

Proposal for special provisions in the Bankruptcy Code for capital market transactions

Capital market transactions, including issue of bonds, covered bonds, structured bonds, etc. deserve a special treatment so as to preserve the ranking of security interest as provided for in the terms of issue of the respective instrument.

This is very important in view of the need to promote the bond market, and also retain the flexibility of bringing various types of structured bonds, such as subordinated bonds, perpetual debt instruments, covered bonds, etc.

The differential security interest in case of these bonds, which may either be a subordination (as in case of subordinated bonds), or super-senior priority (say, in case of covered bonds) is reflected clearly by the terms of the issue of the bonds. A senior-secured bond, for example, may offer first layer of security interest, which may actually be senior to the claim of other secured lenders. Thereby, the issuer is able to raise funds by issuing capital market instruments at a lower cost.

In Europe, for over 200 years, legislation has provided protection to covered bonds referred to as *pfandbriefe* in Germany, *pantbrev* in Spain, etc. In UK Insolvency Act also, exceptional treatment was introduced in case of capital market transactions by introducing special provisions, albeit in context of administrative receivership, in Schedule 2A of the Insolvency Act.

It is proposed that the provisions of Clause 54 of the Code may create a specific carve out for capital market transactions, by adding the following Explanation:

Provided that, subject to priority for workmen's dues as provided hereinabove, the priority of payments in case of capital market instruments shall be as per the ranking of the relevant security, or class of securities, as disclosed in the offer document for the security.

The expression “capital market instrument” shall mean any issue of securities done in pursuance of any of the regulations for issue of such instruments framed by the Securities Exchange Board of India.

Comments on the Insolvency and Bankruptcy Code, 2015 as introduced in Lok Sabha

Sl. No.	Clause No.	Text of the Code	Our Comments/Recommendations	Rationale
1.	Clause 3(6) – Definition of “claim”	(6) “claim” means— (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured; (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed,	(6) “claim” to means— (a) a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, contingent, fixed, disputed, undisputed, legal, equitable, secured, or unsecured; (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or	Definition of ‘claim’ under the Code is predominantly inspired by that under section 101(5) of the US Bankruptcy Code. However, the US Bankruptcy Code includes liquidated, unliquidated and contingent claims as well, and there seems no reason as to why these claims shall not be included in the Indian Bankruptcy Code.

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		matured, unmatured, disputed, undisputed, secured or unsecured;	unsecured;	
2.	Clause 3(16) – Definition of “financial service”	(16) “financial service” includes any of the following— (a) acceptance of deposits; (b) safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so; (c) effecting contracts of insurance; (d) offering, managing or agreeing to manage assets consisting of financial products belonging to another person; (e) rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of— (i) buying, selling, or subscribing to, a financial product; (ii) availing a financial service; or (iii) exercising any right associated with a	“financial service” means – (a) buying, selling, or subscribing to a financial product or agreeing to do so; (b) acceptance of deposits; (c) safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so; (d) effecting contracts of insurance; 35 (e) offering, managing or agreeing to manage assets consisting of financial products belonging to another person; (f) rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of – (i) buying, selling, or subscribing to, a financial product; (ii) availing a financial service; or (iii) exercising any right associated with a financial product or financial service; (g) establishing or operating an investment scheme; (h) maintaining or transferring records of ownership of a financial product; (i)	The Indian Financial Code defines the term ‘financial service’. It had been better if those definitions were adopted 'as is' in this Code. This Code and the Draft Indian Financial Code, once these come into force, will complement each other in resolving insolvency of non-financial entities and financial entities respectively. Therefore, there must be sync in definitions to avoid any gaps.

