CORPORATE INSOLVENCY REGULATIONS IN INDIA: A CRITICAL STUDY

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SUPERVISOR CERTIFICATE

It is to certify that Jyoti Khurana is pursuing Masters of Laws(LL.M.) from National Law University and Judicial Academy, Assam and has completed her dissertation titled "CORPORATE INSOLVENCY REGULATIONS IN INDIA : A CRITICAL STUDY" under my supervision. The research work is found to be original and suitable for submission.

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DECLARATION

I, JYOTI KHURANA, pursuing Master of Laws (LL.M.) from National Law University and Judicial Academy, do hereby declare that the dissertation titled "CORPORATE INSOLVENCY REGULATIONS IN INDIA: A CRITICAL STUDY" is an original research work and has not been submitted either in part or full anywhere else for any purpose, academic or otherwise, to the best of my knowledge.

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PREFACE

Corporate rescue mechanisms are used to revive a corporation suffering from financial distress. In the competitive era government plays a vital role in providing effective regulatory mechanisms which can benefit the corporation in financial distress, a way out by providing opportunity of its revival and also contents the creditors. A balance is required in insolvency laws in regard with creditors right and protecting corporate debtor. UNCITRAL and WORLD BANK have made modal insolvency law, which can be of great help while developing insolvency laws in a country.

In the quest to curb the menace of high NPAs and long time required for the insolvency resolution government has introduced the "Insolvency and Bankruptcy Code ,2016" along with other regulations. Even after its introduction, it is still work in progress. At this juncture it is pertinent to review regulations and efficiency of the corporate insolvency process in India.

TABLE OF CASES

1. *Arcellor Mittal Private Limited v. Satish Kumar Gupta[Essar Steel India Limited*
2. *Anuj Interim Resolution Professional v. Axis Bank*
3. *B.K. Educational Services Private Ltd v. Parag Gupta And Associates*
4. *COC Of Essar Steel India v.Satish Kumar Gupta*
5. *Innovative Industries Ltd. v. ICIC Bank Ltd*
6. *Jaiprakash Associates v.IDBI*
7. *JK Jute Mill v. Juggilal Kamlapt Jute Mill*
8. *K. Kishan v. Vijay Nirman Co*
9. *Nikhil Mehta And Sons (HUF) v. AMR Infrastructure Ltd.*
10. *Reliance Communitation v. SBI*
11. *Pioneer Urban v. UOI*
12. *SBI V. Ramakrishnan*
13. *Swiss Ribbons Pvt Ltd v. Union Of India*
14. *Vijay Kumar v. Standard Chartered Bank*

TABLE OF STATUTES

1909 - Presidency Town Insolvency Act

1920 - Provincial Insolvency Act

1985 - Sick Industries Companies (Special Provision) Act

1993 - Recovery of Debt Due to Banks and Financial Institutions Act

2002 - Securitization and Reconstruction Financial Assets Enforcement of Security Interest Act

2013 - The Companies Act

2016 - Insolvency and Bankruptcy Code

TABLE OF ABBREVIATION

S.NO	ABBREVIATION	FULL FORM
1.	BIFR	Board of Industrial and Financial Reconstruction
2.	COC	Committee of Creditors
3.	DRT	Debt Recovery Tribunal
4.	HC	High Court
5.	IBC	Insolvency and Bankruptcy Code
6.	IRP	Interim Resolution Professional
7.	NCLT	National Company Law Tribunal
8.	NCLAT	National Company Law Appellate Tribunal
9.	NPA	Non Performing Asset
10.	RBI	Reserve Bank of India
11.	RDDBFI	Recovery of Debt Due to Bank and Financial Institution
12.	RP	Resolution Professional
13.	SARFAESI	Securitization and Reconstruction Financial Assets Enforcement of Security Interest Act
14.	SC	Supreme Court
15.	SICA	Sick Industrial Companies Act

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CHAPTER-I

INTRODUCTION

1.1 BACKGROUND

An economy includes the contribution of many corporations for its overall development . Such corporations make their best efforts to compete and survive in the market , for that they use new marketing strategies or product innovation to have a competitive edge in the market. To have competitive advantage many times corporations takes hefty amount of loan which they are unable to pay, this lead them to drive out of the market because survival of the fittest is the law that govern the market[1].The main objective of any insolvency law in a country should be to encourage the company to revive itself, so that it can repay its debts to its creditors and stand up again in the market .

The purpose of any insolvency law in the country should not be to discourage its growth chances rather the government should provide such companies an opportunity to run their affair more efficiently[2].Insolvency laws should satisfy different interests to the extent possible such as employment of manager and workers, stock price requirement of the shareholders etc. Law has given stakeholders, different rights due to this reason they bargain their right in such distress of the company. They need to look for a balance within themselves so as to resolve the situation in the smooth manner. Law should also try to bring the harmony in the relationship of corporate debtor and corporate creditor in the ex-ante sense [during solvency]and in ex-post sense[insolvency][3].

Parliament has passed "Insolvency and Bankruptcy Code, 2016" to resolve all the insolvency issues and to curb the menace of high NPAs in the country. According to "World Bank" report in 2011 the percentage of NPAS was 2.5%. This increased to 9.1% in 2016, which is a threefold increase. Further, prior to the enactment of IBC the time

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[1] M. White, The Corporate Bankruptcy Decision, vol. 3 Journal of Economic Perspectives,,pg. 129,(1983).

[2] Vanessa Finch, CORPORATE FAILURE AND CORPORATE INSOLVENCY LAW, 11th ed., 2009, pg. 144

[3] [3]Matej Marinc & Razvan Vlahu, THE ECONOMICS OF BANK BANKRUPTCY LAW, 7th ed., 2012, pp. 5

required for insolvency resolution was very high and the recovery rates very low (25.7 cents to Dollar)[4]. Among the "BRICS" economies, India has one of the lowest recovery rates. Such high rate of "Non Performing Assets" has many adverse affects like high rate of interest, affects investment and credit cycle of the economy, lack of investor confidence in the economy and overall limits the growth potential of the economy. Due to the passage of the IBC, NPAs will be resolved within 180 days and hopefully the recovery rates will also go up.

Some of the major changes brought by it are the establishment of the "Insolvency and Bankruptcy Board of India", "Insolvency Resolution Professionals", "Committee of Creditors" etc. India's ranking in the "Ease of Doing Business Report 2020" by the "World Bank" has moved up 14 places to be 63rd among 190 nations[5] on the back of multiple economic reforms and one of such parameter is “Ease of Resoling Insolvency”. Even a year after its introduction, it is still a work in progress. At this juncture, it has become pertinent to review its functioning and identify issue impeding the efficiency of the IBC resolution and liquidation framework.

1.2 AIM AND OBJECTIVES

(a) To understand the need for a comprehensive corporate insolvency reform in India.

(b) To evaluate the present corporate insolvency regulations in India regarding CIRP, resolution plans and the role of RP in corporate insolvency.

(c) To compare the present provisions of IBC with the insolvency provisions prevalent in UK and USA.

(d) To propose various mechanisms to improve upon the existing legal framework on insolvency and bankruptcy laws.

1.3 STATEMENT OF PROBLEM

There were various problems prevalent in India prior to introduction of insolvency reforms like inadequacy of SICA, multiplicity of legislations, high costs for raising funds,

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[4] World Bank Report, 2011 (May, 20, 2020) https://openknowledge.worldbank.org/handle/10986/4389.

[5] Ease of Doing Business Report 2020 (May 20,2020), https://www.doingbusiness.org/en/rankings.

rise in NPAs, delays and harassment in filing civil suits, lengthy winding up procedures, low profitability and recovery ratios. In such scenario there is urgent need for taking reforms relating to insolvency regulations .

1.4 SCOPE AND LIMITATION

The scope of the study can be well defined by considering the limitations

1.The proposed research confines itself to legal framework regarding Insolvency and Bankruptcy laws as applicable to India.

2.The proposed research is purely analytical in nature.

3.The research does not include any field data collection or sampling but does include study of various reports and case studies.

1.5 RESEARCH QUESTIONS

1.What is the conceptual background of insolvency?

2.What are the issues prevalent in Indian economy prior to introduction of insolvency reforms ?

3.What are the present regulations governing corporate insolvency in India related to CIRP procedures, resolution plan and resolution professional role in insolvency proceedings ?

4.How efficient are the novel corporate insolvency reform ?

1.6 RESEARCH METHODOLOGY

The proposed research work is Doctrinal and Non- Empirical Research. Hence research work is purely based on the resources from libraries, archives, online database and various e-learning resources. The proposed research is a combination of Descriptive Methodology, Analytical Methodology and Comparative Methodology. The aforementioned research does not include any field data or sample collection

1.7 DETAILED LITERATURE REVIEW

16.1. BOOKS

“History of Insolvency and Bankruptcy from an International Perspective (2008)”:
The book brings together new international research on bankruptcy and insolvency. Their study is divided into three different perspectives first, the role of bankruptcy in transforming business, the second part deals with tools of international history where the author advances arguments by using political economy and the third part presents a comparative legal perspective of the Insolvency and Bankruptcy laws”

“Insolvency and Bankruptcy Code, 2016: Concepts and Procedure (2017)”:
The book is a practical guide providing a pragmatic analysis of the Insolvency und Bankruptcy Code, 2016. The book aims at providing a practical guide to the concepts and procedure established by the Code from the inception of insolvency resolution process relating to both corporate as well as individual, till the ultimate distribution of assets of the debtor towards recovery of creditors' dues. It strives to act as a guide on the concepts und procedure in the Code along with an in-depth analysis of relevant case law.

1.6.2 ARTICLES

Shivam Goel "The Insolvency and Bankruptcy Code, 2016: Problems and Challenges" (2017):
The paper examines the problems and challenges in the working and implementation of the "Insolvency and Bankruptcy Code". Further the study enumerates the key aspect of the IBC and looks into various I ndicators like "Recovery Rate, Average duration of Insolvency proceedings, average cost of insolvency proceedings and the strength of the insolvency framework index" to assess the ground reality of Insolvency and Bankruptcy in India and around the world. The result suggests India's state of Insolveney and Bankruptcy resolution to be unsatisfactory. Further it was found that IBC even after being a paradigm shift from the previous insolvency law has numerous predicaments.

Adam Feibelman "Anticipating the Function and Impact India's New Personal Insolvency and Bankruptcy Regime" (2017):
The paper explored the regime of personal insolvencies and bankruptcies under the "Insolvency and Bankruptcy Code, 2016". The study suggests that the part of the code

relating to personal insolvency was hurriedly drafted and it received very less legislative attention. Therefore the paper suggests that many fundamental questions regarding the purpose or the impact of many provisions are still not clear. This paper tries to analyze the purpose of various provisions, assess the design of the framework and also anticipate the function which will be fulfilled by the provisions. The paper observes that the new framework is a kind of legal shock due to unavailability of various tools to both creditors and debtors. The paper concludes by saying the IBC, 2016 has the potential to transform Indian society by removing the stigma attached to financial distress and debt relief'.

Ashish Pandey "Anticipating the Function and Impact India's New Personal Insolvency and Bankruptcy Regime" (2016):

The paper analyses the development of Bankruptcy and Insolvency Laws in India after independence. The paper has examined the changes in the legal regimes in the context of political realities. Further the paper suggests there the certain loopholes in individual laws relating to insolvency and also discusses the lack of harmonization. By empirical data the paper demonstrates that there has been negative impact on the insolvency resolution timelines due to the inefficient and insufficient Insolvency and Bankruptcy legal framework. Moreover the author argues that in the IBC, 2016 encourages liquidation rather than financial restructuring. Another opinion of the author expressed in the paper is that the IBC fails to provide adequate representation to all stakeholders. Finally the author concludes by giving various possible solutions to the challenges faced by the IBC.

Anarna Ravi "The Indian Insolvency Regime in Practice: An Analysis of Insolvency and Debt Recovery Proceedings" (2015):

The study analyzed 45 cases relating to resolution of insolvency and bankruptcy for the purpose of assessing the efficiency of the resolution process under the "SICA 1985". "Companies Act, 1956", "SARFAESI Act, 2002". The paper on basis of the data enumerated demonstrates that in more than 40% of case the time from filing of application to judgment was more than 10 years, while winding up procedures or debt recovery proceeding took over 5 years. The concludes that the reasons behind such was overlapping of multiple laws to protect the interest of debtor from various stakeholder,

overlapping jurisdictions of civil courts and tribunals, and the rehabilitation stance of adjudicators in resolving insolvency an bankruptcy.

Rajeswari Sengupta, Anjali Sharma & Susan Thomas "Anticipating the Function and Impact India's New Personal Insolvency and Bankruptey Regime" (2016):

The study argues that the legal regime of insolvency and bankruptcy has many deficiencies. Further an absence of a coherent and efficient framework has resulted in negative economic outcome. The paper suggests that evolution of the Bankruptcy and Insolvency laws certain way has led to such a fragmented legal regime. Finally the paper concludes that piecemeal problem solving attitude will only lead to inefficient outcomes in solving this complex problem and the problem needs to be approached in a holistic way to achieve the desired outcome. At last, the authors advocates for a comprehensive "Insolvency and Bankruptcy framework.

Rajesh Kumar "Banking Sector Efficiency in Globalized Economy(2006):

It highlighted that the performance of the banks both in the public and private sectors has become more market driven with growing emphasis on better performance. Author has examined the broad structure of banking system in India, analyzed the overall efficiency of the system in terms of financial parameters into two components: technical efficiency and allocation efficiency. He concluded that the much-publicized fact that public sector banks are inefficient is based on a piecemeal analysis in the form of a simple, static, partial and isolated ratios having some hidden and often misconceived assumptions about the structure. The study concluded that there is an urgent need of the time to go in for this kind of system wide analysis to explore the intricacies of the complex system.

Vikram Bhatia "Non-performing assets of Indian public, private and foreign sector banks: An empirical assessment (2007)":

It explored the application of an empirical approach to the analysis of NPAs. The NPAs are considered as an important parameter to judge the performance and financial health of banks. The level of NPAs is one of the drivers of financial stability and growth of the

banking sector. This paper attempts to find out the fundamental factors which impact the level of NPAs of banks in India . A framework consisting of two types of factors, viz., macroeconomic and bank-specific parameters, is developed and the behavior of NPAs of the three categories of banks has been analyzed'.

1.8 RESEARCH DESIGN

The research analyses the corporate insolvency mechanism prevalent in India by looking into its conceptual and historical background, reasons for requirement of a new reforms in this regard, the regulatory framework and finally knowing its efficiency by studying various data issued by RBI and IBBI. The dissertation is divided into eight chapters , each dealing with a separate aspect which is given as under:

The first chapter titled "*Introduction*" provides the research background which briefly explains the relevance and reasons of the study. The chapter further provides the statement of problem, aim and objectives of research, scope and limitation, literature review, research questions and the research methodology used.

The second chapter titled "*Concept and Evolution*" briefly explores the meaning, nature , concept and frontiers of insolvency and bankruptcy laws. Further this chapter also talks about the evolution of insolvency laws in India.

The third chapter titled "*Issues Prevalent in India*" mentions about the different problems which Indian economy was facing and various loopholes in the current mechanism prevalent in the country.

The fourth chapter titled "*National Legislations –A Legal Analysis*" briefly mentions about the requirments for inititation of the corporate insolvency resolution process, formation of committee of creditors and its regulatory requirements and the vital role of resolution professional in the insolvency process.

The fifth chapter titled "*International Insolvency laws*" deals with the modal law passed by UNCITRAL and World Bank and a comparative analysis of insolvency laws in USA, UK and India.

The sixth chapter titled "*Latest Developments: A Legal Analysis*" discusses about the various landmark cases held by Supreme Court of India and the latest amendments and ordinance passed

The seventh chapter titled "*Effectiveness of New Reforms in Insolvency*" demonstrates and evaluate the efficiency and effectiveness of the various steps taken by government in the insolvency regulation.

The eleventh chapter titled "*Conclusion*" evaluates all the above mentioned chapters and suggests the reforms needed to enhance the effectiveness of the corporate insolvency laws in India.

CHAPTER 2

CONCEPT AND EVOLUTION OF CORPORATE INSOLVENCY

2.1 INTRODUCTION

A corporation likes humans takes its birth and has a separate legal entity in the eyes of law[6]. For an economy a corporation plays an imperative role in its development, this can be witnessed by the financial crisis in 2008 that reminded the world how few key corporations and their failure could effect the economy of the world[7]. Failures of a corporation can include various reasons like under capitalization, lack of cash, inability to pay its debts, taken more loan than the requirement of the project of the company etc.

However like humans , a corporation also suffers from an 'ill health' or 'financial distress' due to many reasons . In such distressed situation , contrary to many contractarian theorists who have conceptualized that a corporation is a combination of contracts fail because in such scenario the other party in the contract is more inclined towards breaching of the contract signed, therefore the law of a country should step in to regulate the insolvency laws which can protect the rights of the creditors and the conduct of the parties as suggested by proprietary right theorist[8] .

Various systematic measures either formal or informal are taken in attempt t revive a corporation same as doctor makes all of him attempt to revive an ill health of his patient , such attempts are termed as 'Corporate Rescue'. There are various terms used in the process of revival of the corporation in the economy . However it is essential to understand the meaning of such interchangeable words like insolvency , bankruptcy, winding up of a company and liquidation of company .

2.1.1 DEFINITIONS

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[6] Indrajit Dube, *Indian Corporate Insolvency Law: Efficiency and efficacy from a Cross Border Perspective*, http://ssrn.com/abstract=1141931

[7] J C Coffee, '*What went wrong? An initial inquiry into the causes of the 2008 financial crisis',* vol. 9 JOURNAL OF CORPORATE LAW STUDIES, pg. 110, (2013).

[8] John Armour and Michael J. Whincop, *The Proprietary Foundations of Corporate Law,* vol.27, OXFORD JOURNAL OF LEGAL STUDIES,pg. 429-465, (2007).

2.2.1 CORPORATE INSOLVENCY

Insolvency means "The condition of a person who is insolvent; inability to pay one's debts; lack of means to pay one's debts. Such a relative condition of a man's assets and liabilities that the former, if all made immediately available, would not be sufficient to discharge the latter. Or the condition of a person who is unable to pay his debts as they fall due, or in the usual course of trade and businesses"[9].

According to Investopedia, "Insolvency is when an organization, or individual, can no longer meet its financial obligations with its lender or lenders as debts become due, payment arrangements. Insolvency can rise from poor cash management, a reduction in cash inflow forecasts or from an increase in expenses". A company has to make lot of formal as well as informal arrangements with its creditors prior to the initiation of the insolvency proceedings.

Therefore corporate insolvency can be defined as a situation when a company is not able to repay its debts on the day it became due , this leads to a state of default of the corporation. Insolvency by a corporate personality which has an artificial legal existence can be said to be corporate insolvent.A body corporate that is "unable to pay debts as they fall due in the usual course of business" or has "liabilities in excess of a reasonable market value of assets held" is said to have attained insolvency, Insolvency is attained mainly due to the following reasons:

a. cash mismanagement
b. rise in cash expenses;
c. decline in cash flow

Early recognition of insolvency is of paramount importance to satisfy the of the creditors of the insolvent individual or body corporate which arises on the o of insolvency. For instance, assets belonging to the insolvent individual or body comp may have to undergo liquidation to discharge the outstanding debts. It is a common practice that before

[9] Black's Law Dictionary 11th ed. 2006 ''insolvency "

initiating liquidation process, the insolvent may try to negotiate and arrange an alternative payment method. "Mismanagement" and "Financial burden" are the primary reasons behind Insolvency. These conditions are comparatively more widespread in companies of smaller size s of the notable causes of insolvency are that the company could not adapt to the demands of the market, incompetent management, "long term capital loss", "Knod effect" from other insolvencies, business done taking huge risk, too much expenditure competition, unrealistic ventures, credit situations etc[10]. Some actions that can rectify insolvency are "reconstruction of debts", "revival rehabilitation of sick industries" and "companies restructuring" like mergers amalgamation..

2.2.2BANKRUPTCY

On the other hand, Bankruptcy is a legal proceeding involving a person or an individual regarding its inability to pay its debts in due course of time. All of the debtor's assets are measured and evaluated and it may be used discharge a portion of the outstanding debt. Bankruptcy offers an opportunity to individuals and businesses to start afresh by giving the effect of discharge of debts which in reality cannot be paid in whole[11].

This process also offers the creditors an opportunity to obtain part repayment based on the debtors assets left for liquidation. Therefore the process of Bankruptcy is beneficial to the overall economy as the benefit is two fold[12] i.e, the individuals and businesses get a new lease successful completion of bankruptcy proceedings, the debtor is relieved of the debt obligations incurred prior to filing for bankruptcy. of life their old loan gets discharged they get a second chance to gain access to consumer credit, further, the creditors also get some measure of debt repayment.Bankruptcy can be of two types –

[10] Ileana Ashrafzadeh - Nișulescu & Marușa Beca**,** *The Corporate Insolvency's Evolution in the EU and India in the Period 2007-2012, 3* Journal Of Knowledge Management, Economics And Information Technology, pg.290[2015]

[11] M. White, *The Corporate Bankruptcy Decision*, vol.3, Journal of Economic Perspectives, pg.190, (1983)

[12] Roy Goode, The Foundations of Corporate Insolvency Law in PRINCIPLES OF CORPORATE INSOLVENCY LAW, 6th ed.,(2011), pp. 58

Reorganization bankruptcy- in this type of bankruptcy the person tries to restructure its organization or business to revive

Liquidation bankruptcy – in this case the debtor tend to collect its assets to pay off its creditor

Bankruptcy is a status that can only be attained by individuals and not by companies . bankruptcy is temporary legal status which is given to an insolvent person, which attains lapse of a specified time has the effect of discharging the debts of the bankruptcy.

2.2.3 COMPANY BANKRUPTCY

Technically there is no concept as business bankruptcy or company bankruptcy. Companies cannot be declared as bankrupt as they are liquidated once there is a failure of 'Corporate Insolvency Resolution Process'. Unlike US laws there is no provision of 'Corporate Insolvency' in India under the new insolvency act i.e. IBC 2016. This term is widely in use but has no legal basis. Therefore the term 'bankrupt' can only be associated with persons including partnership declared by a court to be insolvent, whose property is taken and disposed of to repay its creditors . One can become bankrupt in two ways either debtor himself filing for bankruptcy or petition is filed by the creditors for there repayment of debts.

Difference

It is essential to understand that an entity going through insolvency proceedings can be declared as bankrupt but the visa-versa cannot be true . Insolvency can be of some period of time till the entity has the inability to pay its debts, but this not the case in bankruptcy. All insolvent entities might not be declared as bankrupt , while the later can be said to be insolvent. Insolvency is generally filed by corporate persons whereas the bankruptcy is filed by individuals.

BASIS FOR COMPARISON	INSOLVENCY	BANKRUPTCY
Meaning	Inability of the corporation to pay off its debts either due to cash unavailability	Inability of an individual to pay off its debts and files application in the court to

	i.e cash insolvency or excess of its liabilities i.e. balance sheet insolvency	declare himself bankrupt
Nature	Its nature is temporary and there is a chance of revival of the company	It is permanent in its nature, assets are sold to repay the creditors
Related to	Insolvency is related a financial state of companies	It is more of a legal concept
Last Resort	This is not the last resort	This is the last resort available
Process	Insolvency proceeding are generally involuntary but with the indroduction of IBC even the corporate debtor can intitate for insolvency proceedings	Bankruptcy proceeding are generally voluntary where the person himself goes to court to declare him insolvent
Credit Rating	Credit rating is not much affected	In case of bankruptcy credit rating is severely affected

2.2.4WINDING UP

It is a state of affairs where a company is dissolved in which the assets are realized out of which the company debts are paid back and in case any surplus is left than it is distributed among its members[13] . This whole process of liquidation is done according to the process of law[14]. The Supreme Court held in "*Pierce Lesis and Co. Ltd. v. Violet Ouchterlony*" that the existence of the company does not cease to exist during the winding up procedure except in case it is dissolved . Winding up precedes dissolution and

[13] M. White, *The Corporate Bankruptcy Decision*, 3 Journal of Economic Perspectives,129, (1983)
[14] Ileana Ashrafzadeh Nişulescu & Maruşa Beca**,** *The Corporate Insolvency's Evolution in the EU and India in the Period 2007-2012, 3* JOURNAL OF KNOWLEDGE MANAGEMENT, ECONOMICS AND INFORMATION TECHNOLOGY, 68, (2009)

there is no legal provision as heirs or successor of the company . on dissolution if there is any property left than such property will vest in the government[15] .

Insolvency is a stage which also involves the process of corporate rescue or corporate resolution plans which has a chance of revival of the company, whereas winding up comes at later stage which leads to dissolution of the company where the company ends its existence. Even a the central government or registrar or any contributories can file for winding up of the company but this not the case incorporate insolvency . The tribunal appoints the 'official liquidator' as company liquidator in accordance with section 275 of the Companies Act 2013 who look after all the winding up proceedings.Key difference between winding up and insolvency

Basis for Comparison	Insolvency	Winding Up
meaning	It is a situation of financial distress under which the company is unable to pay its debts in due course of time .	It is a stage which leads to dissolution of the company
Financial soundness	A company initiates the insolvency proceedings when it not finically sound	It is not necessary for the company to wound up when it is financially unsound . It can initiate the winding up proceedings even if it is financially sound
Property is vested with	During insolvency, all the assets are taken care by resolution professional	Whereas during winding up the assets are managed by the official liquidator
Dissolution	Corporate debtor is discharged after paying its liabilities	The company is dissolved or cease to exist

[15] Vanessa Finch, Corporate Failure, CORPORATE INSOLVENCY LAW, (2009), pp. 144.

There is another term 'liquidation' which is used in common parlance when the insolvency is in process and often misunderstood. Liquidation is nothing but the winding up procedings of a corporation[16] by the person specially appointed by the court to supervise this known as 'official liquidator'. Liquidator is entrusted with the responsibility to collect the assets of the company and distributes it proceeds wisely among various creditors with the permission of the court. Only corporate persons who has artificial legal entity can be liquidated and no individual can be liquidated.

Therefore insolvency is a trigger that can lead to liquidation , this depend upon the corporate creditor either to initiate insolvency proceedings against corporate debtor or directly take the company to the liquidation . By initiating the insolvency proceedings the cost to be paid by the society is reduced to a large extent as the corporate debtor has the opportunity to revive itself nd have a come back in the market.

