INSOLVENCY AND BANKRUPTCY CODE, 2016: A PARADIGM SHIFT IN INSOLVENCY LAW

Dissertation submitted to National Law University, Assam
in partial fulfilment for award of the degree of MASTER OF LAWS

Supervised
by:
Mrs. Monmi Gohain
Assistant Professor of Law

Submitted
by:
Monzur Ul Kabir Choudhury
UID: SM0217010
2017-2018

National Law University, Assam
June/2018

DECLARATION

I, **Monzur Ul Kabir Choudhury**, pursuing Master of Laws (LL.M.) from National Law University, Assam, do hereby declare that the present dissertation titled **'INSOLVENCY AND BANKRUPTCY CODE, 2016: A PARADIGM SHIFT IN INSOLVENCY LAW'** 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.

Date : **Monzur Ul Kabir Choudhury**

UID: SM0217010

ACKNOWLEDGEMENT

It brings me great pleasure for an opportunity to submit my dissertation titled 'INSOLVENCY AND BANKRUPTCY CODE, 2016: A PARADIGM SHIFT IN INSOLVENCY LAW' as an integral part of my LLM programme. For this I am deeply indebted & sincerely thankful to Mrs. Monmi Gohain, Assistant Professor of Law, National Law University, Assam, for her help, invaluable guidance and encouragement throughout the course of present work.

I am also thankful to Prof. (Dr.) J.S. Patil, Vice-Chancellor, National Law, Assam, for allotting the dissertation topic as per my area of research interest.

Finally, I am deeply thankful to my parents and teachers who helped and inspired me in completing this research.

Date: **Monzur Ul Kabir Choudhury**

UID: SM0217010

PREFACE

In India, Law relating to Insolvency and Bankruptcy seems to have acquired a position of great importance since 2016 and rightly so. This is partly because of the many big corporations going into a painstakingly slow liquidation process which leads to diminishing value of assets, high rise in NPAs in major banks and partly due to policy change favoring entrepreneurship, "ease of doing business" and "ease of exit". The Insolvency and Bankruptcy Code, 2016 is a well intentioned legislation and apparently cures much of the earlier problems faces by the banking sector and provides impetus to policies like "ease of doing business", "ease of exit" and encouraging "Start Ups". Nevertheless the code does face difficulties in implementation and is often criticized as being too ambitious. The code is still in its early stages and is still a work in progress; hence reviewing it to iron out the creases that hinder it from achieving its purpose must be carried out routinely. The recent changes made by the "Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018" following the report of "Insolvency Law Committee" is a welcome step towards an effective implementation.

This dissertation is an attempt to understand and analyze the shift in Insolvency and Bankruptcy law brought by the Code, the need for such change and challenges faced by the new code. The dissertation discusses both "Personal Insolvency Resolution Process" and "Corporate Insolvency Resolution Process in fair detail. Further it also elaborately deals with cases where resolution process is unsuccessful viz. "Bankruptcy" in case of Individual debtors and "Liquidation" in case of corporate debtors. Further the research analyses 12 specific challenges faced by the Code. The research also analyses the judicial attitude in the working and implementation of the code by discussing a few landmark judgments delivered by the Supreme Court.

Monzur Ul Kabir Choudhury

UID: SM0217010

TABLE OF CASES

TABLE OF STATUTES

1872- The Contract Act

1909- Presidency Towns Insolvency Act

1920- Provincial Insolvency Act

1956-The Companies Act

1985-The Sick Industrial Companies (Special Provisions) Act

1993-The Recovery of Debts Due to Banks and Financial Institutions

2002-The Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act

2013-The Companies Act

2016-Insolvency and Bankruptcy Code

ABBREVIATIONS

§- Section

AA-Adjudicating Authority

CIC-Creditor in Control

CIRP-Corporate Insolvency Resolution Process

COC-Committee of Creditors

DIP- Debtor in Possession

DRT-Debt Recovery Tribunal

DRAT-Debt Recovery Appellate Tribunal

EOI-Expression of Interest

FC-Financial Creditor

FRDI-Financial Resolution and Deposit Insurance Bill

IBBI-Insolvency and Bankruptcy Board of India

IBC-Insolvency and Bankruptcy Code

IRP-Insolvency Resolution Professional

IU-Information Utility

MSME-Micro Small and Medium Enterprise

NCLT-National Company Law Tribunal

NCLAT-National Company Law Appellate Tribunal

NPA-Non Performing Asset

OC-Operational Creditor

RP-Resolution Plan

SARFAESI- Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest

CONTENTS

CHAPTER-III

EVOLUTION OF INSOLVENCY AND BANKRUPTCY LAW: AN ANALYSIS

CHAPTER-IV

BANKRUPTCY AND INSOLVENCY REGIME UNDER THE IBC, 2016: AN ANALYSIS

REMARKABLE JUDICIAL PRECEDENTS IN INSOLVENCY AND BANKRUPTCY LAW IN INDIA IN THE LIGHT OF INSOLVENCY AND BANKRUPTCY CODE 2016

CHAPTER-VII

ISSUES AND CHALLENGES TOWARDS IMPLEMENTATION OF INSOLVENCY AND BANKRUPTCY CODE 2016

CHAPTER VIII

CONCLUSION

BIBLIOGRAPHY

i. List of Books

V.S. WAHI, TREATISE ON INSOLVENCY AND BANKRUPTCY CODE (1st ed. 2017).

JYOTI SINGH & VISHNU SHRIRAM, INSOLVENCY AND BANKRUPTCY CODE: CONCEPTS AND PROCEDURE (2nd ed. 2017).

KARL GRATZER AND DIETER STIEFEL, HISTORY OF INSOLBECY AND BANKRUPTCY FROM AM INTERNATIONAL PERSPECTIVE (2008).

E.J. HAYEK, PRINCIPLES OF BANKRUPTCY IN AUSTRALIA 5 (2nd ed. 1967).
MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 321 (9th ed. 1883), 321.
ALLSOP AND DARGAN, THE HISTORY OF BANKRUPTCY AND INSOLVENCY LAW IN ENGLAND AND AUSTRALIA 415, 419(1st ed. 2013).

MURRAY AND HARRIS, KEAY'S INSOLVENCY PERSONAL AND CORPORATE LAW AND PRACTICE 7 (7th ed. 2011).

MCQUEEN, A SOCIAL HISTORY OF COMPANY LAW GREAT BRITAIN AND THE AUSTRALIAN COLONIES 1854-1920 106 (2009).

ii. List of Journal

Shivam Goel, *The Insolvency and Bankruptcy Code, 2016: Problems & Challenges,* 3 IJIR. 1724 (2017).

J.K. Budhiraja, *Insolvency Resolution Process, Liquidation and Opportunities for CMA under IBC,* 2016, TMA. 48(2016).

Ashish Pandey, *The Indian Insolvency and Bankruptcy Bill: 60 Years in the Making,* 8 IMJ. 26(2016).

Levinthal, *The Early History of Bankruptcy Law*, 66(5) U.PA.L.REV. 223, (1918).

Quilter, *The Quality of Mercy-The Merchant of Venice in the Context of the Contemporary Debt and Bankruptcy Law of England,* 6 Insolv LJ 43, 49 (1998).

Low, *The Adventures of Bentham in Van Diemen's Land: Sir Alfred Stephen and the Insolvency Act,* 22 UTLR 164,176 (2003).

iii. List of websites

The Challenges of Insolvency and Bankruptcy Code, RAKESH NARULA & CO. (June 15, 2018), http://www.rakeshnarula.com/challenges-insolvency-bankruptcy-code/.

Rajeswari Sengupta & Anjali Sharma, Challenges in the Transition to the New Insolvency and Bankruptcy Code, THE WIRE (Dec. 15, 2016), https://thewire.in/law/insolvency-and-bankruptcy-code.

Raghav Pandey, Challenges to Bankruptcy Law Remain, THE PIONEER (Aug. 30, 2017), http://www.dailypioneer.com/columnists/oped/challenges-to-bankruptcy-law-remain.html.

Reema Jain, 9 Landmark Judgments in Insolvency and Bankruptcy Code, 2016, TAXGURU (Mar. 12, 2018), https://taxguru.in/corporate-law/9-landmark-judgements-in-insolvency-and-bankruptcy-code-2016.html.

Ashwin Bishnoi & Rohit Ambast, The Insolvency and Bankruptcy Code: The journey so far, LIVEMINT (Jan. 26, 2018), https://www.livemint.com/Opinion/uexS4sLEW4j4q8ZrYOPoGP/The-Insolvency-and-Bankruptcy-Code-The-journey-so-far.html.

KPS Kohli & Raghav Soni, Creating Inroads In The Liquidation Process Under The New IBC Insolvency & Bankruptcy Code 2016, MONDAQ (Sept. 20, 2017), http://www.mondaq.com/india/x/629852/Insolvency+Bankruptcy/Creating+Inroads+in+the+Liquidation+Process+under+the+new+IBC+Insolvency+Bankruptcy+Code+2016.

CHAPTER-I

INTRODUCTION

1.1 BACKGROUND

Indian Banking sector has long been plagued by the issue of the "Non Performing Assets". 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. To control the menace of the "NPAs", Govt. of India and RBI hosted a lot of reforms. The biggest among them was in December 2016 i.e. passing of the "Insolvency and Bankruptcy Code". Prior to passing of this code, insolvency and bankruptcy laws relating to corporate borrowers were "Companies Act of 1956", "Companies Act of 2013" and "Sick Industrial Companies Act of 1985".[1] On the other hand in case of retail borrowers or individual borrowers there were laws such as "Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002" (SARFAESI), and "Recovery of Debt due to Banks and Financial Institutions Act, 1993".[2] Now rather than having this kind of fragmented framework, IBC provides a single framework for resolving insolvency for both retail and corporate borrowers. Further, prior to the enactment of IBC the time required for insolvency resolution was very high and the recovery rates very low (25.7 cents to Dollar).[3] 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" by the "World Bank" has moved up from "136th prior to 2016 to

[1] *Parliament passes the Insolvency and Bankruptcy Code*, PRESS INFORMATION BUREAU (May 11, 2016), http://www.pib.nic.in/newsite/PrintRelease.aspx?relid=145286.
[2] Ibid.
[3] Shailesh Menon, *Bankruptcy Code: Huge pile up is the real challenge*, THE ECONOMIC TIMES, Feb. 23, 2017.

100th in 2017" since 2016 as one of the parameters considered for the report is "Resolving Insolvency".[4] 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 issues impeding the efficiency of the IBC resolution and liquidation framework.

1.2 STATEMENT OF PROBLEM

The quest to curb the menace of high NPAs and long time required for insolvency resolution has led to the passing of the "Insolvency and Bankruptcy code". The debtor-creditor relationship was expected to undergo a positive change which would eventually lead to better credit availability and help in improving "ease of doing business". 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 issues impeding the efficiency of the IBC resolution and liquidation framework.

1.3 AIM

To understand and analyze the changes and implications in insolvency and bankruptcy law brought in by the enactment of the "Insolvency and Bankruptcy Code, 2016" and also various issues regarding the implementation of the Code.

1.4 OBJECTIVES

(a) To understand the need for a comprehensive Insolvency and Bankruptcy law.

(b) To critically analyze the shift in insolvency and bankruptcy laws due to IBC.

(c) To carry out an analysis of the challenges faced by the new code.

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

[4] *Ease of Doing Business rankings: India makes highest ever jump to rank 100 out of 190 countries*, BUSINESS TODAY, Nov. 1, 2017.

1.5 SCOPE AND LIMITATION

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

- The proposed research confines itself to legal framework regarding Insolvency and Bankruptcy laws as applicable to India.
- The proposed research is purely analytical in nature.
- The research does not include any field data collection or sampling but does include study of various reports and case studies.

1.6 DETAILED LITERATURE REVIEW

1.6.1. 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 and 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 and 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 & 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 aspects of the IBC and looks into various indicators 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 Insolvency 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 anticipates 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.

Aparna 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 the basis of the data enumerated demonstrates that in more than 40% of case the time taken 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 delay was overlapping of multiple laws to protect the interest of debtor from various stakeholder, overlapping jurisdictions of civil courts and tribunals, and the pro 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 Bankruptcy 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 in a 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".

Sreyan Chatterjee, Gausia Shiekh & Bhargavi Zaveri "Watching India's Insolvency Reforms: a new dataset of insolvency cases" (2017):

The paper introduced a new dataset of orders passed by the "National Company Law Tribunal (NCLT)" under the "IBC, 2016". With such empirical data, the author analyses the economic impact of the IBC and the performance of judiciary. The paper by analyzing the data finds change in behavior of the credit market participants. The study has answered questions like who were the initial users of the insolvency process under IBC, the types of evidence used in NCLT, average time taken to dispose cases, outcome of proceedings and the variation among benches.

1.7 RESEARCH QUESTIONS

(a) What was the position of law relating to Insolvency and Bankruptcy prior to the enactment of IBC?

(b) Why did the need for a comprehensive "Insolvency and Bankruptcy Code" arise?

(c) What are the major changes brought by the code in the insolvency law of India?

(d) How does the IBC address the challenges faced by various stakeholders in the Insolvency resolution process?

(e) What are the criticisms faced by the new "Insolvency and Bankruptcy code"?

1.8 RESEARCH METHODOLOGY

The proposed research work is a Doctrinal and Non-Empirical Research. Hence, research work is purely based on the resources from libraries, archives, online databases 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.

1.9 RESEARCH DESIGN

The research analyses the "Insolvency and Bankruptcy Code" by looking into its evolution, the legal framework, changes brought and their implications and finally the judicial attitude towards it. The dissertation is divided into seven 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 limitations, literature review, research questions and the research methodology used.

The second chapter titled "**Nature and Conceptual Analysis of Insolvency and Bankruptcy**" briefly explores the meaning, nature and concept of Insolvency and Bankruptcy laws. Further this chapter deals with the scope and structure of IBC.

The third chapter titled "**Evolution of Insolvency and Bankruptcy Law: An analysis**" examines the evolution and development of "Insolvency and Bankruptcy" beginning from the ancient civilization till finally the enactment of IBC, 2016. The chapter includes within it the development of "Insolvency and Bankruptcy Laws" in the Middle Ages, Tudor and Stuart periods and 19th century. The chapter further covers the aspect of Informal Insolvency arrangements which is a much later development.

The fourth chapter titled "**Bankruptcy and Insolvency Regime under the IBC, 2016: An Analysis**" deals with the substantive framework under the IBC. The Chapter has further been subdivided into two broad categories, one, dealing with the "personal insolvency resolution process" and the other dealing with "corporate insolvency resolution process". This chapter also provides the recent amendments made to the IBC by the "IBC (Amendment) ordinance 2018".

The fifth chapter titled "**Major Changes bought in Insolvency and Bankruptcy Regime by Insolvency and Bankruptcy Code 2016**" demonstrates the various aspects of the Insolvency law where a paradigm shift has been brought by the IBC. The study identifies major changes in the "role of liquidator", the "order of priority" during

liquidation of corporate debtors, “Debtor in Possession” to “Creditor in Control” and the various ambitious institutional innovations like the “Insolvency and Bankruptcy Board of India”, “Insolvency Resolution Professionals”, “Information utilities” and “Insolvency Fund”. Further the chapter also looks into how the preexisting tribunals like the “DRT”, “NCLT” etc. have been repurposed.

The sixth chapter titled “**Remarkable Judicial Precedents in insolvency and bankruptcy law in India in the light of Insolvency and Bankruptcy Code 2016**” discussed briefly 6 important cases under the IBC, 2016 decided by the Supreme Court and the NCLT. This chapter is important to understand the judicial attitude towards the code and actual level of implementation in the face of real life challenges.

The seventh chapter titled “**Issues and Challenges towards implementation of Insolvency and Bankruptcy Code 2016**” identifies and enumerates various predicaments faced by the IBC. The study identifies 12 broad challenges including Low minimum default amount, too much faith in creditors, inadequate participation for operational creditors, unrealistic timelines, limited scope for fresh start proceedings, lack of regulation of ARCs, lack of specialized knowledge among ARC, no qualification specified for IRP, Lack of necessary infrastructural facilities and failure of insolvency fund to provide incentives.

The seventh chapter followed by a **conclusion** to the dissertation.

CHAPTER-II

NATURE AND CONCEPTUAL ANALYSIS OF INSOLVENCY AND BANKRUPTCY

2.1 DEFINITION OF INSOLVENCY

Though the terms 'Insolvency' and 'Bankruptcy' are not defined in the "Insolvency and Bankruptcy Code", 2016, it is nevertheless important to understand them clearly before proceeding into the nuances of the Code.

According to Black's Law Dictionary, 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 business."

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. Before an insolvent company, or person, gets involved in insolvency proceedings, it will likely be involved in informal arrangements with creditors, such as making alternative payment arrangements. Insolvency can rise from poor cash management, a reduction in cash inflow forecasts or from an increase in expenses".

2.1.1 WHO ATTAINS INSOLVENCY?

An individual or 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. mismanagement of cash;
b. inflation in cash expenses;

c. Reduction in cash flow.

Early recognition of insolvency is of paramount importance to satisfy the various rights of the creditors of the insolvent individual or body corporate which arises on the occasion of insolvency. For instance, assets belonging to the insolvent individual or body corporate may have to undergo liquidation to discharge the outstanding debts. It is a common practice that before initiating liquidation process, the insolvent may try to negotiate to 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. Some of the notable causes of insolvency are that the company could not adapt to the changing demands of the market, incompetent management, "long term capital loss", "Knock on effect" from other insolvencies, business done taking huge risk, too much expenditure, competition, unrealistic ventures, credit situations etc.

Some actions that can rectify insolvency are "reconstruction of debts", "revival and rehabilitation of sick industries" and "companies restructuring" like mergers and amalgamation.

2.1.2 PROCEDURE FOR GRANTING INSOLVENCY STATUS

Minimum Default: The IBC, 2016 provides that an application for insolvency proceedings can only be started if the default amount is at least Rupees 1 Lakh in case of a corporate debtor and at least Rupees 1000 in case of individuals and partnerships.

Insolvency Resolution: As per the provisions of IBC in cases of either individual debtor or corporate debtor, the creditors initially has to undertake a insolvency resolution process and if that fails, than has the option of going for liquidation or bankruptcy.

