

All about Information Utilities under Insolvency and Bankruptcy Code, 2016:

What is Information Utility under IBC?

The laws governing information utilities are Sections 209 to 216 of the Insolvency and Bankruptcy Code, 2016 and Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017. Information Utility (IU) is a professional organization which is registered under Section 210 of the Insolvency and Bankruptcy Code, 2016 whose function is to **gather, assemble, accumulate, validate and disseminate financial information** from companies and creditors to facilitate insolvency, liquidation and bankruptcy. A person can rely on the information stored in the IU before investing. This ensures that a person's investment is secured.

Further, An Information Utility is a professional organization (which is registered with IBBI under Section 210 of IBC, 2016 as per the eligibility criteria prescribed) that will collect financial information, get the same authenticated by other parties connected to the debt & store the same and provide access to the Resolution Professionals, Creditors and other stake holders in the Insolvency Resolution Process, so that all stake holders can make decisions based on the same information.

The New Law IBC,2016 consolidates the existing framework and creates a new institutional structure, by setting up of Information Utility Companies, which will store all the credit information of Corporates/entities/persons; The Certificate & data furnished by IUs are accepted by NCLT/DRTs as legal evidence.

This IU set-up is expected to contribute significantly for reduction of NPAs in banking sector, as the code aims to resolve the insolvencies in a time bound manner.

Reason behind the creation of Information Utilities in india:

Before the insolvency resolution process can commence, a vital step is to appropriately establish the facts as to what assets are available, who the applicants are, and what contracts are in force. This has customarily involved paper-based processes and it has its own challenges such as the need to make sure that the documents in hand are true copies. All stakeholders involved in the insolvency or bankruptcy process of the debtor should have access to the debtor's reliable financial information. But asymmetry of information hampers the existing process and the fair negotiations between debtor and creditor. Crucial time is wasted in determining the existence of debt and default.

Hence, to overcome these problems, the Bankruptcy Law Reforms Committee (BLRC) came up with a solution to digitize all credit transactions, to make them available on a digital platform subject to access rules and to give legal sanctity to such digital records. Such electronic records would allow rapid identification of creditors, establishment of the Committee of Creditors (COC) on default and assessment of the viability of the debtor by the committee.

To put the above solution in letter and spirit, the IBC has mandated the creation of a regulated information industry in the form of IUs. Based on the information available with IUs, the time taken to

establish debt and default will be reduced and the insolvency and bankruptcy process will be accelerated.

Legal Framework of an Information Utility

Under:

Insolvency and bankruptcy Code, 2016

Regulated by:

Insolvency and bankruptcy Board of India

Compliances:

IBBI, Information Utility Regulations, 2017

Guided by:

IBBI and IU Technical standards

Stakeholder Advantages:

Financial Creditors

- ✓ Authenticated information as evidence
- ✓ Reduction of asymmetry of information
- ✓ Digital Document Execution of contracts with digital E-stamping
- ✓ Reduction of time for retrieval of information about borrower
- ✓ Information of default in Operational payments by a borrower
- ✓ Real time reports for better credit monitoring (APIs available)
- ✓ Reduction of delays in legal process
- ✓ Integration with e-Court for e-filing of Record of Default

Operational Creditors

- ✓ Debts of Operational Creditors are filed digitally for easy retrieval
- ✓ Generation of Demand Notice against buyer
- ✓ Recording of dispute details
- ✓ Integration with MSME Samadhaan Portal
- ✓ Default alerts from other creditors
- ✓ Authenticated information as evidence
- ✓ Digital Document Execution of contracts with digital E-stamping
- ✓ Information of default in Operational payments by a buyer
- ✓ Integration with e-Court for e-filing of Record of Default

Resolution Professionals/ Liquidators

- ✓ Integration with e-Court for e-filing of Record of Default
- ✓ Access to debt information of debtor
- ✓ Helpful for claim verification
- ✓ Storage of Information in Virtual Data Room
- ✓ End to End CIRP Solution to facilitate to adhere CIRP timelines
- ✓ Regulatory Submissions to COC, IPA, IBBI, AA
- ✓ Integration with e Auction platform

Admissibility of Electronic Records of IU as evidence:

The Information and Technology Act, 2000 amended definitions in the Indian Evidence Act, 1872 to include electronic records as “evidence”. Definition of “documents” and “admission” was also amended to include electronic records. It can therefore be said that the electronic records of IU are admissible as evidence.

For the IU record to be conclusive, it should meet the standard for conclusive evidence as laid down in Section 31 of the Indian Evidence Act, 1872. Once the information is stored in an IU, the creditor and the debtor will be estopped from disputing any of this information.

In Innovative Industries Ltd. vs. ICICI Bank and Ors , the Supreme Court has held that when a corporate debtor commits default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred.