The ideal insolvency and bankruptcy law should include early identification of economic viability of a corporation, fair and transparent allocation of funds raised by selling of the assets of debtor to the creditors involved, reduce the time involved in resolution proceedings , then the recoveries can be faster and the capital of the company can be preserved that can be used for better and more appropriate allocation.

2.3 PRINCIPLES OF CORPORATE INSOLVENCY

An economy includes the contribution of many corporations for its overall development . Such corporations make their best efforts to compete and survive in the market , for that they use new marketing strategies or product innovation to have a competitive edge in the market. To have competitive advantage many times corporations takes hefty amount of loan which they are unable to pay, this lead them to drive out of the market because survival of the fittest is the law that govern the market [17].

The main objective of any insolvency law in a country should be to encourage the company to revive itself, so that it can repay its debts to its creditors and stand up again

[16] Matej Marinc & Razvan Vlahu, GENERAL ISSUES IN BANKRUPTCY LAW, The Economics Of Bank Bankruptcy Law, pg. 34, (2012)

[17] M. White, The Corporate Bankruptcy Decision, vol. 3 Journal of Economic Perspectives,,pg. 129,(1983).

in the market . The purpose of any insolvency law in the country should not be to discourage its growth chances rather the government should provide such companies an opportunity to run their affair more efficiently[18]. There are mainly three objective of any corporate insolvency laws[19] –

1.Maximization of creditors return

2.Establishment of fair system for ranking of creditors claims

3.Provide a mechanism which help in identifying the failure of the company and bring the persons in light who are guilty for mismanagement of the company.

Insolvency laws should satisfy different interests to the extent possible such as employment of manager and workers, stock price requirement of the shareholders etc. Law has given different stakeholder , different rights due to this reason they bargain their right in such distress of the company. They need to look for a balance within themselves so as to resolve the situation in the smooth manner. Law should also try to bring the harmony in the relationship of corporate debtor and corporate creditor in the ex-ante sense [during solvency] and in ex-post sense[insolvency][20] .

2.4 THEORIES OF CORPORATE INSOLVENCY LAW

There are mainly three theories which are related to corporate insolvency laws in any economy which should be taken care of while drafting regulations relating to corporate insolvency[21].

1. *Creditor's wealth maximization and creditors' bargain* (CWM and CB)

The main purpose of any corporate insolvency law in a country is to promote the maximum collection of creditors return by way of efficient collective system during insolvency proceedings. The law should also solve the multiple disputes arising out of the

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[18] Vanessa Finch, CORPORATE FAILURE AND CORPORATE INSOLVENCY LAW, 11th ed., 2009, pg. 144

[19] Roy Goode, PRINCIPLES OF CORPORATE INSOLVENCY LAW, 3rd ed., 2011, pg.. 58

[20] Matej Marinc & Razvan Vlahu, THE ECONOMICS OF BANK BANKRUPTCY LAW, pg.23, (7th ed., 2012).

[21] Ruzita Azmi Universitiy, Utara Malaysia, Kuala Lumpur Adilah Abd Razak,*Theories, Objectives And Principles Of Corporate Insolvency Law: A Comparative Study Between Malaysia And Uk* ,vol.7,UPM, pg. 47(2018).

common pool of assets of the corporate debtor . The rehabilitation of the corporate enterprise is not an acceptable goal of any insolvency law except to the extent it increases the creditors return of payments. As per this theory the main objective of any corporate insolvency law in a country should be to ease the collective debt collection and to agree the corporate creditors for collective proceedings rather than opting for individual actions in the court. By this collective mechanism the creditors returns are assured . This theory gives more focus to respect the ex-ante creditors' rights.

2.*Communitarian Vision*

This theory stresses on multiple constituent interests mainly public interest. This theory consider individuals to be interdependent and it is upon them to act in best interest of themselves and the community even if this effects their own freedom . This theory is in favour to rehabilitate corporate entity where this gives better result for the community by way of protecting jobs . any change in ex-ante insolvency laws is allowed under this theory. This theory also promotes conducts that help in survival of the corporate entity and its proper liquidation . The major reason of it setback is the extensiveness of the interests while making insolvency laws.

3.*Multiple Values*

Unlike above two theories , multiple values theory believes that insolvency issues are very complex and normative that cannot be just reduced to a theory which focus on single aspect of the whole process like creditors wealth maximization theory and communitarian vision theory which emphasize more on community .

2.5 FRONTIERS OF CORPORATE INSOLVNCY LAW

The central emphasis of any corporate insolvency legislation framework is on mainly three frontiers-

1.*Coordination problem*

There is a necessity for smooth coordination in corporate insolvency regulations especially when especially when the company borrows from numerous creditors.

Inefficient insolvency laws and coordination in creditors can lead to premature insolvency of a corporation. Every creditor can sue individually to the corporate debtor so as to remain in safe side , but such actions leads to plethora of cases in the court. While secured creditors might come forward to cash in their collaterals. On the other hand operation creditors might refuse to grant business credit periods to pay their bills.

In such scenario there can be a huge chaos among the creditors that can cause huge harm to the economy. A solution to solve this coordination problem is to apply a legal stay in repayment of debt . equal standing is given in the eyes of laws to all the creditors who debts contracts of equal amount . like most insolvency laws in a country there should be a prior creditors meetings before adopting any major decision relating to insolvent corporation.

2.*Ex-ante efficiency*

The main aim of any insolvency law in ex-ante sense [before debtor is insolvent] is to provide maximum opportunities to debtors and creditors so that debtors can take risk and revive its financial health and improve its repayment capacity . Such law should also provide control to the creditors so as to have an eye on the debtor's behavior[22]. This focuses more on the creditors friendly laws by way of giving enhanced pay offs to creditors and low the chances of any concealment from the side of corporate debtor . Proper incentives to the creditors can significantly decrease the cost involved in the insolvency proceedings and can enhance the chances of revival of corporate debtor.

3.*Ex-post efficiency*

This stage comes after the debtor has become insolvent and only after this stage the ex-post efficiency of insolvency laws comes into picture. It is suggested to have a debtor friendly insolvency law contrary to the ex- ante insolvency laws which is in favour of creditors . After the debtor is declared insolvent, laws should be such that which increase the assets relocation, keep the expenses involved in insolvency law as low as possible , bring the opportunity to revive the lost reputation and ebsure proper incentives to the

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[22]S D Longopher & CT Carlstrom, *Absolute priority rule violations in bankruptcy laws*, FEDERAL RESERVE BANK OF CLEVELAND, ECONOMIC REVIEW, vol.31, pg.21 - 30.(2016).

parties involved.There should be an effort to lower the insolvency laws so as to allow easy exit of the player from the market, this will further increase the healthy competition in the market.

The indirect costs related to insolvency are not easy to determine which further includes lot of costs related to the loss of the employees, reputation loss of the firm corporation, contracts loss with the suppliers . The cost involved in insolvency is directly depended upon the procedure used for such insolvency proceedings. Three basic procedures are followed to solve the insolvency proceedings – foreclosure by senior creditor, liquidation and reorganization[23]. Ex-post efficiency stage involves corporate debtor friendly laws so that there are less chances for concealment of any information from debtor's side . This encourages the corporate debtor to take risk to do new projects through which it can earn some money and revive itself .

2.6 EVOLUTION

Origin of the tem "bankruptcy" is believed to have its roots in the Italian word "banca" (or "banco") and "rotta" (or "rotto "). These words literally mean "broken bench". This word is supposed to be a reference to the Italian money lenders who carried on business of money lending on the bank of river Arno situated in Florence and who used small benches to keep their documents upon[24]. In situations where the money lender could not discharge their obligations, angry customers would break the bench over their head[25]. Many experts have also referred to the Latin word "bancus ruptus" or the French "banque" and "route" as possible sources of the term "bankruptcy"[26].

For the first time the word bankrupt appeared in the English legal system in the year 1542 in the title of a Statute, "An Act Against Such Persons as Do Make Bankrupt"[27]. It is to be noted that in the aforementioned the word "bankrupt" is used as an act or thing but not

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[23]S. Djankov, O Hart & A Shleifer, *Debt enforcement around the world*, vol.8, JOURNAL OF POLITICAL ECONOMY 6, pg.1105 – 1149, (2008).
[24] Quilter, The Quality of Mercy-*The Merchant of Venice in the Context of the Contemporary Debt and Bankruptey Law of England*, 6 Insolv LJ 43, 49 (1998)
[25] Ej. Hayek, PRINCIPLES OF BANKRUPTCY IN AUSTRALIA 5 (2nd ed. 1967).
[26] Levinthal, THE EARLY HISTORY OF BANKRUPTCY LAW, U.PA.L.REV.,pg.78(1991)
[27] (1542) 34 & Henry VIII, c 4.

as a description to legal status held by someone. The use of the term in the latter sense does not occur until the legislation of Elizabeth I in 157" [28].

2.6.1 DEVELOPMENT OF CORPORATE INSOLVENCY IN INDIA

The term "insolvency" has its roots mainly in the 18 century statute targeting insolvent non traders. This word developed as a softer alternative to "bankruptcy" which the English gentleman considered to be too harsh on their ears. The distinction between tradesman and non traders was removed in 1861 when the bankruptcy and insolvency laws were consolidated into one. At this juncture "insolvency" got its current general meaning but term "bankruptcy" was still limited to "personal insolvency"[29].

The Insolvency legislation in India owes its origin to English law. Being a British colony, India has adopted the English method of insolvency . The traces of early insolvency laws can be traced to provisions of Government of India Act,1800 under section 23 and 24. The jurisdiction of all the insolvency matters was given to the Supreme Court (Calcutta) Madras and Recorder's Court in Bombay because of these sections. Such jurisdiction was given because the need was first felt in in Calcutta, Bombay and Madras where the British carried on their trade at most of the time . These courts had power to make rules and grant relief to insolvent debtor.

The Presidency Towns Insolvency Act, 1909 and Provisional Insolvency Act, 1920 were two major enactments that were introduced to govern the proceedings of personal insolvency, but they differ in territorial jurisdiction. The Presidency Towns Insolvency Act, 1909 was made to apply to insolvency cases instituted in Calcutta, Bombay and Madras and the Provincial Insolvency Act, 1920 was made for the all other provinces of India. These acts cover all the insolvency cases related to individuals and partnership firms[30] .

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[28] " Acts titled "An Act Touching Orders for Bankrupts" 13 Eliz 1, c 7 (1571) and "An Act agas Fraudulent Deeds, Alienations 13 Eliz I, c 5(1571).

[29] An act to Amend the Law relating to Bankruptey and Insolvency in England (1861) 24 &25 Vic, c 134

[30]Insolvency and Bankruptcy Law https://www.icsi.edu/media/webmodules/Insolvency%20law%20and%20practice.pdf

.After independence, both state and center government has the power to make laws on the insolvency matters as 'Bankruptcy and Insolvency' is provided under Concurrent List, List III, Entry 9 There were multiple legislations governing the insolvency laws prior to the enactment of the IBC, which are as follows:

- The Presidency Towns Insolvency Act, 1909
- Provisional Insolvency Act, 1920
- Indian Partnership Act, 1932
- The Companies Act, 2013
- SICA[31]
- RDDBFI Act[32]
- SARFESI Act, 2002[33]

SC held that in case of a conflict between a state law and a Central Law, the Central Law will prevail. The Insolvency and Bankruptcy Code is a law that codifies the existing law on bankruptcy, enacted under the powers given to the Central Govt under Part I of Seventh Schedule of the Constitution, and therefore, overrides any contrary state law[34]. With the enactment of IBC, Presidency Town Insolvency Act 1909 and the Provisional Insolvency Act, 1920 has been repealed. In corporate insolvency the major legislations dealing with this were the Sick Industrial Companies (Special Provision) Act, 1985 and the Companies Act 2013 for winding up.

2.6.2 FORMATION OF COMMITTEES

Various committees were constituted from time to time by the Government to review the existing bankruptcy and insolvency laws in India. These committees analyzed the laws and suggested reforms to bring the law in tune with ever evolving circumstances. Following is a snapshot of various committees constituted along with the outcome[35].

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[31] Sick Industrial Companies (Special Provisions) Act, 1985
[32] Recovery of Debts due to Banks and Financial Institutions Act, 1993
[33] Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002
[34] *Innoventive Industries Ltd v. ICICI Bank*, (2017) 23 SCC 321(India)
[35] Matej Marinc & Razvan Vlahu, GENERAL ISSUES IN BANKRUPTCY LAW, The Economics Of Bank Bankruptcy Law, pg. 34, (2012)

S.No	Year	Committee/Commission	Recommendations
1.	1964	Third Law Commission	Third Law Commission was established in 1961 under the Chairmanship of Justice J L Kapur. It submitted 26th Law Commission Report in 1964 proposing amendments to the Provincial Insolvency Act, 1920
2.	1981	Tiwari Committee	Following the recommendations of the Tiwari Committee, the Government of India enacted the Sick Industrial Companies (Special Provisions) Act, 1985, (SICA) in order to provide for timely detection of sickness in industrial companies and for expeditious determination of preventive and remedial measures.
3	1991	Narasimham Committee I	The government enacted Recovery of Debts Due to Banks and Financial Institutions (RDDBFI) Act, 1993
4	1998	Narasimham Committee II	The committee's recommendations led to the enactment of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI), 2002
5	1999	Justice Eradi Committee	Recommended setting up of a National Company Law Tribunal (NCLT) and proposed repeal of SICA
6	2001	N L Mitra Committee	Proposed a comprehensive bankruptcy code
7	2005	J J Irani Committee	The Committee proposed significant

			changes to make the restructuring and liquidation process speedier, efficient and effective and accordingly amendments were made to (RDDBFI) Act, 1993 and (SARFAESI)
8	2008	Raghuram Rajan Committee	Proposed improvements to credit infrastructure
9	2013	Financial Sector Legislative Reforms Commission	Recommended cha nges in Indian Financial Section
10	2014	Bankruptcy Law Reforms committee (BLRC)	Reviewed the existing bankruptcy and insolvency framework in the country and proposed the enactment of Insolvency and Bankruptcy Code as a uniform and comprehensive legislation on the subject

CHAPTER-3

ISSUES PREVALENT IN INDIA PRIOR TO INSOLVENCY REFORM

"Investor patience is running out and the government needs to push through at least one big-banner reform,"

- Kaushik Das

(Economist at Deutsche Bank AG)

In any country the legal environment has a very important role for its economic development. Country will have a strong global background only if its legal environment is well built and properly implemented[36]. The banking sector plays a very vital role in the growth of an economy. The amount of NPA determined the health of a banking industry in any economy as NPA has a direct relation on the performance of banking sector . NPA problem can make banks averse to risk capital in making new loans. Where NPAs or the other factor jeopardize the viability of a bank , or where economic conditions create systemic crises, creditor/debtor regimes insolvency system are particularly important to enable a country and stakeholder to respond promptly[37].

NPA has its direct effect on the profitability of bank in terms of rising cost of capital, increasing risk perception thereby affecting liquidity position of banks2. Banks have to approach courts for recovery of their debts, which is time consuming process because of this, funds get blocked in litigation and value of the assets charged to banks deteriorated. While some of the bad loans resolved due to various reforms in banking sector but the problem continued to simmer due to many factors, including absence of robust insolvency framework.

There are various recovery mechanism adopted by the financial creditor to reduce the amount of non performing assets. The measures earlier adopted by the creditors to recover the amount has not able to get the desired outcomes either through Contract Act or special act like Recovery of Debt Due to Banks and Financial Institutions Act 1993

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[36] Vanessa Finch, CORPORATE INSOLVENCY LAW, pg.144, (2nd ed., 2009).

[37]Ruzita Azmi Universiti Utara Malaysia, Kuala Lumpur Adilah Abd Razak, *Law: A Comparative Study Between Malaysia And Uk* Department of Management & Marketing,UPM,pg 155 (2017).

and Securitization and Reconstruction Financial Assets Enforcement of Security Interest Act 2002. Similarly the various provisions of Company Law relating to winding up of a company and the provisions of Sick Industrial Companies (Special Provisions) Act 1985 are of not much help for the recoveries of the due amount by the lenders[38] . Laws regarding individual insolvency (Presidential Towns Insolvency Act,1909 and Provincial Insolvency Act, 1920) are a century old. All this creates a hurdle in effective recovery mechanism. Therefore this increases the need for single window insolvency and bankruptcy resolution process. NPAs has reached the alarming rates impacting the availability of credit in the economy. The number has grown from Rs. 53,917 cr (2008) to Rs. 3,41641cr (September 2015) i.e from 2.11% to 5.08% of total loans[39]. Insolvency laws were of no help in resolving NPAs. Although banks were able to repossess fixed assets and enforce security interest, there was not much they could do to restructure and liquidate these assets in the absence of efficient insolvency law.

Gradually NPA problem turned into crises. In the initial years private sector banks topped the list of banks with highest NPA, then with time things worsened as 8 out of 10 public sector banks dominate the list . A perverse effect of slow legal process was that banks began shying away from risks by investing a greater than required proportion of their assets in the form of sovereign debt paper. The state of insolvency process continued to be highly ineffective and failed to deal with non performing loans. To confront this crisis and to improve ease of doing business in India, government formed Bankruptcy Law Reform Committee in 2014 to accelerate the enactment of new insolvency laws.

Following are the various reasons which necessitates the reform in the corporate insolvency laws in the Indian economy-

3.1 INADEQUACY OF SICA

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[38] Ruzita Azmi Universiti Utara Malaysia, Kuala Lumpur Adilah Abd Razak, *Law: A Comparative Study Between Malaysia And Uk* Department of Management & Marketing,UPM,pg 155 (2017).
[39] Dinesh Unnikrishnan and Kishor Kadam, *How Indian Banks Big NPA Problem Evolved Over Year,* vol.6, UPES,PG.98[2017]

Its main purpose Sick Industries Companies (Special Provisions) Act, 1985 was to provide for timely detection of sickness in industrial companies and provide remedy for it. SICA has many drawbacks because of which it became ineffective and finally repealed in December 2016 with introduction of IBC . There was no concept of independent insolvency practitioners, appointment of trustees, constitution of creditors' committee or effective court supervision .The automatic stay provision was misused by the debtor and this increases the recovery time . BIFR failed to resolve cases or check the abuse of SICA[40]. SICA was a culture misfit for the India of 21st century. The culture of banking and doing business was very different than SICA failed to fulfill its purpose and mandate. The average life of cases recommended for restructuring in 2002 was 7 years and the average life of cases for winding up takes about 6.5 years[41].

3.2 PROBLEM WITH "OUT OF COURT" RESTRUCTURING FRAMEWORK

As SICA did not prove effective, RBI introduced a scheme namely "Corporate Debt Restructuring Scheme" for out of court restructuring of corporate loans in 2001 inspired by London Approach and INSOL Principles. CDR has been beneficial for the stakeholders but has its limitation also , as it is available to only in cases involving multi-creditor financing. Lenders focus was only on the recovery of money rather that restructuring of the business.

3.3 SCARED OF ONE TIME SETTLEMENT

RBI issued a number of one time schemes for settlement of dues between lenders and borrowers from time to time[42]. Some of these failed to produce desired result as the lenders were scared that writing off loans may bring investigating bodies to come after them and question merits of each waiver[43].

3.4 PROBLEM WITH FILING CIVIL SUITS

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[40] Sumant Batra, *The Asian Recovery :Progress and Pitfalls, the Position of India*, The World Bank Guild, http://www.sumantbatra.com/papers.php, accessed on 26 May 2020

[41] Arvind Panagariya, INDIA:THE EMERGING GIANT, Oxford University Press, pg 2, 2008.

[42] Sumant Batra, *The Asian Recovery :Progress and Pitfalls, the Position of India*, The World Bank Guild,http://www.sumantbatra.com/papers.php.accessed on 29 May 2020

[43] Sumant Batra, CORPORATE INSOLVENC, 1th ed.,2017, pg.12.

Another challenge the bank faced was of long drawn procedure for recovery of debts in overburdened civil courts. Lack of adequate commercial capacity and infrastructure in civil courts also contributed to delay in courts resulting in significant portions of funds of banks getting locked for number of years. Eventually government has to use the taxpayers money to make good the losses suffered by the banks.

3.5 DEBT RECOVERY TRIBUNAL

In 1993, the government of India formed the DRT for effective and speedy recovery of bad loans through a summary procedure. Banks and certain specified financial institutions only can access DRT. The total number of cases filed in DRTs by Scheduled Commercial Banks as a whole amounted to 1,50,503 with amount involved being Rs.2601 billion. Only Rs. 427 billion (16..43%) were recovered till March 2014. The expectations from DRTs were high. but within a lesser period than a decade it became clear that DRT has failed to serve their purpose[44]. After enactment of IBC, NCLT has been vested with the powers of DRT[45].

3.6 ISSUES WITH SARFAESI

NPA continue to rise in banks and financial institutions in the absence of an ineffective insolvency law. Nor any substantial recovery could be made through DRT . T.R. Andhyarujina Committee suggested a special enactment to enable banks and financial institution to recover their dues without the need to go to court or the DRT. This prompted the enactment of SARFAESI Act[46] 2002. The implementation of SARFAESI Act was delayed for some time as it faced a court challenge[47]. Though the amount was recovered but the sale of the assets by creditors was the problem. Not many buyers came forward to purchase assets that were auctioned .There were other issues also like high stamp duty of transfer, disagreement over valuation of asset, even banks were reluctant to takeover the management as banks don’t want to be burdened with the management of the business.

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[44] Shri R. Gandhi (Deputy Governer), *Banks, Debt Recovery and Regulations: A synergy* https://m.rbi.org.in/scripts/BS_SpeechesView.aspx?id=931 accessed on 2 June 2020

[45] *SBI v. Ramakrishnan*, (2018) 6 SCC 421(India)

[46] Securitisation and Recontruction of Financial Assets and Enforcement of Security Interest Act, 2002.

[47] *Mardia Chemicals Ltd. v. Union of India*, (2004) 4 SCC 311 (India).

3.7 ASSET RECONSTRUCTION COMPANY

T.R Andhyarujina Committee recommended the formation of asset reconstruction company under SARFAESI so that stressed assets of banks can be transferred to it . In return asset reconstruction company would issue to bank NPA swap bonds representing realizable value of the assets transferred. There are 19 private sector ARC licensed by RBI. But ARC could not make a significant difference in dealing with NPAs because of many reasons including ineffective insolvency law to enable quick resolution of NPAs acquired by banks.

3.8 WINDING UP OF COMPANY

Winding up of companies takes a long time in India. Till recently application for winding up on any ground including pursuant to recommendation made under SICA was required to be filed under Companies Act 2013. But after enactment of IBC default in payment of debt can be ordered only by NCLT, earlier this power was with the High Court. As on 31 October 2015 only about 955 out of 4636 cases of court were resolved in 5 years. Even some of the cases are pending in court for more than 20 years[48] Due to the lengthy process kept substantial corporate assets unrealized and undistributed. The inordinate delay in liquidation proceedings marred the possibilities of rapid use of productive assets lying dormant in these proceedings throughout the country.

3.9 MULTIPLICITY OF LEGISLATIONS

(a) Corporate and firm insolvency

Prior to the introduction of the Insolvency and Bankruptcy Code 2016 India has multiple and overlapping laws for the insolvency proceedings like provisions of Partnership Act 932 , Companies Act, SICA, Recovery of Debt Due to Bank and Financial Institution Act 1993 , SARFAESI 2002 . Such laws are of no great help to the financial creditors especially banks because of the various loopholes and contradictory provisions. Due this the need arose for a single window insolvency and bankruptcy recovery mechanism.

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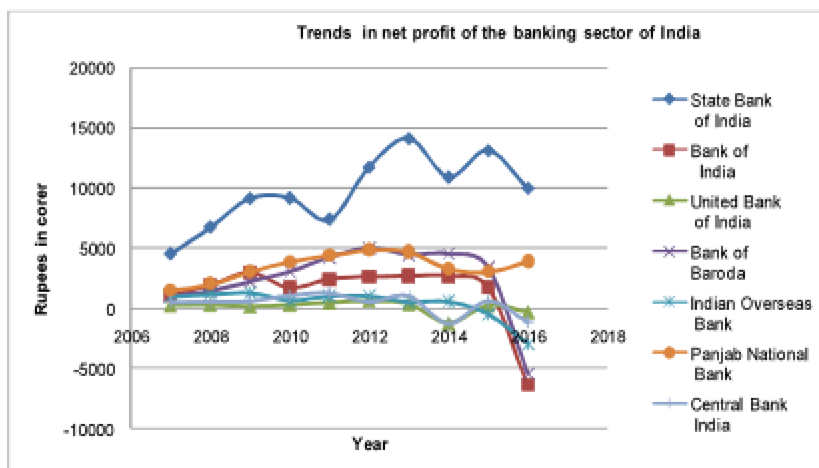
[48] Report of the Joint Parliamentary Committee on Insolvency Code, Department of Financial Services , pg76-77,2016

(b) Individual insolvency

Individual insolvency proceedings was regulated by a century old law (Presidency and Town Insolvency Act 1909 for residents of 3 cities namely Mumbai, Kolkata and Chennai and providing insolvency act 1920 for other residents) . Such law has become outdated and lost its utility in the present era.

3.10 LOW PROFITABILITY RATIO

Indian banking sector is trying to be in line with international best practices so that overall efficiency of the banks can be improved and bring down the NPAs and improve the profitability and overall health of the banking sector in the economy. NPAs reduces managerial, financial and operational efficiency of a bank because it increases the whole administrative cost. This further leads to reduction of overall profitability of the bank. It not only effect current profits but also the profits of the whole financial year as well as the future profit.



Source : Trends in net profit of banking sector in India, RBI (2018)

The graph shows the net profits of the 7 major public sector banks in the Indian economy. It can be clearly seen the losses suffered by the banks . The losses are maximum in 2016.

3.11 LOW RECOVERY RATIO

Over the years it was observed that the public sector banks faces the problem of rising NPAs more in comparison to private sector banks and foreign banks.

