Act, 1985 (“**SICA**”) was repealed.² About two weeks prior to this, various amendments to the winding up provisions in the Companies Act, 2013 (the “**Companies Act**”) that were brought about by the Code were notified.³ While it is too early to tell how this will play out in practice, this Update highlights the immediate implications of these developments and the remaining steps to be taken before all aspects of the Code become operational.

IMMEDIATE IMPLICATIONS:

- Corporate debtors and creditors of corporate debtors may file applications with the National Company Law Tribunal (“**NCLT**”) for commencement of the insolvency resolution process under the Code.
- Entities that meet the relevant criteria to function as insolvency professional agencies (“**IPAs**”) may apply for registration with the Board. The Board has started granting certificates of registration to IPAs, including the Indian Institute of Insolvency Professionals of ICAI and ICSI Insolvency Professionals Agency.⁴
- Individuals who meet the eligibility requirements to act as insolvency professionals (“**IPs**”) may register with an IPA and with the Board to start functioning as IPs under the Code. The deadline for temporary registration of experienced professionals without the need for an examination is December 31, 2016.
- No new references can be made under SICA and all pending references and proceedings under SICA stand abated as of December 1, 2016. Such abated cases will not automatically be transferred to the NCLT for resolution pursuant to the Code. However, a company whose proceeding under SICA stands abated may file an application under the Code within 180 days of the Code coming into effect.⁵

¹ Ministry for Corporate Affairs Notification S.O. 3594(E), dated November 30, 2016.

² Ministry of Finance Notification, S.O. 3568(E), dated November 25, 2016 and Ministry of Finance Notification S.O. 3569(E), dated November 25, 2016.

³ Ministry of Corporate Affairs Notification S.O. 3453(E), dated November 15, 2016.

⁴ Insolvency and Bankruptcy Board of India Press Release, dated November 28, 2016, available at http://ibbi.gov.in/press_release_28.html (last accessed November 29, 2016).

⁵ Sick Industrial Companies (Special Provisions) Repeal Act, 2003, Section 4(b).

- Creditors can no longer file winding up petitions under the Companies Act on the grounds that a company is unable to pay its debts. Instead, such persons would have to file an application for commencement of the insolvency resolution process under the Code. However, winding up petitions under the Companies Act may still be filed on certain other grounds pursuant to amended Section 271 of the Act.⁶
- The Code is silent on the status of pending winding up proceedings in the High Courts under the Companies Act, 1956. However, the Companies (Transfer of Pending Proceedings) Rules, 2016 (“**Rules**”), that were subsequently notified on December 7, 2016, clarify some questions in this regard.⁷ These Rules, which come into effect on December 15, 2016, provide that any pending proceedings of winding up on the grounds of inability to pay debts (under clause (e) of Section 433 of the Companies Act, 1956), where the petition has not yet been served on the respondent, will be transferred to the NCLT and treated as an application under the Code.⁸ This would imply that pending proceedings at a more advanced stage could proceed as before. However, as the Companies Act does not contain any bar on parallel proceedings, the parties to a winding up proceeding could also file a new application under the IBC.
- The Rules also provide that pending winding up proceeding on grounds other than the inability to pay debt, (under clauses (a) and (f) of Section 433 of the Companies Act, 1956), where the petition has not yet been served on the respondent, will be transferred to the NCLT and treated as petitions under the Companies Act, 2013. Winding up proceedings initiated under the Companies Act, 1956 following a reference from the Board for Industrial and Financial Reconstruction, are to continue to be dealt with by the High Courts.

PROVISIONS NOT YET NOTIFIED:

- Liquidation of Corporate Persons: Provisions of the Code governing the liquidation of a corporate entity in the event that the resolution process fails are yet to be notified. These provisions are likely to be notified very shortly given that they may very well be required soon once applications for insolvency resolution begin to be filed.
- Insolvency and Bankruptcy of Individuals and Partnership Firms: To date, most of the discussions around the Code have focused on its applicability to corporate entities. The next stage will be for the Board to focus on getting in place the regulations required for the Code’s processes in relation to individuals and partnership firms to be implemented. Until these provisions come into effect,

⁶These grounds include if a company resolves to be wound up, if the company has acted against the sovereignty or integrity of India, if the company’s business has been conducted in a fraudulent manner, if a company has defaulted in its statutory filings for 5 consecutive years or if the tribunal is of the opinion that it is “just and equitable” that the company be wound up.

⁷Ministry of Corporate Affairs Notification G.S.R. 1119(E), dated December 7, 2016.

⁸ The petitioner in such a case will need to provide all information required for an application under the Code, including the name of the proposed insolvency professional, within 60 days of the notification, failing which the petition would abate.

individual insolvency proceedings will continue in civil courts under the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920.

- Information Utilities: One of the new institutions that the Code envisages are information utilities to collect, store and publish information on debts and defaults. The idea behind information utilities is to make the processes under the Code more efficient by reducing the scope for disputes over the debt owed. As the Code provides limited details on information utilities, the Board will need to issue regulations on the functioning and regulation of information utilities before they can begin to function under the Code.

**This is an update for general information purposes only and does not constitute legal advice. Please contact us if you require further clarifications on this subject.*

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