Categories of Information

The Bankruptcy Law Reforms Committee has identified the following categories of information which must be made available in the IU :

- Reliable and readily accessible records of liabilities of a solvent entity;
- Clear evidence of the instance of default;
- Records of assets that are pledged as collateral against secured credit contracts; and
- Reliable and readily accessible records that comprise the balance sheet and cash flow statements of the entity.

Information Submission: Mandatory or Optional

Regardless of whether the creditor or the debtor initiates the Corporate Insolvency Resolution Process (CIRP) under the IBC, either of them may use the information available to IUs to prove the existence of the debt and default.

As per Section 215 of IBC, financial creditors are obliged to submit financial information to IUs. But the Code does not, however, stipulate any penalty for not submitting this data. It appears, therefore, that if the creditor does not submit this information, the ‘penalty’ is that, in the event of default, the creditor cannot take advantage of the quick and easy processes allowed by the IU mechanism.

According to Section 215(3), it is optional for operational creditors to submit financial information to the IUs.

The financial information which is required to be submitted to the IU is as follows:

- Records of a person’s debt;
- Liability of the person when the person is solvent;
- Records of the assets over which the security has been created;

- Proceedings of default by the person against any debt; and
- Balance sheet and cash-flow statements of the person.

The Working Group on Information Utilities is of the view that the submission of all the financial information referred to above is not mandatory. Only information directly relevant to the determination of the existence of debt and default for the purposes of the CIRP should be made mandatory. Submission of financial records by the financial creditor is optional.

Disclosure of Information:

One of the key functions of IUs is to solve the problem of information asymmetry. Yet, at the same time, confidentiality of sensitive information should not be infringed. I have discussed information disclosure in the four scenarios as follows:

The debtor is solvent: Disclosure of information concerning a solvent entity should only take place with the entity's permission. The debtor has defaulted on a debt: In addition to the disclosures in the first case above, every financial creditor should be informed of the fact of the default and not just the creditor against whom it has been defaulted.

The application for initiating CIRP has been filed: Once an application has been made to the adjudicating authority to initiate the CIRP, the adjudicating authority shall have full access to the information about the debtor from the IU, free of charge. CIRP has been triggered: After the CIRP is triggered, all information about the debtor is available to the public.

Ownership and Immutability of IU Information:

The IU is not considered as the owner of the information but as the custodian of the information. As such, the IU is obliged to be a good steward of the information. Once the information is stored in an IU, it should not be deleted or modified in any way whatsoever. That is essential to ensure that an IU preserves the sanctity of information, so that it can be accepted as conclusive evidence in a court of law. However, if a record stored in an IU is incorrect, this should be marked as erroneous by the IU.

Standards to be complied by Information Utility:

An important standard used by the IU industry is a common Application Programming Interface (API) whereby all IUs interact with other stakeholders in the performance of their core services. This API specifies how an IU can be inquired for information, how information can be submitted to an IU, how it can be authenticated, how it can be retrieved and how IU prices can be queried.

Services of Information Utility:

The role of IUs in the corporate insolvency proceedings depends on three factors:

- The existence of information on debts and defaults in the IU;
- The validity of information in the IU as evidence in the court; and
- The use of this information in the insolvency procedure.

There are two points where information is critical in an IU:

At the time of trigger of the resolution process: The IBC envisages that the occurrence of default will be recorded in the IU, and this evidence will be used by the adjudicating authority to initiate the resolution process. At the time of forming the creditors committee: The information from the IUs will be used to identify all creditors to the debtor in order to form the creditors committee.

Core Services of Information Utility:

The core services of an IU are determined by two sections of the IBC. These are *Section 3(9) of IBC and Section 3(13) of IBC*. *Section 3(9) defines core services* and *Section 3(13) defines financial information*. These provisions suggest that core services of an IU should include the acceptance, storage, authentication and access to information which includes assets, debts, security interest, balance sheet and cash flow statements and default. What is critical to the insolvency resolution procedure is the credit contract record and the occurrence of a default. It is this information which is used to initiate the CIRP.

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It is essential to be aware of the identity of the information submitter. It is also important to ensure that the information is not manipulated between the submitter submitting the information and receiving it from the IU. Digital signatures can solve both of these problems.

Information authentication

The Code specifies that the IU may accept the information only from specified persons. IUs should not accept information from persons not related to the debt transaction. The IU has a responsibility to authenticate the information with other concerned parties as per Section-214(2) of IBC.

The term concerned parties is defined in the following two cases: In a case where information is submitted to substantiate the existence of a debt contract, then the concerned parties should be defined as both creditor and debtor.

In a case of evidence of default, the debtor may not wish to authenticate that it has defaulted. In such a case, the concerned parties could be defined as the creditor and the bank hosting the repayment account for default information.