Table: 6: Scheduled Commercial Banks NPAs Recovered through Lok Adalats, DRTs and SARFAESI Act

(Amount in Billion)

Year/ Recovery Channel	Lok Adalats			DRTs			SARFAESI Act		
	No.of Cases	Involved amount	Recovered amount	No.of Cases	Involved amount	Recovered amount	No.of Cases	Involved amount	Recovered amount
2012-2013	840691	66	4	13408	310	44	190537	681	185
2013-2014	1636957	232	14	28258	553	53	1,94,707	953	253
2014-2015	2958313	310	10	22004	604	42	175355	1568	256
2015-2016	4456634	720	32	24537	693	64	173582	801	132
2016-2017	2152895	1058	38	28902	671	164	80076	1131	78
Total	12045490	2385	98	117109	2830	367	814257	5133	904

Notes 1. *: 'Refers to amount recovered during the given year, which could be with reference to cases referred during the given year as well as during the earlier years'.
2. #.:' Number of Notices issued', 3.'DRTs- Debt Recovery Tribunals'.

Table:Schduled Commercial Banks NPAs Recovered through Lok Adalat, DRTs, SARFAESI

SOURCE: RBI Financial Report 2016-2017

The table reveals about NPAs recovery through various channel, from 2012-13 to 2016-17. In the year 2012-13 total number of cases filed are 10,44,636, out of which most of the cases (8,40,691) are filed through Lok Adalats but the recovery was only 6.1 per cent, cases which are filed through SARFAESI Act was (190537) but recovered 27.2 percent of amount. Whereas in the year 2016-17total cases were 22,61,873, but most of the amount was recovered through DRTs. It is observed that year by year NPA cases are increasing i.e 46.18 percent during this five years and recovery through Lok Adalats is very less though most of the cases dealt by this channel. It is also found that most of the amount recovered through SARFAESI Act and DRTs only. Hence, the government and RBI has to take measures to recover through the SARFAESI Act and DRTs which will maximize the recovery of NPAs, which enables stability of bank performance and contributes for the growth and development of economy

3.12. HIGH COST OF FUNDS

Quite often banks face difficulties in giving funds for loans to the genuine borrowers. Banks are reluctant in improving the required loan amount to the genuine borrowers or if the fund is provided , the rate of interest so high that the borrower hesitate to take the required amount. Bank charges high rate of interest so as to compensate the losses it suffered due to the high NPA. Therefore it is common that corporate prefer to raise funds

through commercial papers where the interest rate on working capital charge by bank is higher . With the enactment of SARFAESI act 2002 , banks can send default notices to the borrowers to clear there due amount within a period of 60 days.

The secured asset cannot be sold or transferred without the permission of the lender once the bank issues the default notice. The whole purpose of sending the default notice is to inform the borrower to pay the amount mention the default notice or else the bank will take over the possession of the asset , takeover the management of the company .This is a default in this provision of the act that what banks should ensure is that this should move with speed and charge with Momentum and disposing of the asset. Because of this uncertainty increases with them passage of time that the value of the asset can also be reduced and cannot fetch good price then the very purpose of the Securitization act 2002 would be defeated and the hope of seeing must have growing banking sector can easily vanish[49].

3.13 RISE OF NPA .

High level of NPA can severally affect an economy in multiple ways. Earning assets declines as the operating expenses increases. NPA problem can make banks averse to risk capital in making new loans. Where NPAs or the other factor jeopardise the viability of a bank , or where economic conditions create systemic crises, creditor/debtor regimes insolvency system are particularly important to enable a country and stakeholder to respond promptly[50]. The legal impediments and time consuming nature of asset disposal process was one of the major cause of bank NPAs[51]. Banks have to approach courts for recovery of their debts, which is time consuming process because of this , funds get blocked in litigation and value of the assets charged to banks deteriorated. While some of the bad loans resolved due to various reforms in banking sector but the problem continued to simmer due to many factors, including absence of robust insolvency framework.

Impact of NPAs on banks

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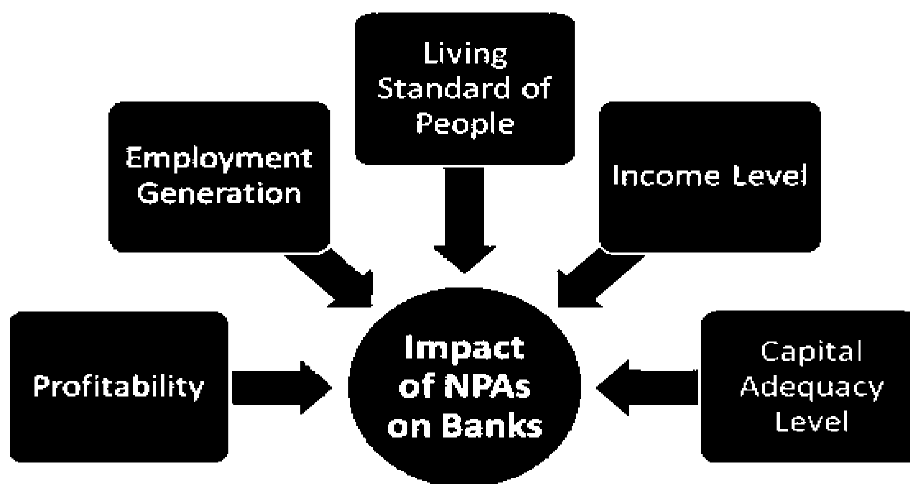
[49] C. S. Balas Subramanium, *Non Performing Assets and Profitabiliy of Commercial Banks in India – Assessment and Emerging Issues*, Vol 7, Journal of Research In Commerce and Management, pg. 10, (2017)

[50] World Bank Principles for Effective Insolvency and Creditor/Debtor Regime.

[51] Ibid. pg23

The constant increase of NPAs has a bad effect on banking sector which further has a direct impact on the profitability of the banks. The various impacts of NPAs on banking sector are mentioned below-

1. Liquidity position- high NPA creates difference between assets and liabilities this pushes the bank to raise the funds from the market at a higher cost which affects the liquidity of the bank.
2. Undermine banks image - high level of NPAs taints the image of a bank in the market both domestic as well as global, this further leads to low profitability of the bank.
3. Effect on funding by bank- due to high NPAs in banks in an economy there will be scarcity of funds in an economy, hence only few Bank will be in a position to lend money.
4. Higher cost of capital- for smooth day to day working operation , the banks have to keep aside more money.



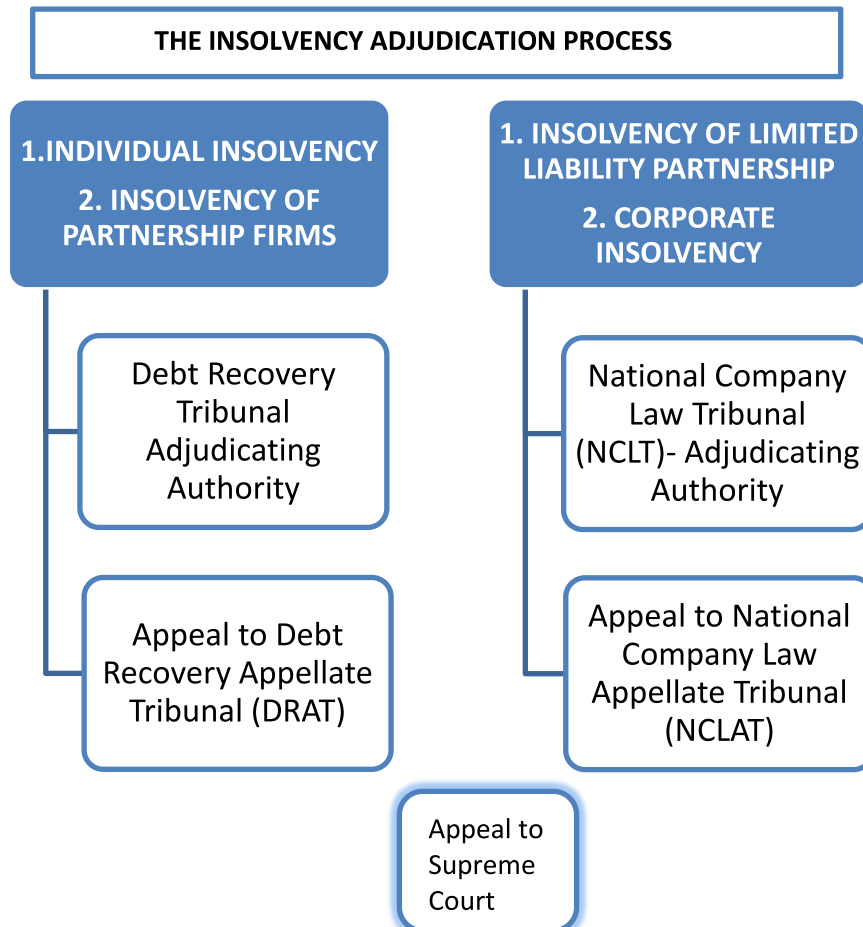
5. High risk - high NPA affect the risk taking capacity of a bank
6. Effect on income- as NPA not generating money this reduce the income of the bank
7. Effect on profitability and rate of interest
8. Ultimate burden on society - because of the increase of cost and reduction in the income of the bank there will be a shift of burden to the society as Bank charge high interest from the consumers.

CHAPTER 4

IBC REGULATIONS FOR CORPORATE PERSON : AN ANALYSIS

4.1 IBC : AN INTRODCTION

The Code proposes to cover Insolvency of individuals, unlimited liability partnerships, Limited Liability partnerships (LLPs) and companies. The Insolvency Resolution Process (IRP) for individuals and unlimited liability partnerships varies from that of companies and LLPs. The Debt Recovery Tribunal ("DRT") shall be the Adjudicating Authority with jurisdiction over individuals and unlimited liability partnership firms. Appeals from the order of DRT shall lie to the Debt Recovery Appellate Tribunal ("DRAT"). The National Company Law Tribunal ("NCLT") shall be the Adjudicating Authority with jurisdiction over companies, limited liability entities. Appeals from the order of NCLT shall lie to the National Company Law Appellate Tribunal ("NCLAT").



The Insolvency & Bankruptcy Code 2016 ("IBC"), enacted to address the troubling shortcomings in existing staggered insolvency laws in India and to bring them under one umbrella, is set up to face a monumental challenge and equally monumental expectations. At present, according to the data available with the World Bank in 2016, insolvency resolution in India takes around 4.3 years on average, compared with United Kingdom (1 year), USA (1.5 years) and South Africa (2 years). India was ranked 135th/190 countries in the World Bank Ease of Doing Business Index 2015 on the ease of resolving insolvency. Thus it is apparent that the Code is perhaps one of the most critical legislations introduced in the recent years impacting the ease of doing business in India

4.2 PROCESS OF INSOLVENCY FOR CORPORATE PERSON

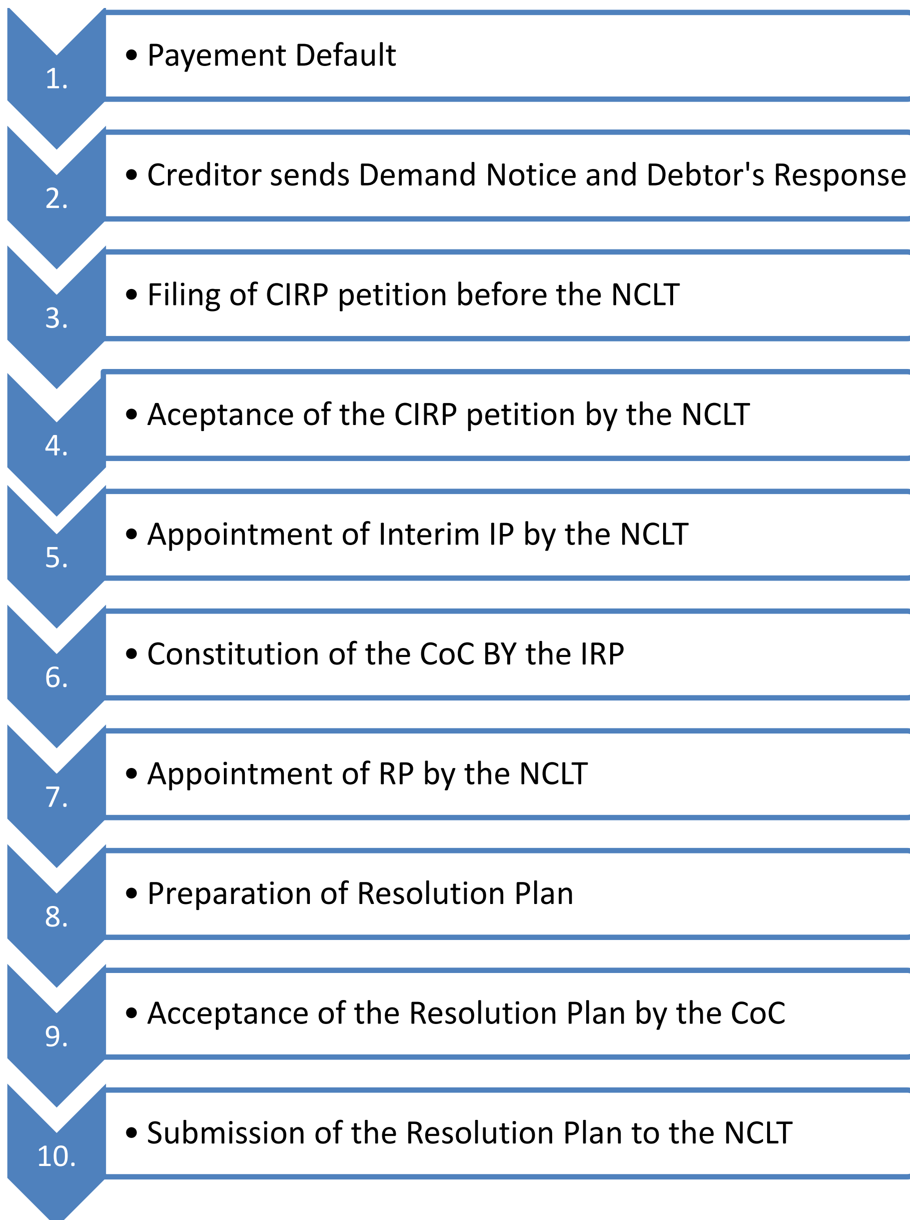
Part II of "Insolvency And Bankruptcy Code, 2016" mentions about insolvency resolution and liquidation proceedings for corporate persons. Central government is empowered under the code to specify the basic minimum amount of default by notifying in official gazette which shall not be more than one crore rupees. The whole proceeding of Corporate insolvency resolution is governed by Chapter 2 of part 2 of IBC.
Regulatory Mechanism.

The Code proposes to regulate insolvency professionals and insolvency professional agencies. Under Regulator's oversight, these agencies will develop professional standards, codes of ethics and exercise a disciplinary role over errant members leading to the development of a competitive industry for insolvency professionals.

The Code proposes a swift process and timeline of 180 days for dealing with applications for corporate insolvency resolution. This can be extended for 90 days by the Adjudicating Authority only one time extension. During insolvency resolution period (of 180/270 days), the management of the debtor is placed in the hands of an interim resolution professional/resolution professional.

Further, an insolvency resolution plan prepared by the resolution professional has to be approved by a majority of 66% of voting share of the financial creditors. Once the plan is approved, it would require sanction of the Adjudicating Authority. If an insolvency resolution plan is rejected, the Adjudicating Authority will make an order for the liquidation.

PROCESS OF INSOLVENCY OF CORPORATE PERSON



4.3 CORPORATE INSOLVENCY RESOLUTION PROCESS

In "Corporate Insolvency Resolution Process" the corporate creditor more specifically financial creditor has the assess to the corporate debtor's business for revival and rehabilitation. In case of failure of CIRP process financial creditor has the authority to make a decision to end the business of corporate debtor by way of opting of liquidation as the business no longer can repay their debts. The code gives the authority to the corporate debtor and creditors both financial creditor as well as operational creditors to initiate the CIRP proceedings[52] in case of any default. Any person who has legally given the financial debt to a corporate debtor is known as "financial creditor" on the other hand when operational debt is given by a person than such person can be termed as "operational creditor"[53].

Any claim related to the goods and services involved in the normal business transactions including the claims to be given to government and employment will be included under "Operational Creditor"[54]. On the other hand the term "Financial Debt" also has an inclusive definition in which following things are included like money taken on loan against any interest, any money raised against issue of debentures or bonds etc.

Therefore any corporate debtor who has done default worth one lakhs or upwards then the CIRP proceedings can be initiated as per the provisions of IBC by either the corporate debtor, financial creditor or operational creditor. As per the latest notification government has raised this limit to one crore.

4.3.1 PERSONS NOT ENTITLED TO MAKE APPLICATION

The "Insolvency and Bankruptcy Code, 2016", mentions about the persons who are not eligible to initiate any of the CIRP proceedings in the court of law. Following are such persons which may include[55]-

1. A debtor against whom the CIRP proceedings has been initiated in the court

[52] Sec.6, IBC, 31,Act of Parliament, 2016 (India)
[53] Sec 5(20), IBC, 31,Act of Parliament, 2016 (India)
[54] Sec 6, IBC, 31,Act of Parliament, 2016 (India)
[55] Sec 10, IBC, , 31,Act of Parliament, 2016 (India)

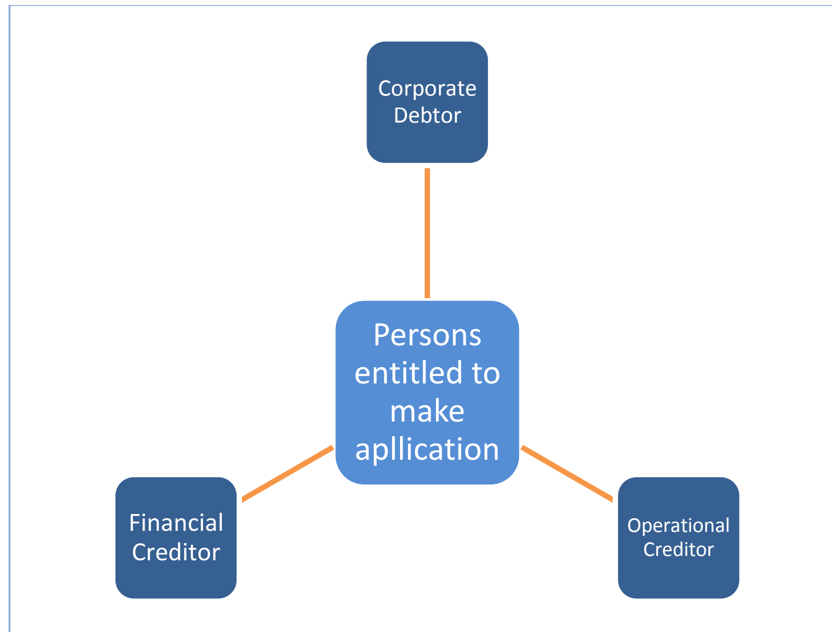
2. A corporate debtor against whom CIRP proceedings has been completed and 12 months has not been elapsed since the application is made
3. A corporate debtor or any financial creditor who has not obeyed the terms decided in the resolution plan and 12 months has not been elapsed
4. A debtor against who any of the liquidation proceedings has been made.

The term corporate debtor includes corporate applicant also[56]. IBC makes sure that three is no repeated course to CIRP, as corporate debtors are barred to initiate the proceedings till 12 months have not been elapsed as his can delay the payments of debts. Similarly corporate debtor or any financial creditor who has not obeyed the terms as decided in resolution plan is also barred to initiate any of CIRP proceedings. They can make any application in the court of law only after twelve months and not early than that. Such provisions in the law ensure that there is no abuse of corporate insolvency proceedings and make sure that terms decided in resolution plan is well executed .

4.3.2PERSON ENTITLED TO MAKE APPLICATION

The "Insolvency and Bankruptcy Code, 2016" allows three category of persons to initiate the corporate insolvency resolution process by making application in NCLT. Corporate Debtor himself or creditors both financial as well as operational can initiate the CIRP proceedings by presenting an application in the National Company Law Tribunal.

[56] Sec 11, IBC, 31,Act of Parliament, 2016 (India)



4.3.2.1FINANCIAL CREDITOR

The 'financial creditors' includes any person who has given financial debt to a corporation who is unable to repay its claim within due course of time. In such scenario, financial creditors along with the other creditors can initiate the corporate insolvency resolution process in the "National Company Law Tribunal" by presenting an application along with furnishing record or evidence of default and name of resolution professional to act as interim resolution professional and may also include such other documents as may be prescribed by Central Government or State Government in this regard. After the application is made NCLT has to confirm the existence of any kind if default within 14 days of of the application of CIRP. NCLT has to confirm the acceptance of application in case no default is found. Whereas on the other hand if any default is found application will be considered as incomplete and therefore application for CIRP is rejected. Sufficient notice has to be given to the applicant so that they can rectify the defects found in the 'corporate insolvency resolution process' application. The day NCLT accepts the application the corporate insolvency resolution process is deemed to be initiated-

(a)*Filing*

The "Insolvency And Bankruptcy Code" gives power to the financial creditors to either initiate the proceedings itself or along with the other financial creditors. It is not necessary that financial creditor will start the proceedings itself it can be done by any other person notified by the central government on its behalf. Section 7 of the IBC which govern the filing of CIRP application was amended by insolvency and bankruptcy code(second amendment) act 2018 . Prior to amendment only the financial creditor can initiate the proceedings when the default arises but now any person on its behalf can file an application before NCLT on the occurrence of default.

(b)*Time frame for ascertaining the default*

The Code mandates the furnishing of proof of default and name of resolution professional while making the application to initiate the proceedings against corporate debtor. Within 14 days of the receipt of application the NCLT has to find the default in the records the application will be deemed to be accepted in case no default is found within the period prescribed.

(c) *Admission*

NCLT can admit the application only if there is no default in the application and no disciplinary proceedings is initiated against the RP who is proposed in the application made. The records has to be proper and be made in the due course of time mentioned in the IBC . There is no other requirement to be looked after NCLT.

(c) *Rejection*

The application will be rejected by the NCLT and the notice has to be given to the applicant so that it can make good the default. Such notice should be served to the applicant within 7 days of receiving application. There are two grounds mentioned in the code for rejection of application first when the default is found the application and second when disciplinary proceedings is pending in the court of law against RP.

(d)*Commencement of Corporate insolvency resolution process*

"Insolvency And Bankruptcy Code" mentions that CIRP will be commenced from the date when the application is presented to the NCLT by the financial creditor against corporate debtor[57].

(e) *Communication of order*

Within 7 days of admission or rejection of the application there is a need of communication of order by the NCLT to the financial creditor or any other person who has presented the application on its behalf.

4.3.2.2OPERATIONAL CREDITOR

Section 8 of the insolvency and bankruptcy code 2016 governs the law relating to the CIRP proceedings by operational creditors against corporate debtor who has made the default in repayment of claims. The procedure for insolvency resolution by operational creditor is different from the procedure initiated by financial creditor, the reason behind such change in the procedure is because the amount of claims involved generally of small amounts like salary claims operational debts[58]. Whereas the chances of disputes are higher in case of operational creditor. The insolvency laws in India make sure the corporate debtor do not get involved premature insolvency proceedings by the operational creditors for small amounts. This promotes negotiations between the creditors and the corporation so as to restructure the debt.

(a)*Demand Notice*

The operational creditor has to serve a notice demanding the claims in regard of which default is made corporate debtor. Usually copy of invoices of purchase attached to such demand notice.

(b)*Payment of Debt*

The corporate debtor has 10 days from the date on which the notice is received for refusing to claim demanded by the operational creditor. Debtor can dispute the death

[57] Sec 7, IBC, 31,Act of Parliament, 2016 (India)

[58] Sec 8, IBC, 31,Act of Parliament, 2016 (India)

claim by sending record of unpaid amount of corporate debtor and copy of record in which the payment is made to the operational creditor.

(c)*Application*

Section 9 of the code provides for the initiation of corporate insolvency process against corporate debtor. When the demand notice is served by the operational creditor[59] to the corporate debtor and in relation to this no payment is made or no notice for existence of dispute is send within 10 days from the date on which the demand notice is received. In such case operational creditor can initiate the insolvency proceedings in NCLT against corporate debtor. The application should be submitted along with proof of evidence[60].

(d)*Furnishing of information*

The operational creditor has to attach few other documents as mentioned in the code along with the application[61]. These documents include copy of the demand notice to the debtor, affidavit has to be filed stating that no notice of dispute is given by corporate debtor, confirmation from the banks of the operational creditors that no payment has been received buy them from corporate debtor, a duplicate of record with information utility that no payment is received for operational debtor, no proceedings which is disciplinary in nature going on against RP.

(e)*Rejection of application*

The power is given to NCLT to reject the application made by operational creditor on the following grounds – when there is not proper application, any kind of payment is made by corporate debtor to operational creditor, no demand notice has been attached along with application and any kind of disciplinary proceedings is going on against RP. There is a provision in the code to give seven days to applicant rectification of any error in the application.

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[59] Sec 8,IBC, 31,Act of Parliament, 2016 (India)
[60] Sec 9, IBC, 31,Act of Parliament, 2016 (India)
[61] Sec 10, IBC, 31,Act of Parliament, 2016 (India)

4.3.2.3CORPORATE APPLICANT

When the operational creditor is a corporation the provision of section 10 of the code will be applicable. The term corporate applicant means and individual who manages the operations of corporate debtor or a person look after the financial decisions of corporate debtor or a member of corporate debtor specially authorized for this by the company. It is important to note that even corporate debtor can be corporate applicant.

(a) *Default By Corporate Debtor*

CIRP proceedings can be initiated only on the default by the corporate debtor and not on mere suspicion that it will be unable to pay it's that debt in your future, this provision make sure that there is no abuse of power given to the corporate applicant against corporate debtor.

(b)*Furnishing Of Information*

In case of default corporate applicant can file application with NCLT along with Furnishing books of accounts information related to the default, duplicate copy relating to appointment of RP.As per "Insolvency And Bankruptcy Code (Second Amendment) Act, 2018" minimum 75% of votes should be in favor of initiation of corporate insolvency resolution process by corporate applicant. This amendment also makes proceedings against RP a ground for rejection of application.