Creditors or debtor may apply: An insolvency resolution process can be initiated by either the creditor or debtor. In cases of corporate insolvency resolution creditor includes both operational and financial creditors.

Moratorium: Once an application for insolvency resolution is admitted, a moratorium sets in which prohibits transfers of the corporate debtors assets, enforcement of security interest, recovery of any property from the corporate debtor by its owner or lessor.

Secured Creditors: To incentivize the secured creditors in taking part in the insolvency resolution process, the enforcement of security interest is stopped in case of corporate debtors during the "Corporate Insolvency Resolution Process" (CIRP) and there is a prohibition for pursuing legal proceeding with regards to their debt in case of individual debtors during the process of "Individual Insolvency Resolution Process" (IIRP).

Committee of Creditors: The IRP will do verification and classification of claims and forms the "Committee of Creditors" (COC). The COC takes important decisions during the insolvency process. There is a bias against the operational creditors in the CIRP as only the financial creditors can vote in the committee meetings. At the end of the insolvency resolution process, the resolution or repayment plan has to be approved by the COC. Nevertheless IRP must see if the basic criteria regarding repayment plan is met.

2.2 DEFINITION OF BANKRUPTCY

On the other hand, Bankruptcy is a legal proceeding involving a person or business that is unable to repay outstanding debts. The bankruptcy process starts either with a petition filed by the debtor or the creditor. All of the debtor's assets are measured and evaluated and it may be used to 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. 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 twofold i.e, one, the individuals and businesses get a new lease of life as their old loan gets discharged and they get a second chance to gain access to consumer credit, further, the creditors also get some measure of debt repayment. Upon successful completion of bankruptcy proceedings, the debtor is relieved of the debt obligations incurred prior to filing for bankruptcy.

Often the terms 'Insolvency' and 'Bankruptcy' are used synonymously, while assuming that they mean the same thing. However both these terms, though similar, have different meanings. In the simplest terms, insolvency is a financial state of being-one that is reached when one is unable to pay his debts; on the other hand, Bankruptcy is a legal process that serves the purpose of resolving the issue of insolvency.

2.2.1 WHO ATTAINS BANKRUPTCY?

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 after lapse of a specified time has the effect of discharging the debts of the bankrupt. Companies on the other hand cannot be bankrupt as they are liquidated once the "Corporate Insolvency Resolution Process" fails. Unlike the US, under the "Insolvency and Bankruptcy Code 2016" there are no provisions relating to bankruptcy of a company, therefore even though the term "corporate bankruptcy" is widely in use, it is a misnomer and has no legal basis. Therefore the term "bankrupt" can only be associated with "a person (also includes a partnership) judged by a court to be insolvent, whose property is taken and disposed of for the benefit of their creditors".

2.2.2 PROCEDURE FOR GRANTING BANKRUPTCY STATUS

The insolvency resolution under the IBC has to get over within a time limit of 180 days with a maximum 90 days of possible extension. If the insolvency resolution does not fructify, liquidation in case of corporate debtor and bankruptcy proceeding in case of individuals and partnerships so that the assets owned by debtor can be sold to discharge debt owed to the debtor's creditors.

During the Bankruptcy or liquidation proceedings, the assets of the debtor are managed by the liquidator in case of corporate debtor and by bankruptcy trustee in case of individual debtors. Further there can be no legal proceedings against the debtor regarding recovery of debts during this period. Nevertheless, secured debtors may pursue "enforcement of security interest"[5].

[5] IBC, § 52.

The Code further lays down a waterfall mechanism which enumerates an order of priority which has to be followed in case of liquidation or bankruptcy. Workmen's wages and financial creditors are kept higher in priority than unsecured creditors. A surprising aspect of the new waterfall mechanism is that crown debts are given lower priority than unsecured creditors.

2.3 SCOPE AND STRUCTURE OF INSOLVENCY AND BANKRUPTCY CODE

In 2015 India was positioned 130 out of 189 countries in a report relating to "Ease of Doing Business" and was ranked 136 out of 189 countries so far as "Resolving Insolvency" (2015) is concerned. Further "The Presidency Towns Insolvency Act, 1909" and the "Provincial Insolvency Act, 1920" had become obsolete, with the former being more than a century old. Corporate "Non Performing Assets" comprised about 56% of the total bad debts of the Nationalized Banks. It was in such desperate backdrop that that the BLRC "Bankruptcy Law Reforms Committee", Chaired by the Former Secretary General, Lok Sabha and Former Union Law Secretary, Mr. T.K. Viswanathan submitted the final report prepared by the BLRC and recommended the passage of the Insolvency and Bankruptcy Code, 2015. The Insolvency and Bankruptcy Code was introduced in the Lok Sabha on December 21, 2015. A reference was made to the Standing Committee, which gave its report on April 28, 2016. The Insolvency and Bankruptcy Code was passed by the Lok Sabha on May 05, 2016, and by the Rajya Sabha on May 11, 2016. The Insolvency and Bankruptcy Code received the assent of the President of India on May 28, 2016.

The long title of the 2016 Code states as under: "A Code 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 the value of assets of such persons, to promote entrepreneurship, availability of credit and balancing the interest of stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto."

The “Insolvency and Bankruptcy Code” centers around the following two primary objectives, specifically, equal, expeditious and economic distribution of assets of the debtor, and the liberation of the individual from the demands of the creditor.

The 2016 Code comprises of 255 Sections which is divided into five parts.

Part I deals with the preliminary aspects of the Code, comprising of one chapter and Sections 1 to 3;

Part II deals with the “corporate insolvency resolution process”, comprising of seven chapters and Sections 4 to 77;

Part III deals with the insolvency resolution and bankruptcy for individuals and partnership firms, comprising of seven chapters and Sections 78 to 187;

Part IV deals with the regulation of “insolvency professionals”, “insolvency resolution professional agencies” and “information utilities”, comprising of seven chapters and Sections 188 to 223;

and Part V deals with miscellaneous provisions, running from Sections 224 to 255 (Sections 245 to 255 enable amendments in other statutes such as the “Companies Act, 2013”).

Amendments have been provided for preexisting statutes by the IBC so that its provisions can be comprehensively brought into effect. In various “The Insolvency and Bankruptcy Code, 2016” comprises of 11 Schedules, which provide for amendments to be carried out in following statutes:

i. the “Indian Partnership Act, 1932” (First Schedule annexed to the 2016 Code);
ii. the “Central Excise Act, 1944” (Second Schedule annexed to the 2016 Code);
iii. the “Income Tax Act, 1961” (Third Schedule annexed to the 2016 Code);
iv. the “Customs Act, 1962” (Fourth Schedule annexed to the 2016 Code);
v. the “Recovery of Debts due to Banks and Financial Institutions Act, 1993” (Fifth Schedule annexed to the 2016 Code);
vi. the “Finance Act, 1994” (Sixth Schedule annexed to the 2016 Code);

vii. the “Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002” (Seventh Schedule annexed to the 2016 Code);

viii. the “Sick Industrial Companies (Special Provisions) Repeal Act, 2003” (Eighth Schedule annexed to the 2016 Code);

ix. the Payment and Settlement Systems Act, 2007 (Ninth Schedule annexed to the 2016 Code);

x. the Limited Liability Partnership Act, 2008 (Tenth Schedule annexed to the 2016 Code);

xi. and the Companies Act, 2013 (Eleventh Schedule annexed to the 2016 Code);

CHAPTER-III

EVOLUTION OF INSOLVENCY AND BANKRUPTCY LAW: AN ANALYSIS

In modern times, the word "Insolvency" alludes to a situation where an individual or a corporation is unable to pay its debts when they become due and payable. The word "Bankruptcy" refers to the insolvent estates of individuals and the term "Liquidation" or "Corporate Insolvency" refers to the insolvent estates of companies. But such was not always the case.[6]

Origin of the term "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.[7] In situations where the money lender could not discharge their obligations, angry customers would break the bench over their head.[8] Many experts have also referred to the Latin word *"bancus ruptus"* or the French *"banque"* and "*route*" as possible sources of the term "bankruptcy".[9]

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".[10] It is to be noted that in the aforementioned the word "bankrupt is used as an act or thing but not 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 1571.[11]

The term "insolvency" has its roots mainly in the 18th 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.

---

[6] Levinthal, *The Early History of Bankruptcy Law*, 66(5) U.PA.L.REV. 223, 224 (1918).
[7] Quilter, *The Quality of Mercy-The Merchant of Venice in the Context of the Contemporary Debt and Bankruptcy Law of England*, 6 Insolv LJ 43, 49 (1998).
[8] E.J. HAYEK, PRINCIPLES OF BANKRUPTCY IN AUSTRALIA 5 (2nd ed. 1967).
[9] Levinthal, *The Early History of Bankruptcy Law*, 67 U.PA.L.REV. 1,2 (1919).
[10] (1542) 34 & 35 Henry VIII, c 4.
[11] See the Acts titled "An Act Touching Orders for Bankrupts" 13 Eliz I, c 7 (1571) and "An Act against Fraudulent Deeds, Alienations 13 Eliz I, c 5(1571).

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 insolvencies.[12]

3.1. BANKRUPTCY LAW IN ANCIENT ERA

Many Commentators on history opined that concept of credit was almost absent in the ancient times and indebtedness in those societies was considered as an anomaly.[13]Even than there are many accounts of ways in which failure to pay debt was dealt with in ancient times. These accounts show use of such principles which were not in use until the 18th or 19th centuries. It is to be noted from the historical accounts that in the ancient societies, insolvency was enforced by sentiment of community rather than by rule of law. The most important example in this regard is of Ireland where the practice of "fasting on" was prevalent i.e the creditor used to stay at the debtors doorway to compel payment. The logic followed in this system was whether society would allow the creditor to die of exhaustion or starvation at the debtor's door.[14] This example clearly demonstrates that insolvency was a question of morality and spirituality rather than a question of legality. Even as late as in the 19th century, bankruptcy was still considered to be "the logical outcome of sins".[15]

Even though the records show that insolvency was a rare occurrence but perhaps due to the close relation of insolvency with morality, most of the civilizations had a harsh attitude towards debtors.[16] In Roman law, the creditor was empowered to enslave his debtor if the debt had not been discharged even after three calls to pay and waiting for 60

[12] An Act to Amend the Law relating to Bankruptcy and Insolvency in England (1861) 24 & 25 Vic, c 134.
[13] MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 321 (9th ed. 1883), 321.
[14] Levinthal, *The Early History of Bankruptcy Law*, 66(5) U.PA.L.REV. 223, 229 (1918).
[15] BOYD HILTON, THE AGE OF ATONEMENT: THE INFLUENCE OF EVANGELICALISM ON SOCIAL AND ECONOMIC THOUGHT 1785-1865 132-133 (1st ed. 1988).
[16] However, generalizations should not be too readily made. For instance the Code of Hammurabi (c. 1795-1750 BCE) allowed for the life and freedom of a debtor made insolvent by misfortune and exemptions were allowed to honest debtors under Islamic law (Levinthal, above n 1, 237).

days.[17]In popular English literature, it can be very well found in Shakespeare's works that where more than one creditor existed, the debtor "could be hacked in pieces proportionate to the amounts owed".[18] It is to be noted in the above examples of insolvent debtors, the execution against the debtor was against his person and not his property.

The modern approach towards discharge of debt by execution of a debtor's property is believed to have originated in Egypt. The reason for such an approach was that the claim of the creditor towards the debtor's person was considered to be subordinate to the claim of the state over that person, mainly for military purpose.[19] This idea was later adopted by the Greeks during the time of the great Athenian statesman Solon.[20]

In Roman law the concept of execution of property to discharge a person's debt was applied for the first time in 105BC when Publius Rutilus permitted for proprietory execution to discharge a private debt.[21] Such execution was attained by the action, "*bonorum emptio or venditio*", where the debtor's whole estate was sold for discharging all creditors. On the other hand "*bonorum vendito*" was granted only in some specified instances. For example, the debtor is absconding or hiding from the creditors.[22] This process was later replaced by action of "*bonorum distracto*" in which a "*curator bonorum*" was appointed and disposed of the debtor's assets, satisfying the creditors *pro rata*.[23]

Other options at that time were a voluntary composition of creditors known as *"cession bonorum",* which was formed where the case involved honest debtors, who could avoid imprisonment by this system. Further a system was prevalent where the creditors had the choice of proceeding to liquidate the assets or give some grace period not exceeding 5 years to the debtor. But the Roman law dealt differently with fraudulent debtors and had

[17] BUCKLAND, A TEXT BOOK OF ROMAN LAW FROM AUGUSTINE TO JUSTINIAN (3rd ed. 1963).
[18] G.KEETON, SHAKESPEARE'S LEGAL AND POLITICAL BACKGROUND 110-111 (1st ed. 1967).
[19] Levinthal, *The Early History of Bankruptcy Law*, 66(5) U.PA.L.REV. 223, 231 (1918).
[20] ALLSOP AND DARGAN, THE HISTORY OF BANKRUPTCY AND INSOLVENCY LAW IN ENGLAND AND AUSTRALIA 415, 419(1st ed. 2013).
[21] Levinthal, *The Early History of Bankruptcy Law*, 66(5) U.PA.L.REV. 223, 232 (1918).
[22] Ibid.
[23] Ibid.

provisions for "vitiating fraudulent transfers of property".[24]The aforesaid makes it clear that during the Roman times, the concepts of execution of property for discharge existed and debts were not discharged against a debtor's person.

To summarize the historical accounts and to put it simply, history of insolvency took a very progressive path of "death, to enslavement, to imprisonment and, finally, to release of the debtor in acknowledgement of the inevitable vicissitudes of commercial life".[25]

3.2 BANKRUPTCY LAW IN THE MEDIEVAL ERA

After the decline of the Roman Empire and due to the diminishing trade and onset of economic depression, many advances made by Roman law specifically in the field of Bankruptcy law faded away. However Italian Bankruptcy law in a worthy mention of the Middle Ages. Italian statues of this time considered actions by a debtor while on the verge of insolvency as void or voidable.[26] Similarly a provision based on concept of relation back was promulgated by the Jewish Council of the Four Lands of Poland. Here it was provided that the amount paid as dowry paid by a father in law who was bankrupt within the year could be claimed back from the son in law.[27]

3.2.1 EARLY ENGLISH BANKRUPTCY LAW

Much of our insolvency law is based on the English law and therefore, it is pertinent to study its development. Prior to 1283, there is no conception of any process by which "a man could pledge his body or liberty for payment of a debt".[28] During the Crusades in 11th century, the English common law took a back step as there was a subsequent increase in trade and need for credit. Merchants of the time often avoided trading with England as there was no established expeditious system to recover debt.[29]

---

[24] Ibid.
[25] ALLSOP AND DARGAN, THE HISTORY OF BANKRUPTCY AND INSOLVENCY LAW IN ENGLAND AND AUSTRALIA 460 (1st ed. 2013).
[26] Levinthal, *The Early History of Bankruptcy Law*, 66(5) U.PA.L.REV. 223, 242 (1918).
[27] Ibid.
[28] ENCYCLOPEDIA OF THE LAWS OF ENGLAND 80-83 (3rd ed. 1962).
[29] ALLSOP AND DARGAN, THE HISTORY OF BANKRUPTCY AND INSOLVENCY LAW IN ENGLAND AND AUSTRALIA 422 (1st ed. 2013).

Subsequently in 1283 and 1285 laws were enacted which provided for the imprisonment of the debtor if he acknowledged a debt and his failure to pay.[30]Punishment under the act was awarded irrespective of whether the debtor is honest or unfortunate. Much later in 1311 a clarification was issued that this law relates just to tradesmen.[31]But even then, the non traders who were insolvent were not in a better position. A system of issuance of writ for an action for recovery of debt of "*capias and resondendum"* prevailed.[32] The writ was of the nature that it was a direction to the sheriff for imprisoning the debtor before and until the completion of trial of action. After a decree is obtained in favor of the creditor, writ of "*capias ad satisfaciendum*" was issued to keep the debtor imprisoned until repayment.[33]

Although the aforesaid position of law may seem harsh but at that point, imprisonment was considered necessary largely due to the lack of power of the writs in recovery of debt; namely "*fiery facias"* and "*levari facias".* For instance the writ of "*fiery facias"* only directed seizure of chattels (not goods such as jewellery).[34] Therefore it can be safely said that creditors today are in a much better position than in 1311 as they have access to many types of property. To make matters worse, every one of the creditors had to file for separate writs. This led to initial creditors getting the benefit at the cost of subsequent creditors. Hence in such a situation Imprisonment was an efficient and effective means to force a debtor to cooperate along with the creditors.

3.2.2 BANKRUPTCY LAW DURING TUDOR AND STUART PERIODS

The Concepts of collective administration and ratable distribution in insolvency law which were in some ways present in the ancient times reemerged during the Tudor period. The emergence could be seen for first time in 1542 when the act titled "An Act against Such Persons as Do Make Bankrupt".[35] The Act declared that it was directed towards persons "as do make bankrupt" by "chiefly obtaining into their hands great

[30] Statute of Acton-Burnell (1283) 11 Edw I and State of Merchants (1285) 13 Edw I.
[31] (1311) 5 Edw II, c 33.
[32] (1350) 25 Edw III, c 17.
[33] ROSE LEWIS, AUSTRALIAN BANKRUPTCY LAW 9 (11th ed. 1999).
[34] ALLSOP AND DARGAN, THE HISTORY OF BANKRUPTCY AND INSOLVENCY LAW IN ENGLAND AND AUSTRALIA 424 (1st ed. 2013).
[35] (1542) 34 & 35 Henry VIII, c 4 (1542 Act).

substance of other men's goods and do suddenly flee to parts unknown or keep their houses". The acts included within the definition of bankruptcy in the 1542 act are still considered as bankruptcy. The act further provided that the creditors are to be rated according to the quantity of the creditors debts. If we analyze the 1542 act from an administrative perspective, we come to know that it provided for power to summon and examine persons associated with the debtor who are suspected of concealing of a debtor's property. Various criticisms also surround the acts practical effect because even though the act declared fundamental insolvency principles but the method to exercise such powers was not well laid out. For example the act did not specify how and through what power the officials can "take order" of the insolvent estates.[36]Moreover, another primary criticism in the absence of any way or means by which a bankrupt can get discharged.