Acknowledgement of information

Once the information submitted to an IU has been authenticated, the IU shall provide an acknowledgement to the submitter and authenticator. Acknowledgement of information fulfils several functions:

- The acknowledgement serves as evidence that the submitter has fulfilled its statutory obligation (if any) to submit the information to the IU.
- The acknowledgement shall protect against the manipulation of the data by the IU and the repudiation by the submitter or the authenticator.
- The acknowledgement protects against data loss by an IU.

Correcting erroneous information

The Code requires the person who intends to rectify errors to apply to the IU stating the reasons for the request.

Storage of information

The principal purpose of IUs is to safely and reliably store accurate information. If an IU accepts information but then loses that information, then it defeats the point of having IUs therefore, IU shall store the information.

Access to information:

The following persons can access the information stored in the IU:

- A person who is party to the debt or default;
- The adjudicating authority;
- The Insolvency and Bankruptcy Board of India; and
- Resolution Professionals.

The IU also allows any person permitted by the debtor to have access to information about the debtor.

Market Structure of Information Utility

The IBC does not prescribe any specific design for the IU market. The Act mentions “Information Utilities” several times in the plural sense. Therefore, the Act does not appear to envisage a monopolistic IU, nor does it visualize an IU housed within the IBBI. The BLRC opines that there should be “an open competitive industry”. The Working Group on Information Utilities has finally decided in their deliberations that there should be a competitive industry consisting of multiple IUs.

Eligibility Criteria to get registered as Information Utilities:

The IBC states that every IU should be set up as a company under the Companies Act and it should be a public company. The Working Group on Information Utilities has suggested the minimum authorised capital to be Rs.75 crores and the minimum paid-up capital to be Rs. 60 crores. It has also suggested a FDI limit of 49%.

To get registered as an IU an application has to be made to the IBBI in Form A of the Schedule of the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017.

Regulatory requirements to be complied by Information Utility

Data availability to the regulator and the adjudicating authority. If the adjudicating authority is required to access data from the IU, it should be made available to it immediately and free of charge. This ensures that the adjudicating authority always has the relevant data available, and to make court proceedings faster and smoother. The IU also ensures that the adjudicating authority is only provided with data relevant to the case being heard by the adjudicating authority.

Indemnification

The IU is responsible for the performance of the core services pursuant to the Act, rules and regulations of the insolvency and bankruptcy code, 2016. As long as an IU authenticates the data it receives and stores it according to the regulator's specified requirements, it cannot be held liable for the accuracy of the data stored therein. Furthermore, it cannot be held liable for any loss caused to third parties because of the data stored therein. If any loss is caused by negligence on the part of the IU in the performance of its services to the debtor or creditor, the IU should be liable to indemnify the debtor or creditor.

Exit Management Plan

The information that is stored on an IU is of regulatory interest. Consequently, even if the IU is about to fail or its registration is about to be cancelled, the information contained therein should remain available to the market. To ensure this, each IU shall prepare an exit management plan when applying for a certificate of registration. This plan will contain details on how the regulator can retrieve the data in the IU and transfer it to another IU, which the regulator has chosen.

Grievance redress

Every IU shall have a Grievance Redressal Policy to address consumer grievances. The IU should also report the number of grievances received and resolved at periodic intervals to the regulator.

Outsourcing of core services

The IU shall not outsource the provision of core services to a third party service provider.

Submission of Information to the Information Utility:

Step I

The creditor submits information to the IU

The IU verifies the identity of the creditor.

The creditor submits information, including the identities of all parties, the amount, the date, details of the security if any, the host bank if any, etc.

The creditor pays the fee charged by the IU.

Step II

The IU enables the debtor to authenticate the information

The IU verifies the identity of the debtor against the unique identity.

The IU makes the information submitted by the creditor available to the debtor for authentication.

Step III

The debtor authenticates the information.

Step IV

The IU generates a unique identifier for the loan, sends acknowledgements to both the parties and stores the information

National E-governance Services Limited

National E-Governance Services Limited (NeSL) is India's first Information Utility (IU) which is registered under the Insolvency and Bankruptcy Code, 2016. It was incorporated on 24th June, 2016 as a Union Government Company. NeSL is set up by leading public institutions like State Bank of India, Life Insurance Corporation of India, Canara Bank, Bank of Baroda, ICICI Bank, HDFC Bank and Axis Bank.

The objective of NeSL is 'to accept, store and make readily available authenticated financial information submitted by creditors that helps establish defaults as well as verify claims under the Insolvency and Bankruptcy Code, 2016 expeditiously and thereby facilitate completion of the insolvency resolution transactions under IBC in a time-bound manner'.

Conclusion

The information utilities leads to the creation of a financial information database for all credit seeking entities and more importantly it facilitates the completion of the corporate insolvency resolution process in time bound manner.

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