(c)*Admission or Rejection Of Application*

NCLT is given 14 days for approval or dismissal of the application under order has to be served to the corporate applicant. A chance should be given to corporate applicant in case of any default in the application. After approval of the corporate insolvency resolution process by the NCLT the proceedings are deemed to be commenced on the date of admission

4.3.3COMMITTEE OF CREDITORS

(a)Constitution

IRP will form committee of creditors after collection of all the data relating to the claims against corporate debtor. This committee will be consisting of financial creditors and not the operational creditors as financial creditors have higher claims and substantial interest involved. This committee helps in forming routine task related to CIRP, giving approvals to IRP for actions against corporate debtor. This committee plays a vital role in taking major decisions relating to corporate insolvency resolution process and liquidation proceedings against corporate debtor. The power is given to IRP for formation of committee of creditors within specific time period as mentioned in the code[62]. For the purpose of voting mechanism in the committee only such creditors who takes part in voting shall be considered and the creditors who you are refusing to vote will be deemed to be dissenting votes. Operation creditors are excluded from committee of creditors because they are not in a position to take the risk of restructuring of the debt and they do not have assessed to the commercial viability of the corporate debtor.

(b)Exclusion of related party

Financial creditor who is related to the corporate debtor[63] do not have any right of representation in the committee of creditors. Related party creditors cannot vote in the meeting organized. Such persons have no right of participation in COC. A person will be considered to be related party of corporate debtor when he is a policy maker, director, managerial personnel, who has technical information, manages the corporate debtor, a person who has more than 20% of the share capital. Even the holding, subsidiary or associate company will be considered as related party to corporate debtor and therefore is excluded from participation in committee of creditors.

The "Insolvency And Bankruptcy Code (Second Amendment) Act, 2018" clarified on related party. It states that the provisions relating to related party shall not be applicable to financial creditor who are regulated by financial sector regulator. Such financial creditors shall not be considered as related party only because of conversion of debt into equity shares earlier to insolvency commencement.

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[62] Sec 18, IBC,, 31,Act of Parliament, 2016 (India)
[63] Sec 5, IBC, , 31,Act of Parliament, 2016 (India)

4.3.3.1PERSON IS BOTH FINANCIAL AND OPERATIONAL CREDITOR

Practically there are situations when a person is financial creditor as well as operational creditor. In such situation the person shall be treated as financial creditor to an extent of its financial debts. The financial creditors who are also operational creditors will be given right of participation while constituting committee of creditors they are considered as financial creditors only for the financial debt given by them to the corporate debtor[64].

(a)Assignment of operational debt- Operational creditor has transferred its debt to a financial creditor in such case the transferee will be a re operational creditor in the eyes of law for such transfer.

(b)Single agreement with two or more financial creditor - Each of the financial creditor who has given loan to corporate debtor in a single agreement have a right of participation and to vote in COC to the extent of financial debts given by them.

(c)One agent for all financial creditors- This facility is available only when it is specifically mentioned in the contract between the financial creditors and corporate debtor. A person can be authorized act on behalf of all the financial creditors for voting, representation, appointment of RP in committee of creditors. Even the security holders and deposit holders can appoint a person on their behalf for their representation in committee of creditors if the terms of contract allow them.

(d)Remuneration for Authorised Representative- “Insolvency And Bankruptcy Code(Second Amendment) Act 2018” specifically mentions about remuneration to be paid to authorized representative only to the extent of terms of the financial debt and will be included in the insolvency cost.

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[64] S D Longopher & CT Carlstrom, Absolute priority rule violations in bankruptcy laws, FEDERAL RESERVE BANK OF CLEVELAND, ECONOMIC REVIEW 31, pg.21 – 30 (2019).

(e)Decision of committee of creditors - all the decisions in the committee only when vote in favour is not less than 51%.

4.1.3.2COMMITTEE WITH ONLY OPERATIONAL CREDITORS

Insolvency and bankruptcy code do not talk about situation where committee involves only operational creditors. However "Insolvency And Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Person) Regulations, 2016"mention provisions relating to such situation. committee consisting of only operational creditors can be formed in a situation there is no financial debt or all the financial creditors are excluded to form a committee of creditors because there related party to the corporate debtor. Following members shall be included in this committee[65]-

1.All the operational creditors are included in case there are less than 18 in number

2. An authorized representative of employees as well as workmen. Voting rights will be decided on the basis of the debt given. Such committee shall have same rights, powers, duties, and the responsibilities as COC.

4.3.3.3MEETING OF COC

There are some requirements to be fulfilled in case of meeting of committee of creditors as specified in "Insolvency And Bankruptcy Code". The participants of COC should meet in person or can even participate through electronic media[66]. RP should organize and give notice prior to such meeting all the participants. Operational creditors can attend the meeting but have no voting right. The voting share shall be in accordance with the financial that given by financial creditors to the corporate debtor. The meeting can be conveyed by RP in the request of members who have more thirty three percent of voting rights. The meeting required for the creditors shall have minimum members who have 33 percent of the voting rights[67]. Such members can attend the meeting either by way of video conferencing or in present itself by way of authorized representative. If the meeting lacks the quorum then it is stand adjourned for the next day.

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[65] Regulation 16, Insolvency And Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Person) Regulations, 2016"

[66] Sec 24,IBC, 31,Act of Parliament, 2016 (India)

[67] Regulation 22 of IBBI (insolvency Resolution process for corporate persons) regulations 2016

4.1.3.4SPECIAL APPROVAL FROM COC

Resolution professional cannot take all the decisions himself for insolvency proceedings. To make sure all the powers relating to CIRP is not only with resolution professional the act mentions about certain approvals buy RP from committee of creditors. Following are the matters that require prior approval of COC[68] –

1. Raising of interim finance more than the approval of COC
2. any major changes in the fundamental documents of Corporate debtor
3. Delegation of authority
4. Indulgence any related party transaction
5. Any changes of capital structure
6. Taking more money from Financial Institutions then decided
7. Any major changes relating to internal auditors
8. Any substantial change in the management of the company

Minimum 66% of voting share is required for approval of above-mentioned reasons. Any action without such approval shall be considered as void in the eyes of law.

4.3.4TIME LIMIT FOR COMPLETION OF CIRP

The corporate insolvency resolution process should be completed within 'one hundred and eighty days'[69] from the date when the insolvency application is initiated in the court. Though sometimes the proceedings can not be completed in due course of time due to many reasons either court is on holiday, some delay on behalf of RP or no consensus among the committee of creditors etc. in such scenario the code provides for the provision in which the time limit can be extended by filing an application in NCLT for extension .

This application can be made only after passing resolution by vote of more than 66 percent in favour by the committee of creditors. The "Insolvency and Bankruptcy Code (Second Amendment) Act, 2018" has amended this provision and reduced the percentage

[68] Sec 28,IBC, 31,Act of Parliament, 2016 (India)
[69] Sec 12 ,IBC, 31,Act of Parliament, 2016 (India)

to 66 from 75 percent , which is required to initiate the extension application in the Tribunal.

On application of the extension of CIRP because the process cannot be completed within due period of time than NCLT can extend the time period but such time period shall not exceed 90 days[70]. Any of the extension cannot be granted more than once as this can delay the proceedings and can go against the interest of creditors.

As per "Insolvency And Bankruptcy Code (Amendment) Act, 2019"the CIRP shall mandatorily be completed within a period of 330 days from the insolvency commencement date.

4.3.5WITHDRAWAL OF APPLICATION ADMITTED

When the IBC was passed there was no such provision for the withdrawal of application under the code. But the "Insolvency and Bankruptcy Code (Second Amendment) Act, 2018" has inserted a new provision which introduce the concept of withdrawal of the applications admitted under section 7,9,10. This process requires approval of 90 percent voting share of COC, this makes sure maximum of the creditors are in favor of the decision to withdraw the application.

4.4RESOLUTION PLANS AND STRATEGIES

The main concern of any insolvency law in a country is to maximize repayment to the creditors for their unpaid claims and to provide platform for revival of corporate debtor. Introducing the insolvency resolution plans is a way for giving chance of revival to the corporation which is going to insolvency proceedings. The IBC defines the term resolution plan which means plan proposed for revival of Corporate debtor by way of insolvency resolution in accordance with IBC provision[71]. The substitution is made in the definition of resolution applicant by way of passing "Insolvency And Bankruptcy Code

[70] Sec 12(3),IBC, 31,Act of Parliament, 2016 (India)
[71] Sec5(25), IBC, 31,Act of Parliament, 2016 (India)

(Amendment) Act 2018" . Resolution applicant is a person who makes us submission of resolution plan to the RP appointed for the insolvency proceedings and the code[72].

4.4.1PERSONS NOT ELIGIBLE TO BE RESOLUTION APPLICANT

Prior to 2018 there was no restriction on person who can be resolution applicant. But with the introduction of section 29A in the code where is a restriction on the resolution applicant for the submission of resolution plan. Following are the persons not eligible to propose resolution plans for revival of corporate debtors –

1. Any person who is undischarged insolvent
2. Any person who comes under the definition of wilful defaulter (Banking Regulation Act)
3. Any person who is convicted for or seven or more years
4. Person is disqualified to work as a director under any of the companies incorporated under Companies Act 2013
5. Any kind of prohibition imposed by SEBI for trading securities
6. The account of the corporate debtor is declared as NPA as per the guidance of RBI and such declaration is made within one year of commencement of CIRP.

4.4.2PROSPECTIVE RESOLUTION APPLICANT

The RP has a power to invite the application for prospective resolution applicants. He will mention about the criteria for prospective application as it is approved by committee of creditors. COC can impose any conditions for appointment of prospective resolution applicants[73]. All the information related to prospective resolution applicant will be mentioned under information memorandum, this will disclose about the financial position of corporate debtor and the disputes against it. The RP will cooperate and access the new resolution applicant if agrees to maintain the confidentiality and protect the IPR of the corporate debtor.

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[72] S. Djankov, O Hart & A Shleifer, *Debt enforcement around the world*, 116 Journal Of Political Economy 6, 1105 – 1149 (2018).

[73] Dr Raj Mittal & Diksha Suneja, *"The Problem of Rising NPA in Banking Sector in India : Comparative Analysis of Public and Private Sector Banks"*, Volume 7 , International Journal of management it and Engineering, Pg 2-3 (2017)

4.4.3SUBMISSION OF RESOLUTION PLAN

The RP will submit a resolution plan to COC after such approval it will be presented to NCLT for approval. Committee of creditors will look into the feasibility and practicality of resolution plan before giving its approval. There is a requirement to pass the resolution plan by COC with 66 percent of voting share[74] .

Steps involved under submission of resolution plan

(a)*Resolution plan by resolution applicant*- Resolution applicant is required to file an affidavit for its eligibility under section 29A to the RP. Disappointed shall be made on the basis of information memorandum prepared by RP.

(b) *Examination*- Before submission of resolution plan to COC, RP is required examine the resolution plan proposed by resolution applicant. He will look that such plan is not contrary to any of the laws passed. It will make sure that all the requirements mentioned by IBBI is fulfilled . The "Insolvency And Bankruptcy Code(Second Amendment)Act ,2018" mentions that if there is any requirement for approval of shareholders under Companies Act or any other law it shall be deemed to be have taken.

(c)After this the resolution plan will be submitted to committee of creditors and they will decide the terms before passing resolution for its approval. The votes shall not be less than 66% in favour of passing resolution plan. COC will look into feasibility and viability of the resolution plan before giving its approval[75].

(d)*Attending the meeting*- Resolution applicant can attend the committee of creditors meeting but has no right to vote for approval of resolution plan. If the resolution applicant is a financial creditor then in such case he has a right to vote.

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[74] Sec 30, IBC, 31,Act of Parliament, 2016 (India)

[75] RBI Master Circular "Prudential Norms on Income Recognition, Asset Classification and Provisioning - Pertaining to Advances"(Jan 29,2020 6:30p.m.) https://www.rbi.org.in/scripts/BS_ViewMasCirculardetails.aspx%3FId%3D449

(e)*Submission of resolution plan* - After committee of creditors approve the resolution plan suggested by resolution applicant it has to be submitted to the NCLT for its Review.

4.4.4APPROVAL OF RESOLUTION PLAN

After approval of the resolution plan by COC , it shall be placed before NCLT for its review. The adjudicating authority will approve the resolution plan only if search plan fulfill all the legal requirements provided in the act as well as in the regulations passed by IBBI[76]. The authority has the right to reject the plan proposed if this is not in accordance with the law passed by legislation in this regard. Order of approval has two consequences-

1. The Moratorium order will no more be effective
2. For database requirement RP will send all the records to the board
3..Necessary Approvals –In case resolution plan suggest any combination as defined under Competition Act .The resolution applicant how to take prior approval of competition Commission of India before suggesting such plan to COC.

4.4.5APPEAL

An appeal can be filed against the order of approving the resolution plan to the appropriate authorities[77]. The grounds on which an appeal can be filed, these are discussed below[78]-

1. Resolution plan is against any law passed by legislation
2. Substantial irregularity has been done by the RP
3. There is no provision for repayment of operational creditors as suggested by IBBI
4. It is not in accordance with any other criteria of IBBI

4.4.6RESOLUTION STRATEGIES

Corporate Restructuring process in India is governed by the Companies Act, 2013, the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 and various other regulatory laws such as the Income Tax Act, 1961, the Competition Act, 2002, the

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[76] Sec 31, IBC, 31,Act of Parliament, 2016 (India)
[77] Sec 32, IBC, 31,Act of Parliament, 2016 (India)
[78] Sec 61, IBC, 31,Act of Parliament, 2016 (India)

Foreign Exchange Management Act, 1999, the Indian and State Stamp Acts and Insolvency and Bankruptcy Code, 2016. Chapter XV of the Companies Act, 2013 (comprising sections 230 to 240 regulates compromises, arrangement and amalgamations.

Corporate restructuring may be broadly categorized as:

1. Organizational Restructuring

2. Financial Restructuring

1.Organisational Restructuring

Organizational Restructuring may include formation of fresh departments to assist increasing markets or reducing or eliminating departments to protect overheads. A corporation may commence restructuring to emphasize on a specific market segment[79] leveraging its essential competencies or may take on restructuring to make the organization lean and competent. This type of restructuring affects workers and involves dismissals or association with third parties to elevate abilities and technical know-how.

2. Financial Restructuring

'Financial restructuring is the process of reorganizing the financial structure, which primarily comprises of equity capital and debt capital. There may be several reasons (financial and non-financial) that trigger the need for financial restructuring'.

Financial restructuring is undertaken either because of compulsion (to recover from financial distress) or as part of company's financial strategy. Financial restructuring is done for various business reasons such as to overcome poor financial performance[80], to gain market share, or to seize emerging market opportunities. Financial restructuring undertaken to recover from financial distress involves negotiations with various stakeholders such as banks, financial institutions, creditors in order to reduce liabilities.'

No change in the company's financial structure and is undertaken for various business reasons such as:

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[79] Dr Raj Mittal & Diksha Suneja, *"The Problem of Rising NPA in Banking Sector in India : Comparative Analysis of Public and Private Sector Banks"*, Volume 7 , International Journal of management it and Engineering, Pg 2-3 (2017)

[80] SUMANT BATRA, The Asian Recovery :Progress and Pitfalls, the Position of India, The World Bank Guide (Jan 26, 2020 7:23 p.m.),http://www.sumantbatra.com/papers.php

• To overcome poor financial performance

• To address external competition

• To regain market share

• To seize emerging market opportunities

• Risk reduction

• Development of core competencies

The two components of financial restructuring are:

• Debt Restructuring

• Equity Restructuring

4.4.7FORMAL RESTRUCTURING AND INSOLVENCY PROCEEDINGS

The legislative framework in India now provides only for formal restructuring and insolvency proceedings. Chapter XV of the Companies Act, 2013 (comprising sections 230 to 240 lay down provisions to regulate compromises, arrangement and amalgamations. Barring few exceptions, these provisions are mostly used for the purposes of corporate restructuring (mergers, demergers, amalgamations) and have rarely been employed as a tool for debt restructuring.

Part II of the IBC deals with the insolvency resolution and liquidation for corporate persons. Section 4 of the Insolvency and Bankruptcy Code, 2016 provides that Part II of the Code shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees. The proviso to section 4 empowers the Central Government to specify, by notification, the minimum amount of default of higher value but it shall not be more than one crore rupees[81]**.**

Insolvency and Bankruptcy Code, 2016 lays down the following two independent stages:

(i) Corporate Insolvency Resolution Process[82]

(ii) Liquidation[83] .

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[81] Ibid. pg23

[82] Sec 4and 6-32, IBC, 31,Act of Parliament, 2016 (India)

Under the Insolvency and Bankruptcy Code, 2016, the resolution professional, during the corporate insolvency resolution process, invites resolution plans from prospective Resolution Applicants.

Such plans may be based on one or more mechanisms outlined in Chapter XV of the Companies Act, 2013 as well as in accordance with various mechanisms laid under Regulation 37 of the IBBI (Insolvency Resolution Process for Corporate Persons), Regulations, 2016 subject to the compliance of conditions as laid down under Section 30(2) of the IBC, 2016. The resolution plan shall provide for the measures, as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets, including but not limited to the following[84]:

(a) transfer of assets of the corporate debtor to one or more persons;

(b) sale of assets whether subject to any security interest or not;

(c) the substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;

(d) modification of any security interest;

(e) waiving of any breach of the terms of any debt due from the corporate debtor;

(f) reduction in the amount payable to the creditors;

(g) extension of a maturity date or a change in interest rate of a debt due

(h) amendment of the constitutional documents of the corporate debtor;

(i) issuance of securities, for cash, property, securities, or in exchange for claims or interests,

(j) change in portfolio of goods or services produced or rendered by the corporate debtor;

(k) change in technology used by the corporate debtor; and

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[83] Sec 33-54, IBC, 31,Act of Parliament, 2016 (India)

[84] Regulation 37 , IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

(l) obtaining necessary approvals from the Central and State Governments and other authorities.

One of the best methods for corporate debt restructuring is debt-equity swap where specified shareholders have right to exchange stock for a predetermined amount of debt in the same company. In debt-equity swap debt /bonds are exchanged with shares/stock of the company. Debt-for-equity swaps can be used as a tool for restructuring[85] and the resolutions plans that may be submitted by the Resolution Applicants to the Resolution Professional[86]. Under the Insolvency and Bankruptcy Code, a resolution plan requires the consent of the Committee of Creditors and thereafter the approval of the Adjudicating Authority.

4.5RESOLUTION PROFESSIONAL IN CORPORATE INSOLVENCY

The profession for insolvency professionals in India came into existence with the establishment of pillar for new Insolvency And Bankruptcy Code .This code has helped the debtor to collect its unpaid debts from the creditors and it is a method to give relief to the debtor who has stake in the hands of creditor and creditors who use to play the game with the debtor now faces the hard some and strict rules under the enactment of new law . Today, there are over '2000 insolvency professionals regulated with the insolvency and bankruptcy board of India' (IBBI). The IBBI has also prescribed the qualification to become its members who will have in return absolute power to regulate the scheme of this code. The scheme to become its members are given to the CA, CS, CMA, and Advocate with the registration in the Bar. The role of insolvency professional in undertaking both the resolution and liquidation processes which are mentioned in the IBC, as well as the practical issues and hurdles stages of its implementation.

- Has qualified the limited insolvency examination
- Is enrolled with the Insolvency Resolution Agency,
- Is registered with the Board.

[85] Sec 230–231, Companies Act,,25, Act of Parliament,2013 (India)
[86] Arvind Panagariya, INDIA:THE EMERGING GIANT, Oxford University Press, pg 27, (2008).

The Adjudicating Authority appoints the Resolution Professional who manages the entire process of insolvency and bankruptcy. According to the Code, “Resolution Professional” means an Insolvency Professional who conducts the insolvency resolution process and includes an interim resolution professional and takes necessary steps to revive the company. The Insolvency Professional is governed by specific legislation that they have to follow i.e., IBBI (Insolvency Professional) Regulation, 2016.

4.5.1APPOINTMENT OF RP

Before the appointment of a Resolution Professional (RP), an Interim Resolution Professional (IRP) is appointed until the constitution of the committee of creditors (CoC) and appointment of an RP. During the process of liquidation, the RP will work like as the role of a Liquidator and in case of individual insolvency, he acts as a Bankruptcy Trustee. The IRP manages the affairs of the company until an RP is appointed. Within 7 days of the constitution of the CoC, its first meeting is held in which they decide whether to appoint the IRP as the Resolution Professional or to appoint another resolution professional[87]. In case the Committee decides to appoint the IRP as the RP, they are required to communicate the same to the IRP, Corporate Debtor and the Adjudicating Authority. The CoC appoints the RP within 30 days from the date of commencement of the Corporate Insolvency Resolution Process’.

4.5.2ROLE OF A RESOLUTION PROFESSIONAL

Insolvency professionals in India play a vital role in the discharge of their duties. Their roles under the IBC can be categorized on the basis of designated functions during the resolution and liquidation processes. For the purposes of a resolution process, insolvency professionals act as:

(i)*Interim Resolution Professionals*.

[87] Sec 22, IBC, 31,Act of Parliament, 2016 (India)

The IRP are usually appointed simultaneously with the admission of an application to initiate the corporate insolvency resolution process ("CIRP") in respect of a company under the IBC. The interim resolution professional undertakes the management of the company during the period between the commencement of the CIRP and the appointment of a full-time resolution professional by the CoC[88]. The name of the interim resolution professional to be appointed is specified (mandatorily in the case of a financial creditor or company applicant, and optionally in the case of a trade creditor application—in which case, the IBBI recommends the interim resolution professional to be appointed) in the application for initiation of the CIRP. The interim resolution professional remains in office until the date of appointment of the resolution professional (which may be delayed, for example, by a challenge to the eligibility of the resolution professional sought to be appointed).

(ii)*Resolution Professionals*

The appointment of a resolution professional is approved by the CoC in its first meeting (by way of a majority vote of not less than 66% by value), approximately 30 days from the date of the commencement of the CIRP or soon thereafter. The CoC has the option of reappointing the interim resolution professional as the resolution professional for the corporate debtor or to choose a different insolvency professional to be appointed as the resolution professional. If the CoC elects to appoint the interim resolution professional as the resolution professional[89], it is required to communicate its decision to the National Company Law Tribunal ("NCLT") along with the written consent of the interim resolution professional demonstrating his/her willingness to be appointed as the resolution professional for the corporate debtor, pursuant to which the NCLT passes an order for the re-appointment of the interim resolution professional as the resolution professional for the company. If it is decided to replace the interim resolution professional with another insolvency professional, any CoC member may propose the name of insolvency professional to be considered for appointment. The CoC would then

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[88] Shri R. Gandhi(Deputy Governer), *Banks, Debt Recovery and Regulations: A synergy*, https://m.rbi.org.in/scripts/BS_SpeechesView.aspx?id=931

[89] Mardia Chemicals Ltd. v. Union of India, (2004)4 SCC 311 (India)

have to vote in favor of the appointment of such person by the requisite majority, and is required to communicate its decision to the NCLT, which in turn, is required to forward the name of such proposed resolution professional to the IBBI for its confirmation. The NCLT is authorized to appoint such person as the resolution professional of the debtor upon receiving the confirmation from the IBBI'.

However, if this confirmation is not received within a ten day period (from the date the name is forwarded by the NCLT to the IBBI), the NCLT is statutorily obligated to direct the previously appointed interim resolution professional to continue to function as the resolution professional of the debtor until such time as the IBBI confirms the appointment of the new resolution professional. Further, the IBC also gives the CoC the right to replace the RP appointed by it with another RP at any time during the CIRP of the CD[90]. If the CoC elects to appoint the interim resolution professional as the resolution professional, it is required to communicate its decision to the National Company Law Tribunal ("NCLT") (which is the court vested with the name of an insolvency professional to be considered for appointment.

The CoC would then have to vote in favor of the appointment of such person by the requisite majority, and is required to communicate its decision to the NCLT, which in turn, is required to forward the name of such proposed resolution professional to the IBBI for its confirmation[91]. The NCLT is authorized to appoint such person as the resolution professional[92] of the debtor upon receiving the confirmation from the IBBI. However, if this confirmation is not received within a ten day period (from the date the name is forwarded by the NCLT to the IBBI), the NCLT is statutorily obligated to direct the previously appointed interim resolution professional to continue to function as the resolution professional of the debtor until such time as the IBBI confirms the appointment of the new resolution professional. Further, the IBC also accords the CoC

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[90]Insolvency and Bankruptcy Law, https://www.icsi.edu/media/webmodules/Insolvency%20law%20and%20practice.pdf

[91] Sumant Batra, CORPORATE INSOLVENCY, pg.12 (1st ed. , 2017).

[92] Ibid. pg43

the right to replace the resolution professional appointed by it with another resolution professional at any time during the CIRP of the corporate debtor.

This appointment is also required to be approved by the NCLT and is subject to the confirmation of the proposed resolution professional by the IBBI. All applications submitted to the NCLT for the approval of the appointment of the relevant interim resolution professional/resolution professional are liable to be dismissed in case there are any disciplinary proceedings pending against the relevant insolvency professional. Similarly, a resolution professional may, with his/her consent, be re-appointed by the NCLT as the liquidator of the corporate debtor if the company enters liquidation, unless there are circumstances.

'The insolvency professionals are required to pass an examination conducted by and to be registered with the IBBI and are also to be enrolled with an insolvency professional agency that is recognized by the IBBI. — Eligibility to apply for registration as an insolvency professional is restricted to individuals that are resident in India (a non-citizen is eligible for membership if he/she is a partner or director of an 'insolvency professional entity' ("IPE")), and grounds for ineligibility include being a minor, an undischarged insolvent or of unsound mind; or having a conviction for an offense involving moral turpitude which results in imprisonment for a period exceeding six months (subject to certain mitigating factors which have been prescribed). — Further, insolvency professionals are prohibited from engaging in any alternative employment while holding a valid certificate of registration'.

4.5.3FUNCTIONS

The Resolution professional conducts the entire Corporate Insolvency Resolution Process and manages the operations of the corporate debtor during the period of the CIR Process[93]. Further, even after the expiry of the period of CIR, the RP continues to manage the operation until the order of the approved resolution plan or appointment of the

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[93] Sec 23, IBC, 31,Act of Parliament, 2016 (India)

liquidator is passed. He is also vested with the exercise of power and to perform the duties that are vested with the Interim Resolution Professional'.