Subsequent to the 1542 Act, two statutes on the same subject were passed in 1571, first was the Statute of Elizabeth and second the Fraudulent Conveyances Act.[37]The former statute limited the scope of bankruptcy laws to tradesmen. Further it made bankruptcy into a legal status and also enumerated the "acts of bankruptcy". The second act i.e The Fraudulent Conveyances Act declared that the transactions done with an intent to defraud or avoid the creditors to be void unless the purchaser acted in a *bonafide* manner.

Both the acts of 1571 also gave power to the creditors called as "commissioners" to administer the debtor's estate. Later it was confirmed by the courts that power of the creditor extended to the seizure of the bankrupt debtor's property and further it was laid down that the practice of paying one creditor over others was void. Thus this can be seen as the commencement of the doctrine of unfair preferences which later on continued to be enforced through common law.[38] Many commentators say that even though there was development of general principles it can be concluded that bankruptcy law in Tudor and Stuart period are still focused on "creditor recovery rather than debtor rehabilitation".[39] Well into the 1600s, harsh treatment was still mated out to the debtors who failed to

[36] Levinthal, *The Early History of Bankruptcy Law*, 66(5) U.PA.L.REV. 223, 415 (1918).
[37] An Act Touching Orders for Bankrupts (1571) 13 Eliz I, c 7 and An Act against Fraudulent Deeds, Alienations (1571) 13 Eliz I, c 5.
[38] Smith v. Mills 76 ER 441(1590).
[39] MURRAY AND HARRIS, KEAY'S INSOLVENCY PERSONAL AND CORPORATE LAW AND PRACTICE 7 (7th ed. 2011).

repay, often they faced public abuse by standing in the pillory and had to lose an ear if they could not prove that bad fortune was the cause of the bankruptcy.[40]

The attitude of the age towards the bankrupt can be very well understood from the following comments by Chief Justice Montague in 1551 while deciding on a debtor who had borrowed 40 Pounds and failed to repay. He stated:

"neither the plaintiff nor the sheriff is bound to give him meat or drink, no more than if one disdains cattle…he ought to live off his own goods …and if he has no goods he shall live off the charity of others, and if others will give him nothing, let him die in the name of God…and impute the cause of it to his own fault, for his presumption and ill behavior brought him to that imprisonment"[41]

The position changed slightly when in 1705 honest insolvent tradesman given a way to be discharged.[42]But this too had a caveat that such an insolvent tradesman had to get the consent of 4/5th of the creditors. Hence even though it was a small step but it was a move toward s debtor rehabilitation. At this point society realized the inherent risks associated with credit and the fact that the debtors were using the credit in the benefit of the expanding British Empire.[43]

It is to be clearly understood that relief for the insolvent non traders is yet to be granted. It was still thought that "it to be unjustifiable practice, for any person but a trader to encumber himself with debts of any considerable value."[44]

3.3 BANKRUPTCY LAW IN THE MODERN ERA: THE EMERGENCE OF INSOLVENCY LAW AND ERADICATION OF IMPRISONMENT

There were efforts in the late 18th and early 19th century for reforming the bankruptcy law. Often this phenomenon is linked to emergence of philosophies of utilitarianism,

[40] 21 James I, c 19 (1623).
[41] Dive v. Maningham 75 ER 96, (1551).
[42] 4 & 5 Anne, c 17 (1705) and 10 Anne, c 15(1711) .
[43] Low, *The Adventures of Bentham in Van Diemen's Land: Sir Alfred Stephen and the Insolvency Act,* 22 UTLR 164,176 (2003).
[44] BLACKSTONE, COMMENTARIES 473-474 (vol. II, 1803).

social liberalism and evangelicalism.[45]Imprisonment of debtors for minor defaults was totally against such ideas.

To be more practical, perhaps the reforms started due to rise in bankruptcies due to increasing use of credit due to industrialization and also as people become more sensitized towards the horrors faced by the debtors when imprisoned.

There was also huge injustice in the imprisonment system which was brought to light when people compared between the "Master's side" and "The Rules" side which was an area surrounding the Fleet and King's Bench prison of Marashalsea. In these areas the rich debtors or the ones commonly known as insolvent gentleman used to stay in luxury knowing that their creditors will not get remedy under common law easily. [46] Moreover the circumstance became such that it was "almost a matter of public embarrassment" by the beginning of 19th century.

This situation started changing in 1813with enactment of insolvency laws which established the Insolvent Debtors' Court.[47]Further this law had a provision that allowed the court if it is satisfied to release honest insolvent after elapse of 3 months from the conclusion of proceedings. But such release from imprisonment did not mean discharge of the debt and the future assets of the debtor still remained liable.[48]Many experts on the subject commented that this was considered as return of the principle of *"cession bonorum"* in Roman law.[49]Following the reformatory act of 1813 more legislation on similar lines were passed.[50]For example, in the legislation passed in 1843 there was

[45] ALLSOP AND DARGAN, THE HISTORY OF BANKRUPTCY AND INSOLVENCY LAW IN ENGLAND AND AUSTRALIA 434 (1st ed. 2013).
[46] In fact some bankrupts sought compensation (which could then have been used to pay of their debts) for being falsely imprisoned in the "wrong" part of prisons. See for example Yorke v Chapman 113 ER 80 (1839).
[47] An Act for the Relief of Insolvent Debtors in England, 53 Geo III, c 102(1813).
[48] LESTER, VICTORIAN INSOLVENCY: BANKRUPTCY, IMPRISONMENT FOR DEBT, AND COMPANY WINDING-UP IN NINETEENTH-CENTURY ENGLAND 95 (1995).
[49] DUFFY, BANKRUPTCY AND INSOLVENCY IN LONDON DURING THE INDUSTRIAL REVOLUTION 88 (1985).
[50] Insolvent Debtors (England) Act 53 Geo III, c 102(1813); Insolvent Debtors (England) Act 7 Geo IV, c 57 (1826); Judgments Act 1 & 2 Vic, c 110(1838) and Insolvent Debtors Act 5 & 6 Vic, c 116 (1842).

provision for debtor's petitions by insolvent non traders.[51]The provision for an insolvent debtor to declare oneself as bankrupt had already been there since 1825.[52]

Even though insolvency law emerged much later to bankruptcy law in the scene but it caught up early to the same pace of development. Hence in 1838in bankruptcy proceedings, pre trial imprisonment was abolished, and in cases relating to insolvent non traders, petition for their release could be filed after an elapse of three months.[53] The punishment of imprisonment as a whole was abolished in such proceedings in 1869.

Many cases of Insolvency and bankruptcy seemed to overlap and therefore in 1861 the two were consolidated and the distinction between trader and non trader was abolished.[54]This change removed the need that had arisen for an increasing technical law that had started growing around the definition of "tradesman" (which had included within it bankers and brokers but did not include in-keepers or drovers).[55] Ensuing to the consolidation, "Insolvent Debtor's Court was abolished and all the cases were brought before the Court of Bankruptcy created in 1831.

Further in the 19th century, changes also took place in the balance between official and private administrations. A system was established where an official assignee was appointed, which effectively led to limiting the power of creditor's assignees.[56] Further changes occurred which further moved the trend from creditor administration to court administration like in 1842 the power of discharging a debt was left entirely at the discretion of the court rather than the creditors.[57]Such change in attitude was due to the practice of corruption by the creditor commissioners. A perfect example in this regard was the case where a firm of shipwrights wanted a client to be declared as bankrupt as he did not pay for a ship made for him. The petition by the shipwrights was refused and was

[51] Insolvent Debtors Act 5 & 6 Vic, c 116 (1842).
[52] An Act to amend the Laws relating to Bankrupts 6 Geo IV, c 16 (1825).
[53] An Act for abolishing Arrest on mesne Process in Civil Actions, except in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England 1 & 2 Vic, c 110(1838).
[54] An Act to Amend the Law relating to Bankruptcy and Insolvency in England 24 & 25 Vic, c 134 (1861).
[55] ALLSOP AND DARGAN, THE HISTORY OF BANKRUPTCY AND INSOLVENCY LAW IN ENGLAND AND AUSTRALIA 442 (1st ed. 2013).
[56] An Act to Establish a Court in Bankruptcy 1 & 2 Will IV, c 56 (1831).
[57] An Act for the Amendment of the Law of Bankruptcy 5 & 6 ic, c 122 (1842).

held to be abuse of process of court as it was found out that the solicitors, barrister and commissioners were all shareholders of the firm.[58]

Again in 1869, the discretionary power of the courts was made subject to fulfillment of a condition that the debtor has to pay a minimum of 10 shillings in the pound to creditors or the creditors have to give consent to the discharge.[59]Further the system of official assignees which was introduced in the 19th century was abolished and the system prevailing in the 17th century returned where private commissioners were appointed.

3.3.1INFORMAL INSOLVENCY ARRANGEMENTS

Because of inclination of the policy and law towards private over official administrations, informal means of insolvency resolution developed in the 19th century. Before 1825 "any adjustment of the rights between an insolvent and his creditors outside the statutory framework was considered an evasion of law."[60] In 1825, a deed of arrangement was made legal.[61] Moreover due to the legal requirement of consideration, the contracts between the creditor and the debtor for compromise sums could only be made enforceable if made as a deed.[62]

When legislations, arrangements and composition started to develop, this was a noticeable shift from the time where businessmen considered settlement of debts as a moral obligation to repay that was to be enforceable as a part of "general commercial ethics".[63] Moreover lawyers of the time were "utterly unqualified to meddle with bankruptcy legislation".[64]

[58] *Ex parte Story,* 1 Buck's Reports 70 (1817).
[59] 1869 Act, s 48. This situation partly swung back in favor of official administration again in 1883.
[60] ALLSOP AND DARGAN, THE HISTORY OF BANKRUPTCY AND INSOLVENCY LAW IN ENGLAND AND AUSTRALIA 428 (1st ed. 2013).
[61] An Act to Amend the Laws Relating to Bankrupt 6 Geo IV, c 16, s 4(1825).
[62] Pinnel's Case77 ER 237 (1600).
[63] MCQUEEN, A SOCIAL HISTORY OF COMPANY LAW GREAT BRITAIN AND THE AUSTRALIAN COLONIES 1854-1920 106 (2009).
[64] Ibid.

3.4 EMERGENCE OF INSOLVENCY AND BANKRUPTCY LAWS IN INDIA

Soon after independence India was primarily an agrarian economy but it soon adopted various policies to foster industrialization. Along with policy reforms, legislative provisions were also introduced and amended. Before delving into the nuances and effectiveness of the new law, it is important to understand and analyze the legislative history and understand the prior efficacy of insolvency and bankruptcy frameworks in India.

The entry of Insolvency and Bankruptcy in covered in the seventh schedule under concurrent list in the Indian Constitution and therefore both State and Central Governments can make their own legislative framework. The concurrent list is an important pillar of the robust structure of federalism. This dual control on particular subject matters was first introduced in the Government of India Act, 1935. This legal position of concurrent power is similar to such power of the states and the federation in the United States. In US insolvency laws are generally are subject matter of the state but after a bankruptcy process gets started for insolvency resolution only federal laws are applicable. However in India there is no state legislative history regarding either insolvency or bankruptcy in the post independence period and the subject matter was left entirely to the parliament. Here is pertinent to mention that the Indian constitution under Art. 19 provides for freedom to undertake industrial activity but such freedom can be restricted with both entry and exit restrictions and many conditions have been imposed that needs to be fulfilled prior to the dissolution of trade or business.

3.4.1. TILL 1985:

There were only three statutes making up the insolvency and bankruptcy law framework in India. The Companies Act, 1956 which was based on the Bhaba Committee recommendations in 1952 dealt with the matter of corporate insolvency. On the other hand the matter of personal bankruptcy was dealt by two archaic laws- The Presidency Towns Insolvency Act, 1909 and The Provisional Insolvency Act, 1920. While the former was relating to the individuals residing in the erstwhile presidency towns of

Calcutta, Bombay and Madras, the latter covers all other individuals. Section 425 of the Companies Act, 1956 provided for a basic framework for involuntary dissolution (compulsory winding up as defined in the Act) as well as voluntary dissolution. Other sections of the Act, namely Section 433, 443,444, 455, 463, 466, 481 and 488 contained detailed procedures for the resolution process. Even though various sections described the resolution process, the Companies Act of 1956 was incapable of dealing with corporate insolvencies. The statute failed to provide for insolvency cost or for super-priority of insolvency cost. The provisions led to insolvency matters going to the court where the courts relegated the due process to an official liquidator, who, generally is a legal professional having very limited understanding of the company's business. Such ineffective and inexperienced liquidators having limited knowledge of technology, auction theory, organizational behavior and financial engineering affected prolonged resolution timelines and suboptimal recovery for the benefit of all stakeholders. The power to decide on merit was given to the judiciary (i.e. High Courts) by the Companies Act but the courts were not provided proper legislative framework which resulted in a deranged legal process as each of the High Courts were interpreting the cases differently, often passing contrary orders.

In the 1980s the number of sick industries reached an alarming rate leading to downsizing. The government's effort to appoint interim management and nationalize to manage the situation proved to be futile. The situation got worse with the workmen's due increasing, an anemic level of loan recovery and high unemployment. In such a desperate backdrop, the first legislative attempt to deal with insolvency and bankruptcy was promulgated in the form of The Sick Industrial Companies Act, 1985. The SICA was result of various recommendations of committees appointed by the Government and the Reserve Bank of India since 1975. The committees who recommended for the enactment of SICA are Tandon Committee of 1975, Rai Committee of 1976 and Tiwari Committee of 1981. SICA defined a sick industry as "an industrial company with five years of history whose net worth is zero or negative, having 50 or more workers and established in accordance with Industrial Disputes Act, 1985". SICA had a provision for companies to make a reference to a quasi judicial body called Board for Industrial and Financial Reconstruction (BIFR). BIFR had the duty to adjudicate the reference in presence of its

creditors. An appellate authority was also established in the form of Appellate Authority for Industrial and Financial Reconstruction (AAIFR). Provisions of SICA allowed distressed companies to opt a restructuring package in the form of Draft Rehabilitation Scheme with the support of an operating agency. With all its good willed provisions, SICA proved to be ineffective. Of its many short comings, Section 22 is the most prominent as it provided companies an opportunity to seek bar on proceedings for execution, arbitration, recovery suits, enforcement of security interest etc. This provision was most misused by promoters. Moreover the delay in sanctioning of the scheme, and lack of power of BIFR and AAIFR to accelerate the process, exacerbated the situation.

3.4.2 AFTER 1985:

In the 1990s there was greater development in the area of Insolvency and Bankruptcy Law. Firstly, in 1993, The Recovery of Debts Due to Banks and Financial Institutions Act was passed. This act came on the recommendation of the Goswami Committee which had the mandate of working on improving the framework of Insolvency and Bankruptcy Law. RDDBI was enacted at the juncture where SICA was proving itself to be a impediment for creditors while trying to recover loans from fraudulent creditors. Further the Banks and Financial Institutions were facing excessive delays in securing decree from the civil court. The Goswami Committee report preamble declares that' "There are sick companies, sick banks, ailing financial institutions, and unpaid workers, but there are hardly any sick promoters. Therein lies the heart of the matter". RDDBI act aimed to hasten the debt recovery process. It provided that Banks can approach the newly constituted 'Debt Recovery Tribunal' which can issue a 'Certificate of Recovery' which has the same value and effect as a final decree of a civil court. But sadly enough, the RDDBI could not bring a paradigm shift in confusing and disordered state of the insolvency and bankruptcy law framework. The main problem was the fact that SICA had precedence over and above RDDBI i.e. where a case was pending adjudication before the BIFR, the DRT did not have the power to issue 'Certificate of Recovery'. Furthermore, DRT also did not have the power to order rehabilitation or dissolution and therefore this was usually the last choice of the promoters. Due to the aforementioned impediments faced by the DRTs, the government with intent to accelerate the resolution of NPAs (Non

Performing Assets), it introduced a new law called as 'The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI) in 2002. The passing of the SARFAESI was indeed a revolutionary step in Insolvency resolution law of India. The SARFAESI Act empowered the Banks and Financial Institutions to recover their Non Performing Assets without intervention of the court as it provided for a legal mechanism for quick recovery of secured assets. This Act did expedite the process of recovery in case of secured assets but the situation in case of unsecured assets mostly remained unchanged. Further the worst problem remained i.e like RDDBI, SARFAESI Act also did not provide for considering restructuring and reorganization. Further in many instances SARFAESI and RDDBI exercised parallel jurisdictions which resulted in confusion over primacy and 'Forum Shopping'. Many of the provisions and definitions in the SARFAESI Act were challenged strenuously by debtors in courts and the challenges were resolved as late as in 2014.

Meanwhile the government introduced the SARFAESI Act, the Reserve Bank of India brought in a Corporate Debt Restructuring Scheme ("CDR Scheme") which laid down broad guidelines for debt restructuring by Banks. The CDR scheme was first brought in 2001and it was amended multiple times in 15 years of its existence. Thus it was criticized to be a working document rather than a law. In the mean time various committees were evaluating into the efficiency and effectiveness of the Companies Act in tackling the issue of insolvency and bankruptcy. In this regard the first report that was released is the Sachar Committee Report in 1987. This report finally resulted in a major amendment to the Companies Act in 1988. Thereafter the government additionally wanted to amend Companies Act in 1993 and 1997 but the amendments failed to get effect as they could get the support of the majority in the parliament. Later, in the year 2000, Eradi Committee presented its recommendations for amendments to Companies Act to address the insolvency situation. Following the Eradi Committee recommendation, the Companies Act was amended in 2002 incorporating some of the recommendations. Later these were followed by Chandra Committee report in 2002 and Irani Committee report in 2005 which led to an amendment in 2006. The changes have been very gradual in nature and whenever there was a paradigm shift in the regulations the Companies Act was not amended to its effect. Therefore these led to a slow progress of reforms.