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		financial product or financial service; (f) establishing or operating an investment scheme; (g) maintaining or transferring records of ownership of a financial product; (h) underwriting the issuance or subscription of a financial product; or (i) selling, providing, or issuing stored value or payment instruments or providing payment services;	underwriting the issuance or subscription of a financial product; (j) providing information about a person's financial standing or creditworthiness; (k) selling, providing, or issuing stored value or payment instruments or providing payment services; (l) making arrangements for carrying on any of the financial services in clauses (a) to (k); (m) rendering or agreeing to render advice on or soliciting for the purposes of – (i) buying, selling, or subscribing to, a financial product; (ii) availing any of the financial services in clauses (a) to (k); or (iii) exercising any right associated with a financial product or any of the financial services in clauses (a) to (k); (n) any service carried out by an Infrastructure Institution; and (o) any other service that may be prescribed;	
3.	Clause 3(31) – Definition of “security	(31) “security interest” means right, title or interest or a claim to property, created in	(31) “security interest” means right, title or interest or a claim to property, created in favour of, or provided for a secured	Use of the word “transaction” seemingly implies whether code intends to cover only those

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	interest”	<p>favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:</p> <p>Provided that security interest shall not include a performance guarantee;</p>	<p>creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:</p> <p>Provided that security interest shall not include a performance guarantee;</p>	<p>security interests which are created by act of parties. Security interest can be a result of 'act of parties' or as a consequence of 'operation of law'.</p>
4.	Clause 3(33) – Definition of “transaction”	<p>(33) “transaction” includes a agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;</p>	<p>(33) “transaction” includes an agreement or arrangement in writing—for the transfer of assets, or funds, goods or services, from or to the corporate debtor or the debtor, as the case may be;</p>	<p>The Code accepts only those transactions that are in writing -- such provision may pose a problem in avoidance of certain transactions. Further, the Contract Act itself accepts oral contracts, except where any law requires a particular transaction to be carried out in writing.</p> <p>The term transaction as</p>

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				defined under the Code applies to the entire Code. Therefore, the same cannot be restricted to the corporate debtors (i.e. part II).
5.	Clause 5(14) – Definition of “insolvency resolution process period”	(14) “insolvency resolution process period” means the period of one hundred and eighty days commencing on the insolvency commencement date and ending on one hundred and eightieth day;	(14) “insolvency resolution process period” means the period of one hundred and eighty days commencing on the insolvency commencement date and ending on one hundred and eightieth day, subject to extension, if any, approved and availed in accordance with section 12 or section 56, as the case may be, of this Code;	Several provisions of the Code use the expression ‘insolvency resolution process period’, e.g. in section 23, the Code mandated the resolution professional to manage the operations of the corporate debtor during the insolvency resolution process period. Then, there is section 5(15) defining ‘interim finance’ which a resolution professional is authorized to raise during insolvency resolution process period. The definition limits the period to 180 days only. Exclusion of the extension period may result in creating ambiguities. Hence, the term insolvency resolution process period shall also include the extension

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				period, if at all granted by the adjudicating authority.
6.	Clause 5 (21) – Definition of “operational debt”	(21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;	(21) “operational debt” means a claim debt in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;	Claim is a right; debt is a liability. When the Code talks about operational ‘debt’, it is primarily a ‘debt’, which in turn, is a liability to a claim (as defined under the Code)
7.	Clause 6 - Persons who may initiate corporate insolvency resolution process	Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter.	Where any corporate debtor commits a default, a financial creditor, an operational creditor or a corporate debtor applicant may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter.	The same has been inadvertently mentioned as corporate debtor instead of corporate applicant. Further, clause 7, 9 and 10 deals with initiation of corporate insolvency resolution process by financial creditor, operational creditor and corporate applicant, respectively. Also, the term corporate applicant as defined under clause 5(5) includes corporate debtor.