(1)*Management of the affairs of the corporate debtor*

After the order for the commencement of CIR is passed, an insolvency professional is appointed who acts as an IRP by the Adjudicating Authority. On and from the date from which the IRP is appointed he is vested with the management of the affairs of the corporate debtor[94]. The control from the corporate debtor is now transferred to the IRP. The power of the Board of Directors of the corporate debtor also vests and is exercised by the IRP. For the purpose of managing the affairs of the corporate debtor by the IRP, the officers and managers of the corporate debtor are required to give access to the IRP of all the relevant documents, books of accounts, records, etc as may be required. This Section also makes it obligatory for the officers and managers of the corporate debtor to report to the IRP. The IRP acts and executes all the deeds, receipts, documents in the name and on behalf of the Corporate Debtor and takes all such action specified by the Board. However, the managing of the affairs of the corporate debtor does mean that he has to perform the day to day activities of the entity'.

(2)*Taking over the control of the assets of the corporate debtor*

'For the purpose of the resolution, the control and custody of the assets from the corporate debtor is taken over by the resolution professional[95]. The NCLT, Mumbai Bench in the case of has held that to facilitate the Corporate Insolvency Resolution Process, the RP can take custody of the assets of the corporate debtor that forms the subject-matter of the litigation[96].

(3)Constitutes the Committee of Creditors

To bring the Creditor together is one of the important tasks of the insolvency professional. After the collation of claims and determination of the position of the corporate debtor, the interim resolution professional constitutes the committee of

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[94] Sec 17, IBC, 31,Act of Parliament, 2016 (India)

[95] Sec 18(f), IBC, 31,Act of Parliament, 2016 (India)

[96] Goa Auto Accessories v. Suresh Saluia(2017), 7, SCC, pg. 98(India)

creditors. The committee of creditors then decides whether to resolve the insolvency of the entity or to liquidate it. In its first meeting of the CoC appoints the resolution professional who then convenes and conducts the meetings of the committee. The resolution professional conducts all the meetings of the Committee of Creditors[97].

(4)Management of the operations of the corporate debtor as a going concern

When the CoC approves the resolution plan, the entity continues as a going concern. The Insolvency Professional in case of a default manages the entity and its assets and runs the entity as a going concern. The Code mandates the IRP to preserve and protect the value of the property and to manage the operations of the corporate debtor as a going concern[98]. The IRP or RP must do all such acts that is necessary for keeping the corporate debtor in a going concern phase.'

(5)Preparing the information memorandum

'The Resolution Professional is required to make and submit the information memorandum in order to formulate a resolution plan. He is also required to provide all relevant information to the resolution applicant. Regulation 36(2) provides for the details to be contained in the information memorandum. The meaning of the term 'information memorandum' to mean information which is required by the resolution applicant to make a resolution plan for a corporate debtor[99]. It includes information relating to the financial position, disputes and any other matter in relation to a corporate debtor.'

(6)Examining the resolution plan

The resolution professional facilitates the resolution plan. On the basis of the information memorandum prepared by the resolution professional the resolution applicant submits the resolution plan to the resolution professional[100].

The RP is required to examine each resolution plan submitted to him to ensure that each resolution plan has in the manner specified by the Board:

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[97] Sec 24(2), IBC, 31,Act of Parliament, 2016 (India)

[98] Sec 20 , IBC, 31,Act of Parliament, 2016 (India)

[99] Sec 29, IBC,31,Act of Parliament, 2016 (India)

[100] Sec 30, IBC, 31,Act of Parliament, 2016 (India)

1.Has provided for the priority of the payment of insolvency resolution process costs to the payment of other debts of the corporate debtor.

2.Has provided for the payment of debts of the operational creditor not less than.

3.Amount paid to be paid to such creditor in the event of liquidation[101]

4.Amount to be paid to such creditor if the amount is to be distributed as per the order of priority

5.Has provided for the payment of debts of the financial creditor not less than the amount paid to such creditors in the event of liquidation of the corporate debtor[102].

If the resolution confirms the above condition then, the resolution professional presents the resolution plan for the approval of the committee of creditors. If the committee approves the plan it has to do so by a vote of not less than 60% of the voting share of financial creditors. The approved resolution plan is then submitted to the Adjudicating Authority by the resolution professional. The Adjudicating Authority if it is satisfied, approves the resolution plan by an order and such order will be binding to the corporate debtor, employees of the corporate debtor, members, creditors, guarantors and other stakeholders that are involved in the resolution plan'. If the Adjudicating Authority is not satisfied, it may by order reject the resolution plan[103] .

4.5.4DUTIES AND RESPONSIBILITIES OF AN INSOLVENCY PROFESSIONAL

The duties of the IRP and RP are provided by the code under Section 18 and Section 25. Following the public announcement under section 13 and 15 to receive and collating of claims that are submitted by the creditors.

1.Filling of information collected with the information utility.

2.To represent himself and act on the behalf of the corporate debtor.

3.To raise interim finances as per the limits prescribed by the CoC.

4.Disclose the insolvency resolution process cost.

5.Appointment of accountants, legal professionals, and other professionals.

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[101] Sec 53(1), IBC, 31,Act of Parliament, 2016 (India)

[102] Ibid pg 43

[103] Sec 31, IBC, 31,Act of Parliament, 2016 (India)

6.Receiving, verifying and maintaining an updated list of the claims.

7.Presenting resolution plans before the CoC meeting.

8.To submit the resolution plan to the Adjudicating Authority approved by the CoC.

9.Any other such duty as specified by the Board.

Apart from the above mentioned, the RP is also required to follow a certain code of conduct provided by the IBBI regulation. The Adjudicating Authority in the case of held that a Resolution Professional discharges his/her duties as an officer of the Court and any non cooperation or non-compliance with the Court's officer amounts to Contempt of Court[104].

Interestingly, the IBC does not provide for specific duties to be owed by interim resolution professionals or resolution professionals to creditors of the company. However, as per a recent decision of the National Company Law Appellate Tribunal ("NCLAT"), it has been clarified that the objective of an insolvency resolution process under the IBC framework is the overall resolution of the corporate debtor and the maximization of value of assets of the company for the benefit of all of its stakeholders.

In addition, in one case, a bench of the NCLT equated the resolution professional with a 'public servant' and clarified that the CoC is to perform the function of an 'instrumentality of the state', and that their duties/performance should be scrutinized by courts accordingly.

Further, although the interim resolution professional/resolution professional is obligated to take over the management functions of the board of directors of the corporate debtor pursuant to the initiation of a CIRP against the company, the fiduciary obligations of directors have not been extended to insolvency professionals.

While the powers of the board of directors of the corporate debtor stand suspended upon the commencement of the CIRP, the powers of the shareholders are also effectively suspended, as the approval of a resolution plan does not require the consent of the shareholders. For ease of understanding, the duties of insolvency professionals under the IBC have been segregated into their duties in the capacity of: (i) interim resolution

[104] ARC (India) Pvt. Ltd v Shivam Water Treaters Pvt Ltd (2018), 3, SCC, pg. 105(India)

professionals; (ii) resolution professionals; and (iii) liquidators, as set out below: Interim Resolution Professionals .The duties imposed on interim resolution professionals under the IBC are specific to the role they perform during the ‘transitory’ phase (as mentioned above), before the full-time resolution professional is appointed for the company. Most significantly, in line with the shift away from the debtor-in-possession regime, the management of the affairs/assets and the powers of the board of directors of the company immediately vest in the interim resolution professional upon his/her appointment by the NCLT.

Consequently, the officers and managers of the corporate debtor, and financial institutions maintaining the accounts of the corporate debtor, are required to act on the instructions of the interim resolution professional and to provide him/her all the necessary details, information and access. The primary duty of an interim resolution professional is to take such actions as are necessary to keep the corporate debtor as a going concern. Interim resolution professionals are also empowered to act and execute any documents/deeds/receipts in the name of the company, and they also have the obligation to ensure that the company complies with requirements under applicable law during its operation.’

Interim resolution professionals are also required to constitute the CoC, to receive/collate claims submitted by various creditors and to collect information relating to the assets, finances and operations of the corporate debtor. Further, interim resolution professionals are required to take control of all assets over which the debtor has any ownership rights (including shares held by the corporate debtor in its subsidiary companies—but not including any of the assets of the subsidiary companies, as was clarified by the appellate court under the IBC). It is also important to note that the interim resolution professional is bound by the terms of the moratorium instituted against the corporate debtor, including the prohibition on transfer or disposal of any assets, legal right or beneficial interest by the corporate debtor during the CIRP period.

Resolution Professionals As the role/functions of resolution professionals come into play during the substantive part of a CIRP, they have a wider and more significant range of duties to perform (than do interim resolution professionals). Resolution professionals are required to conduct the entire CIRP and manage the operations of the company during the CIRP following their appointment. The IBC includes a specific deeming provision that provides that resolution professionals are to exercise all the powers and perform all the duties as are vested or conferred upon interim resolution professionals under the statute. Similar to interim resolution professionals, resolution professionals also have the duty to carry out certain functions to preserve and protect the value of the corporate debtor, and to continue its business operations.

Further, resolution professionals are required to maintain an updated list of claims of the company's various creditors, convene and attend all meetings of the CoC, file applications (before the NCLT) to reverse the effect of avoidable transactions and prepare an information memorandum to be issued to the prospective resolution applicants of the company. Resolution professionals are also required to appoint two 'registered valuers' for the purpose of determining the fair value and liquidation value of the company. One of the most significant duties of the resolution professional is the invitation and vetting of resolution plans submitted by resolution applicants.

As mentioned below, the Supreme Court has recently clarified that the examination of resolution plans by resolution professionals is only to be done for purposes of the issuance of an opinion containing the prima facie views of the resolution professional, and that resolution professionals are not expected to make any binding determination in this regard. Inviting and Presenting Plans for the Insolvent Company One of the most important duties performed by the resolution professional is in relation to effecting the resolution of the company. As per the IBC, the resolution professional is required to invite prospective resolution applicants, who meet the eligibility criteria prescribed by the CoC (usually pertaining to the financial and technical capability of the prospective resolution applicants), to submit resolution plans for the company. The resolution professional is also required to provide to the resolution applicants (who meet the

eligibility criteria specified in the expression of interest issued by the resolution professional) all information in relation to the insolvent company that is relevant for the preparation of resolution plans by such persons. All such information is provided subject to the execution of a strict confidentiality undertaking and can be used by the resolution applicants only for the purpose of preparing resolution plans for the company. In practice, resolution professionals usually issue a 'process memorandum' to the prospective resolution applicants, which sets out the entire process and timelines for submission of resolution plans'.

Typically, resolution applicants are provided a window to carry out legal and financial due diligence on the debtor. In order to protect against disclosure of sensitive information to non-credible bidders, it is usually required (under the terms of the process memorandum) that prospective applicants submit an earnest money deposit/bid bond prior to gaining access to the data room. It is relevant to mention that courts have been flexible when it comes to strict compliance with the process memorandum, so long as creditors are able to maximize their recoveries in a fair and just manner.

The code places restrictions on the actions of the resolution professionals[105]. It sets out certain actions that he cannot do during the corporate insolvency resolution process without the approval of the committee of creditors. The Court held that a resolution professional is only required to give his prima facie opinion to the Committee of Creditors that the requirement laid down by the law has been fulfilled[106]. The NCLAT observed that in case of any misconduct by the RP, it shall be reported to the appropriate authority[107].

4.3.7DISCIPLINARY PROCEEDINGS AGAINST INSOLVENCY PROFESSIONALS

The possibility of insolvency professionals abusing their powers or overstepping their mandate is mitigated by the power accorded to the IBBI to initiate disciplinary

[105] Sec 28,IBC, 31,Act of Parliament, 2016 (India)
[106] ESIL v. Satish Kumar Gupta,(2016),4,SCC,861(India)
[107] Dinal Shah v. Bharti Defence Infrastructure Ltd(2018),3,AIR,962(India)

proceedings against insolvency professionals. — The IBBI may initiate such proceedings, either on a complaint received from any person or suo moto. — It is significant to note that an insolvency professional who has been issued a show cause notice by the IBBI (pursuant to which disciplinary proceedings are initiated), is not permitted to accept any fresh assignment (whether as interim resolution professional, resolution professional or liquidator) until the completion of the disciplinary proceedings against him/her.

Another safeguard in this respect is the power given to the CoC to replace or remove the concerned interim resolution professional/resolution professional at will. — This power is currently not exercisable by the operational creditors and other stakeholders that do not qualify for membership in the CoC, however. — At the same time, it is relevant to note that the IBC accords protection to all insolvency professionals for any actions taken by them in good faith.

4.3.8JUDICIAL PRONOUNCEMENTS

1,In the case of "*Swiss Ribbon Pvt. Ltd v. Union of India*",'the Supreme Court observed that the resolution professional is only a facilitator of the resolution process. He cannot act without the approval of the committee of creditors.

2.In the case of "*Arcelor Mittal India v Satish Kumar Gupta"* ,the court observed that the role of an RP is only to examine and confirm that each resolution plan confirms to the requirement of section 30(2)." It further said that his role is administrative and not adjudicatory.[108]

3,The Supreme Court in the case of *ESIL* observed that the RP is required to ensure that the resolution plan is complete before submitting it to the Committee of Creditors. It further observed that an RP not only manages the affairs of the corporate debtor as a going concern from the stage of admission of application under Section 7,9,10 till the approval of the plan by the Adjudicating Authority but is also a key person who appoints

[108] Arcelor Mittal India v Satish Kumar Gupta(2018), 5, AIR, 875(India)

and convenes the meetings of the CoC who decides the resolution plan who decides upon the resolution plan'.

4.5.8 PRACTICAL CHALLENGES

Despite several protections built into the statutory framework to enable and facilitate the functions of insolvency professionals, such professionals have, in a few cases, faced hurdles in the day-to-day management of companies undergoing a CIRP. In some instances, the workers, the suppliers, the promoters and the erstwhile management have refused to cooperate with such third-party professionals. This is especially true of companies where wages and salaries of workers have remained due for a long period of time, even prior to the commencement of insolvency. In cases where an official complaint is filed by the resolution professional regarding the non-cooperation by an officer of the company during the CIRP, the IBC provides for a penalty of imprisonment of between three and five years, and/ or a fine of between INR 100,000 and INR 10 million.

Another major issue is having to work with incomplete information and records, and having to conduct extensive and time-consuming compliance checks and corrections, with the employees and personnel of the corporate debtor not being easily forthcoming with information. It is relevant to note that the July amendment to the relevant IBC regulations provide for tight milestone-based timelines for the insolvency professionals to follow during the CIRP.

This includes an upper limit of ten days (from the date of receipt of expressions of interest from prospective resolution applicants) for the issuance of a provisional list of eligible prospective resolution applicants; and a further ten-day period (post completion of the five-day window for receipt of objections regarding non-inclusion in the provisional list) for the issuance of the final list of prospective resolution applicants. Further, the resolution professional is now also obligated to issue the information memorandum, evaluation matrix and request for resolution plan document to every prospective resolution applicant (including prospective resolution applicants who

challenged the decision of non-inclusion in the provisional list) within five days of issuance of the final list of prospective resolution applicants. Another stringent timeline that has been introduced is the requirement for the resolution professional to form his/her opinion regarding the occurrence of any antecedent/avoidance transactions prior to the commencement of the CIRP on or before the 75th day from the insolvency commencement date. A final determination in this regard is required to be made on or before the 115th day, and an application to the NCLT seeking the appropriate relief is to be filed on or before the hundred and 135th day from the insolvency commencement date.

The Resolution professional plays a very significant role for the efficient operations of the insolvency process. He has to perform a whole range of functions and duties that are vested in him. The primary responsibility of a resolution professional is to conduct the Corporate Insolvency Resolution Process with transparency. Besides, the Insolvency Professional is also required to possess the appropriate skills, knowledge, expertise to ensure that the proceedings are conducted in an effective manner and carry out the duties and responsibilities vested in him.

CHAPTER - 5

INTERNATIONAL INSOLVENCY LAWS : A COMPARISON

Global Convergence in terms of corporate law and governance is the mantra in the present day globalized and industrialized society[109] Especially in the domain of law and that too corporate law we have various advanced countries to look up to Firstly, a glance at the essentials of UNICITRAL Model Law on Insolvency would tell us the requirements of an ideal framework Secondly, studying the best practices The three major jurisdictions that posses the most advanced form of corporate insolvency framework are the United States, United Kingdom and Germany. A glance at these and its comparison with India would also help us to arrive at vital issues that could have a 'legal transplant'.

5.1 WORLD BANK AND UNCITRAL INDICATORS

The UNCITRAL Model Law on Insolvency (2004) and the World Bank (2011) framework provides for various indicators for an efficient insolvency procedures[110] It ranges from the integration of a nation's broader legal system to be creditor friendly ex-ante and debtor friendly ex-post Provide for smooth and speedy liquidation procedure, free from delay and as less expensive so as to reduce costs Also the major point which requires preponderance from the Indian standpoint is to ensure that the insolvency systems are circumvented and misused.

Providing the corporate rescue mechanisms which ensure success and providing priority to creditors in case of liquidation also for those who provide finance to a sick unit during a revival process. Another point for providing an investor friendly process, cross-border insolvency mechanism must be also efficacious[111].

[109] S. Djankov, O Hart & A Shleifer, *Debt enforcement around the world*, 116 Journal Of Political Economy 6, 1105 – 1149 (2018).
[110] Source: Doing Business Report, World Bank, 2015.
[111] Ruzita Azmi Universiti Utara Malaysia, Kuala Lumpur Adilah Abd Razak, *Law: A Comparative Study Between Malaysia And Uk* Department of Management & Marketing,UPM,pg 155 (2017).

WORLD BANK PRINCIPLES	UNCITRAL GUIDE	RESOLVING INSOLVENCY INDICATORS
Integrate with a country's broader legal and commercial systems	Provision of certainty in the market to promote economic stability and growth	
Maximize the value of a firm's assets and recoveries by creditors	Maximization of value of assets	New indicator tests whether the value of the debtor's assets can be preserved by continuing contracts of the debtor essential to survival of its business , by rejecting overly burdensome contracts, by indicating preferential and undervalued transactions and by obtaining post commencement financing
Provide for the efficient liquidation of both nonviable businesses and businesses whose liquidation is likely to produce a greater return to creditors and reorganization of viable businesses		Existing indicator test whether viable business can be reorganized and whether businesses in liquidation can be sold as a gaining concern
Strike a careful balance between liquidation and	Strike a balance between liquidation and	New indicator tests whether creditor and debtors have

reorganization , allowing for easy conversion of proceedings from one proceeding to another	reorganization	access to both liquidation and reorganization proceedings and what the basis for declaring a debtor insolvent
Provide for equitable treatment of similarly situated creditors, including similarly situated foreign and domestic creditors	Ensuring equitable treatment of similarly situated creditors	New indicators tests how similarly situated creditors vote on a reorganization plan and what treatment they receive under the plan
Prevent the improper use of the insolvency system		New indicator tests the basis for commencing insolvency proceedings
Establish a framework for cross- border insolvencies, with recognition of foreign proceedings	Establishment of a framework for cross border insolvency	Because Doing Business focuses on domestic entites and transactions, the indicators do not test the principle

Source – Analysis based on World Bank (2011) and UNCITRAL (2004)

5.2 INSOLVENCY LAW COMPARISON: USA, UK, INDIA

5.2.1 PROOF OF INSOLVENCY

UK - In UK Insolvency or likelihood of insolvency of a company as a trigger to invoke administration (the formal process for revival and rehabilitation of companies under financial distress) .Since doubtful solvency is often an indicator of impending financial troubles, such a test is best suited for determining whether steps for rehabilitating the company are to be taken In the UK, an administration order is made by the court only if it is satisfied that the company (a) 'is unable to pay its debts' or 'is likely to become unable to pay its debts' and (b) that the administration order is reasonably likely to

achieve the purpose of administration The term “likely” has not been defined anywhere in Insolvency Act 1986 (IA 1986) or the rules, and therefore it becomes relevant to look at the judicial development on this aspect

US - does not require proof of insolvency in order for a company to under go rescue procedures under Chapter 11 of the US Bankruptcy Code.

INDIA - Whereas section 4 of IBC Apply to matters relating to the insolvency and liquidation of corporate debtors where minimum amount of the default is one lakh rupees and the government may by notification specify the minimum amount of default of higher value which shall not be more than rupees one crore”..

5.2.2 ROLE OF UNSECURED CREDITORS IN THE INSOLVENCY PROCESS

UK - In UK, any creditor can apply to the court for an administration order in relation to the company.

US - In the US, a Chapter 11 proceeding may be commenced on the filing of a petition under Chapter 11 by three or more entities, each of which is either a holder of a claim against the company that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder[112], if such non-contingent, undisputed claims aggregate at least $10,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims.

INDIA - In India , under section 8 and 9 of IBC an operational creditor can initiate insolvency resolution process after giving 10 days notice of demand for the payment of amount involved in the default.

5.2.3 MORATORIUM

UK - In UK Schedule B1 of the IA 1986 an interim moratorium applicable during the period between the filing of an application to appoint an administrator or giving of notice of intention to appoint an administrator and the actual appointment of such administrator

[112] Daisy Roy, *Analysis of the Recent Case Laws on Definition and Scope of Financial Debt* https://blog.ipleaders.in/analysis-of-the-recent-case-laws-on-definition-and-scope-of-financial-debt/

Further, the IA 1986 provides for an automatic moratorium on insolvency proceedings. The moratorium on insolvency proceedings is broad in nature[113]. Further, there is an automatic moratorium on enforcement of security over the company's property, repossession of goods in the company's possession under a hire-purchase agreement (defined to include retention of title arrangements), exercise of a right of forfeiture by a landlord by peaceable re-entry and institution of legal proceedings against the company The moratorium in these cases can be lifted with the approval of the administrator or the consent of the court.

USA- Section 362 of the US Bankruptcy Code provides for an automatic moratorium on the enforcement of claims against the company and its property upon the filing of a Chapter 11 petition The moratorium covers judicial and administrative proceedings, enforcement of judgments against the company or its estate, acts to obtain possession/control of estate property, acts to create, perfect or enforce liens[114], acts to collect claims, exercise of right of set off, tax"

INDIA - NCLT can declare moratorium period which starts from the date of acceptance of application by NCLT and continue till approval of the resolution plan as provided under section 13, 14 and 31 of IBC.

5.2.4 APPOINTMENT OF RESOLUTION PROFESSIONAL

UK - In the UK, the holder of a qualifying floating charge may appoint an administrator out of court at any point This enables a qualifying floating charge holder who has a substantial stake in the company's fortunes and receives early warning signals about impending financial trouble to act at the earliest and initiate proceedings for turning the company around In order to appoint the administrator, the qualifying floating charge holder only has to file with the court the following documents: a notice of appointment- the notice must include a statutory declaration by or on behalf of the person that he/she is a QFCH, that each floating charge relied on is/was enforceable on the date of the

[113] M. White, *The Corporate Bankruptcy Decision*, 3 Journal of Economic Perspectives,129, (1983)

[114] Ileana Ashrafzadeh Nișulescu & Marușa Beca**,** *The Corporate Insolvency's Evolution in the EU and India in the Period 2007-2012, 3* JOURNAL OF KNOWLEDGE MANAGEMENT, ECONOMICS AND INFORMATION TECHNOLOGY, 68, (2009)

appointment and that the appointment was in accordance with Schedule B1.Further, the notice must identify the administrator.

INDIA - Under section 16 and 22 OF IBC Interim professional is appointed by NCLT within 14 days from Insolvency commencement date and the interim professional will be appointed as resolution professional subject to approval of 66% of financial creditors at the committee of creditors at the meeting of committee of creditors or a new resolution professional will be appointed at the meeting of committee of creditors.

5.2.5TAKEOVER OF MANAGEMENT AND DUTIES OF RESOLUTIONS PROVISIONAL

UK- In the UK, the administrator, once appointed, takes over the management of the company. The administrator plays a central role in the rescue process and has the power to do anything 'necessary or expedient for the management of the affairs, business and property of the company' . The administrator has the power to carry on the business of the company. Most significantly, it may be noted that a company in administration[115] or an officer of a company in administration may not exercise a management power without the administrator's consent. Once appointed, the administrator shall manage the company's affairs, business and property. The power of the court to give directions to the administrator is limited to those instances where none of the administrator's proposals have been approved by the creditors' meeting, or where its directions are consistent with such proposals/revisions, or if the court thinks the directions are required in order to reflect a change in circumstances since the approval of proposals/revisions Further, an administrator has the power to remove a director of the company or to appoint a director of the company. Most significantly, a company in administration or an officer of a company in administration may not exercise a management power without the administrator's consent.

US - In contrast, the US follows a debtor-in-possession regime wherein the management remains in control of the debtor company even after Chapter-11 proceedings have been initiated It has been suggested that in the case of a debtor-in-possession regime as under Chapter 11 of the US Bankruptcy Code, the management would be encouraged to make a

[115] Vanessa Finch, CORPORATE INSOLVENCY LAW, pg.144, (2nd ed., 2009).

timely reference for early resolution of financial distress as they would not fear the loss of control in the event of entry into insolvency proceedings

However, such a system has been criticized because it leaves the management (which may be responsible for the company's failure) in charge of managing the rescue proceedings.109 It could also increase risks of fraudulent activity by the management, including the siphoning away of the company's assets. However, the US bankruptcy law provides an important safeguard against the abuse of the debtor-in-possession regime by permitting the appointment of a trustee in certain circumstance. Section 1104(a) of the Bankruptcy Code permits the appointment of a trustee to take over the management of the debtor company on two grounds.

A trustee shall be appointed for cause, including fraud, dishonesty, incompetence or gross mismanagement of the debtor company's affairs by the present management, either before or after the commencement of the Chapter 11. It must be noted that the grounds mentioned in Section 1104(a)(1) are not exhaustive. Further, a trustee shall also be appointed if such appointment is necessary in the interests of the debtor company's creditors, any equity shareholders, and other interests of the estate.

The trustee may be appointed by the court on the request of an interested party or the trustee at any point of time after the commencement of Chapter 11 proceedings but before a plan has been confirmed. Once the trustee is appointed, unless the court orders otherwise, the trustee takes control of the assets and business operations of the debtor. The trustee steps into the shoes of the debtor and has fiduciary obligations to all the parties. The trustee's duties are set out in Sections 1106 and Section 704 .

They include: (i) investigating the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the viability of continuing the business, any other matter relevant to the case or to the formulation of a plan; (ii) file a plan under Section 1121 or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case; and (iii) post-confirmation of the plan, file such reports as are necessary or in accordance with the court orders, etc. An examination

of the jurisprudence of the US courts on Section 1104(a) shows that this remedy for creditors and other interested parties has been considered to be an extraordinary one. This is based on the strong presumption that the debtor is to be left in possession even after Chapter 11 proceedings have commenced.