By the year 2010 it become evident that a comprehensive single framework is needed to address the delay in insolvency and bankruptcy proceedings. The first step towards a comprehensive framework was the setting up of the Financial Sector Legislative Reforms Commission, headed by Justice Srikrishna in 2011. Secondly, in 2014, the Bankruptcy Legislative Reforms Committee which was headed by T.K.Vishwanathan was instituted by Ministry of Finance. The aforesaid committee submitted its report in 2015. The economic rationale and design was laid out in the first volume of the report and a draft bill was made the second volume. A slightly changed version of the bill including public comments was passed in the parliament. Parliament appointed a Joint Parliamentary committee which submitted a slightly modified version of the draft law in their report. Thereafter the law was passed after the due deliberation in December 2016.

To summarize, the legal framework relating to insolvency and bankruptcy laws was grossly inadequate from 1947 till the recent enactment of the insolvency and bankruptcy code in 2016.Though within this period there were attempts made by the government to set up an adequate mechanism for insolvency and bankruptcy, but these failed due to multiplicity of laws leading to lack of harmonization among various regulations. The most significant result of this situation of poor handling of insolvency led to the development of a bank oriented economy. Businesses relied on banks rather than market for raising funds. The capital markets also had to stay extremely cautious due to the frequently changing legal framework and the impact of new laws on debt recovery and enforceability of security interest. Therefore capital availability got affected as the participation of the private sector was extremely limited in lending to corporate and the lending activity was largely done by the Public Sector Banks. This situation added to the high rise of Non Performing Assets as the there was negligent free market completion and individual debtor risk was mispriced.

CHAPTER-IV

BANKRUPTCY AND INSOLVENCY REGIME UNDER THE IBC, 2016: AN ANALYSIS

India's new "Insolvency and Bankruptcy Code" is broadly seen as amongst the most noteworthy economic and financial changes to have taken place in the nation in recent times. This new piece of legislation, barring a few exceptions,[65] includes provisions regarding both corporate and individual debtors and consequently nullifies the effect of all pre-existing laws in this regard. The law was drafted and enacted in a relatively brief timeframe for such an important and comprehensive law. In the latter half of 2014, India's "Ministry of Finance" set up a "Bankruptcy Law Reforms Committee" to draft new piece of legislation. The Committee published an interim report after a couple of months in February 2015, portraying potential changes to the nation's insolvency and bankruptcy law. Further the report put forward a basic framework for corporate debtors. Moreover, the report highlighted that the Committee also wanted to propose changes to the existing individual insolvency law.

The final report[66] by the Committee was published along with a draft bill, which included provisions regarding individual debtors, in November 2015. After a concise period for open comments,[67] a marginally changed draft bill was presented in the Lok Sabha in December.[68] The draft bill was reviewed by a joint legislative committee representing both houses of Parliament. The committee further listened to various testimonies and took public comments throughout the winter of 2016 and finally issued a report and a bill with a few alterations in April of 2016.[69] The bill was subsequently enacted by the Parliament and affirmed by the President the following month. Thus, the total time taken

[65] The Code does not include, for example, any provisions dealing with cross-border insolvencies, and resolution of financial firms is provided for separately by the Financial Resolution and Deposit Insurance Bill, 2016, which is currently under consideration.
[66] *Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design*, at 6.2, available at http://dea.gov.in/sites/default/files/BLRCReportVol1_04112015.pdf.
[67] See Indira Gandhi Institute of Development Research, Finance Research Group, *Bankruptcy Law Reforms* http://www.ifrogs.org/POLICY/blrc.html
[68] Lok Sabha, *Report of the Joint Committee on the Insolvency and Bankruptcy Code*, http://ibbi.gov.in/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf
[69] Ibid.

was around year and a half, from the earliest starting point of the Bankruptcy Law Reform Committee's work to the enactment of the Code is a relatively short time for such a significant piece of legislation, particularly one that effects such a large number of stakeholders.

4.1. INSOLVENCY RESOLUTION AND BANKRUPTCY FOR INDIVIDUALS AND PARTNERSHIP

4.1.1. INSOLVENCY RESOLUTION PROCESS

Under the provisions of this new law, debtors who wish to access the new framework will either enter though an insolvency proceeding or "fresh start" proceeding. Generally a repayment plan has to be proposed by the debtor himself in accordance to the Code where such plan is being approved by a majority of the creditors. An insolvency case can also be initiated under the code by a debtor in event that he or she "commits a default"[70] on debt of no less than 1,000 rupees,[71] unless said default is on an "excluded debt."[72] The definition of "excluded debt" incorporates liabilities for courts or fines by tribunals; "on negligence, nuisance or breach of a statutory, contractual or other legal" obligations; maintenance of any individual mandated by law; student loans; or some other thing mandated by regulation.[73] As per the code the definition of default is " nonpayment of debt when whole or any part or installment of the amount of debt has become due and payable and is not repaid…"[74] A insolvency can also initiated by a creditor regarding any debtor in default if the creditor sends formal demand and debtor thereafter fails to pay in 14 days.[75] At this juncture Information utilities have to play an important part as policymakers aspired and anticipated that defaults will be recorded with at least one utility in and can be very quickly checked by the adjudicating authority. The Code says that "where the debt for which an application has been filed by a creditor is registered with a information utility, the debtor shall not be entitled to dispute the validity of the

[70] IBC, § 94, 95.
[71] IBC, § 78 .It further provides that the Central Government can raise this minimum but not above one lakh rupees.
[72] IBC, § 94(3).).
[73] IBC, § 79(15).
[74] IBC, § 3(12).
[75] IBC, § 95(4)(b).

debt."[76] To start a case relating to an individual debtor, an application must be filed in the "Debt Recovery Tribunal" in the relevant jurisdiction by the individual debtors and creditors.[77] It can be done by either by the party filing the case or may also choose a resolution professional, who will then apparently deal with the case.[78] The insolvency professional that has been picked by the filing party has to be confirmed by the Board or the Board has to nominate an alternative insolvency resolution professional within a period of 7 days.[79]In an application has been filed by the party directly, the Tribunal will ask for the Board to designate a insolvency resolution professional within 7 days[80] and thereafter within 10 days the Board has to appoint one.[81]A party has the liberty to file an objection and apply for the replacement against an insolvency resolution professional who have initiated a case or who has been appointed by the Board.[82] Once a case is filed, it automatically grants and interim moratorium.[83] For any Insolvency and bankruptcy system a moratorium period is of foremost necessity. An interim moratorium in such a situation stays "any legal action or proceeding which are pending in respect of any debt" stops the creditors of the borrower from initiating any legal action or proceedings in respect of any debt. Apparently this moratorium period applies to only secured creditors, yet it does not explicitly stretch out to actions other than legal proceedings relating to debts. This raises vulnerability among the debtors on the issue as to whether creditors will take action within the moratorium rather than taking a legal action to create a pressurizing technique to force the debtor to repay. [84] The central government is empowered by the code to incorporate other actions inside the scope of the interim

[76] IBC, § 99(3).
[77] IBC, § 94, 95, No. 31, Acts of Parliament, 2016 (India) does not specify information or documents that a debtor must include with an application but provides that an application submitted by a creditor must include information about all debts owed by the debtor to the filing creditor(s), the creditor's demand for payment and the debtor's failure to do so within 14 days, and evidence of the debtor's default.
[78] If a party files directly, they can subsequently designate a resolution professional. If they do not do so, the Debt Recovery Tribunal will request that the Insolvency and Bankruptcy Board do so. Other parties may object to a resolution professional designated by the filing party or by the Board. The Code does not provide a standard or any specific bases for removal of a resolution professional.
[79] IBC, § 97, provides that of the proposed professional is disqualified, the Board appoints a different professional.
[80] IBC, § 97 (3).
[81] IBC, § 97.
[82] IBC, § 98.
[83] IBC, § 96.
[84] A creditor night, for example, withhold services or property from a debtor or engage in informal debt collection efforts, which might defeat the underlying purpose and spirit of the moratorium.

moratorium.[85] Once affirmed or appointed, a report has to be submitted to the "Debt Recovery Tribunal" within 10 days by the "Insolvency Resolution Professional" suggesting either endorsement or dismissal of the application.[86] For this report, the IRP must decide if the application fulfills the essential prerequisites for such applications set out under the Code[87] yet additionally requires that the IRP "record the reasons for recommending the acceptance or rejection of the application in the report…"[88] This probably implies that the IRP should basically attest that the borrower has defaulted on a debt of no less than 1,000 rupees and, if required, that a request was made and not discharged within 14 days. Yet, the prerequisite to "record the reasons" may likewise be understood to welcome a more dynamic gatekeeping role for "Insolvency resolution Professionals". It has to be determined within 14 days by the "Debt Recovery Tribunal" after receiving the aforementioned report of the IRP as to whether to admit or dismiss the insolvency application.[89] No set standards are provided by the code on the basis of which the approval or rejection has to be made by the tribunal. This probably implies the Tribunal will basically affirm that the essential qualifications required by the Code are met or not. But similar to the situation where the IRP has to recommend acceptance or rejection of application, without proper guidance for the tribunals, judges also look at other factors while the deciding the question of approval or rejection.

On the occasion where the application is admitted, the aforementioned moratorium period which was earlier intermediary becomes permanent and the scope is also enlarged by providing that the debtor "shall not transfer, alienate, encumber or dispose of any his assets or his legal rights or beneficial interests therein."[90] A public notice inviting claims of the creditors within a period 3 weeks has to be issued by the "Debt Recovery Tribunal" within 7 days of accepting an application.[91] From the information filed in the application and the claims made by the creditors with regard to the public notice, the IRP has to

[85] IBC, § 96 (3).
[86] IBC, § 99. Further Section 99 (4) (5) provides that the resolution professional can request additional information from a party, who then has seven days to provide the information.
[87] IBC, § 99(6).
[88] IBC, § 99(9).
[89] IBC, § 100.
[90] IBC, § 101(2)(c).
[91] IBC, § 102.

compose a list of creditors.[92] In both voluntary and involuntary Insolvency proceeding against an individual, the debtor has to make a repayment plan in consultation with the "resolution professional", [93] containing the reasons behind the plan and "reasons on the basis of which the creditors may agree upon the plan", ascertain a fee for the IRP, as well as other matters " to be specified."[94] The Code in itself does not set forth any other standards or guidelines for the repayment plan of the debtor, but it does provide that a repayment plan "may authorize or require the resolution professional to carry on the debtors business or trade…; realize the assets of the debtor; or administer or dispose off any funds of the debtor" [95] Draft regulations regarding additional requirements in repayment plan like exclusion of assets and that they cannot be affected, a time frame, a schedule, debtor's minimum budget and the terms of discharge .[96]

The question as to whether the plan should include discharge of debts which are otherwise non dischargeable or some specific way of dealing with debts that would have priority in a bankruptcy case.[97] As examined below, if the debts which are otherwise dischargeable are discharged through a repayment plan, or if the plan does not require to include bankruptcy priorities, this could lead to increase in inter creditor conflicts during the insolvency process.

The Code or the draft regulations does not set any protective limit to the terms of repayment plan other than securing excluded assets and providing a minimum budget. All things considered, the IRP must present the resolution plan of the debtor and a report about it to the Debt Recovery Tribunal within three weeks of the due date for creditors to submit claims.[98] The Code mandates that this report must affirm that the repayment plan complies with the present law and that the plan has "a reasonable prospect of being

[92] IBC, § 103, 104.
[93] IBC, § 105(3)(a).
[94] IBC, § 105(3)(c). It is not clear if this provision envisions that other matters might be specified by an adjudicating authority on a case by case or whether they can only by specified in general by the Board through regulations.
[95] IBC, § 105(2).
[96] *See* Section 22 of Insolvency Resolution Process for Individuals and Firms, Draft Regulations, 2017.
[97] On the other hand, the personal insolvency regime does recognize the category of excluded debts, denying eligibility to debtors who only default on such debts. This could provide some basis for affected creditors to argue that the Code should be construed to disallow discharge of excluded debts in an insolvency case.
[98] IBC, § 106.

approved and implemented."[99] It is conceivable that the IRP's power to review for "a reasonable prospect of being…implemented" might give a level of discretion to keep a check on plans for especially onerous terms.

The report of the IRP on the "resolution plan" of the debtor must also contain if the meeting of creditors is necessary and if not so, the reasons must be stated.[100]This shows that the law presumes that the "Insolvency Resolution Professional" will call for a meeting of creditors.[101] Once the IRP submits the repayment plan of the debtor, the meeting of creditors has to be called after at least 2 weeks of such submission and before completion of 28 days.[102] The copies of repayment plan must be served to all the creditors before convening the meeting, further the report of the IRP on the debtor's repayment plan and a "statement of affairs of the debtor." must also be given[103]. During the meeting the creditors except the associates of the debtor,[104] must choose whether to accept or reject the plan or alter it with debtor's consent.[105] Approval requires "a majority of more than three fourth in value" of the claims of creditors whether voting in person or in proxy.[106]

In the aforementioned process the secured creditors can rightfully vote if they participate in the voting, but, these secured creditors can only enforce the security interest in the unsecured part of the claim during the period of the plan.[107] There, even if a secured creditor does not take part in voting, they are apparently qualified for enforce their security interest under other legal regime. Moreover, the consent of a secured creditor is necessary if such creditor does not participate in voting that affects its "right to enforce security."[108] Although the Code isn't express on this point, it can be inferred from its language that the consent of a secured creditor is required if the payment plan

[99] IBC, § 106(2)(a),(b).
[100] IBC, § 106(2)(c).
[101] IBC, § 106, 107.
[102] IBC, § 106.
[103] IBC, § 107(3). *See also*, *Draft Regulations*, at Section9 (setting forth the required contents of the debtor's statement of affairs and providing that the statement be prepared by the resolution professional).
[104] IBC, § 109(4)(b).
[105] IBC, § 106-11.
[106] IBC, § 111.
[107] IBC, § 110.
[108] IBC, § 110 (5).

incorporates a cure of a default of a debt to that specific creditor which would have otherwise given rise to enforce its security.

A report has to be prepared by the IRP regarding the meeting of the creditors which is than to be submitted along with the repayment plan to the recovery tribunal.[109] At that point, the tribunal issues an order either approving or rejecting the plan "on the basis of the report of the meeting of the creditors",[110] the Tribunal may likewise give instructions for implementing the plan or may instruct the creditors to meet to amend the plan.[111] There are no other standards given by the code to govern the assessment of the IRP's report by the "Debt Recovery Tribunal" or its choice on whether to approve or reject the plans. In any case, the way that the Tribunal has the power under the Code to give instruction regarding implementation or require changes, shows that a more extensive, more involving role for the Tribunal at this phase than simply approving the choice of the creditors and the recommendation of the IRP.

The "moratorium" as mentioned earlier ends either at the elapse of 180 days from the date of admission of the application of the debtor or on the issuing of order of the tribunal.[112] This implies the full procedure of submitting and approving a repayment plan must take place within the period of 180 days; the Code does not accommodate an extension of this due date.

In the event of approval of the debtor's repayment plan by the "Debt Recovery Tribunal", the IRP is then under an obligation of implement the plan throughout its duration[113] and applying for discharging the debts of the debtor.[114] Generally upon the successful completion of the plan the debtor is entitled to get discharged, although the court may even authorize early discharge.[115] The provisions relating to individual insolvency of the Code don't specify as to whether any debts are non-dischargeable, but it is provided for in the provisions for personal insolvency. Instead, the Code provides that the IRP must

[109] IBC, § 112-13.
[110] IBC, § 114(1).
[111] IBC, § 114(2),(3).
[112] IBC, § 101.
[113] IBC, § 116.
[114] IBC, § 119.
[115] IBC, § 119.

apply for discharge of the debtor "on the basis of repayment plan;"[116] as noted earlier, the Code does not explicitly put outside scope a repayment plan from providing that some excluded debt may also be discharged.

4.1.2. BANKRUPTCY PROCEDURE:

The personal bankruptcy portion of the Code gives "Debt Recovery Tribunal" power to liquidate the non excluded assets of the debtor, to discharge the debt to the extent possible, and also to satisfy the unpaid balance of certain debts. Three situations have been enumerated under the code when bankruptcy is available: where an application of insolvency by a debtor have been rejected by the DRT on the reason of fraudulent application; where repayment plan made by the debtor is rejected by the "Debt Recovery Tribunal"; and where a debt repayment plan of the debtor ends before completion.[117] If any one of these circumstances persists a case must be filed within 3 months.[118]

Either the debtor himself or one of the debtor's creditors can start a debt recovery proceeding in the DRT.[119] While filing an insolvency case the party can propose an "Insolvency Professional",[120] and the Tribunal should within seven days inform the Board of the proposed Insolvency Professional or, if the party does not propose a name for IP, ask for that the Board do so.[121] In case where the filing party has proposed a name for IRP, the board has to approve within 10 days or it has to nominate a IRP if it either rejects the proposed individual or in cases where filing party did not propose individuals.

[116] IBC, § 119 (1).
[117] IBC, § 121. *See also* IBC, § 100, 115, 118. It is not entirely clear from the Code whether a debtor might be eligible for bankruptcy if creditors do not vote to approve his or her repayment plan; this would presumably be precluded if Debt Recovery Tribunals only consider whether to approve or reject plans that have already been approved by creditors. The resolution professional must submit a report on creditors meetings regardless of whether the creditors approve the debtor's plan or not. Section 114 does not expressly prohibit the Tribunal from approving a plan that has not been approved by creditors, but the general structure and logic of the insolvency provisions does not seem designed to allow such a circumstance.
[118] IBC, § 121.
[119] IBC, § 121. A secured creditor that files an application to initiate a debtor's bankruptcy must either relinquish its security or file a statement that it is only filing "in respect of the unsecured part" of its debt. IBC, § 123(2).
[120] IBC, § 122(2), 123(4).
[121] IBC, § 125.

