

Comments on the Insolvency and Bankruptcy Code, 2016

Sl. No.	Section No.	Text of the Code	Our Comments	Rationale
1.	Section 3(31) – Definition of “security interest”	(31) “security interest” means right, title or interest or a claim to property, created in 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: Provided that security interest shall not include a performance guarantee;	(31) “security interest” means right, title or interest or a claim to property, created in 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: Provided that security interest shall not include a performance guarantee;	Use of the word “transaction” seemingly implies whether code intends to cover only those 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'.
2.	Section 3(33) – Definition of “transaction”	(33) “transaction” includes a agreement or arrangement in writing for the transfer of assets, or funds, goods or	(33) “transaction” includes an agreement or arrangement in writing —for the transfer of assets, or funds, goods or services, from or to the	The Code accepts only those transactions that are in writing -- such provision may pose a problem in avoidance of certain

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		services, from or to the corporate debtor;	corporate debtor or the debtor, as the case may be;	<p>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 defined under the Code applies to the entire Code. Therefore, the same cannot be restricted to the corporate debtors (i.e. part II).</p>
3.	Section 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

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				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 period, if at all granted by the adjudicating authority.
4.	Section 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)
5.	Section 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	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	The same has been inadvertently mentioned as corporate debtor instead of corporate applicant. Further, Section 7, 9 and 10 deals with initiation of corporate insolvency resolution process by financial

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		respect of such corporate debtor in the manner as provided under this Chapter.	this Chapter.	creditor, operational creditor and corporate applicant, respectively. Also, the term corporate applicant as defined under Section 5(5) includes corporate debtor.
6.	Section 33 – Initiation of liquidation	(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor: XX	(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted or continued by or against the corporate debtor: XX	Unlike clause (a) of sub-section (1) of section 14, sub-section (5) of section 33 does not include the word ‘continued’. In absence of the word ‘continued’, the continuation of pending suits or proceedings will hamper smooth conduct of liquidation proceedings.
7.	Section 100 – Admission or rejection of application	(4) If the application referred to in section 94 or 95 , as the case may be, is rejected by the Adjudicating Authority on the basis of report submitted by the resolution professional that the application was made with the intention to defraud his creditors or the resolution professional, the order	(4) If the application referred to in section 94 XX , as the case may be, is rejected by the Adjudicating Authority on the basis of report submitted by the resolution professional that the application was made with the intention to defraud his creditors or the resolution professional, the order under sub-section (1) shall record that the creditor is entitled to file for a bankruptcy order under Chapter IV.	XX Where the application has been filed by a creditor under section 95, the debtor may not be a party acting <i>malafide</i> . In such circumstances, providing the right to initiate bankruptcy proceedings to the creditor himself does not seem to strike the right chord.

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		under sub-section (1) shall record that the creditor is entitled to file for a bankruptcy order under Chapter IV.		
8.	Section 113 – Notice of decision taken at meeting of creditors	The resolution professional shall provide a copy of the report of the meeting of creditors prepared under section 99 to— XX	The resolution professional shall provide a copy of the report of the meeting of creditors prepared under section 112 99 to— XX	Error of reference.
9.	Section 123 – Application by creditor	(2) An application under sub-section (1) made in respect of a debt which is secured , shall be accompanied with— XXX (b) a statement by the creditor stating— (i) that the application for bankruptcy is only in respect of the unsecured part of the debt . . .	(2) An application under sub-section (1) made in respect of a debt which is secured by a secured creditor of a debtor , shall be accompanied with— XXX (b) a statement by the creditor stating— (i) that the application for bankruptcy is only in respect of the unsecured part of the debt . . .	While the application can only be made in respect of the unsecured part of the debt owed to a secured creditor, use of the words “made in respect of debt which is secured” sounds contradictory. Hence, the words shall be replaced as follows:
10.	Section 128 – Effect of bankruptcy	(1) On the passing of the bankruptcy order under	(1) On the passing of the bankruptcy order under section	The restriction is on initiation of an action against the bankrupt’s

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	order	<p>section 126,—</p> <p>XX</p> <p>(c) subject to provisions of sub-section (2), a creditor of the bankrupt indebted in respect of any debt claimed as a bankruptcy debt shall not—</p> <p>(i) initiate any action against the property of the bankrupt in respect of such debt; or</p> <p>(ii) commence any suit or other legal proceedings except with the leave of the Adjudicating Authority and on such terms as the Adjudicating Authority may impose.</p>	<p>126,—</p> <p>XX</p> <p>(c) subject to provisions of sub-section (2), a creditor of the bankrupt indebted in respect of any debt claimed as a bankruptcy debt shall not—</p> <p>(i) initiate or continue any action against the property of the bankrupt in respect of such debt; or</p> <p>(ii) commence any suit or other legal proceedings except with the leave of the Adjudicating Authority and on such terms as the Adjudicating Authority may impose.</p>	<p>property or commencement of any suit or legal proceedings – there is no indication of a “stay” on pending suits or proceedings.</p>
11.	Section 132 – Preparation of list of creditors	<p>The bankruptcy trustee shall, within fourteen days from the bankruptcy commencement date, prepare a list of creditors of the bankrupt on the basis of—</p> <p>(a) the information</p>	<p>The bankruptcy trustee shall, within fourteen days from the bankruptcy commencement date, prepare a list of creditors of the bankrupt on the basis of—</p> <p>(a) the information disclosed by the bankrupt in the application</p>	<p>Error of reference.</p>