INDIA - The interim/Resolution professional takes custody and control of all assets of corporate debtor as provided under section 17,18 and 25.

5.2.6 VOTING FOR THE PLAN

UK - In a UK administration proceedings, acceptance of the proposal requires a simple majority in value of the creditors present and voting.

US- In Chapter 11 proceedings in the US as each class of creditors that are impaired by the plan need to consent to it through a vote of two-thirds of that class in volume and half the allowed claims of that class . Any class of creditors that are not impaired by the plan are automatically deemed to have accepted the plan and any class that does not receive any property or claims under the plan are deemed to have rejected the plan The US Bankruptcy Code provides for "cram down" of dissenting creditors as long as certain conditions are satisfied.

INDIA - Under section 30 of IBC Voting by not less than 66%..

5.2.7 REGULATORY COMPARISON

1. REGULATORY FRAMEWORK IN UK

The 1982 Report of the Insolvency Law review Committee, Insolvency Laws and Practice (commonly known as "the Cork Report") recommended the adoption in the United Kingdom of Unified Insolvency legislation. Ultimately the Insolvency Act, 1986 (UK) was enacted and this encompasses both types of insolvency administrations, including corporate restructuring.[116]The existing UK insolvency framework is defined by the Insolvency Act 1986 According to the Act, failing companies are either liquidated

[116] T. H Jackson, THE LOGIC AND LIMITS OF BANKRUPTCY LAW, pg. 35, (1st ed., 1986).

or submitted to an insolvency process that may allow them to be rescued as going concerns. The Insolvency Act, 1986 deals the insolvency of individuals and companies The Act is divided into three groups and 14 Schedules as follows:

Group 1 deals with Company Insolvency

Group 2 deals with Insolvency of Individuals and

Group 3 deals with Miscellaneous Matters Bearing on both Company & Individual Insolvency. Basically, a company in financial difficulties may be made subject to any of five statutory procedures.

1. administration;

2. company voluntary arrangement;

3 scheme of arrangement;

4. receivership (including administrative receivership); and

5. liquidation (winding-up)

With the exception of schemes of arrangement, which fall within the ambit of the Companies Act, 2006, these are formal insolvency procedures governed by the Insolvency Act, 1986"

USA

The US Congress enacted the "Bankruptcy Code" in 1978. The Bankruptcy Code, which is codified as title 11 of the United States Code, has been amended several times since its enactment. It is the uniform federal law that governs all bankruptcy cases. The procedural aspects of the bankruptcy process are governed by the Federal Rules of Bankruptcy Procedure (often called the "Bankruptcy Rules") and local rules of each bankruptcy court. The Bankruptcy Rules contain a set of official forms for use in bankruptcy cases[117]. The Bankruptcy Code and Bankruptcy Rules (and local rules) set forth the formal legal procedures for dealing with the debt problems of individuals and businesses.

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[117] Matej Marinc & Razvan Vlahu, GENERAL ISSUES IN BANKRUPTCY LAW, The Economics Of Bank Bankruptcy Law, pg. 34, (2012)

The Insolvency Act 1986 also introduced three new procedures that held out the possibility of a company being brought back to life as a viable entity. These measures represented an attempt to emulate the 'rescue culture' that characterised the corporate sector in the US.

The first of these procedures – 'company voluntary arrangements' (CVAs) – provides a way in which a company in financial difficulty can come to a binding agreement with its creditors.

The second procedure – 'administration' – offers companies a breathing space during which creditors are restrained from taking action against them. During this period, an administrator is appointed by a court to put forward proposals to deal with the company's financial difficulties.

A third option – 'administrative receivership' – permits the appointment of a receiver by certain creditors (normally the holders of a floating charge) with the objective of ensuring repayment of secured debts.

In addition, the Act explicitly established a 'hierarchy of purposes' for the administration process. The primary duty of administrators was defined as rescuing the company as a going concern (a duty that does not exist for an administrative receiver). Only if this is not practicable – or not in the interests of creditors as a whole – is the administrator allowed to consider other options, such as realising the value of property in order to make a distribution to creditors

CHAPTER 6
LATEST DEVELOPMENTS: A LEGAL ANALYSIS

6.1 FAST TRACK CORPORATE INSOLVENCY RESOLUTION PROCESS

When the statement made by Benjamin Franklin that time is money he surely meant the biggest valuable asset is time and we must surely make it count. This statement has its significance when dealing with financial debts and its realisation therefore, IBC mentions about the provision of solving insolvency on a Fast Track mode[118]. The main purpose of this concept used to solve the complexity and save the time for resolving claims during insolvency proceedings . This process cuts down the time taken for the normal insolvency proceedings two half.

The Bankruptcy Law Reforms Committee (BLRC), which suggested the enactment of IBC, also suggested that a distinct procedure be put in place for those corporations whose insolvency could be resolute in less than 270 days. Therefore, the fast track process was considered with a view to offer a shorter procedure for corporations that have a fewer intricate structure of liabilities and assets or a smaller size of operations. While the report of the BLRC does not clearly mentions that this fast-track process is battered towards refining the insolvency resolution process for Medium, Small and Micro Enterprises (MSMEs), the World Bank in its Report[119] on the Treatment[120] of MSME Insolvency, classes the fast track process as a process that abridges timelines to make general insolvency law more appropriate for MSMEs. As such, this procedure is made for 'small corporate debtors'.

The IBC is a new era law that provides a framework for revival of corporate debtor and also presents challenges in the form of capacity building, harmonize different laws, IP, regulatory bodies, etc.The objective of IBC is to determine the process within half of the

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[118] S D Longopher & CT Carlstrom, Absolute priority rule violations in bankruptcy laws, FEDERAL RESERVE BANK OF CLEVELAND, ECONOMIC REVIEW 31, pg.21 – 30 (2019).

[119]IMF, World Economic Outlook (Oct 2019) (Jan 19, 2020, 5:00 p.m.) https://www.imf.org/external/datamapper/NGDP_RPCH@WEO/OEMDC/ADVEC/WEOWORLD

[120] S. Djankov, O Hart & A Shleifer, *Debt enforcement around the world*, 116 Journal Of Political Economy 6, 1105 – 1149 (2018).

nonpayment time period listed under the Code. The corporation looking for the fast relief will have responsibility on the procedure at set-off and that the corporation that sets-off the Fast-track procedure must upkeep that the case is fit for the Fast-track. Therefore, whosoever files the application for fast track process under Chapter IV of the IBC will have to file the application alongside the proof of default as evidenced by records accessible with an information utility or such other means as may be identified by the IBBI to set out that the corporate debtor is qualified for fast track corporate insolvency resolution process.

Central government has notified the process for fast track insolvency proceedings which creditors and corporate debtors can initiate the Fast track insolvency proceedings by way of application. A separate chapter is allocated for this concept in IBC. The fast track CIRP is governed by sec 55 of IBC and The insolvency and bankruptcy board of India (Fast Track insolvency resolution process for corporate person) regulations 2017 .

The application for fast track CIRP can be initiated against the following corporate debtor-

1. Small company[121]
2. Any startup notified by Ministry Of commerce (not partnership)
3. Unlisted company having assets less than one crore.

(a)Time Period For Completion

The fast track corporate insolvency resolution process should be completed within 90 days from date of application unlike 180 days in other countries. However this can be further extended to 45 days if the resolution professional files an application requesting for search extension. The resolution professional cannot initiate the proceedings without the prior approval of committee of creditors with the 75% of voting share[122]. If satisfied The Fast Track insolvency resolution cannot be completed within 90 days and require more time period as suggested by RP then the authority can further extend the time period up to 45 days and not more than that. This extension can be availed only once.

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[121] Sec 2 , Companies Act, 25, Act of Parliament2013 (India)
[122] Sec 56, IBC, , 31,Act of Parliament, 2016 (India)

The Fast Track corporate insolvency resolution process can be initiated order by creditor or corporate debtor by way of presenting the n application to adjudicating authority . the application should be accompanied with the documents which shows the proof of default and such other documents as may be specified by IBBI by way of passing regulations.

6.1.1INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (FAST TRACK INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) REGULATIONS 2017

The process for Fast Track Insolvency Resolution Process is well-defined in Insolvency Board of India Regulations 2017. As per this process the corporation shall employ an insolvency resolution professional and make a public declaration shall be made as per definite form A. Proof of claims shall be acquired and committee of creditors shall be constituted. The meeting of these creditors shall be arranged by Insolvency Professional who will then initiate the fast track process as per process well-defined in Fast Track Insolvency Resolution for Corporate Persons Regulation, 2017 which came into effect from 5th October 2017.

6.1.2 NEED FOR A DIFFERENT PROCESS

A Standard corporate insolvency resolution takes 270 days to complete the proceedings of repayment during this time the COC measures the practicality of repayment capabilities of corporate debtor. COC invites resolution plans through corporate applicant if such plans are not approved then company can go into liquidation[123]. This process is more suitable for the larger companies which has Complex capital structure. Such CIRP and liquidation process is not appropriate for small companies or small limited liability partnership, since they require the position and keep ability to pay for or public and complex processes, active participation of creditors, active market for assets of the debtor and timely detection of distress , to be successful. The whole procedure of insolvency involves exorbitant cost which small companies are not in position to pay.

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[123] S. Djankov, O Hart & A Shleifer, *Debt enforcement around the world*, 116 Journal Of Political Economy 6, 1105 – 1149 (2018).

1.ABILITY TO PAY FOR A PUBLIC AND COMPLEX PROCESS

CIRP is expensive process that necessitates the employment of an insolvency professional (IP), an exhaustive and public dues collection procedure, meetings of COCs and a public marketing exercise of the CD. Moreover the public side of the CIRP means that a establishment has to suffer the loss of goodwill accompanying with the commencement of insolvency proceedings against itself. The course of liquidation too has numerous formalities, together with responsibilities to carry out several valuations, formulate several reports and conduct meetings of different stakeholders

This mechanism performs fine, when paying the charges of these public procedures facilitate a translucent and reasonable marketing exercise that upshots in the most value maximizing use of the assets of the corporate debtor. However, these practices can be 'too multifarious, extensive and costly for small businesses, which are considered by low value, less sophisticated, less complex. For example, the public marketing exercise may not be more in small corporations where interested purchasers are insignificant. In such cases, procedures are merely to be expected to decrease recoveries for creditors. In certain circumstances, small corporations may not be capable to bear the expenses of running this process and there is a great threat that the value of their 'business would 'fade on the initiation of insolvency proceedings. This is particularly expected since minor CDs often have a lesser fixed assets, higher turnover on total assets. This may be headed towards shutting down of companies .

2.ACTIVE CREDITOR PARTICIPATION

The Committee of Creditors of the financial creditors is likely to make the viable decisions 8 in the CIRP. The vital obligation of the COC is to evaluate whether the CD is commercially viable, and to commend a proper resolution plan. However, decisions like raising of interim finance, sale of assets during the CIRP, related party transactions, change in the conditions of appointment of the CD etc. all this require approval of Committee of Creditor . The conclusions of the Committee of Creditor , including on how the corporate debtor assets are to be sold, are also significant in liquidation. Further, there is now an responsibility to constitute a stakeholder committee consist of financial

creditors , which would be responsible for assistance to the liquidator on a various matters. This model works finest when creditors believe that collective action would be most value maximising and that the expenses of take part in the procedure will be overshadowed by the proceeds. However, in case of small Corporate Debtor, particularly those that house micro companies, secured creditors may desire individual execution of their security interest over the main assets of the company, outside of a collective process.

Also, the BLRC mentions that 'banks take proactive actions to start recovery proceedings against MSMEs in the event of a default by corporation', in spite of recommendations of RBI that incentivize them to contemplate restructuring debts due. On the other hand, unsecured creditors may find that the unfettered assets of the corporations would not give them sufficient realisation to overshadow the expenditures of participating in the procedure. Thus, there is no sufficient motive for creditors to participate in the CIRP or liquidation processes.

3.ACTIVE MARKET FOR THE ASSETS OF THE DEBTOR

CIRP changes the management of corporate debtor and necessitates that a public marketing exercise be steered for the assets of the corporation . The Insolvency and Bankruptcy Code originally mentions that any person can suggest a resolution plan on behalf of corporate debtor, but with the amendment in 2018 under section 29A, prohibits the promoter from suggesting resolution plans as a resolution applicant in the CIRP or in liquidation[124]. This means that with commencement of insolvency procedure the corporate debtor being snatched from the hands of the promoters permanently.

Likewise the promoters to enter into a cooperation with the creditors in liquidation, and reclaim control of their enterprise, the use of schemes may prove extremely unwield and expensive for small debtors[125]. Thus, the chance of the promoter repossessing regulate of the CD is negligible. This may be beneficial in constructing a market for corporate

[124] Report of the Joint Parliamentary Committee on Insolvency Code, Department of Financial Services , pg76-77,2016

[125] Sec 230, Companies Act, 2013

regulation of strategic/large assets, particularly since companies are normally closely held. However, in cases of small CDs, such a market may not exist for manifold motives. Firstly small corporation do not maintain proper records. Such facts are probable to make it tougher for a third party to purchase the business of the enterprise. Secondly, smaller companies have few fixed assets, and may be comprehensively reliant on on the promoter-manager and employees,[126] which may not be so simply transferred. Consequently, the best likelihood of undertaking insolvency may be to keep the business in the hands of the current promoters/manager.

4.TIMELY DETECTION OF DISTRESS

CIRP can be commenced by an OC ,FC or the CD on the ' default' in disbursement of a debt. The test of 'default' was selected to authorize the apt recognition of distress and resort to a rescue procedure. However, in case of smaller corporations where the connection between promoters and the management is probable to be more, the fact that the promoter is likely to be defeat the control on the beginning of the CIRP, and is unlikely to be able to bid for the CD, means that promoters are less expected to start the CIRP quickly. In addition to this, the provisions of the IBC dealing with personal insolvency have not been executed yet, which means that in such matters where the promoter has given personal guarantees, which is probable to be common in matters of small corporations, the promoter is unlikely to be guaranteed a discharge. This further disincentives promoters from initiating proceedings under the Code.

It may be stiffer to aptly apply provisions such as those stopping unlawful trading or fraudulent trading, in the context of small CDs since it ’would be hard to judge ‘what the honest behavior of the director should have been retrospectively. This may lead to persistent litigation that creditors may be less fascinated in funding due to the restricted assets of the promoter-managers of such debtors, which would further reduce the efficacy of such provisions. If creditors of such a company are also passive, as may be the

[126] Report of the Expert Committee on COMPANY LAW 2005 http://reports.mca.gov.in/Reports/23-Irani%20committee%20report%20of%20the%20expert%20committee%20on%20Company%20law,2005.pdf

case as discussed above, they are also unlikely to identify distress sufficiently early, and trigger the CIRP. This means that such corporations do not enter the CIRP till a progressive stage of distress. Given these essential disparities between the corporate insolvency resolution system and the needs of small CDs, there is a requirement to have a dissimilar insolvency resolution process for such debtors.

6.1.3 ASSESSMENT OF CURRENT FAST TRACK CIRP

There is a necessity to have a diverse insolvency resolution process for small CDs, which the fast-track process could have assisted. However, first, the fast track process hardly differs from the CIRP. It chiefly decreases the time period within which the insolvency of the debtor may be resolute to ninety days, extendable by another 45 days. Other than falling the timelines, the fast-track process only acclaims a variant in the number of valuers to be appointed. As such, the fast-track process, which was meant to provide an alternate framework for the insolvency resolution of small CDs offers no significant deviation from the CIRP. Secondly, the fast-track process relates only to the 'resolution' stage. However, in many cases, it may be tough to release small CDs. In such cases, they would have to go through the liquidation process, which could be value vicious in a disproportionate manner due to the widespread regulations and expenditures of the process.

Given this, there is a necessity to have a simplified and low-cost liquidation process as well, which the fast-track process does not cover. Considering that the fast-track process does not factually simplify the process for small CDs, even the Insolvency Law Committee suggested the rescind of the fast-track process in 2018. Thus, the Code does not offer the most effective regime for the insolvency resolution of smaller CDs. This is mainly damaging since MSMEs ‘form the foundation of the Indian economy, and are key drivers of employment, production, economic growth, entrepreneurship and financial inclusion.’ As such, the absence of a suitable insolvency resolution and liquidation process is possible to affect credit accessibility to and entrepreneurial activity for this sector, and challenge the objectives of the Code. Accordingly, there is a necessity to

reconceptualise the fast track insolvency resolution process framework to empower maximisation of value for all stakeholders of such special types of debtors.

6.1.4 REDESIGNING OF THE PROCEDURE

To reform the fast-track process one of two tactics can be followed. First, the CIRP and Liquidation Process can be applied to small CDs with extra alterations. Secondly, an completely new scheme, which is considerably different from the present procedure may be unified into the Code.

1.CIRP AND LIQUIDATION PROCESSES CAN BE APPLIED WITH ADDITIONAL MODIFICATIONS

Most dominions treat the insolvency of small CDs by making some alterations to their insolvency resolution process. For instance, the UK makes certain exemptions, including exemptions from holding physical meetings, exemptions from providing proof of small debts and deemed approval of routine decisions of creditors. Argentina, on the other hand, provides for minimum documentation requirements, and eliminates the necessity to mandatorily establish COC. The Organization for the Harmonization of Business Laws in Africa's uniform insolvency law[127] also provides for a streamlined reorganisation and liquidation process[128]. The simplified reorganisation process has less documentation requirements, and permits for the planning of a easy reorganisation plan.

The simplified liquidation procedure offers for sale of properties through private agreements. Likewise, in India too, the fast-track process could be redesigned to comprise a additional simplified CIRP and liquidation procedure. The CIRP and liquidation practices could be abridged for this purpose by:

- building the interface with the Adjudicating Authority on virtual platform,
- decreasing documentation,
- assuming deemed approval of the CoC in some cases,

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[127] M. White, *The Corporate Bankruptcy Decision*, 3 Journal of Economic Perspectives,129, (1983)

[128] Roy Goode, The Foundations of Corporate Insolvency Law in PRINCIPLES OF CORPORATE INSOLVENCY LAW, pg. 23, (3rd ed., 2011).

• construction the establishment of the stakeholders' consultation committee in liquidation not mandatory or optional in some cases,

• give a model resolution plan for small CDs made with help of softwares

, • permitting for private sales in a larger number in case of liquidation, and

• providing for an obligation to file in restricted circumstances to incentivise well-timed filing, as divergent to depend purely on wrongful trading provisions which are tough to apply.

2.A NEW SCHEME CAN REPLACE THE FAST-TRACK PROCESS

Otherwise, the fast-track process could be redesigned to comprise a new system for resolution and liquidation, whose central features would be diverse from those of the CIRP and liquidation under the IBC. A fresh system for resolution could include:

• Commencement of the procedure before real default on the occurrence of the debtor in adding to the commencement on default on the instance of the creditor;

• Debtor's potential to be supervisor or administrator ;

• Decreasing the participation of courts; and

•debtor as corporate applicant,

which if approved, could bind smaller creditors.

Example of such procedures include:

(a)Company Voluntary Arrangements (CVAs), United Kingdom

In a CVA, the directors may offer a voluntary debt arrangement, which necessities to be approved to by the creditors of the company. Where the directors of the company propose a CVA, they must approach an insolvency professional to act as a nominee, whose function is to suggest if the proposal has a practical prospect of being approved and implemented. After this, the proposal is put for approval of the creditors. If at least 75 per cent of the unsecured creditors of the company approve of the CVA, broadly, the company and its unsecured creditors are bound. Secured creditors are bound only if they approve of the CVA. However, creditors may apply to the court if the CVA's terms are unfairly prejudicial or if there was some substantial irregularity in the process leading up to its consent.

(b)Small Business Rehabilitation Procedure, Korea

Korea also have a distinctive process for Small Businesses. In this process, the CD remains in the management of the business. However, an examiner is to be employed to evaluate the debtor's financial condition using a simplified accounting method[129]. Further the for approval of a resolution plan are also abridged in this case to make sure that one major creditor is incompetent to block the sanction of the resolution plan. This procedure is common for small corporations as well as unincorporated entities.

(c)Personal Insolvency under the Code

Closer home, this procedure looks to be alike to the insolvency resolution process for unincorporated entities in the Code as well, in which the debtor rests in possession of the business assets, and suggests a repayment plan which the creditors may favor in their meetings. While this procedure has not yet been executed and does not broadly comprise all the features, some features from this procedure could potentially be looked to while designing the framework for small CDs.[130] The new system for resolution could also be reformed to allow for a cost-effective business sale, which may even be determined to existing parties.

Examples of such a process could comprise: Pre-packaged sales of the business

(d)United Kingdom

A prepackaged sale in the United Kingdom involves the 'pre-negotiated sale of the debtor's assets which is performed soon after' the commencement of proper insolvency proceedings, and without wanting previous statutory approval of creditors. Since the negotiation of the sale takes place before formal insolvency processes are initiated, the indirect costs of insolvency and the direct costs of following a legal procedure are not experienced by companies that take recourse to these procedures. Further, since the negotiation of the sale takes place when the management is still in control, (although insolvency professionals advise while the deal is negotiated) and even connected parties

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[129] Ruzita Azmi Universiti Utara Malaysia, Kuala Lumpur Adilah Abd Razak, *Law: A Comparative Study Between Malaysia And Uk* Department of Management & Marketing,UPM,pg 155 (2017).

[130] M. White, *The Corporate Bankruptcy Decision*, 3 Journal of Economic Perspectives,129, (2013)

may purchase the business, management is incentivized to take recourse to this simple restructuring procedure.

(e)Sweden

In Sweden, an auction procedure can be availed of on the case of the debtor or individual creditor. This auction is lead by the trustee appointed by court on the basis of a cash-only deal, where payments are made on the basis of the main concern of creditors. The BLRC, in its Interim Report, also recommended that 'a small business looking for rescue protection could be subjected to voluntary auction of the entire business… Auctions, either as pre-packs or in bankruptcy, have been utilized under the Swedish bankruptcy system with success- they have been found to be a quick, low-cost bankruptcy procedure.' While this does not make available for the debtor-in-possession, these firms may also be repurchased by the original owner in these auction processes. Certainly, 'firms sold as going concerns are repurchased by the original owner in 54% of the cases.' The new system could make liquidation more quick and less expensive by:

• Permitting direct option to liquidation on an request by the CD,

• Permitting publicly sponsored authorities such as the Official Liquidator, and a new cadre of low cost insolvency professionals to carry out this procedure,

• Assisting dissemination of assets to stakeholders in a larger variety of circumstances, and

• Abridging the liquidation process by releasing documentation/ reporting requirements, making the establishment of the stakeholders' consultation committee optional and allowing private sales in a larger number of circumstances (as discussed previously).

There is therefore, a suite of options to choose from while redesigning the fast-track process. Policy-makers may choose one or a mix of any of these options in the interests of a value maximising insolvency resolution of small CDs[131], based on a detailed analysis of the costs and benefits of each of these options

[131] Matej Marinc & Razvan Vlahu, GENERAL ISSUES IN BANKRUPTCY LAW, The Economics Of Bank Bankruptcy Law, pg. 34, (2012)

6.2 RECENT JUDICIAL PRECEDENTS

The objective of the 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 for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India.

1.*Coc Of Essar Steel India Limited Through Authorised Signatory V. Satish Kumar Gupta And Others*

In this landmark judgment Hon'ble Supreme Court clarified several aspects of the Code,-

- Role of Resolution Professional (RP): Various provisions provide for the roles and duties of an RP which can be summed into the fact that an RP is responsible for managing the affairs of the corporate debtor and operate it as a going concern during CIRP. An RP is instated with the duty to convene the meeting of the Committee of Creditors (CoC) and collate the claims of the creditors etc. Thus, it is evident that the role of RP is not adjudicatory whereas it is administrative in nature.

- Role of prospective Resolution Applicant (RA): The resolution applicant has the right to receive complete information about the corporate debtor, the debts owed by it and its activities as a going concern prior to CIRP. The resolution applicant must incorporate all measures which are necessary for maximization of the value of its assets. The plan should also define the tenure and implementation of the plan and shall have terms servicing the debts due to all creditors but priority shall be given to operational creditors over financial creditors. Further, the RA should have the capability to implement the plan.

- Role of CoC: The Court enumerated that the affairs of the corporate debtors are handled by the financial creditors who are placed in the CoC as they are the one who, from the very beginning, are interested in the success of business of the corporate debtor,

it is their commercial wisdom that is to decide whether to rehabilitate a corporate debtor by accepting a resolution plan. Such decisions as to affair of the corporate debtor and approval of the resolution plan are taken by majority votes of the financial creditors forming the CoC.

- Jurisdiction of Adjudicating Authority (AA) and Appellate Tribunal (AT): Judicial review by AA and AT must be within that of sections 30 and 32 read with section 61(3) of the Code. They can only review the equitability and fairness of a resolution plan by considering whether the resolution plan provides for maximization of the value of assets of the corporate debtor and the interest of all the stakeholders is ensured. They cannot trespass a decision taken by the majority of the CoC and cannot adjudicate the plan on merits.

- Secured and unsecured creditors, the equality principle: There exists a clear demarcation between secured and unsecured creditors as well as between financial and operational creditors. Financial creditor provides capital to a corporate debtor and in turn acquire interest or charge on the assets of the corporate debtor. Whereas, the operational creditor is just a supplier of goods or services to the corporate debtor who gets paid in return. Thus, treating the unequals equally would defeat the purpose of the Code as the financial creditors would want the corporate debtor to go through liquidation for better benefits

- Extinguishment of personal guarantees and undecided claims: NCLAT in its decision had extinguished the rights of the creditors against the guarantors once the resolution plan was approved. However, setting aside this order the Court, the SC stated that the resolution plan was binding on all stakeholders including guarantors. Even after the amount is paid to the creditors under the resolution plan, they can chase the guarantors for their remaining claim.