After the filing of a bankruptcy case an interim moratorium becomes operational,[122] and the "Debt Recovery Tribunal" must either pass an order for bankruptcy or dismiss in a time limit of maximum 2 weeks of the Board approving the Insolvency Professional.[123]Further no additional standards are provided in the code for issuing an order of bankruptcy, so the Tribunal is apparently restricted at this phase to affirming that the basic eligibility criteria are satisfied. Upon an order of bankruptcy, an "estate of the bankrupt," which ultimately have to be distributed among the creditors of the debtor, vests in the insolvency professional[124] who, in this specific situation is called the "bankruptcy trustee". The estate of a debtor includes "all property belonging to or vested in the bankrupt at the bankruptcy commencement date."[125] It does exclude "excluded assets," property held by the bankrupt as a trustee, dues to the workman, or any other assets which are designated by the central government and financial regulators.[126] Assets which are excluded are "tools, equipments, books, and vehicles of personal or business use; basic house hold goods, furniture, and equipment; certain personal ornaments of religious significance; life insurance policies or pension plans; and a house up to a value to be determined by the board".[127] It has to be taken note here that the existing encumbrances will not be affected by these exclusions.[128] Disposing off of property while the bankruptcy proceeding is going on is "void," however a *bonafide* purchaser cannot be deprived of his property.[129]Property procured amid bankruptcy proceeding is a piece of the estate unless it is an excluded asset.[130]

The "interim moratorium" ends when an order for bankruptcy is passed, after which another moratorium starts which stops creditors from initiating actions "against the property of the bankruptcy in respect of" debts owed to them or from initiating some

[122] IBC, § 124. The interim moratorium in this context has the same scope as one that operates in a personal insolvency case under Chapter III.
[123] IBC, § 126.
[124] IBC, § 128(1)(a).
[125] IBC, § 155.
[126] IBC, § 155.
[127] IBC, § 79(14).
[128] IBC, § 79(14).
[129] IBC, § 158.
[130] IBC, § 159.

other actions in regard of such debt without permission from the Tribunal.[131] A public notice of bankruptcy must be given by the Tribunal within 10 days,[132] and the creditors must register their claims within 10 days of the notice.[133]

During a bankruptcy case, secured creditors are not barred from exercising their non bankruptcy rights, but such claim has to be made within 30 of issuing of bankruptcy order or they will have to forfeit interest on their debt.[134]The debtor suffers from various disabilities during the pendency of the case until discharge. For instance, "he or she can't serve as a trustee, hold public office, be a director or manager of a company, take on debt without approval, or travel overseas".[135]

In a case of bankruptcy, the IRP's part as a "trustee"[136] gives off an impression of being a more central and active role than the role played by them in individual insolvency cases. As aforementioned, once the "trustee" is appointed vests, the estate of the debtor vests with the IRP.[137]The Insolvency Professional calls meeting of the creditors,[138] the debtors estate is also administered by the IRP,[139] and later the professional applies for the discharge of debts.168 The trustee should "investigate the affairs of the bankrupt; realize the estate of the bankrupt; and distribute the estate of the bankrupt" while administering a bankruptcy case.[140] Among The trustee has been vested with various powers including power to hold property, enter into contracts, to sue, sell assets of the estate, exercise the rights of redemption of secured property, and collect repayment on the debts owed to debtor.[141] Some of the actions of the debtor can only be carried out by approval of the creditors, for example, "carrying on debtors business to wind it up; bringing or defending legal actions related to the estate; using property of the estate as collateral; or appointing

[131] Section128(1)(c). It does not appear to expressly provide that pending actions continue to be stayed after the interim moratorium expires.
[132] IBC, § 130.
[133] IBC, § 131.
[134] IBC, § 128(2).
[135] IBC, § 140-41.
[136] IBC, § 125.
[137] IBC, § 154.
[138] IBC, § 132-35. The trustee can forego a meeting if he or she deems it unnecessary.
[139] IBC, § 136 Part III, Chapter V, governs how the trustee administers and distributes the estate.
[140] IBC, § 149.
[141] IBC, § 151-52.

the debtor to manage property in the estate or carrying on debtor's business".[142] The debtor has an obligation to help the trustee in his or her execution of these functions.[143]

Remarkably the DRT can be requested by the bankruptcy trustee for avoiding various transactions made by the debtor, including "undervalued transactions" made within a period of 2 years that "caused the bankruptcy process to be triggered",[144] preferential transfers,[145] and "extortionate credit transactions".[146] An extortionate transaction under the code means a transaction requiring "exorbitant payments" compared to the amount of credit extended or that are unconscionable under the contract law.[147] The regulated creditors complying with the relevant legal provisions are protected from the extortionate credit transaction provision.[148]

Trustees may make either or both interim distribution to the lenders[149] and make a final distribution "when the trustee has realized the entire estate or so much of it as could be realized" in the trustee's opinion.[150] The trustee undertakes the distribution among the creditors in accordance with the following priorities: "trustee expenses and costs, in full; dues to the workmen for the two years preceding the bankruptcy case and secured debts; wages to other employees for the one year preceding the bankruptcy case; government claims for the two years preceding the bankruptcy case; and all other debts."[151]

For the discharge of the debtor, the trustee has to either apply to the DRT within 1 year of the beginning of the bankruptcy case or 7 days of committee of creditors giving approval for discharge, whichever is earlier.[152] The debts which are obtained fraudulently or

[142] IBC, § 153.
[143] IBC, § 150.
[144] IBC, § 164.
[145] IBC, § 165. The preference period is two years for transactions with an "associate" and, otherwise, six months. To be avoidable, the bankrupt must have had "a desire" to make the other party better off, the counter-party must be a creditor or guarantor, and the transaction must put them in a position "better than … if that thing had not been done."
[146]IBC, § 167.
[147] IBC, § I67(5).
[148] IBC, § 167 (6).
[149] IBC, § 174.
[150] IBC, § 176.
[151] IBC, § 178.
[152] IBC, § 138 and 142, The discharge order can be withdrawn or modified.

"excluded debt" will not be considered as discharged[153]. After the committee of creditors had administered and distributed the estate of the bankrupt, the committee of creditors has to vote for the release of the trustee.

4.1.3 "FRESH START" PROCEEDINGS:

At last, the Code provides for a "Fresh start process" for the borrowers having a humble financial background and who are "unable to pay their debt."[154] The procedure is restricted to people with yearly income of 60,000 rupees[155] or less; hiving assets of either Rupees 20000 or less; having qualifying debts under 35,000 rupees; who don't own a house; and who in the preceding year have not obtained the benefit of "fresh start". Qualifying debt in this context means a debt which is dischargeable (i.e., not "excluded debt"), unsecured, and which is not incurred within a period of three months of applying the fresh start process.[156]If prima facie from the face of the application it can be seen that the debtor is not able to repay debts, such a presumption will follow.[157] A fresh start case can either be filed by the debtor himself or through the IRP,[158] but it is not upon the creditors to file involuntary fresh start cases.

When a debtor files a fresh start case, similar to other cases an interim moratorium prohibiting legal action relation to the debt comes into operation.[159] Once an application is filed by the debtor before the debt recovery tribunal, it has to inform the board within 7 days, and the Board subsequently has to approve Resolution professional for the debtor or it has to appoint one within 10 days of receiving the DRT's notice.[160] After this the IRP within 10 days has to review the information given in the application of the debtor and subsequently has to forward a report to the DRT, either recommending acceptance or rejection of the debtors application..[161] The aforementioned report of the IRP must show

[153] IBC, § 139.
[154] IBC, § 80.
[155] See PRAMIT BHATTACHARYA, *The Richest 20% Account for 45% of Income*, THE MINT, Dec. 1, 2016. Nonetheless, the study found that the bottom quartile of households by income have a monthly average of 7,700 rupees in disposable income.
[156] IBC, § 79 (19).
[157] IBC, § 83 (5).
[158] IBC, § 80.
[159] IBC, § 81.
[160]IBC, § 82.
[161]IBC, § 83.

clearly the debts subject to discharge[162] and the reasons behind its recommendation.[163] The IRP may likewise ask for more information from either of the parties, who then will have to produce that information within 7 days.[164] The code provides for various considerations to be made during making this report which is in sharp contrast to the code not offering any guidance in cases of report of IRP for repayment plans in the context of insolvency. The code lays down that in cases where the debtor does not meet the eligibility criteria the application is to be rejected by the IRP after determination, further the IRP must also reject applications where debtor do not owe debts which are subject to discharge, or the debtor has "deliberately made false representation or omission" in the application filed by the debtor.[165]

In less than 14 days from getting the IRP's report,[166] on order of either admission or rejection has to be passed by the tribunal wherein the amount of dischargeable debt as determined by the IRP has also to be stated.[167] The Tribunal must inform the creditors affected by this decision within a period of seven days.[168]In cases of admission of the application of the debtor the interim moratorium period is extended by 180 days[169] and certain handicaps are expanded extended or imposed on the debtor, which includes prohibition on being a director of a company; alienating property; and travelling abroad.[170]

Within a period of 10 days, the creditors who have been acknowledged in the debtors application which have been admitted by the tribunal, must submit their objections to the IRP, these must only be relating to the question as to whether their debt qualify for discharge or the accuracy of "details of the qualifying debt"[171] These objections must be acknowledged or dismissed by the IRP within ten days.[172] Either of the parties would then

[162] IBC, § 83 (5).
[163] IBC, § (83)(7).
[164] IBC, § 83 (3),(4).
[165] IBC, § 83(6).
[166] IBC, § 84(1).
[167] IBC, § 84(2).
[168] IBC, § 84(3).
[169] IBC, § 85(2).
[170] IBC, § 85(3).
[171] IBC, § 86.
[172] IBC, § 86(5).

be able to challenge any determination made by the IRP within a period of 10 days, and the Tribunal subsequently has 14 days to decide on the merits of the challenge.[173] Parties can likewise ask for replacing of the IRP[174] Later if the debtor's circumstances changes, the Tribunal will be at liberty to revoke the application of the debtor or if he misbehaves or does not comply with the duties mentioned in the code.[175]

Not less than 7 days before the "moratorium period" of 180 days expires, the IRP has to provide a final list of all qualifying debts to the Tribunal.[176] The Tribunal then has the responsibility of issuing final discharge order by the time the "moratorium period" ends, where the order will provide for discharge of qualifying debts and also penalties, interest, and contractual fees on qualifying debt since the application of the debtor[177].This order apparently does not affect the debtor's other debts or liabilities. Further, distributions to creditors from the debtor's assets, is not provided by "fresh start proceedings".

4.2. INSOLVENCY AND LIQUIDATION PROCEDURE RELATING TO CORPORATE DEBTOR

4.2.1. CORPORATE INSOLVENCY RESOLUTION PROCESS

"The Insolvency and bankruptcy Code", 2016 along with "Insolvency and Bankruptcy (Adjudicating Authority) Rules, 2016" and the "IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016" provide the framework for CIRP in India.

"A Corporate Insolvency resolution Process" can be initiated by a corporate debtor, financial[178] or an operational creditor[179] or a corporate applicant in cases of default of at least 1 lakh rupees.[180] The application for initiating CIRP has to be filed before the "Adjudicating Authority" (AA). This is a right give to the stakeholders and therefore is

[173] IBC, § 87.
[174] IBC, § 89.
[175] IBC, § 91.
[176] IBC, § 86(5).
[177] IBC, § 92.
[178] IBC, § 7.
[179] IBC, § 9.
[180] IBC, § 6.

not a duty cast on them. Hence filing of an application is optional at the behest of the stakeholders.

There are some types of persons who are not eligible for initiating a "Corporate Insolvency Resolution Process".[181] A corporate debtor who is undergoing CIRP or who has completed CIRP in the last 12 months is disqualified. Further a corporate debtor or financial creditor who in proceeding 12 months has acted in violation of any terms of the resolution plan and corporate debtor against whom an order for liquidation have been passed, are also not eligible to initiate a CIRP. In case of corporate debtors, the adjudicating authority is the "National Company Law Tribunal" (NCLT) and the appellate authority is the "National Company Law Appellate Tribunal" (NCLAT).[182] These adjudicating authorities have territorial jurisdiction over the registered office of the company. A CIRP can be initiated by a financial creditor either jointly or severally by an application made to the Adjudicating Authority which should be accompanied with a proof of default. The default of debt may be either to the filing financial creditor or to any other financial creditor of the corporate debtor i.e a CIRP can be initiated although the debtor has defaulted to a different financial creditor.

The situation for operational creditor initiating CIRP is somewhat different. They have to first send a notice of demand or a copy of the invoice of unpaid debt asking for the payment of the default amount. Only after such notice is given and in lapse of 10 days after notice is given, if the operational creditor does not receive the payment from the corporate debtor or notice regarding the existence of a dispute, the operational creditor may initiate CIRP by filing an application with the AA.

While filing the application for CIRP, the creditor has to adduce evidence as to the existence of default which is being recorded with an Information Utility (IU) or such other specified record or evidence. A CIRP of the corporate debtor may also be initiated by a corporate applicant by filing an application with the AA.[183] An "Interim Resolution Professional" (IRP) has to be proposed by the financial creditor and the operational

[181] IBC, § 11.
[182] IBC, § 60.
[183] IBC, § 10.

creditor in their application for initiating the CIRP. In case of operational creditors, this requirement of proposing an IRP is optional. After an application for CIRP is filed with the A, the financial creditor and operational creditor have to serve a copy of the application to the corporate debtor.

Admission of an application in the AA is made within fourteen days of its receipt in normal course. If a defect in the application is found by the AA, and time is given to the filing party to rectify it, the AA may reject an application if it is not rectified within the due date. Further, withdrawal of application for CIRP may be allowed by the "Adjudicating Authority" if the applicant makes a request before admission. If an application for CIRP gets admitted, this date of admission will be considered as date of commencement of CIRP and it has to be completed within 180 days from this date.[184]

After the application is admitted an order of interim moratorium is passed by the AA which then continues till the completion of CIRP. This is a protection to the corporate debtor from "new and pending suits, and enforcement of security interest", and prohibits corporate debtor from "transferring, encumbering, and disposing of any of its assets".[185] It is to be noted here that while the moratorium period is active, supply of essential services like electricity, water, telecommunication, and information technology are neither terminated or suspended or interrupted. This is upto the extent to which these services are not a direct input to the output that is either produced or supplied by the corporate debtor.

In cases where the corporate applicant or the financial creditor has proposed an IRP, the AA appoints as proposed within 14 days of the commencement of the insolvency proceeding. In other cases where IRP has not been proposed, AA will make a reference to the IBBI after which the Board will recommend a name within 10 days of receipt of the reference from the AA. An IRP assumes the role till the expiry of 30 days from the date of his appointment.

[184] IBC, § 12.
[185] IBC, § 14.

After the IRP is appointed, the management of the affairs of the corporate debtor is vested on the IRP.[186] There is a suspension of the powers of the Board of Director of the corporation which is in debt and these powers are exercised by the IRP. All the officers of such a corporate debtor report to the IRP and provide access to the records and documents of the debtor as and when required. Other personnel, management and promoters of the debtor company must give all kinds of assistance and cooperation to the IRP.[187]

While the IRP manages the management and operation of the company as a going concern[188], he takes over the control of the assets of the corporate debtor. There are some excluded assets like assets in possession of the debtor company either under trust or under contractual arrangements including bailment but which is actually owned by a third party, assets of any Indian or foreign subsidiary of the corporate debtor and other assets which may be notified by the central government.

It is important that the resolution plan has to resolve the insolvency of the debtor company as a going concern. Feasibility and viability of the resolution plan is considered as an important factor. Apart from these two caveats, resolution plan permits numerous prospects like turn-around, buy-out, merger, acquisition, takeover, change in product lines, change in management, etc.

The code provides for prohibition on kinds some persons from submitting a resolution plan. Such kinds of persons are: a person who is an "undischarged insolvent", is a willful defaulter, has an NPA account for more than a year, has been convicted of a offence punishable for more than 2 years, is disqualified to act as a director, is prohibited from accessing or trading in securities market, etc.

The Insolvency resolution professional has to carefully go through each of the resolution plan to check if it satisfies the following requisites[189]:

[186] IBC, § 17.
[187] IBC, § 19.
[188] IBC, § 20.
[189] IBC, § 25.

a. That, the sources of funds for payment of insolvency resolution process costs has been identified. This payment has to made by giving priority to any other creditor.
b. That the liquidation value has been enumerated which is due to the operational creditors in priority to any financial creditor. Such payment has to be made before expiry of 30 days from the date of approval of the resolution plan by the AA.
c. That it must provide for the liquidation value which is due to the dissenting financial creditors. Ultimately this payment has to be made prior to any recoveries by the financial creditors who voted in favor of the RP. In this context both, creditors who abstained from voting and those who voted against the RP are considered as dissenting creditors.
d. That the RP contains provisions for firstly, the term of the plan and its implementation, secondly, the management and control of the business of the corporate debtor during the implementation period, thirdly, adequate means of supervision of the plan.
e. That the RP does not contravene any law in force in India.
f. That the RP includes a statement declaring how it has dealt with the interests of various stakeholders, including the FC and OC of the debtor entity.

The cost of the insolvency resolution process includes the following:

a. Amount of interim finance and the cost incurred in raising such finance;
b. Fees payable to IRP
c. Cost incurred by RP in managing the debtors business and keeping it as a going concern;
d. Cost incurred at the expense of the government to facilitate CIRP;
e. Amounts due to persons whose rights are prejudicially affected because of the moratorium imposed;
f. Amounts due to persons who are prejudicially affected because of the moratorium imposed;
g. Expenses incurred on or by the IRP to the extent ratified and fixed by CoC;
h. Other costs relating to CIRP and approved by CoC.

The main function of the IRP is basically two fold i.e to present a resolution plan and to see that it conforms to the provisions of the code and criteria prescribed by the COC. After the resolution plan is brought before the COC, it holds discussions[190] and once its viability and feasibility has been considered, it approves a resolution plan by vote of not less than 66% of voting share.After approval by the CoC, the IRP submits the RP to the AA for its approval. If the AA is satisfied that RP as approved by the COC is also in accordance with the provisions of the code, the resolution plan is approved by it. On receiving such approval by the AA, the RP starts having a binding effect on various stakeholders involved in the resolution plan like the corporate debtor itself, its employees, members, creditors, guarantors etc[191]. It is to be noted that once the resolution is approved by the AA, CIRP ceases and the moratorium also ends. There lies a provision for one time extension for a period of maximum 90 days on an application filed by an IRP giving valid reasons and on the instruction of COC, with the AA.