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		disclosed by the bankrupt in the application for bankruptcy filed by the bankrupt under section 118 and the statement of affairs filed under section 125 ; and XX	for bankruptcy filed by the bankrupt under section 122 and the statement of affairs filed under section 129 ; and XX	
12.	Section 135 – Voting right of creditors	(2) The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board.	(2) The bankruptcy trustee resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by the Board.	Error of reference.
13.	Section 142 – Modification or recall of bankruptcy order	(3) A copy of the order passed by the Adjudicating Authority under sub-section (1) shall be provided to the Board, for the purpose of recording an entry in the register referred to in section 191 .	(3) A copy of the order passed by the Adjudicating Authority under sub-section (1) shall be provided to the Board, for the purpose of recording an entry in the register referred to in section 196 .	Error of reference.
14.	Section 158 – Restriction on disposition of property	XX (2) Any disposition of property made under sub-section (1) shall not give	XX (2) Any disposition of property made under sub-section (1) shall not give rise to any right against	The word “even if” is not mismatched with previous expression “shall not give rise”. The intent is to provide a defense to

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		<p>rise to any right against any person, in respect of such property, even if he has received such property before the bankruptcy commencement date in —</p> <p>(a) good faith;</p> <p>(b) for value; and</p> <p>(c) without notice of the filing of the application for bankruptcy</p> <p>XX</p>	<p>any person, in respect of such property, even if he has received such property before the bankruptcy commencement date in —</p> <p>(a) good faith;</p> <p>(b) for value; and</p> <p>(c) without notice of the filing of the application for bankruptcy</p> <p>XX</p>	<p>transactions satisfying the 3 features mentioned in clauses (a) to (c) and not to ignore them.</p> <p>The section is apparently based on section 284 of the UK law, which provides a remedy of reversing any transfers that happen from the date of submission of bankruptcy petition, till the date of its admission. However, the provision protects any property or payment which he received before the commencement of the bankruptcy in good faith, for value and without notice that the petition had been presented [section 284 (1) (a)]. The UK principle has been explained in UK BIS guidance¹ as follows:</p> <p>In the case of bankruptcy, dispositions of property made after the presentation of the petition up to the vesting of the estate in a trustee are void unless</p>

¹ <https://www.insolvencydirect.bis.gov.uk/casehelpmanual/A/AntecedentRecoveries.htm>

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				<p>approved by the court, either at that time or subsequently. Anything done in good faith, for value, prior to the commencement of the bankruptcy and without notice of the petition is not a voidable transaction. This means, for example, that any payment to suppliers where goods, materials or services were delivered in the same period would not be affected provided proper value was provided. Any debts incurred after the commencement of the bankruptcy without notice of the presentation of the petition would also remain unaffected.</p> <p>Any other interpretation will be illogical. The would-be bankrupt entity still continues to trade between the date of filing till the date of commencement of bankruptcy. It is only on the date of commencement of</p>

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				<p>bankruptcy that the entity stops trading. Therefore, dispositions of property made in good faith, and for value, without knowledge of bankruptcy filing, must remain protected.</p> <p>Note that there is no publication of the filing for bankruptcy. Publication happens only when the bankruptcy order is passed. Therefore, it is unlikely that third parties, who are not colluding with the debtor, are aware of the filing.</p>
15.	Section 161 – Notice to disclaim onerous property	(1) No notice of disclaimer under section 160 shall be necessary if— XX	(1) No notice of disclaimer under section 160 shall be necessary given if— XX	Use of the word “necessary” leads to an inference that on the fulfillment of conditions stated in clauses (a) and (b) of the sub-section, the bankruptcy trustee will not be under an obligation to give a notice of disclaimer – which does not seem to be in consonance with the intent of the section. The section seeks to put a restriction on disclaimers

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				where an application by an interested person in relation to whether an onerous property should be disclaimed or not, is pending or is not responded by the bankruptcy trustee within 7 days.
16.	Section 163 (5)	An order under sub-section (2) vesting property in any person need not be completed by any consequence , assignment or transfer.	An order under sub-section (2) vesting property in any person need not be completed by any conveyance , assignment or transfer.	Typographical error.

Thanking you

For **Indian Securitisation Foundation**

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(Vinod Kothari)