- The constitutional validity of section 4 & 6 of the Insolvency and Bankruptcy (Amendment) Act, 2019 dealing with section 12 of the Code: Section 4 of the

amendment Act determines a mandatory deadline of 330 days (including extended time granted and legal proceeding in relation to CIRP) from the commencement date, for completion of CIRP. The Supreme Court removed the word ‘mandatorily’ and stated that the tribunal shall ensure that the insolvency process is resolved within 330 days. However, in circumstances where it is in the interest of the corporate debtor or such delay is because of the legal proceedings then such timelines shall be extended In respect of section 6 the Supreme Court held that the provision is only directory and acts as a guideline. The CoC does not act in a fiduciary capacity on behalf of anyone and is responsible to approve the resolution plan with its commercial wisdom.

2.Jaiprakash Associates Ltd. v. IDBI Bank Ltd.

The Court in this case dealt with two issues hereunder: a. Whether a resolution applicant whose plan has been rejected by CoC can again submit a revised plan after the statutory period provided for in the Code. b. Whether NCLT/NCLAT have the inherent power to exclude any period from statutory period of CIRP provided under the Code The court clarified that the order made by it in such an exceptional case shall not tantamount to a precedent. In the instant case, majority of stakeholders were home buyers. It permitted the interim resolution professional to send requests to submit a revised resolution plans as per Regulation 36B (7) of the Code. Further, it exercised its power under Article 142 of the Constitution and extended the time by 90 days for completion of the proceedings instead of the amendment Act, 2019 coming into force. It did not touch the issue related to the power of NCLT/NCLAT to exclude any time period from statutory time period.

3.Pioneer Urban Land And Infrastructure Ltd. v. UOI

In this landmark judgment the constitutional validity of section 5(8)(f) of the Code as amended by Insolvency & Bankruptcy (Second Amendment) Act, 2018 was challenged. As per the said amendment, the amount raised by allottees under a real estate project shall be deemed to be an amount having the commercial effect of borrowing and ultimately such allottees shall be ‘financial creditors’ under the Code and shall be entitled to be

represented in CoC by authorised representatives. In the given petition the real estate companies contended that the amendment is violative of Article 14 of the constitution as it treated unequals equally and equals unequally, having no intelligible differentia. It was also contended that the amendment was against the objectives of the Code. The amendment was also contented to be violative of Article 19(1) (g) as a real estate developer with sound management and perfectly solvent could fall under CIRP because of one allottee.

Dealing with the issue, the Hon'ble Supreme Court referred to the Insolvency Committee Report which deliberated that if forward sale or purchase transactions are structured as a tool or means for raising finance, there is no doubt that the amount raised from allottees would fall within section 5 (8) (f) of the Code. Further, the Hon'ble SC also highlighted differences between the real estate developers and operational creditors on the following grounds: (i) in operational debts, a person supplying the goods/services is a creditor, which is exactly the opposite in real estate projects; (ii) an operational creditor has no interest in or stake in the corporate debtor, while an allottee is vitally concerned with the financial health of the corporate debtor; and (iii) in an operational debt, there is no consideration for the time value of money, but in real estate projects, money is raised from the allottees against time value of money

On the above ground, the SC held that the amendment rationally equates home buyers to financial creditors just like an individual debenture holder or fixed deposit holder and does not amount to the infraction of Article 14 of the Constitution of India and that the amendment was brought in the public interest and does not impose an unreasonable restriction on the petitioner's fundamental right under Article 19(1) (g). Since no person is deprived of its property without any constitutionally valid law, it does not amount to a breach of Article 300 A.

4.JK Jute Mill Mazdoor Morcha v. Juggilal Kamlapat Jute Mills Company Ltd**.**

The case revolves around the question as to whether trade unions would be considered as operational creditors for the purpose of IBC or not. Facts: The appellant had issued a demand notice to the respondent under section 8 of the Insolvency & Bankruptcy Code, 2916 ('Code') against dues owed to its workers, to which the respondent had replied. On an application made to the NCLT, it dismissed the application on the ground that trade unions weren't covered as operational creditors. NCLAT upheld NCLT's decision. Thus, the present appeal. In the light of the above question, the Hon'ble Supreme Court held that registered trade union can sue and be sued under the Trade Unions Act ('Act') and trade union being an entity established under a statute is a ''person" under section 3(3) of the Code.

Further, rule 6 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 clearly states that an application can be filed conjointly. The fund of the trade union comes from the collection of the workmen who are its members and this fund can be utilized to protect the rights of its members in case of dispute with their employer. Thus, a registered trade union is admissible to make an application under the Code on behalf of its workers to whom the corporate debtor owes in place of services rendered by them as 'Operational Creditors'.

6.2.5 Reliance Communications Limited v. SBI

Reliance companies owed dues to Ericsson (operational service provider). On non-repayment of service fee, an application for initiation of CIRP was moved before NCLT and the same was admitted. However when the corporate debtor filed an appeal before NCLAT it agreed to settle the due through an undertaking to pay the due within 120 days. Another undertaking was filed before Supreme Court while seeking extension of the time period but with a conditional clause saying 'pursuant to sale of assets of the companies' disobeying the order of the court. On failure to pay the debts within the extended time period, it filed for further extension before the Supreme Court to which the court denied. Ericsson being aggrieved by non-payment of its dues moved a contempt petition, which is dealt with in this judgement.

The Reliance companies contended that the assets could not be sold by it due to objections from Department of Telecommunications. The undertakings were not breached and were in consonance to each other. Further it had deposited a small percentage of the amount due with the Registrar of Supreme Court. Thus, fresh insolvency proceedings shall be initiated and the aggrieved shall be paid its due as a creditor. The Court held the while considering the question of disobedience of an order, what must be regarded is the letter and the spirit of the order, together with the bona fide or genuine belief of the alleged contemnor.

In the instant case, the act of the petitioners amounted to hampering the administration of justice and took cognizance of such conduct on the part of the petitioners. Thus, levied penalty of Rs. 1 crore on the petitioners along with the remaining dues to be paid within a week of the order being made failing which they would have to undergo an imprisonment of 3 months.

6.2.6 Swiss Ribbons Pvt. Ltd. v. UOI

Constitution of NCLT/ NCLAT was upheld. The same is on the basis of Govt Affidavit on adherence to the guidelines set by the SC in the Madras Bar Association case. Scheme of law distinguishing between financial creditors and operational creditors was upheld based on the basis of distinction mentioned in the BLRC. Absent of right to vote by operational creditor was upheld and reference was made to the ILC Report. Principle of fair and equitable treatment is incorporated. IUs notings are only prima-facie evidence.

The same may be rebutted. Sec 12A is not violative of Article 14. Once CIRP triggered and CoC is constituted, it becomes proceedings in rem and therefore cannot be terminated by a single creditor.Where CoC is not constituted, the party may approach NCLT which shall exercise its inherent powers under Rule 11A of NCLT Rules, 2016 to decide on the withdrawal.Sec 60 of the Code ensures that CoC does not have last word. In case NCLT/ NCLAT can always set aside the decision of CoC in case the same is not a just

settlement.Sec 29A – the retrospective effect of the section is upheld considering that the RAs does not have any vested interests.

Malfeasance is not the only criteria for making a person ineligible.The categories of “related persons” in sec 29A have to be read noscitur a sociis [ejusdem generis, that is, having the same flavour] with Explanation 1, and if so read, “would include only persons who are connected with the business activity of the RA. Foremost objective of Code is “reorganisation” i.e resolution. Liquidation is only last resort.. Judiciary should play minimum role in the role of legislature in framing economic laws, based on several Indian and global laws. Section 53 was upheld considering the money paid back to bank / FIs is infused back into the economy to further lending to other entrepreneurs for their business. Power of RP as against liquidator 1.RP is only facilitator, liquidator does not work under CoC 2. RP is given only administrative powers and not quasi-judicial powers. Liquidator, who “determines” the claim is given quasi judicial powers.

6.2.7 Arcelor Mittal India Private Ltd. v. Satish Kumar Gupta

Section 29A is a “see through provision” and the “de facto” position of person has to be checked as opposed to “de jure” position. It is important to discover as to who are the real individuals or entities who are acting jointly or in concert, and who have set up such a corporate vehicle for the purpose of submission of a resolution plan .“Acting jointly” does not mean a JV necessarily, it is in the sense acting together. Stage of ineligibility attaches at the time when the resolution plan is submitted by a resolution applicant. The expression “control”, in Section 29A(c), denotes only positive control, which means that the mere power to block special resolutions of a company cannot amount to control.

“Control” here, as contrasted with “management”, means defacto control of actual management or policy decisions that can be or are in fact taken. Observation of SAT in “*Subhkam Ventures (I) Private Limited v. SEBI”* shall apply to 29A. Timelines specified in IBC are mandatory and cannot be extended. Model timelines to be followed as closely as possible by all authorities. Appeal against order “approving” a resolution plan has to

be only for grounds provided in section 61(3). Appeal against order "rejecting" a resolution plan would also lie under section 61Time utilized for proceedings must be excluded from the CIRP period.

Challenge at various stages ,Resolution Applicant cannot challenge the report of the RP u/s 30(2) rejecting the resolution plan. It is to be noted that the RP is only required to confirm the completeness of the resolution plan u/s 30(2) and not to take any decision. As regards conformity of the resolution plan with all applicable laws, the RP is only required to give his prima- facie opinion to the CoC that applicable law has not been contravene. Resolution Applicant cannot challenge the decision of CoC in case the plan could not garner 66% votes .

Section 60(5), when it speaks of the NCLT having jurisdiction to entertain or dispose of any application or proceeding by or against the corporate debtor or corporate person, does not invest the NCLT with the jurisdiction to interfere at an applicant's behest at a stage before the quasi-judicial determination made by the Adjudicating Authority. Sec 60(5) – NCLT is the sole authority for applications and proceedings by or against a corporate debtor covered by the Code. No other forum has jurisdiction to entertain / dispose of any such applications / proceedings

6.2.8 Innoventive Industries Ltd. v. ICICI Bank And Another

IBC is a time bound process and cannot be extend to better preserve economic value of the asset. 2. ICICI's insolvency application against Innoventive has been upheld by the Supreme Court. The insolvency declaration was being challenged on the ground that Innoventive was a "relief undertaking" under the Maharashtra law for relief in case of industrial undertakings. Supreme Court held that there was a conflict between the Maharashtra Relief law and the Bankruptcy Code, but citing well settled rulings in the past, the SC held that in case of a conflict between a state law and a Central Law, the Central Law will prevail. The Insolvency and Bankruptcy Code is a law that codifies the existing law on bankruptcy, enacted under the powers given to the Central Govt under

Part I of Seventh Schedule of the Constitution, and therefore, overrides any contrary state law. In several remarks through the ruling, the SC has highlighted the fact that time is of essence in bankruptcy proceedings. In case of financial debt, the question of a dispute does not arise. All that the financial creditor is required to produce is evidence of non-payment through records of information utility or otherwise. The SC also hinted at a very important principle – which may actually become a sad spot if the existing directors of companies under insolvency matters try to challenge the insolvency filings – that once the Insolvency has been ordered, the Board of Directors ceases to have the power to represent the company. SC also remarked: "Entrenched managements are no longer allowed to continue in management if they cannot pay their debts."

6.2.9 Anuj Jain Interim Resolution Professioal v. Axis Bank

The case essentially deals with a third-party mortgage extended by the Corporate Debtor for a loan taken by its holding company, wherein the Corporate Debtor mortgaged its property for such borrowing. For clarity in the categorization of a transaction as preferential, the Apex Court laid down the following steps-

(a)Determining "Relevant Time" concerning section 43:- Two years in case of related party and one year in case of unrelated parties (both to be calculated from insolvency commencement date)

(b) The next step would be to determine whether there has been a transfer of property or transfer of an interest of the corporate debtor.

(c) Then establishing the fact whether the beneficiary is a creditor or guarantor or surety in the capacity of the corporate debtor.

(d) Then to analyse whether the transaction is made on account of financial debt or an operational debt and whether the said transfer puts the transferee in a beneficial position than it would have been in the event of distribution of assets as per section 53 of the Code.

6.2.10 Vijay Kumar v. Standard Chartered Bank

Based on the above discussion, the SC held the transaction between the Corporate Debtor and its holding as 'preferential' under the Code. As regards the second question, the instant question was determined in light of the fact that the Corporate Debtor had mortgaged its assets as security for loans taken by its holding company, i.e., there was no "direct nexus" between the Corporate Debtor and the lenders of the holding company. Whereas, the root requirement of a creditor to become a financial creditor for the purpose of the Code is the transaction vis-à-vis the corporate debtor. The Hon'ble SC primarily held that in the given set-up, since the corporate debtor has given its property in mortgage to secure the debt of a third party (its holding company), the same may fall within the definition of 'debt' as per section 3 (10) of the Code but it cannot partake the character of 'financial debt' within the meaning of section 5 (8) of the Code. Hence, the financial creditor of the holding will only be considered as a secured creditor of the corporate debtor (and not financial) as there was no direct financial assistance given to the CD on the time value of money

6.3 LATEST AMENDMENTS

6.3.1Insolvency And Bankruptcy Code (Amendment) Act, 2019

There have been certain judicial pronouncements which are being viewed as contrary to the Code's envisioned priority of distribution to financial creditors *vis-à-vis* operational creditors. To address some of these issues, the Parliament passed the Insolvency and Bankruptcy Code (Amendment) Act, 2019.Following are the key changes –

(a)*Clarity on allowing comprehensive corporate restructuring through merger, amalgamation and demerger under a resolution plan*

The Amendment clarifies that a '*resolution plan*' may include provisions for restructuring by way of merger, amalgamation, and demerger. This clarification can be seen as legitimising existing practices being used to arrive at a commercial resolution.

(b)*Time-bound disposal of the resolution application*

The Supreme Court in the case of "*J.K. Jute Mills Co. Ltd. v/s Surendra Trading Co"*. had concurred with the opinion of the National Company Law Appellate Tribunal (NCLAT) that this time limit of 14-days is directory rather than mandatory, and that the NCLT has inherent powers to extend the 14-day period on a case-to-case basis in the interest of fairness and justice. In practice, in many cases, the NCLT would take 3 weeks to a month to ascertain the existence of a default before admitting or rejecting a Resolution Application.

The Amendment introduces judicial discipline in this respect by making it mandatory for the NCLT to pass an order admitting or rejecting a Resolution Application within 14 days from the date of its receipt. In the event of a failure to do so, the NCLT is now required to record the reasons in writing for the delay in determination of default. This amendment therefore seeks to ensure that the 14 day period is only extended in exceptional cases and not as a matter of routine.

(c)*Timeline for completion of CIRP increased to an overall limit of 330 days*

Prior to the Amendment, the Code required that the CIRP should be concluded within a maximum period of 180 days (with a maximum one-time extension of 90 days) from the insolvency commencement date (the Code denotes this to be the date of appointment of interim resolution professional). However, many CIRPs were exceeding this overall 270-day limit on account of legal proceedings initiated either against the corporate debtor, the CoC or the Resolution Professional.

The Amendment provides that the CIRP must mandatorily be completed within an overall timeline of 330 days from the insolvency commencement date (including all or any extensions granted as well as any litigations and related legal proceedings). Additionally, for an ongoing CIRP, in case the 330-day overall timeline has already been breached at the time the Amendment comes into force, the Amendment provides for an additional relaxation of 90 days as a transitionary measure.

(d)*Voting by an authorized representative on behalf of certain classes of financial creditors*

In order to facilitate decision making in the CoC, the Code provided that if an authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received, to the extent of his voting share.To simplify this voting process for CIRPs involving a large number of financial creditors (such as homebuyers, beneficiaries of securities or deposits held with a trustee, etc.), the Amendment clarifies that the authorised representative of a particular class of financial creditors will vote in the CoC, on behalf of all financial creditors represented by him as per the decision taken by a vote of more than 50% of the voting share of the financial creditors of such class, who have cast their vote. Such majority vote within a class of creditors will be counted as a 100% vote from that class of creditors in favour or against a voting item.

For instance, if out of a class of 100 homebuyers 51 or more homebuyers vote in favour of a resolution plan, then all homebuyers would be considered to have voted in favour of the resolution plan. This amendment will not only facilitate a simplified voting process for classes of creditors but will help the authorised representative to effectively participate in the CoC proceedings and cast his vote on behalf of the financial creditors he represents. This will smoothen the decision-making process in cases where debenture-holders, homebuyers, depositors or other classes form a significant percentage of the CoC. Further, it is clarified that the amended voting process will not be applicable for taking a decision on the withdrawal of a Resolution Application and the voting process in such cases will be as originally provided under the Code wherein each individual financial creditor will vote individually.

(e) *Distributions under the Resolution Plan*

Prior to the Amendment, the Code provided that payment to operational creditors under a resolution plan must not be less than the amount that the operational creditors would have received in a liquidation scenario.

However, the Amendment has included an additional requirement – stating that the payment received by operational creditors must not be less than the higher of:makes it

clear that once a resolution plan is approved, it is binding on them as well. The amount such operational creditors would have received in the event of a liquidation of the corporate debtor as per section 53 of the Code; or the amount such operational creditors would have received if the amount distributed under the resolution plan was distributed in accordance with the priority specified as per the liquidation waterfall under section 53 of the Code.

The Amendment provides that payments to financial creditors who do not vote in favour of a resolution plan will be determined in accordance with regulations framed by the Insolvency and Bankruptcy Board of India; but will not be less than the amount that would have been paid to such creditors in the event of liquidation of the corporate debt. Additionally, the Amendment clarifies that such payments made to operational creditors as well as dissenting financial creditors under the resolution plan will be construed as fair and equitable to such creditors, thereby reducing the scope of judicial intervention and litigation at this stage.The Amendment also provides for retrospective application of the above minimum payments to financial and operational creditors under all pending CIRP proceedings namely.

(f) *Resolution Plan binding on all Stakeholders*

Under the Code, once a resolution plan is approved, it is binding on all stakeholders. The Amendment aims to capture this spirit by specifically providing that a resolution plan will also be binding on the Central Government, State Governments or any local authority to whom a debt in respect of payment of dues is owed. This amendment will reduce delays caused by the government or any local authority raising demands post-approval of a resolution plan and makes it clear that once a resolution plan is approved, it is binding on them as well.

(g) *Powers of the CoC*

The Essar Order had severely curtailed the powers of the CoC vis-à-vis consultation and negotiation with bidders while evaluating any resolution plan. The Essar Order held that the CoC can only approve or reject a resolution plan and cannot negotiate it with a

resolution applicant to bargain for better terms (the Essar Order stated that the CoC can only request the resolution applicant to do so).

However, the Amendment seeks to change that and in clear words has empowered the CoC to commercially consider the manner of distribution proposed in the resolution plan while deciding its feasibility and viability. The CoC can evaluate such manner of distribution by taking into account the order of priority amongst creditors as per the liquidation waterfall in section 53 of the Code, including the priority and value of the security interest of a secured creditor.

6.3.2 Insolvency And Bankruptcy Code (Amendment) Ordinance, 2020

Article 123 of the Constitution of India grants the President of India certain law-making powers to promulgate ordinances when either of the two Houses of Parliament is not in session. The fundamental reason for bestowing the executive with the power to issue ordinances is to deal with situations where an emergency in the country necessitates urgent action, such as the unprecedented economic and health crisis faced by the nation in the wake of the pandemic COVID-19.

(a)By virtue of the said powers vested in him under the Constitution of India, the Hon'ble President of India has promulgated the IBC Ordinance 2020 to effectively suspend the operation of Sections 7, 9 & 10 of the Insolvency and Bankruptcy Code, 2016 with respect to defaults arising on or after 25.03.2020 for a period of six months, extendable up to a maximum of one year from such date as may be notified. The promulgation of this Ordinance has resulted in the insertion of new clauses, i.e., Section 10A and Section 66(3) in to the Insolvency and Bankruptcy Code, 2016.

(b)Amendment to Section 66 of the IBC, 2016 :The Ordinance also envisages the amendment of Section 66 of the IBC, 2016.The aforesaid provision provides relaxation from wrongful trading provisions, i.e., resolution professionals will be barred from initiating wrongful trading applications against directors of companies where the IBC process is suspended. This is certainly a matter of conce

CHAPTER-7

EFFECTIVENESS OF NEW CORPORATE INSOLVENCY LAW IN INDIA

"Due to the 'Insolvency and Bankruptcy Code', nearly 3.5 lakh crore have also been recovered by the banks and other institutions"

- Hon'ble President of India

(Joint Session of Parliament, January 31, 2020)

According to the notification of RBI in September 2019 with the help of Insolvency and Bankruptcy Code the public sector banks are able to recover around 1.2 lakh crores from stressed assets during the end of the financial year in 2019. Banks recovered around 55000 crore from NCLT resolution by way of IBC. The recovery in the financial year in 2017 and 18 was around 74. 562 trolls where as in 2018 and 19 recovery was doubled to 1.2 lakh core. There were many procedures prior to IBC enactment that deal with the recovery of loans from the companies but all of these failed because of ineffective mechanism like legal delays etc. which led to the deterioration in the quality of assets and claim'.

IBC was one of the significant reform in the the insolvency proceedings in India . It was passed in Parliament on 11th May 2016, this act will override all the existing relating to the insolvency and bankruptcy in India. IBC works under the umbrella of IBBI(insolvency and bankruptcy board of India)through NCLT (National company law tribunal) . It is only with 3 years since the IBC started working and the number of cases registered under this is what makes this act a game changer in the economy it operates through 11 branches of NCLT across India. Transparency, equality, resolution and pace four pillars of IBC.

On of the main benefits of IBC is that it gives power to administrative structure for inflow of Information and issue of resolution in a time bound manner .It gives liberty to the creditor's decision for the revival and restructuring of corporate debtor and corporate resolution plan is not able to be passed or approved . NCLT has the authority to order company for liquidation or make public announcement.

Quarter	CIRPs at the beginning of the Quarter	Admitted	Closure by				CIRPs at the end of the Quarter
			Appeal/ Review/ Settled	Withdrawal under Section 12A	Approval of Resolution Plan	Commencement of Liquidation	
Jan - Mar, 2017	0	37	1	0	0	0	36
Apr -Jun, 2017	36	130	8	0	0	0	158
Jul - Sep, 2017	158	235	18	0	2	8	365
Oct - Dec, 2017	365	144	40	0	7	24	438
Jan - Mar, 2018	438	196	23	0	11	59	541
Apr - Jun 2018	541	249	22	1	14	51	702
Jul - Sep, 2018	702	242	33	27	29	86	769
Oct - Dec, 2018	769	276	13	38	18	82	894
Jan - Mar, 2019	894	382	50	21	20	86	1099
Apr - Jun, 2019	1099	301	26	26	26	95	1227
Jul - Sep, 2019	1227	582	28	21	32	153	1575
Oct - Dec, 2019	1575	613	27	11	35	149	1966
Jan - Mar, 2020	1966	387	23	12	27	121	2170
Total	NA	3774*	312	157	221**	914	2170

*These CIRPs are in respect of 3706 CDs

**This excludes 1 CD which has moved directly from BIFR to resolution Source: Compilation from website of the NCLT

Table- CIRP[132] as on March 2020

The table shows the progress of IBC from 2017-2018. The total number of cases filed till December 2018 were 1484. The total number of cases appealed are reviewed or settled 142 where does withdrawal of cases under section 12 a only 63 . 79 cases approved of resolution plan December 2018 and 302 liquidation plans were commenced . as of December 2018 they were only 898 cases which were outstanding. There were only 30% of the cases 275 in total in which 270 days were exceeded, while rest of the cases we dealt within 270 days. There is no major success in terms of insolvency when we look at the number of cases admitted and the cases resolved. Never many cases which were not resolved within the mandatory time framework. This can be seen as a beginning of the era rather than commenting on the success of the IBC.

[132] Source: IBBI quarterly newsletter Jan-March,2020 (vol.14)

7.1 INITIATION OF CIRP

Quarter	No. of CIRPs Initiated by			
	Operational Creditors	Financial Creditors	Corporate Debtors	Total
Jan - Mar, 2017	7	8	22	37
Apr - Jun, 2017	58	37	35	130
Jul - Sep, 2017	98	99	38	235
Oct - Dec, 2017	65	65	14	144
Jan - Mar, 2018	89	85	22	196
Apr - Jun, 2018	129	102	18	249
Jul - Sep, 2018	126	100	16	242
Oct - Dec, 2018	146	114	16	276
Jan - Mar, 2019	164	197	21	382
Apr - Jun, 2019	154	130	17	301
Jul - Sep, 2019	294	279	9	582
Oct - Dec, 2019	329	267	17	613
Jan - Mar, 2020	215	163	9	387
Total	1874	1646	254	3774

Source: IBBI quarterly newsletter Jan-March,2020 (vol.14)

The total CIRP initiated till March 2020 is 3774, in which CIRP initiated by OC is 1874, whereas CIRP initiated by FC is 1646. The claims demanded by OC is more than FC. The initiation of corporate insolvency resolution process by corporate debtor is the least among all with number of only 254.

7.2 STATUS OF CIRP

Status of CIRPs	No. of CIRPs
Admitted	3774
Closed on Appeal / Review / Settled	312
Closed by Withdrawal under section 12A	157
Closed by Resolution	221
Closed by Liquidation	914
Ongoing CIRP	2170
>270 days	738
> 180 days ≤ 270 days	494
> 90 days ≤ 180 days	561
≤ 90 days	377

Table- status of CIRPs as on March31, 2020
Source: IBBI quarterly newsletter Jan-March,2020 (vol.14)

The status of corporate insolvency resolution process can clearly been seen from above data issued by the IBBI . the total case admitted till March 2020 is 3774. On the other hand ongoing CIRP is only 2170. CIRP which are closed on appeal or review are 312 and CIRP closed by resolution is 221 and rest of 914 went for liquidation.

7.3 WITHDRAWALS UNDER SEC 12A

Amount of Claims Admitted* (` crore)	No. of CIRPs
≤ 01	64
> 01 ≤ 10	36
> 10 ≤ 50	21
> 50 ≤ 100	08
> 100 ≤ 1000	06
> 1000	02
Reason for Withdrawal*	
Full settlement with the applicant	38
Full settlement with other creditors	08
Agreement to settle in future	10
Other settlements with creditors	45
Corporate debtors not traceable	02
Corporate debtor struck off the Register	01
Applicant not pursuing CIRP due to high cost	02
Others	31

* Data awaited in 20 CIRPs

Table : Claim Distribution and Reasons for Withdrawal
Source: IBBI quarterly newsletter Jan-March,2020 (vol.14)

In the above table there are various reasons given for the withdrawal and accordingly the data is bifurcated. There were 38 cases were the reason of withdrawal was full settlement with the applicant and only 8 cases where it is done with the creditors. Future settlements is also one of the reason of the withdrawal in which there are 10 such cases. Only 2 cases can be found where corporate debtor is not available .