In cases where the IRP fails to submit a resolution plan within either 180 days or the extended period or the RP which was submitted got rejected by the AA, the liquidation process has to be started by the corporate debtor. It is to be noted that the COC may even decide to liquidate anytime during the CIRP. If a person gets aggrieved by an order of the AA either of admission or rejection of application for starting CIRP or an order relating to approval or rejection of resolution plan may appeal against it in the NCLAT.[192] Further if a person is aggrieved by the order of the NCLAT, they may go for an appeal against it to the Supreme Court on the question of law. An important thing to be noted here is that civil court does not have jurisdiction under the code.[193] It is to be noted that the RP is under an obligation to apply to the AA for directions or orders whenever the IRP discovers preferential transactions, undervalued transactions, extortionate credit transactions, and fraudulent transactions.

[190] IBC, § 24.
[191] IBC, § 31.
[192] IBC, § 61.
[193] IBC, § 62.

4.2.2 FAST TRACK INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS

The IBC provides a simple and faster insolvency resolution process for the corporate debtors of small size. This provision is particularly helpful for the startups and MSME's who can get over with an insolvency and look forward to future venture without being frustrated. Such fast track process gets completed in 90 days in place of the normal time frame of 180 days.[194]This time period of 90 days can be extended by a maximum of 45 days. The Code read with The "Insolvency and Bankruptcy (Adjudicatory Authority) Rules, 2016" and "IBBI (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017" govern the Fast Track CIRP. Other than the shorter time limit for completion and appointment of only one valuer in place of two, the Fast Track CIRP is mostly similar to the normal CIRP.

The following types of Corporate Debtor will get the benefit of resolution under the Fast Track process[195]:

i. A small company, as defined under Section 2(85) of Companies Act, 2013 i.e a company whose paid up capital is less than Rupees 50 Lakhs and annual turnover is less than 2 crores; or
ii. an unlisted company with total assets not exceeding Rupees 1 crore as per the financial statement of the preceding year.
iii. A startup[196] i.e an entity before elapse of less than 5 years time since its incorporation or its turnover has not crossed Rupees 25 crore since incorporation or if the entity is working for innovation or is a scalable business model with a high potential for generation of employment and creation of wealth.

[194] IBC, § 56.
[195] *Information Brochure on Insolvency Resolution of Corporate Persons,* INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (Jan. 10, 2018), http://www.ibbi.gov.in/CIRP_and_Fast_Track_Information_Brochure.pdf.
[196] As defined in the notification dated 23rd May, 2017 of the Government of India in the Ministry of Commerce and Industry.

In case it is later found by the IRP that according to the records of the entity it is not eligible for fast track resolution process, than after application to the AA, the matter will be converted to the normal Insolvency Resolution Process.

4.2.2. LIQUIDATION PROCESS OF CORPORATIONS UNDER IBC

The procedure of liquidation as provided under the Code has been described under the following headings:

Initiation of liquidation

The "Insolvency and Bankruptcy Code" determines the conditions under which an order for liquidation is passed in respect of the corporate debtor by the NCLT.[197]

Following are the conditions:

(i) The AA does not receive a resolution plan from the IRP during the pendency of the Insolvency Resolution proceeding (including extension of such time, if any);

(ii) The resolution plan received by the AA from the resolution professional does not comply with the requirements of section 31;

(iii) If even before a resolution plan is agreed upon, the committee of creditors decides to go for liquidation of the corporate debtor and the same is notified by the IRP to the AA.

(iv) In cases where AA determines that the corporate debtor contravened provision of resolution plan in an application for initiating liquidation proceeding where it is made by a person who is prejudiced by such contravention of the resolution plan duly approved by the AA.

Commencement of moratorium

The "moratorium" period begins after the order of liquidation is made by the AA. The effect of the "moratorium" leads to a bar on filing suit or other legal proceedings by or

[197] IBC, § 33.

against the corporate debtor. Nevertheless, by taking the prior approval of the AA, a suit or other legal proceeding can be filed on behalf of the corporate debtor by the liquidator. Nonetheless the rights of the secured creditor remain unaffected during the moratorium period due to effect of section 52.

Public announcement

A public announcement notifying the liquidation of the corporate debtor has to be issued.

Appointment of liquidator

Section 34 deals with the appointment of liquidator and fee to be paid to him. The "resolution professional" appointed during the "corporate insolvency resolution process" continues to act as the liquidator on failure on the resolution plan unless replaced by NCLT. The revenue generated from the liquidation process will be used to discharge the fees of the liquidator. Section 35 deals with powers and duties of the liquidator, and section 37 empowers the liquidator to "access any information systems for the purpose of admission and proof of claims and identification of the liquidation estate assets" relating to the corporate debtor from various sources.

Liquidation estate

Section 36 of the IBC deals with the creation of the liquidation trust and also lays down its scope. All assets belonging to the debtor that comes within the definition of "liquidation estate", will be distributed by the liquidator. The liquidator holds the estate like a trustee, with the creditors being the beneficiaries. The distribution of the assets is done as per the order of priorities laid down under the Code itself. Prior to IBC, an express provision in the company law for the formation of a liquidation trust never existed thereby expressly "marking the assets" for the purpose of distribution in accordance with the rules of priority.

Claims

Section 38 provides for "consolidation of claims from financial and operational creditors"; section 39 deals with "verification of claims", and section 40 deals with

"admission or rejection of claims" by the liquidator. Section 41 provides that the "valuation of the claims" by the liquidator shall be done in accordance with the regulations specified by the Board. "Appeal against the decision of the liquidator" shall be made in accordance with section 42. A large part of these sections have to be substantiated by regulations notified by the "Insolvency and Bankruptcy Board of India".

Distribution of assets

The proceeds from the sale of assets of the liquidation estate have to be distributed in accordance with section 53. The "order of priority" i.e "waterfall mechanism" has been changed from the "order of priorities" under the Companies Act, 1956/2013. A notable difference is that "unsecured financial creditors" have been given higher priority under the IBC, and now have put on a higher pedestal above both crown debts, that is, debts owed to government, and other unsecured creditors. This was done to increase the credit availability to the corporate creditors.

The "order of priority" is has been depicted as follows –

(i) Insolvency resolution process costs and liquidation costs

(ii) Workmen's dues and debts due to a secured creditor who has relinquished security interest

(iii) Wages and dues of employees other than workmen

(iv) Financial debts owed to unsecured creditors

(v) Dues to the government, and dues owed to a secured creditor who has realized security interest but the proceeds are insufficient to meet the debts.

(vi) Residuary debts and dues.

(vii) Preference shareholders

(viii) Equity shareholders or partners

Dissolution of the Assets

Section 54 provides for termination of liquidation proceedings relating to corporate debtor. After the "liquidation estate" of the creditor has been completely liquidated, an application shall be made by the liquidator to the AA for dissolution of the corporate debtor following which the AA shall pass an order of dissolution of the corporate debtor and the corporate debtor shall be dissolved accordingly.

Avoidance transactions

Sections 43 to 51 contain the power of the resolution professional or liquidator to seek avoidance and reversal of transactions entered into during a "look back or relate-back period" or "reach back period" prior to commencement of insolvency proceedings and powers of the NCLT to make certain orders for avoidance of such transactions.

Rights of secured creditors

Section 52 preserves the right of a secured creditor in liquidation proceedings regarding "enforcement of security interest". In lieu of enforcement, the secured creditor may exercise his option to relinquish the security interest in favor of the "liquidation estate". In the former case, the secured creditor has to prove the existence of the security interest and the liquidator shall verify such security interest. Provisions for facilitating, the realization of "security interest" by the secured creditor is also provided under this section. If the revenue generated from the enforcement of the security interest is higher than the debts due to the secured creditor, the surplus shall be tendered to the liquidator.

4.3. IBC (AMENDMENT) ORDINANCE 2018 AND THE PRESENT INSOLVENCY RESOLUTION PROCESS: A COMPARISON

Pursuant to the report of the "Insolvency law Committee" which was set up to review the working of the Insolvency and Bankruptcy Code, 2016, the President promulgated the

"Insolvency and Bankruptcy code (Amendment) Ordinance, 2018". The committee was set up with the with the purpose of making recommendations on the following:

1. Issues arising from the functioning and implementation of the code,
2. Issues that may impact the efficiency of the corporate insolvency resolution and liquidation framework prescribed under the code,
3. Any other relevant matters as it deems necessary.

Following are the necessary amends made by the "Insolvency and Bankruptcy code (Amendment) Ordinance", to the IBC, 2016. These amendments were as per the recommendations made in the Report of the "Insolvency Law Committee" given on March 2018.

1. Home buyers are included within the definition of "Financial Creditors": After the amendment homebuyers are now given recognition as financial creditors. It will give them the right of initiating a "Corporate Insolvency Resolution Process (CIRP)" under Section 7 of the IBC and right to be part of the "Committee of Creditors (COC)". Further now the homebuyer at least has the guarantee of getting a part of the liquidation value under the resolution plan. An explanation clause have now been added to section 5(8)(f) which is the definition of financial creditor to include homebuyers. The committee had observed that the definition of "financial debt" was already enough to incorporate homebuyers of a real estate project and therefore only an express clarification in this regard was considered as enough. This amendment came as a relief to all those remediless homebuyers who were needlessly harassed by the errant developer.
2. Exclusion of willful defaulters in submitting a resolution plan: Section 29A of the IBC excludes certain persons from submitting a resolution plan. This section bars persons who led to the default of the corporate debtor due to their misconduct or are not desirable to regain control of the corporate debtor.

   Earlier the section was very wide which read as follows, "A person shall not be eligible to submit a resolution plan, if such person, or any other person acting

jointly or in concert with such person suffers from any of the infirmities stated in clauses (a) to (i) or has a connected person not eligible under clauses (a) to (i)."

As the intent of section 29A was to disqualify only those "people who had contributed in the downfall of the corporate debtor or were unsuitable to run the company because of their antecedents directly or indirectly", the earlier words in the first line of the section "if such person, or any other person acting jointly or in concert with such person" were considered much wide and went beyond connected persons. Therefore this part of the section was deleted by the IBC (Amendment) Ordinance, 2018 and the scope of the section was narrowed down to connected persons only. The ordinance has fine tuned the section to be used only against habitual miscreants or applicants who might themselves be sick and not against genuine applicants. Lately this provision has been facing criticism for having the effect of restricting genuine buyers of stakes in an entity.[198]

3. Opting for resolution over liquidation is made easier: With a view to promote resolution over liquidation, the ordinance has lowered the voting threshold i.e from 75 percent to 66 percent while decisions like "approval of resolution plan", extension of "CIRP" period, etc. Further even in taking of routine decisions, the voting threshold is brought down to 51 percent.

   Earlier section 21(8) provided that "…all decisions of the COC shall be taken by a vote of not less than 75 percent of the voting share of the financial creditors". The voting threshold of 71 percent was found to be very high and this acted as a road block in the resolution process. In effects this led to a situation where stopping a decision of the Committee of Creditors become easier than approving them. Finally the required voting share for approving a resolution plan and other such important decisions was reduced from 75 percent to 66 percent. This was

[198] Apoorva Mandhani, *President Promulgates Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018; Home-buyers recognized as Financial Creditors*, (June 6 2018, 7:45 AM), http://www.livelaw.in/insolvency-and-bankruptcy-code-amendment-ordinance-2018-here-are-the-highlights/.

recommended by the "Insolvency Law Committee" by taking past track record of restructuring laws and international best practices into consideration.[199]

4. Minimum of 1 year grace period: Another glaring example how the ordinance tried to promote resolution is the minimum grace period of 1 year have been granted to the resolution applicant. For the efficient and effective implementation of rhe resolution more time is granted to the new management. This is because the resolution applicant has to satisfy numerous statutory obligations.
5. Withdrawal of cases has been made difficult: Once a case under the IBC, 2016 have been instituted; the ordinance has made it difficult for it to be withdrawn. The difficulty arises from the strict requirement of approval of the CoC with 90 percent of the voting share. Fulfillment of such requirement makes withdrawal of cases permissible. Further such withdrawal must be before the publication of notice inviting "Expressions of Interest (EOI)". Therefore there is no question of withdrawal after the commercial process of (EoI) and bids starts.

   Other related issues addressed in the ordinance are "non-entertainment of late bids", "no negotiation with the late bidders" and a well laid out "procedure for maximizing the value of assets".

6. Exception in case of MSMEs: The Micro Small and Medium Enterprises have been given relaxation under the ordinance. A promoter of a MSME which is going through "Corporate Insolvency Resolution Process (CIRP)" has not been made disqualified from bidding for his enterprise but he will not have to be a willful defaulter and that he does not fall under other disqualifications not relating to default. The ordinance further gives power to the central government to make further amends regarding MSMEs in public interest.

Some other changes in the IBC:

1. In case enforcement of guarantee, the moratorium period is made not applicable.

[199] Dhaval, *Report on insolvency Law Committee out- Major suggestions & Analysis*, TAXGURU (Apr. 3, 2018), https://taxguru.in/corporate-law/report-insolvency-law-committee-major-suggestions-analysis.html.

2. A requirement of special resolution has been introduced for starting a insolvency resolution by corporate debtor themselves under the IBC.
3. For facilitating of the corporate debtor during the CIRP period the term and conditions of interim finance have been liberalized.
4. Powers of levying fees have been given to the Insolvency and Bankruptcy Board of India which is in respect to the services rendered by the Board.

CHAPTER- V

MAJOR CHANGES BROUGHT IN INSOLVENCY AND BANKRUPTCY REGIME BY INSOLVENCY AND BANKRUPTCY CODE 2016

5.1. DEBTOR IN POSSESSION (DIP) TO CREDITOR IN CONTROL (CIC): A PREFERABLE SHIFT

The primary advantage of a creditor controlled insolvency law is the efficiency which is brought to the market and the benefits it has for entrepreneurship. Firstly, as a model spearheaded by the 'persons whose money is at stake'[200], creditors are bound to take effective action to recover their dues. Further, this model assures them of a timely mechanism to recover their money themselves[201], instead of relying on lengthy court proceedings. This can also serve as an incentive for them to lend money again, despite having witnessed insolvency in their prior experiences. It also helps in bringing down the cost of credit in the market, because when more creditors are willing to provide financing to businesses, the cost for each will reduce due to increased supply[202]. This will lead to competition amongst lenders and ultimately allow many small businesses to enter the market, leading to healthier competition at multiple levels, which ultimately benefits the consumer which in this case the corporate debtor. Such measure can also have a positive impact on investor confidence, leading to more growth in the market, which means creditors will get their dues and interest in a timely manner, with a lower chance of default in payment.

Secondly, this move is also helpful to other stakeholders in the debtor company, such as the employees or shareholders. Ensuring control of creditors enables the Resolution Applicant i.e. one who proposes a resolution plan and the Committee of Creditors (COC) to formulate more efficient means of recovery and allows them their much-needed space for re-organizing the business in the hope of recovering pending dues, provided it is

[200] IBC, § 6 allows creditors to initiate insolvency proceedings.
[201] IBC, § 12.
[202] In the form of lower interest rates and longer repayment periods.

approved by the Adjudicating Authority being the "National Company Law Tribunal" (NCLT). The Committee can approve a Resolution Applicant's plan by passing it with a 66 percent majority of the financial creditors[203]. If such measures are successful due to a timely interjection, they will also prove to be beneficial to the employees and shareholders of the company. Hence, such a model has the potential of partially safeguarding their interests as well.

Shifting this onus on the creditor from the debtor also gives the creditors an incentive to take a greater interest in developments relating to, and performance of, the debtor. In this situation, unlike the past where creditors could only pursue separate suits for recovery, there is greater scope for recognizing the red flags that could lead to insolvency and, in a way, this provides for a buffer where creditors can also act as whistle-blowers to safeguard their own money and interests. This, in turn, can draw public and investor scrutiny, forcing the debtor company to pull up its socks to stave off a possible insolvency.

Allowing the creditor to trigger insolvency proceedings under section 6 that ultimately leads to the appointment of a Resolution Professional who is a third party to whom the management will report during the period of moratorium can best diffuse the tension and ensure the management does not commit any wrong or action leading to greater inability to repay its dues. Further, the management or boards of directors also cede their powers to the Resolution Professional, thereby falling directly under the control of the creditors[204]. The Committee of Creditors also has the right to replace Resolution Professionals where they feel he/she is not performing their duty[205]. This tool can be used to ensure absolute transparency in the process (as seen through the lens of the creditors).

An added benefit of creditor-control is that the Code attempts to establish a level playing field for both secured and unsecured creditors, as the definition of "creditor" under section 3(10) includes both classes. Further, upon initiating liquidation, assets are divided equally between unsecured creditors and debts owed to a secured creditor when it

[203] IBC, § 30(4).
[204] IBC, § 28.
[205] IBC, § 27.

has relinquished his security[206]. Doing away with a classical separation between creditors also eases implementational problems of recovery as, often, financial creditors such as banks may find that the secured assets are no longer available and any inventory that could serve as collateral is not of much value. This may lead to further dispute between the creditors, leaving unsecured creditors with minimal chances of recovery of debts. Previously, even when any recovery occurred through a sale of assets, it was often stalled by pending litigation or income tax disputes and continued for years, furthering the divide between creditors.

5.2. PRIORITIZING UNSECURED FINANCIAL DEBTS OVER CROWN DEBTS:

The waterfall mechanism under the IBC is similar to the priority in the order for distribution under a winding up under the Companies Act, but with a couple of significant differences. Unsecured financial creditors have been given higher priority under the IBC, and now have put on a higher pedestal above both crown debts, that is, debts owed to government, and other unsecured creditors.

Section 53 of the IBC sets out a waterfall mechanism i.e the priority in which the proceeds of liquidation will be distributed. The priority is:

- the insolvency resolution process costs and the liquidation costs;
- the following debts which rank equally: (i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and (ii) debts owed to a secured creditor in the event such secured creditor has relinquished its security to the liquidation estate;
- wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;
- financial debts owed to unsecured creditors;
- ranking equally, (i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated

[206] IBC, § 53(1)(b).

Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date; (ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

- any remaining debts and dues;
- preference shareholders, if any; and
- equity shareholders or partners, as the case may be.