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8.	Clause 16 – Appointment and tenure of interim resolution professional.	-	The Adjudicating Authority shall on receipt of the proposal of the Board for the appointment of an insolvency professional as interim resolution professional, by an order appoint such insolvency professional as the interim resolution professional and shall communicate the appointment under sub-section (4) to the operational creditor and debtor, within 2 days of appointment.	The clause shall be inserted between the existing clause 16(4) and clause 16(5). On receipt of proposal from the board recommending an insolvency resolution professional shall be communicated to the operational creditor (i.e. applicant filing an application) and debtor (i.e. against whom the application is being filed by an operational creditor) in order to enable them to identify the resolution professional who will carry out the insolvency resolution professional process.
9.	Clause 26 - Replacement of resolution professional by committee of creditors	(4) The Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in sub-sections (4)	(4) The Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in sub-sections (3) of section 16: XX	The term of resolution professional cannot be restricted to 30 days. Therefore, reference to sub-clauses (5) of clause 16 in clause 26(4) is not an appropriate reference.

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	Clause 16 - Appointment and tenure of interim resolution professional	and (5) of section 16: XX Clause 16 (5): The term of the interim resolution professional shall not exceed thirty days from date of his appointment		
10.	Clause 36 - Liquidation Trust	Clause 36(4)(b) - assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions	-	In case of netting arrangements for derivatives protection is given as are settled by multi-lateral clearing. However, centralized clearing does not exist in India. Hence the same needs to be reviewed.
11.	Clause 62 - Appeal to Supreme Court	(1) Any person aggrieved by an order of the National Company Law Appellate Tribunal may file an appeal to the Supreme Court on a question of law arising out of such order under this Code within sixty days from the date of	(1) Any person aggrieved by an order of the National Company Law Appellate Tribunal may file an appeal to the Supreme Court on a question of law arising out of such order under this Code within sixty ninety days from the date of receipt of such order. (2) The Supreme Court may, if it is satisfied that a	The aggrieved person has a right to appeal to the higher authority against the order of NCLAT. The provision state that the person can appeal to Supreme Court against the order passed by the NCLAT within a period of 60 days. However, Supreme Court has power

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		<p>receipt of such order.</p> <p>(2) The Supreme Court may, if it is satisfied that a person was prevented by sufficient cause from filing an appeal within ninety days, allow the appeal to be filed within a further period not exceeding thirty days.</p>	<p>person was prevented by sufficient cause from filing an appeal within ninety days, allow the appeal to be filed within a further period not exceeding thirty days.</p>	<p>to extend the time limit upto 30 days in case it is satisfied by the reasoning for non-filing an appeal within 90 days. The time period specified in these two sub-clauses shall be same, either 60 days or 90 days.</p> <p>In the Code, two different timelines are specified for filing an appeal to Supreme Court.</p>
12.	Clause 133 - Summoning of meeting of creditor	<p>(1) The bankruptcy trustee shall, within sixteen days from the bankruptcy commencement date, issue a notice for calling a meeting of the creditors, to every creditor of the bankrupt as mentioned in the list prepared by the bankruptcy trustee under section 132.</p> <p>(2) The notices issued under sub-section (1) shall -</p>	<p>(1) The bankruptcy trustee shall, within sixteen days from the bankruptcy commencement date, issue a notice for calling a meeting of the creditors, to every creditor of the bankrupt as mentioned in the list prepared by the bankruptcy trustee under section 132.</p> <p>(2) The notices issued under sub-section (1) shall -</p> <p>(a) state the date of the meeting of the creditors, which shall not be later than ## days from the bankruptcy commencement</p>	<p>Sub-Clause (1) states that the bankruptcy trustee has the time period of 16 days from the date to bankruptcy commencement date to issue a notice for calling the meeting of creditors. However, sub-clause (2) states that the meeting needs to be held within a period of 21 days from the date of bankruptcy commencement date.</p> <p>## Therefore, effectively, there remains a gap of only 5 days from the last date of</p>

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		(a) state the date of the meeting of the creditors, which shall not be later than twenty-one days from the bankruptcy commencement date;	date;	sending notices and holding the meeting which practically seems to be inconvenient. It is, therefore suggested to increase the time limit of “21 days from the bankruptcy commencement date” for holding the meeting.

Thanking you

For **Indian Securitisation Foundation**

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(Vinod Kothari)