7.4 CIRP ENDING WITH ORDER OF LIQUIDATION

State of Corporate Debtor at the Commencement of CIRP	No. of CIRPs initiated by			
	FC	OC	CD	Total
Either in BIFR or Non-functional or both	251	285	101	637
Resolution Value ≤ Liquidation Value	308	340	107	755
Resolution Value > Liquidation Value	63	35	26	124

Note: 1. There were 55 CIRPs, where CDs were in BIFR or non-functional but had resolution value higher than liquidation value.
Source: IBBI quarterly newsletter Jan-March,2020 (vol.14)

The total of 637 CIRP cases ended with order of liquidation in which 251 are initiated by financial creditors, 285 initiated by operational creditors and 101 were initiated by the corporate debtor itself. There were 755 cases where resolution value were more than liquidation value and only 124 cases where it was less than liquidation value.

7.5 STATE OF LIQUIDATION PROCESS

Status of Liquidation	Number
Initiated	914*
Final Report submitted	69
Closed by Dissolution	55
Closed by Going Concern Sale	1
Ongoing	845
> Two years	70
> One year ≤ Two years	277
> 270 days ≤ 1 year	96
> 180 days ≤ 270 days	143
> 90 days ≤ 180 days	138
≤ 90 days	121

*This excludes 6 cases where liquidation order has been set aside by NCLAT / Supreme Court.

Table - Status of Liquidation Processes as on March 31, 2020
Source: IBBI quarterly newsletter Jan-March,2020 (vol.14)

Till March 2020 there were total of 914 cases which were initated for the liquidation process out of which in 69 case final report was submitted. Only 55 cases were closed by dissolution order. Only 1 is closed as a going concern yet, rest of 845 liquidation cases is ongoing. It took around more than two years for liquidation in 70 cases and on other hand 121 cases were resolved only on less than 90 days.

7.6 RESASONS FOR LIQUIDATION

IBBI has published 4 reasons for liquidations as provided in above table. Total 646 cases which are ongoing for liquidation and only 69 cases where final reports were submitted

Circumstance	Number of Liquidations	
	Where Final Reports Submitted	Ongoin g
AA did not receive resolution plan for approval	33	373
AA rejected the resolution plan for non-compliance with the requirements	0	41
CoC decided to liquidate the CD during CIRP	36	231
CD contravened provisions of resolution plan	0	1
Total	69	646

Data are available for only 715 cases.
Table – Reasons for liquidation as on March 2020
Source : IBBI quartly newsletter Jan-March 2020

The four reasons mentioned for liquidations are: where Adjudicating Authority has not received any resolution plan for approval, other one is where resolution plans were rejected because of non compliance with the requirements, another category is where COC decided to liquidate themselves and the last one is where corporate debtor has contravened in resolution plan.

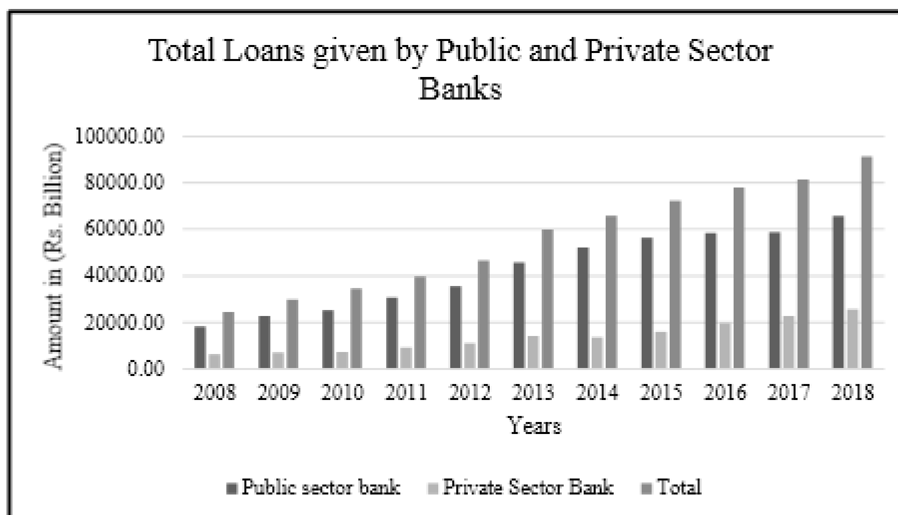
7.7 AVERAGE TIME FOR APPROVA

Sl. No.	Average time	No. of Processe s covered	Time (In days)	
			Including excluded time	Excluding excluded time
CIRPs				
1	From ICD to Approval of resolution plans by AA	221*	415	375
2	From ICD to order for liquidation by AA	914	309	NA
Liquidations				
3	From LCD to submission of nal report	69	270	NA

4	For submission of Final report under Voluntary Liquidation	202	315	NA

Table: Average time for approval of Resolution Plans/Orders for Liquidation/Dissolution[133]

7.8 IMPACT ON LOAN GIVING CAPACITY OF THE BANKS

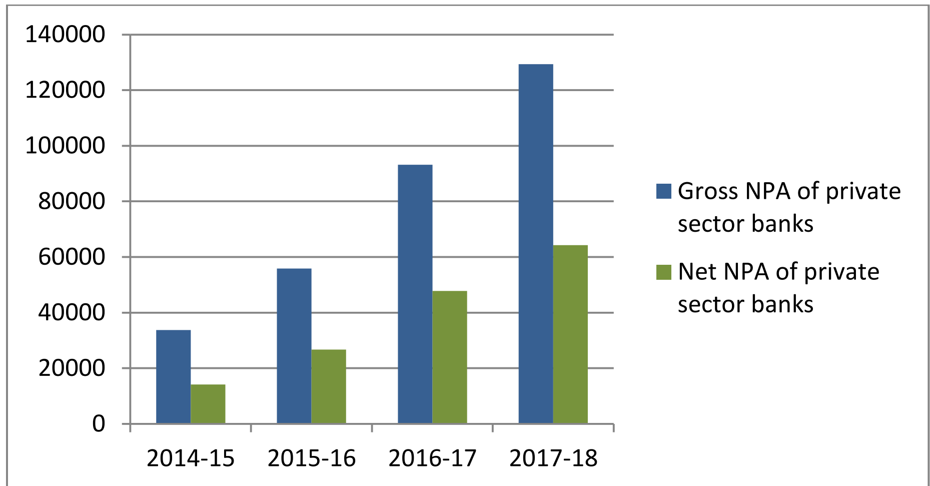


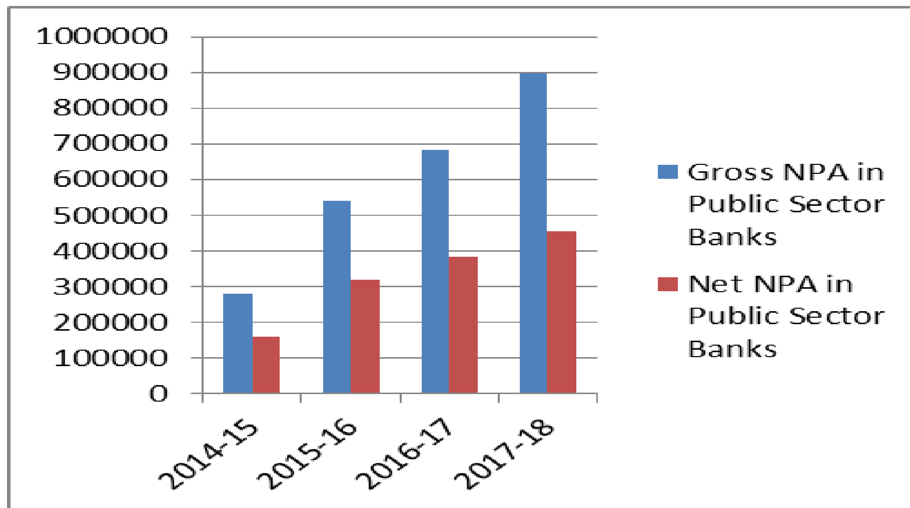
Source - Total loans given by public sector banks and private sector banks to all the industries, RBI, 2019[134]

There was an upward Trend since 2008-18 in the the total loan given by the public and private sector banks as with the growth of the economy the demand for capital in the industries also increases therefore need to to afford trend in the loan given by banks. On analysing the loan an year to year basis.There was growth of 21.69.% in loan amount from FY 2007-08 to FY 2008-09. There was a growth 28.56% which is highest in FY 2012-13 when compared to FY 2011-12 after that there is negative growth. There is a single digit growth from FY 2013-14 to 2017-18. There was a lowest growth of 4.34% in comparison from FY 2016-17 to FY 2015-16. Loan Advances.As per the Reseve Bank of India data released at the end of 2019 ,the total loan advances in banking industry at the end of financial year of 2018 is Rs. 87,45,997cr. and it is increased to Rs. 97,09,829 at the end of 2019. The percentage variation in 2018 was 7.8% which is increased to 11%.

[133] Source: IBBI quarterly newsletter Jan-March,2020 (vol.14

7.9 IMPACT ON NPAs





(Source: Gross and Net NPA of Private sector bank , RBI 2019)

7.10 IMPACT ON PROFITABILITY OF BANKS

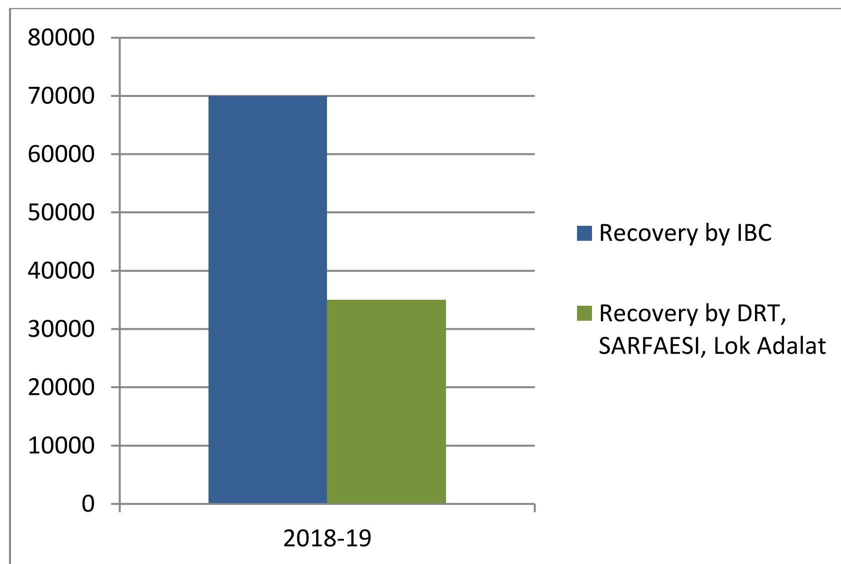
In 2019-2020 , the profitability of public sector banks in the first half of September is around Rs 3221 crore. PSBs has suffered huge losses in 2017 -18 and 2018-19 because of non performing assets and other contingencies. As per the RBI report on global operations of psbs, the aggregate gross advances has increased to Rs. 68.76lakh core as on 31 March 2014 from Rs. 25.03 lakh core as on March end 2008.

As the report released by RBI on 24 December 2019 the overall net profit in the banking industry of india is in negative . The position of the banking industry is improved in 2019

as net profitability in comparison Rs. 23,397 to 2018 in which net profitability is -32,438cr'.

7.11 IMPACT ON RECOVERIES

In 2018-19, recovery of stressed assets through IBC doubled to Rs 70,000 crore as against Rs 35,000 crore recovered using other resolution mechanisms including Debt Recovery Tribunal (DRT), Securitisation and Reconstruction of Financial Assets (Sarfaesi), Enforcement of Securities Interest Act, and Lok Adalat, rating agency Crisil said in a report. the recovery rate for the 94 cases resolved through IBC by FY2018-19 is 43 per cent, compared with 26.5 per cent through earlier resolution mechanisms[135] .



The Insolvency and Bankruptcy Code was primarily enacted to help banks recover a higher amount of The overall bad loans of Indian scheduled commercial banks peaked at ₹10.36 trillion as of March 2018. In May 2016, the Insolvency and Bankruptcy Code (IBC) was put in place to deal with this problem .

(a)What are the total recoveries IBC made

'The Insolvency and Bankruptcy Code was primarily enacted to help banks recover a higher amount of bad loans than they had earlier. Also, the idea was to quicken the

[135] RBI Financial Report, 2019

process. Bad loans are largely loans that haven't been repaid for a period of 90 days or more. The question is how well the insolvency legislation has done on this front. Since it started operating and until 30 June, financial creditors (primarily banks whose loans had been defaulted on by corporates) had filed claims worth ₹2.53 trillion under IBC. The total recovery has been at ₹1.08 trillion. This means a rate of recovery of 42.8%.

(b)*How good is IBC's rate of recovery*?

'On the face of it, IBC's recovery rate of 42.8% sounds quite good. In 2017-18, the rate of recovery from non-IBC methods was around 12.4%. In 2012-2013, the rate of recovery was 22%. It has come down since then. Now a rate of recovery of 42.8% sounds much better than 12.8%. But there is a twist in the tale. The biggest recovery for banks was when Bamnipal Steel, a unit of Tata Steel, bought Bhushan Steel. Bhushan Steel had defaulted on loans worth ₹56,022 crore. Bamnipal Steel paid ₹35,571 crore for the company. The rate of recovery was 63.5% of the defaulted loans'.

(c)*What is the recovery rate if this deal is ignored*?

The rate of recovery falls to around 36.9% from 42.8%, if we ignore Bamnipal Steel taking over Bhushan Steel. The rate of recovery in other cases hasn't been as high'.

(d)*How soon are recoveries made*?

According to IBC, the entire process needed to be completed in 270 days. As of March, the average time taken in cases that were resolved, typically, with the company that has defaulted on a loan being sold to another company, was 324 days. This was longer than the 270-day deadline, but much less than the 4.3 years it used to take before IBC was implemented. In July, the government extended the deadline for the corporate insolvency resolution process to 330 days'.

(e)*What about the cases that are not resolved*?

'Until 30 June, of the 2,162 cases that have been referred to the corporate insolvency resolution process (CIRP), only 120 have seen resolution plans; 1,292 are still under CIRP. Hence, of the 870 cases that are out of CIRP, only 13.8% have seen resolution

plans. This is very low. As many as 475 cases have been closed by liquidation. Of these, liquidation has happened in only 11 cases and the recovery is next to nothing.

7.12 IMPACT ON CLAIMS

As a percentage of claims, banks recovered on average 42.5% of the amount filed through the IBC in the financial year 2018-19, against 14.5% through the SARFAESI resolution mechanism, 3.5% through Debt Recovery Tribunals and 5.3% through Lok Adalats. Against Rs 1.66 lakh crore claims involved under IBC, the recovery was Rs 70,819 crore. Against Rs 1.66 lakh crore claims involved under IBC, the recovery was Rs 70,819 crore[136]. Through the Sarfaesi mechanism, it stood at Rs 41,876 crore. Recoveries through DRTs and Lok Adalats were Rs 10,575 crore and Rs 2,816 crore, respectively

Table:NPAs of SCBs recovered through various channels

Recovery Channel	2016-2017				2017-2018			
	No. of cases Referred	Amount Involved	Amount Recovered*	Col. (4) as % of Col. (3)	No. of cases Referred	Amount Involved	Amount Recovered	Col. (8) as % of Col. (7)
1	2	3	4	5	6	7	8	9
Lok Adalats	3,555,678	361	23	6.3	3,317,897	457	18*	4.0
DRTs	32,418	1,008	103	10.2	29,551	1,333	72*	5.4
SARFAESI	199,352	1,414	259	18.3	91,330	1,067	265*	24.8
IBC	37@	-	-		701@	99#	49^	49.6
Total	**3,787,485**	**2,783**	**385**	**13.8**	**3,439,477**	**2,956**	**404**	**13.7**

Source: *RBI's Report on Trends and Progress of Banking in India, 2017-18*

Notes: 1. P: Provisional

*: Refers to amount recovered during the given year, which could be with reference to cases referred during the given year as well as during the earlier years.

@: Cases admitted by NCLTs

#: Claims admitted of FCs on 21 companies for which resolution plans were approved.

^ : Realisation by FCs from 21 companies for which resolution plans were approved

[136] SOURCE: IBBI Annual Report 17-18

The table reveals about NPAs recovery through various channel, from 2012-13 to 2016-17. In the year 2012-13 total number of cases filed are 10,44,636, out of which most of the cases (8,40,691) are filed through Lok Adalats but the recovery was only 6.1 per cent, cases which are filed through SARFAESI Act was (190537) but recovered 27.2 percent of amount. Whereas in the year 2016-17total cases were 22,61,873, but most of the amount was recovered through DRTs. It is observed that year by year NPA cases are increasing i.e 46.18 percent during this five years and recovery through Lok Adalats is very less though most of the cases dealt by this channel. It is also found that most of the amount recovered through SARFAESI Act and DRTs only. Hence, the government and RBI has to take measures to recover through the SARFAESI Act and DRTs which will maximize the recovery of NPAs, which enables stability of bank performance [137].

7.13 EARLY RECOVERY OF LOAN AMOUNT

IBC has made a drastic change in the relationship of corporate debtor and corporate creditors. Banks are no longer to run behind the corporate bodies. After the establishment of the new insolvency regime in India , the NCLT is the most trusted institution . Those who are responsible for the company to drive it into liquidation, have to exit from management. The new appointed management have to to be honest and work in transparent manner. With the introduction of IBC there[138] is a high possibility that the banks can recover its loan amount at the initial stage of the insolvency proceedings. The recovery of the monies by IBC proceedings has to take place by three methods which help the bank to recover portion of its amount at early phase of the proceedings'-

1.Defaulters knows that once they get into IBC proceedings they will surely be out of management and committee of creditors have more control in the company

2.Once bank file the petition under insolvency proceedings many debtor has to pay the loan amount at the pre admission stage, so as to avoid the insolvency declaration proceedings

3.Many major insolvency cases which are not able to be resolved under insolvency proceedings are moving towards the liquidation and banks are able to get the liquidation

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[138] Sumant Batra, *The Asian Recovery :Progress and Pitfalls, the Position of India*, The World Bank Guild(March, 19, 2020) ,http://www.sumantbatra.com/papers.php.

value from it..According to the report of Insolvency and Bankruptcy Board of India (IBBI), almost Rs 2.02 lakh crore of debt pertaining to 4,452 cases were disposed of even before admission in default to creditor[139].

7.13 FINANCIAL INSTITUTIONS AS OPERATIONAL CREDITOR

It is wrong to perceive that all the debts/loans extended by a bank or financial institution will fall under the definition of financial debt. However, according to NCLT, the nature of the debt is not decided by the fact as to who is extending the loan. As observed from the cases before the adjudicating authority, it is possible that a financial institution extends a loan, however, is utilized for the business operations. One of the popular banks, Standard Chartered Bank extended financial support to Ruchi Soya Industries Private Limited. Ruchi Soya is currently undergoing insolvency resolution in which the Bank has been categorized as an operational creditor. The company received the amount of USD 52.5 million from the Standard Chartered Bank[140] to supply the goods to its subsidiary. The said amount was to be recovered by the Bank with interest from the subsidiary of the corporate debtor which it failed to recover and the parent company went into insolvency resolution process. Presently, the Bank has requested the NCLT, Mumbai to allow it to be categorized as financial creditor instead of current status as an operational creditor. It is yet to be seen as to how the adjudicating authority shall decide the said application.

7.15 WIDE MEANING OF TERM TIME VALUE OF MONEY

To understand the interpretation of 'financial debt', it is important to understand the meaning of Time Value of Money'. The term was first analysed in the matter of *Nikhil Mehta and Sons (HUF) v. AMR Infrastructure Ltd*. (AT) (Insolvency) No. 07 of 2017. In this case, the Applicants, paid almost the entire amount for the unit and in turn were promised by the builder to be paid a sum of money on a monthly basis until the possession of real estate units booked by them was handed over to the applicants. However, the applicants filed an insolvency petition against the Corporate Debtor when

[139] Source: IBBI quarterly newsletter Jan-March,2020 (vol.14)
[140] SOURCE: IBBI Annual Report 17-18

the latter failed to pay the aforementioned 'Assured Returns' as promised under the contract. According to NCLT, the transaction in the case was more in the nature of a sale of goods rather than in the nature of debt. On appeal of this order, the NCLAT considered the sale and purchase agreement between the parties in order to understand the nature of 'assured returns'. As per the Agreement, on payment of most of the consideration amount by the home buyers, the Corporate Debtor undertook to pay a fixed amount, for every

Table: India's performance in resolving insolvency

SOURCE: IBBI Annual Report 17-18

7.16 REDUCED AVERAGE RESOLUTION TIMELINE

Particulars	As per EODB released in October			Outcomes under the Code
	2015	2016	2017	
Rank in Resolving Insolvency	136	136	103	NA
Score for Resolving Insolvency (0 -100	35.59	32.75	40.75	NA
Time (years)	4.3	4.3	4.3	243 days
Cost (per cent of estate	9.0	9.0	9.0	NA
Recovery rate (cents on the dollar	25.7	26.0	26.4	49.6
Strength of insolvency framework index (0 -16)	6.0	6.0	8.5	NA

Table: Resolving Insolvency as on December 2018

SOURCE: IBBI Annual Report 17-18

IBC is a time bound process and cannot be extend to better preserve economic value of the asset. The average resolution timeline for cases resolved through IBC is 324 days, which is better than 4.3 years earlier, it is still above the 270 days set out in the code . As on March 31, 2019, there were 1,143 cases outstanding under the IBC of which resolution in 32 per cent of the cases was pending for more than 270 days calendar month, till the date of handing over of possession[141]. This, according to NCLAT, was the time value of money against the consideration

[141] SOURCE: IBBI Annual Report 17-18

CHAPTER – 8

CONCLUSION

The corporate insolvency law can lay out clear and well defined provision governing the procedures at each stages, effectively and time resolution of an insolvency case will depend to a large extent on the efficacy with those provisions and rules are enforced. The purpose, will go a long way in protecting interest of the creditors in an insolvent company; nonetheless few more steps are desirable. Here are my few suggestions as to what the Indian Government should do to improve its corporate insolvency system-

1.The role of insolvency law is not merely confined to maximising returns to creditors; it has some other distributional roles, for instance to rehabilitate or rescue businesses in financial difficulty and to protect employment, public interests and other victims' interests affected by the corporation insolvency. These views are consistent with the trend developing around the world that the insolvency process should take on socio-economic and wider considerations than absolute economic reason..

2.Also, during the study, a few points of problem were identified. These are that the rivals can purchase companies for a very small amount and in the absence of a healthy competition, it can be a point of depression for the economy A change in the policies to address these issues can make a huge difference and can improve the quality of the code

3.To minimise delays, the need is to vastly enhance capacity and induct experts. More specialised benches of the adjudicating authority must be set up. And bankers must be given the leeway to take haircuts without inviting a witch-hunt by enforcement agencies. Changes are also warranted to the Banking Regulation Act (Section 35AA) to dispense with the precondition that the Centre must authorise RBI to issue directions in the case of specific defaults. RBI should be fully empowered to issue directions to banks initiate bankruptcy proceedings, if needed.

4. Even as the Insolvency and Bankruptcy Board of India (IBBI) taken up a few cases, insolvency professionals (IP) still fear the law (Insolvency and Bankruptcy Code) does

not provide fool-proof protection to them. Although there is a provision in the section 233 of the Code that no suit, prosecution or other legal proceeding shall lie against the insolvency professional, liquidator and other officials of IBBI for anything which is done in good faith under the Code, professionals feel that it is too hard to prove that a particular act was done in a good faith. Once allegations in this regard are made against IP, proving that a particular act was done in good faith will not be an easy task and at the same time the IP will have to bear the heavy litigation cost in this regard. This is a strong reason for professionals to show reluctance in taking the job of an IP.

5.A large number of trained and skilled insolvency professionals will be required for successful execution of the Code. A strong anchor, clear-cut plan will be needed to develop a large pool of insolvency professionals and an institutional structure which will produce, certify and regulate them. Such insolvency professionals will not only be needed to comprehend the subtle distinctions and differences of various aspects of restructuring/ liquidation but must also be capable of carrying out the affairs of the company during the process.

6.The only hope to recover the credited amount from an insolvent company is from the proceeds of the sale of the properties of insolvent companies. So the sale and disbursement of properties of companies under liquidation should be made more transparent. Procedures such as e-auction and e-tender should be introduced to fetch fair market value of the properties of the companies, so that the maximum amount of dues owed to the creditors may be repaid. ¬ Mismanagement of the financial affairs of the company by the board members is the substantial cause for companies‘ finances going bust. Affixation of accountability will act as a deterrent against mismanagement of companies that jeopardize the interest of the creditors. So mechanism or laws to affix accountability for mismanagement of companies, that pushes it towards insolvency is called for.

7. I would like to suggest that self-sustaining NCLT - one which is not dependent on the government for funds - would a go a long way in addressing infrastructure woes. One of

the core issues plaguing the NCLT concept is the lack of funds even at the start-up stage. ¬ Further I would like to suggest that for the system to work it should attract the best and brightest minds. And to attract them, adequate infrastructure has to be provided and the judges and administrative staff need to be compensated appropriately.

8.The government should increase the fee for the insolvency resolution proceedings and then pay back the loan taken from the banks over a period of time; post which the fees could be used to continuously improve the NCLT

9.The dual system never works, and the High Courts are saddled with winding-up cases even today. The transfer of cases from the High Court to the NCLT is taking place in slower batches. The Government should concentrate on creating more benches and transferring all cases in one go in order to spread confidence amongst the stakeholders. The present state of affairs will see India‘s ranking dip further. Quicker transitions would energize the system and bring results.

10.Apart from the above-mentioned challenges, the IBC Code has helped in improving the global rank of India in the ease of doing business. For the first time, India has a rank within the top 100 in the world. This jump is because of economic reforms like; IBC and GST. Due to this development, we can also expect a growth in FDI and GDP in the country. It has also given an immense thrust to M&A drive in India. The success of 'Make in India' campaign will only be possible if an environment is created in India where the failures of entrepreneurs and financiers are handled and treated cautiously on time.

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