Irrespective of the reason behind such a scheme, prioritizing unsecured financial creditors over crown debts signals an obvious shift in economic reasoning. Crown debts, which are basically public debt, are considered of lower importance than unsecured financial creditors. Nevertheless, it is unclear how big this class of unsecured financial creditors will possibly be, and so perhaps the impact of this change may not be significant.

5.3. THE NEW ROLE OF A LIQUIDATOR:

Liquidator is the "Insolvency Professional" who attempts to evaluate and realize the assets of the company to ease the process of liquidation. Although, the power and functions of the liquidator appear similar to the functions of the liquidator under Companies Act 1956, there is an element of dynamism included backed by independence in execution of responsibilities. Even though the new regulations have eased the regulatory compliances, there are a few challenges that are yet to be tackled and addressed to, when it comes to a seamless execution of the said processes. The fee payable to liquidator shall form a part of the liquidation cost. This incentive to liquidator, to liquidate the asset in an efficient and time bound manner, maximizes the return to the stakeholders. Although these incentives aim at obtaining quick and efficient resolution, there are liability provisions as well for liquidators for contravening the provisions of the code.

5.4. INSTITUTIONAL INNOVATIONS UNDER THE NEW FRAMEWORK

The part of the framework relating to corporate debtors was notified[207] and came into effect in August of 2016; the provisions relating to insolvency and bankruptcy of individuals have still not been brought in force.[208] The chairman of the Insolvency and Bankruptcy Board, as explained underneath, has of late expressed that one of the institution's essential current objectives is to "operationalise the individual insolvency regime in respect of guarantors to the corporates and the individuals having proprietary business."[209] It presently seems likely that the individual insolvency and bankruptcy provisions of the Code relating to business-related borrowers will be notified earlier and household debtors in the subsequent years.

The institutional innovations mentioned below are part of the new insolvency and bankruptcy regime equally applies to both personal insolvency as well as corporate insolvency cases. The substantive provisions of the Code's individual insolvency and bankruptcy chapter apply just to personal borrowers, in spite of the fact that they are similar in numerous regards to the new substantive provisions representing corporate cases.

5.4.1. NEW INSTITUTIONS

The Insolvency and Bankruptcy Code has set up what has been portrayed as an ecosystem of various new institutions, institutional characteristics, and institutional players that will be in charge of crucial aspects of the regime.[210] The major institutions out of these are the Insolvency and Bankruptcy Board, insolvency professionals, insolvency professional agencies, and financial information utilities, which are mentioned

[207] As with other legislative acts, the Code provides that "It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint …." IBC, § 1.3. The Official Gazette, published by the Government of India Press, is generally used by the government to publish official notices. *See* http://egazette.nic.in/.
[208] The Code provides that its different provisions can be notified at different times. IBC, § 1.3.
[209] *Individual Insolvency Norms a Priority, Says IBBI Chairman*, The Economic Times,(Oct. 2, 2017)http://economictimes.indiatimes.com/news/economy/policy/individual-insolvency-norms-a-priority-says-ibbi-chairman/articleshow/60912706.cms.
[210] 6th March 2017 Press Release, IBBI, (29 June 2018), http://www.ibbi.gov.in/Press_Release_06032017.pdf

and explained in the following paragraphs. Further the code revamps the existing institutions like “National Company Law Tribunals and Debt Recovery Tribunals to fill in as the fora and the "adjudicating authorities" for cases involving corporate debtors and individual debtors, respectively.

5.4.1.1. The Board:

The “Insolvency and Bankruptcy Board of India” is a noteworthy new regulatory authority, and it will probably develop as an essential part of the nation’s administrative state. The general powers of the Board consist of supervising and regulating “insolvency professional agencies, insolvency professionals, and information utilities”. This involves the determination of the eligibility requirements and prerequisites for registration regarding the professional and their agencies; for each situation, the board has to either approve an “insolvency professional” appointed by a party or appoint one if need be; supervise the working of the insolvency professional agencies and information utilities; and issuing regulations in respect to the working of the numerous other players who execute other substantive parts of the Code.[211] The Board is additionally bestowed with the responsibility to collect and disseminate information regarding the changed insolvency and bankruptcy system.[212] The powers of the Board are “subject to the general direction of the central government”[213]and the central government can assume control from the Board in a crisis or if the Board is failing in carrying out its functions.[214] The Code expressly grants rulemaking authority on some matters to the central government.[215]

The Board consists of members representing the central government from the Ministries of Finance, Corporate Affairs, and Law, and also from the “Reserve Bank of India”,[216] where each one of them are selected by the central government.[217] The first Board has

[211] IBC, § 196, 240.
[212] IBC, § 194 (requiring the Board to “collect and maintain records relating to insolvency and bankruptcy cases and disseminate information relating to such cases; [and] maintain websites and such other universally accessible repositories of electronic information as may be necessary ….”).
[213] IBC, § 196.
[214] IBC, § 225-26.
[215] IBC, § 239.
[216] IBC, § 189.
[217] IBC, § 188.

been assigned and has been duly constituted.[218] Mr. M.S. Sahoo, has been appointed as the chairman of the board and he took office in October 2016. Preceding this position, he was a member of the "Securities and Exchange Board of India" and of the "Competition Commission of India", held different government positions, and also practiced as an advocate.[219]

Given its administrative and rulemaking power, the Board is basically in charge of completing the framework of the Insolvency and Bankruptcy system set up by the Code.[220] Since the part of Code dealing with corporate debtors have become effective, the Board has laid down certain rules regarding authorization and performance of insolvency professionals [221] (including guidelines for the appointment of interim insolvency professionals[222]); the institution and working of the insolvency professional agencies[223] (including model bylaws[224]); the working of insolvency[225] and liquidation[226] provisions (counting the voluntary liquidation provisions[227] and fast track insolvency provisions[228]) for corporate and business debtors; the foundation and operation of information

[218] *The Governing Board*, IBBI, (June. 29, 2018), http://www.ibbi.gov.in/members.html.
[219] *Chairman Dr. M.S.Sahoo*, IBBI (June. 20, 2018), http://www.ibbi.gov.in/about-chairperson.html.
[220] As the Board is getting started, its powers and responsibilities can be exercised by a financial sector regulator or the central government. IBC, § 244.
[221] *Insolvency And Bankruptcy Board of India (Insolvency Professional) Regulations, 2016*, IBBI (June. 20, 2018) http://www.ibbi.gov.in/Law/GAZETTEIP_professional.pdf.
[222] *Insolvency Professionals to act as Interim Resolution Professionals (Recommendation) Guidelines, 2017*, IBBI (June. 20, 2018), http://www.ibbi.gov.in/Interim_Resolution_Profesional.pdf.
[223] *Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016*, IBBI, (June 15, 2018) http://www.ibbi.gov.in/Law/IPA%20REGULATIONS_professional_agencies.pdf.
[224] *Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016*, IBBI, (June 19, 2018), http://www.ibbi.gov.in/Law/MODEL%20BYE-LAWS.pdf.
[225] *Insolvency and Bankruptcy Board of India (Insolvency Resolution process for Corporate Persons) Regulations, 2016*, IBBI, (Jan. 8, 2018), http://www.ibbi.gov.in/Law/1_CIRP%20REGULATIONS301116.pdf.
[226] *Insolvency and Bankruptcy Board Of India (Liquidation Process) Regulations*, 2016, IBBI, (Feb. 15, 2018), http://www.ibbi.gov.in/Law/IBBI%20(Liquidation%20Process)%20Regulations,%202016%2015%20DEC.pdf.
[227] *Insolvency And Bankruptcy Board Of India (Voluntary Liquidation) Regulations*, 2017, IBBI, (Mar. 16, 2018), http://www.ibbi.gov.in/IBBI%20(Voluntary%20Liquidation)%20Regulations%202017.pdf.
[228] *Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations*, 2017, IBBI, (June 29 2018), http://www.ibbi.gov.in/Insolvency_and_Bankruptcy_Board_of_India_Fast_TrackInsolvency_Resolution_Process_for_Corporate_Persons_Regulations_2017.pdf.

utilities;[229] and the investigation and inspection of "insolvency professionals, entities, and agencies" by the Board.[230] Formal recognition has been given to two "Insolvency Professional" entities by the Board.[231]

5.4.1.2. Insolvency Resolution Professionals:

The responsibility to oversee most of the aspects relating to insolvency bankruptcy case under the Code rests with the "Insolvency Professionals". It is perceived that the "Insolvency Professionals" will assume a more consequential role within the new regime than the judges of the tribunals that will only act as adjudicating authorities. Under the present Insolvency and Bankruptcy framework, most cases will probably be initiated by the "Insolvency Professional" on behalf of borrowers or creditors under the Code.[232] Once chosen and affirmed by the Board, they are by and large in charge of acting as intermediary between stakeholders – i.e., borrowers and lenders – and between these stakeholders and the adjudicating authority. As described below in details, they operate and guide individual insolvency and fresh start cases, and they fill in as trustees for personal debtors in bankruptcy proceedings. Among different things, they are relied upon to guarantee stakeholders get relevant information; to assist in formulating plans and thereafter to prescribe plans to the adjudicating authority, which seem to have limited power to review those proposals; and to manage and distribute estates.

It is required under the code that "Insolvency Professionals" must be affiliated by an "Insolvency Professional Agency". Further they need to registered and stay on favorable terms with the "Insolvency and Bankruptcy Board". The Code itself does not, in any case, require any other qualifications to be held by these professionals. It explicitly delegates to the Board authority to "specify the categories of professionals or persons possessing such qualifications and experience in the fields of finance, law, management,

[229] *Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017,* IBBI, (June 29, 2018) http://www.ibbi.gov.in/IU%20Regulations%2031032017%20Final.pdf.
[230] *Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017,* IBBI, (June 20, 2018),http://www.ibbi.gov.in/The_Insolvency_and_Bankruptcy_Board_of_India_Inspection_and_Investigation_Regulations_2017.pdf.
[231] *6th March, 2017Press Release*, IBBI, http://www.ibbi.gov.in/Press_Release_06032017.pdf.
[232] *See, e.g.*, IBC, § 95. Debtors and creditors in both commercial and personal cases can propose their own insolvency professionals.

insolvency or such other field as it sees fit".[233] The Board has laid down a regulation requiring the "Insolvency Professionals" to compulsorily take a "national insolvency exam"; in case they have ten years of experience as an accountant, lawyer, or a company secretary, they require just taking a "limited insolvency exam".[234] Professions with 15 years of involvement in those fields can be enrolled as a Insolvency professional for a limited time,[235] presumably to manage specific cases. Till November 2017, when just the insolvency and bankruptcy provisions for commercial debtors were in force, there were almost 2,000 enlisted "insolvency professionals" and three registered insolvency professional agencies[236] in the nation.

Furthermore the code contains a "code of conduct" for the "Insolvency professionals", which requires the Professions to follow "reasonable care and diligence". It also requires compliance with the internal rules of the insolvency professional agency with whom such individuals are affiliated with. Under the code the IPs must also submit records of proceeding before tribunal to the agency and the "Insolvency and Bankruptcy board".

5.4.1.3. Information Utilities:

The responsibility of taking financial information from private parties have been vested with Financial Information Utilities,[237] including the ones who "are under obligations to financial information under the code;"[238] verifying such data with inputs from "all concerned parties;"[239] "creating and storing financial information in a universally accessible format;"[240] and giving access to the data to entities who are authorized to get it.[241] The drafters of the Code exhibited the expectation that, to dodge the inefficiencies

[233] IBC, § 207(2).
[234]IBC, § 5, *Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016*, IBBI, (June 23, 2018),http://ibbi.gov.in/webadmin/pdf/legalframwork/2017/Sep/23rd%20Nov%2016%20Insolvency%20and%20Bankruptcy%20Board%20of%20India%20(Insolvency%20Professionals)%20Regulations,%202016_2017-09-25%2014:29:23.pdf.
[235] IBC §5, *Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations*, IBBI, (June 29, 2018)
[236] http://www.ibbi.gov.in/ipas.html.
[237]IBC, § 214(c).
[238] IBC, § 214(b).
[239] IBC, § 214(e).
[240] IBC, § 214(a).
[241] IBC, § 214(f).

of monopoly, many such financial information utilities would emerge.[242] If that happens, and assuming that, all of them do not have the same information, parties will need to be able to search for information from all existing information utilities. Therefore the code lays down that each utility must "have inter-operability with other information utilities"[243] and regulations provide that "each information utility must enable users to search information held by other utilities".[244] On September 2017, the first financial information utility was enlisted.[245]

The recommendation of the Drafting Committee was "that the IUs should include records of all financial liabilities, secured and unsecured"[246] and this has echoed in the rules and regulations governing the utilities. The strict time limitations mentioned in the code for taking action under it are based on the presumption that such information will provided by these "Information Utilities" promptly. Further these utilities have the important function of supplying evidence of a debtor's default, which is the primary requirement to be declared as an insolvent.

5.4.1.4 Insolvency Fund:

The Code institutes an Insolvency and Bankruptcy Fund "for the purposes of insolvency resolution, liquidation and bankruptcy of persons under the Code."[247] This fascinating provision in the Code laid down in a very short and general provision and hence the constitution and functioning of the Fund will presumably be decided by the Board by regulations, which till now have not been done. The Code on its own simply lays down two features in place. First, it allows the central government, private individuals and entities, and "other sources" to add to the Fund.[248] Second, it allows any individual or

[242] *Report of the Bankruptcy Law Reforms Committee*, IBBI, (June 15, 2018), http://ibbi.gov.in/BLRCReportVol1_04112015.pdf.
[243] IBC, § 214(h).
[244] IBC, § 24, *Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017*, IBBI, (May 20, 2018), http://ibbi.gov.in/webadmin/pdf/legalframwork/2017/Jul/IU%20Regulations%2031032017%20Final.pdf.
[245] *See 25th Sept. 2017 Press Release*, IBBI, (June 29, 2018) http://ibbi.gov.in/webadmin/pdf/press/2017/Sep/IU%20Registration%20Press%20Release.pdf.
[246] *Report of the Bankruptcy Law Reforms Committeee*, IBBI, (June 15, 2018), http://ibbi.gov.in/BLRCReportVol1_04112015.pdf.
[247] IBC, § 224.
[248] IBC, § 224(2).

entities that have "contributed any amount to the Fund" and end up engaged in an insolvency and bankruptcy proceeding as a borrower to withdraw up to that sum "for making payments to workmen, protecting the assets of such persons, meeting the incidental costs during the proceedings or such other purposes as may be prescribed."[249] Since the Code expects contributions from sources other than private entities, it might be approved to distribute funds in other conditions also, maybe at the discretion of the tribunal or the Board.

5.4.2 Repurposed Tribunals:

The Code assigns the prior "National Company Law Tribunals" and "Debt Recovery Tribunals" as having exclusive jurisdiction in insolvency and bankruptcy cases. Contingent upon the size and extent of the caseload under the new insolvency and bankruptcy framework, this new role can possibly significantly change the nature of these tribunals, basically revamping them. A huge number of aged debtors will fall inside the extent of the personal insolvency and bankruptcy chapters, and even few cases per capita could conceivably overwhelm the "Debt Recovery Tribunal" system. It is unquestionably conceivable that insolvency and bankruptcy cases could come to dominate the workload of the tribunals, in the long run requiring new administrative features and additional tribunal and personnel dedicated to those cases.

[249] IBC, § 224(3).

CHAPTER-VI

REMARKABLE JUDICIAL PRECEDENTS IN INSOLVENCY AND BANKRUPTCY LAW IN INDIA IN THE LIGHT OF INSOLVENCY AND BANKRUPTCY CODE 2016

India had a paradigm shift in Insolvency and Bankruptcy legal regime in 2017 because of the enactment of "Insolvency and Bankruptcy Code 2016". Even after 1 year of coming in force of the code, it still faces many issues and challenges while passing through a meticulous judicial scrutiny.

This chapter discusses the landmark judgments delivered by the Supreme Court which resolved different issues that came up while implementing the code.

6.1. *Innovative Industries Limited v. ICICI Bank & Anr*[250]:

The apex court in this case passed a very extensive judgment as this was the foremost case relating to the implementation of IBC, 2016 to have come before it. In this case the court recognized that there has been a paradigm shift in insolvency law of India. The primary issue before the court in this case was the repugnancy between the IBC, which is a Central legislation, and "Maharashtra Relief Undertakings Special Provisions Act 1958", a State enactment. After analyzing Article 254 of the "Constitution of India", which deals with instances relating to inconsistency between Central and State law, the Supreme Court held that in the event of any inconsistency between any State law and the IBC, in respect of matters relating to bankruptcy and insolvency, the Code would prevail over such State laws. The Court made the following points:

i. The question of repugnancy emerges only if both the State law and Central law identifies with the subjects falling under the concurrent list of the Constitution of India.
ii. Care ought to be taken to accommodate both the statutes so as to avoid repugnancy.

[250] Civil Appeal Nos. 8337-8338 of 2017.

iii. In the occasion of direct conflict between State and Central legislature, the Central enactment will prevail over the State enactment.

iv. Even if there might be no immediate clash, a State law may not ne operative because the Central law is intended to be a complete, exhaustive or exclusive code. In such a case, the State law is inconsistent and repugnant, despite the fact that obedience to both laws is conceivable, because so long as the State law is referable to the same subject matter as the Central law to any extent, it must give way. One test of seeing whether the subject matter of the Central law is encroached upon is to find out whether the Central statute has adopted a plan or scheme, which will be hindered and/or obstructed by giving effect to the State law. It can then be said that the State law trenches upon the Central statute.

v. The only exception to the above rule is when it is found that a State legislation is repugnant to an earlier Central law or an existing law if the case falls within Article 254(2) of the Constitution, and Presidential assent is received for State legislation; in which case State legislation prevails over Central legislation or an existing law within that State. Here again, the State law must give way to any subsequent Central law, which adds to, amends, varies or repeals the law made by the legislature of the State, by virtue of the operation of Article 254(2) proviso.

The Court also made a very important ruling in this case that once "insolvency professional" is appointed to manage the company; the erstwhile directors, who are no longer in the management of the company, cannot maintain an appeal on behalf of the company.

6.2. *Lokhandwala Kataria Construction Private Limited v. Nisus Finance and Investment Managers LLP*[251] :

The Supreme Court in this case considered whether "National Company Law Appellate Tribunal" (NCLAT), the appellate body under the Code, could allow withdrawal of insolvency application after admission on the basis of the consent terms agreed between the parties. Rule 8 of "Insolvency and Bankruptcy (Application to Adjudicating

[251] Civil Appeal No. 9279 of 2017.

Authority) Rules 2016" allows the parties to withdraw the application prior to admission of the application by "National Company Law Tribunal" (NCLT), the adjudicating authority under the Code. However, there is no provision for withdrawal of application after admission.

The petitioner in this case approached NCLAT invoking its inerrant jurisdiction under Rule 11 of "National Company Law Appellate Tribunal Rules 2016" (NCALT Rules) for withdrawal of the application on the basis of the consent term agreed between the parties. Rule 11 allows NCLAT to make orders for meeting the ends of justice. However, NCLAT refused to invoke its inherent power for this purpose.

The petitioner challenged the order of the NCLAT before Supreme Court. The Supreme Court upheld the view of the NCLAT and held that NCLAT cannot invoke its inerrant power to allow the parties to withdraw the application after admission. However, Supreme Court invoked its own inerrant power under Article 142 of the Constitution and allowed the parties to withdraw the application on the undertaking of the appellant to pay the outstanding dues to the applicant as per the consent terms.

6.3. *Surendra Trading Company Vs. Juggilal kamlapat jute mills Company Limited and others*[252]:

The Code prescribes various time limits in dealing with different aspects of the insolvency resolution process. The sanctity of some of these time limits has been tested before the Supreme Court in. The question before the Court was whether time limit of 7 days prescribed under the Code for rectifying or removing defects in the application filed by an operational creditor for initiating corporate insolvency resolution is mandatory or not.

Section 9 of the Code deals with the initiation of corporate insolvency resolution process by operational creditor. The section grants 14 days period to NCLT to accept or reject an application after the receipt of the application. However, before rejecting an application on the ground of any defects, NCLT has to give a notice to the applicant to rectify the defects and seven days period is given to the applicant to remove the defects.

[252] Civil Appeal No. 8400 of 2017

The questions before the NCLAT were:

- Whether time of 14 days given to NCLT for admitting or rejecting an application is mandatory or directory; and
- Whether the period of 7 days given to the applicant for rectifying the defects is mandatory or directory.

The NCLAT held that period of fourteen days prescribed for NCLT to pass such an order is directory in nature, whereas period of seven days given to the applicant for rectifying the defects is mandatory in nature. NCLAT was of the view that the time period of 14 days given to NCLT for accepting or rejecting an application is procedural in nature and cannot be treated to be a mandate of law. NCLAT further held that 14 days time period is to be counted not from the date of filing an application but from the date when such an application is presented before the "Adjudicating Authority", i.e. the date on which it is listed for admission/order. However, NCLAT straightly concluded that the time period of 7 days for rectifying the defect is mandatory and no specific rationale had been given for this conclusion. The appeal to the Supreme Court was filed against this conclusion of NCLAT that 7 days time period is mandatory.

The Supreme Court held that it couldn't find any valid rationale in the conclusion of NCLAT that seven days time period is mandatory. The Court further observed that NCLAT's conclusion cannot be justified on the ground of the time period of 180 days given in the Code for completion of the resolution process because the period of 180 days commence from the date of admission of application. Period prior to that, such as time consumed for scrutinizing the application, rectifying defects in the application or NCLT admitting the application etc. cannot be taken into account. In fact, till the objections are removed, it is not to be treated as application validly filed. It is only after the application is complete in every respect; it needs to be entertained. Under this scenario, the Court held that making the period of seven days as mandatory does not serve any purpose. The Court observed that in a given case there might be weighty, valid and justifiable reasons for not able to remove the defects within seven days. Accordingly, the provision of removing the defects within seven days is directory and not mandatory in nature.

The Honorable Court cautioned that while considering the application for extension of time, a balance approach need to be taken to avoid misuse of the provision. If the objections are not removed within seven days, the applicant while refilling the application after removing the objections, file an application in writing showing sufficient cause as to why the applicant could not remove the objections within seven days. Once the NCLT is satisfied with the cause it can entertain the application; otherwise, the application needs to be rejected.

6.4. *Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited*[253]

In the aforementioned land mark judgment the Supreme Court clarified the interpretation of the term "dispute" under the Code as a dispute raised by the operational debtor prior to the issue of demand notice, even though no suit or arbitration is pending in respect of such dispute.

The Code mandates that NCLT shall reject an application for corporate insolvency by an operation creditor, if the debtor has served a notice of dispute upon the operational creditor. Such notice of dispute shall bring to the notice of the operational creditor "existence of a dispute" or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties prior to the issue of demand notice by the operation creditor.

The question before the Supreme Court was whether only a dispute pending before the court or arbitral tribunal could stop the insolvency proceedings or any other kind of dispute would qualify the criterion. After examining section 8 (6) of the Code, the Court held that the interpretation of the term "existence of dispute" includes dispute raised by the operational debtor prior to the issue of demand notice, even though no suit or arbitration is pending in respect of such dispute. Accordingly, an email send by the debtor, raising dispute, prior to the issue of demand notice by the creditor, will also fall under the definition of dispute under the Code. NCLT only has to examine, at the stage of admitting or rejecting an application, whether there is a plausible contention which requires further investigation and the 'dispute' raised by the operational debtor is not a

[253] Civil Appeal No. 9405 OF 2017

patently feeble legal argument or an assertion of facts unsupported by evidence. However, while doing so, NCLT is not required to satisfy whether the dispute would ultimately succeed or not. So long as dispute truly exists in fact and is not spurious, hypothetical or illusory the NCLT has to reject the application.

The Supreme Court also examined definition of "dispute" under section 5 (6) of Code to consider whether dispute should fall under the three categories mentioned in the definition viz: the existence of amount of debt; quality of goods or services; or breach of representation or warranty. The Court held that the definition is inclusive one as it only deals with suits or arbitration proceedings relating any one of the three categories and not any other kind of dispute. So long as there is a real dispute between the parties even though it does not fall under the above three category, it would fall under the inclusive definition of dispute under section 5(6) of the Code. Hence, dispute raised by the debtor regarding breach of an NDA by the operational creditor in respect of the service provided the operational creditor was held to be a dispute within the meaning of the Code.

6.5.*Macquarie Bank Limited Vs. Shilpi Cable Technologies Limited*[254]

In this case, the Supreme Court brought clarity to two crucial issues pertaining to the Code.

The first question was whether, in relation to an operational debt, the provision contained in Section 9(3)(c) of the Code is mandatory. Section 9 (3) (c) requires that while initiating insolvency proceeding under the Code, operational creditor shall submit a certificate from a financial institution maintaining accounts of the operational creditor confirming that there is no payment of the unpaid operational debt by the corporate debtor.

This above requirement has resulted into undue hardship while filing application against operational creditor mainly due to the reason that financial institutions are often hesitant to issue such certificate. The requirement also created an obstacle for foreign creditors to invoke the Code against operational creditors in India, as foreign creditors generally

[254] Civil Appeal No.15135 OF 2017

don’t have bank account in India and certificate from foreign bank does not satisfy the criteria under the Code.

Regarding this issue, the Supreme Court held that the requirement under Section 9 (3) (c) regarding the certificate from the financial institution is not a condition precedent to trigger the insolvency process under the Code but can only be considered as a piece of evidence. The Court went on to add that the important condition precedent to trigger the Code is occurrence of a default, which can be proved by means of other documentary evidence also and not necessary only through certificate from financial institution. The Court also categorically stated that the Code allows foreign operational creditor to invoke the Code despite the fact that such operational creditor may or may not have a bank account in India.

The second issue under consideration was whether lawyer could issue demand notice under the Code on behalf of operational creditor. The issue is significant due to the earlier decisions of lower adjudicating authorities that only a creditor himself or person holding position with the creditor can issue demand notice. Since lawyers often do not hold position with the creditor, this means that he could not issue demand notice. The Court analyzed the provisions of the Code and categorically concluded that not only the creditor and his authorized agent but lawyers are also entitled to issue demand notice under the Code on behalf of creditors.

Due to proactive judicial interpretation of the various issues cropping up in the implementation process the code is developing gradually with each judgment passed. This in turn removes confusion regarding the code and makes the implementation of the code a reality.

CHAPTER-VII

ISSUES AND CHALLENGES TOWARDS IMPLEMENTATION OF INSOLVENCY AND BANKRUPTCY CODE 2016

7.1. ISSUES REGARDING TIME LIMIT:

The SARFAESI Act, under Section 17, empowers debtors to file an appeal against any action taken by creditors with the "Debt Recovery Tribunal"; and the "Debt Recovery Tribunal" is required to decide such applications within 4 months, but till date, as revealed by DRT Bar Association (Delhi), no case has been decided yet in 4 months, it is also highly unlikely that the 2016 code will usher in a new direction.(even earlier law had time limit)

7.2. LOW MINIMUM DEFAULT AMOUNT TO TRIGGER INSOLVENCY:

The "minimum single default" for triggering the insolvency proceedings is merely a sum of Rs. 100,000/-, which is menace, as any employee for non-payment or late payment of salary (temporary turbulence in company's cash-flows) or any small vendor for unexpected nonpayment of dues, will be in a position to trigger insolvency proceedings. In the U.S., three or more creditors can start insolvency proceedings against a company if the company owes them more than USD 12,300.

7.3. TOO MUCH FAITH IN CREDITORS:

According to some experts, there isn't any significant evidence that confirms that, stowing entire faith in creditors will accelerate the recovery process or will improve the chances of efficient restructuring; that is, by axing the equity holders from the entire decision-making process will eventually result them to be more apprehensive and less supportive of viable insolvency resolution mechanism.

7.4. HIGH THRESHOLD AND INADEQUATE PARTICIPATION FOR OPERATIONAL CREDITORS:

The Insolvency and Bankruptcy Code, 2016 is applicable to both corporate and non-corporate persons. According to Section 6 of the Code, where any corporate debtor commits a default, then financial creditor, operational creditor or the corporate debtor by itself, can initiate the "corporate insolvency resolution process" in respect of such corporate debtor. According to the 2016 Code, any creditor i.e financial [255] or operational[256], will be able to start the insolvency resolution process by giving the proof of default. If the adjudicating-agency, that is, the National Company Law Tribunal or the Debt Recovery Tribunal, gives a clean-go ahead then, the entity will be taken over by the 'Committee of Creditors' and 'Insolvency Professionals'. The applicant creditor will prepare a resolution plan and will submit it to the Insolvency Resolution Professional. The plan will then have to be approved by 66% of the creditors (by value) in the Committee of Creditors (operational creditors will not be the part of the committee). There is no certainty that 66% of the creditors will agree to the resolution plan. Thus, as it will not be easy to get 66% creditors on board, much likely, the resolution/revival plan will be in doldrums and there will be eventual rise of litigation. Necessarily, as the operational creditors are denied seat in the Committee of Creditors as per the 2016 Code, thus, the NCLT while reviewing the resolution plan will have to ensure that the operational creditors are treated fairly.

7.5. UNREALISTIC TIMELINES:

The insolvency resolution mechanism has to be completed within 180 days of the takeover by the insolvency professionals; though in some cases 90 additional days can be provided. If the plan provides for action to ensure the "continuation of corporate debtors as a going concern", and the same is accepted by the adjudicating agency, the debtor shall survive, provided it complies with its provisions. If the revival plan is rejected, then the

[255] Financial creditors are those whose relationship with the entity is purely financial, in the form of a loan or a debt security.
[256] Operational creditors include employees, vendors and suppliers of the ailing/defaulting company.

entity will go into liquidation. There is no time limit specified for the liquidation process. Under the U.S. Chapter 11 insolvency resolution process, the resolution plan is initially proposed by the ailing company itself; in the U.S., the law gives the debtor 120 days to file a revival plan. This period of 120 days can be increased or reduced by the court, but in no case can this period exceed 18 months (that is, 1.5 years). If the debtor fails to file a revival plan, within this stipulated period, the task is undertaken by the Committee of Creditors. Taking this into account, with much deliberation it can be said that the period of 180 days/ 270 days provided for by the 2016 Code is highly inadequate. Insolvency Resolution Professional would need considerable time to understand the dynamics of the ailing/defaulting company, its cash-flows, essential financial and operational creditors, before it can chart out an Information Memorandum/Resolution Plan.

7.6. LIMITED SCOPE OF 'FRESH START PROCEEDINGS':

So far as the mechanism of 'fresh start' is concerned, the same is applicable to those individuals whose monthly income is below Rs. 5000/- and the debt amount is not more than Rs.35, 000/-. This amount is so meager that very few individuals will be able to take benefit of this mechanism.

7.7. LACK OF REGULATION OF THE ARCS:

If the value of the loan taken over by the "Asset Reconstruction Company" albeit the defaulting company, is more than 75%, then it will be able to run the company along with the Insolvency Resolution Professional. This area of the mattress is most concerning and is least talked about. There has to be an adequate system in place to keep a check over the functions and modalities of ARCs, given the fact that, as per Section 3(7) of the 2016 Code, the term 'corporate person' shall not include any 'financial service provider' such as banks, insurance companies, mutual funds and ARCs.

7.8 MISINTERPRETATION OF TERMS AND CONDITIONS :

The real challenge lies in ensuring that, the new system is run by judicial experts who see bankruptcy as a commercial problem and not as a legal problem. It will be important to sternly train the judges for the new system, as the 2016 Code has a certain philosophy

behind it, that is, a judge or a lawyer, no matter how well versed he/she is in legal matters, should not decide, whether a business enterprise should survive or evaporate; it is for the creditors to take the call.

7.9 LACK OF SPECIAL PROVISIONS FOR COMPANIES IN STRESSED SECTOR:

There are no special provisions or exemptions provided for the companies in the "stressed sectors". A sector in stress might see multiple insolvency cases; there are no special provisions for these sectors in stress in the 2016 Code.

7.10 NO QUALIFICATION SPECIFIED FOR IRP:

No qualification per se has been specified for the Insolvency Resolution Professionals in the 2016 Code. Looking into their scope of work and the responsibilities they shall be shouldering, an "Insolvency Resolution Professional" is to require skills of a lawyer, a chartered accountant, a management professional, a company secretary and a cost accountant, which by itself not an easy standard to meet. The "Insolvency Resolution Professionals" will carry out the following functions: collection of financial information about the debtor; verification of claims of creditors; formation of committee of creditors; running the business of the debtor; and working out a rescue plan agreeable to both, the creditors and debtors. Given the fact that there function shall be central to the rescue/revival of the business of the drowning enterprise, it is discomfit to see the lack of clarity on who these professionals would be in terms of their qualifications and necessary experience; and whether they would be empowered enough to accomplish the task given to them.

7.11 LACK OF NECESSARY INFRASTRUCTURAL FACILITIES:

Adjudicating authorities under the Insolvency and Bankruptcy Code, 2016 are the DRTs ("Debt Recovery Tribunals") for individuals and partnership firms; and the NCLT ("National Company Law Tribunal") for the companies. The Government has, however, already notified the formation of NCLT and NCLAT ("National Company Law Appellate Tribunal"), which have now become functional with the retired Supreme Court Judge,

Justice S.J. Mukhopadhaya appointed as the Chairperson of NCLAT, and, Justice M.M. Kumar appointed as the President of NCLT. Number of cases pending in the DRTs in India as on March 2013 was 42,819, and as on December, 2015, this figure went up to 69,658. Similarly, numbers of cases pending with the DRATs (Debt Recovery Appellate Tribunals) as on March, 2013 were 3,405 cases. In Delhi, approximately, each presiding officer of the DRT handles 70-80 cases per day. Given the stretched infrastructure and number of pending cases, DRTs will not be very effective.[257] This in turn will have a direct bearing on the question, how far is the 2016 Code effective? Is it too ambitious a legislation which has been floated at a wrong time when already India is facing 'adjudication infrastructure' crises, or, will it be correct to say that there is no right time to do the right thing taking into consideration the low ranking that India suffers from in the Global Ease of Doing Business? Answers to these questions will be revealed over a period of time, once all provisions and rules of the 2016 Code get notified and receive judicial interpretation and withstand the constitutional scrutiny.

7.12 INSOLVENCY FUND FAILS TO PROVIDE INCENTIVES:

Section 224 of the 2016 Code states that a fund, namely, the "Insolvency and Bankruptcy Fund" is to be created for the purposes of insolvency resolution, liquidation and bankruptcy of persons under the 2016 Code, and any person can voluntarily make contributions to the fund and in any event of insolvency proceedings been initiated against such person, such person can withdraw funds not exceeding the amount contributed by him to the fund to make payments to the workmen or for protecting his assets or to meet the incidental costs incurred during the insolvency proceedings and for any other or such other like purpose. However, the moot question is this, that, if a person will get only that which he has contributed to the fund, then why at all a person will make contributions of the fund and not deposit the amount he has in a bank account over which he will earn interest as per the specified rates.

[257] *Insolvency Code to fast-track 75,000 cases pending before debt tribunals*, Business Line (The Hindu), May 6, 2016.

CHAPTER VIII

CONCLUSION

The enactment of "Insolvency and Bankruptcy Code" have ushered a fresh life on the anachronistic and chaotic Insolvency and Bankruptcy laws of India. It has consolidated the bankruptcy and insolvency resolution laws which were spread across broadly 6 statutes, viz. "The Presidency Towns Insolvency Act, 1909" and "The Provisional Insolvency Act, 1920", "Sick Industrial Companies Act, 1985", "Recovery of Debts Due to Banks and Financial Institutions Act, 1993", "The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002", "Companies Act, 2013", which were often overlapping to each other, in to a comprehensive legislation. Further this act contains insolvency resolution provisions relating to both personal and corporate borrowers. A lack of proper bankruptcy and insolvency law negatively affects the credit availability as there is uncertainty among the lenders regarding recovery of the credit. Further this also stops foreign investments from coming into the country. As noted in the preceding chapters the IBC 2016 was enacted with a motive of increasing "foreign direct investment" and for climbing up the ranks in the "Ease of Doing Business Index" since timely insolvency and bankruptcy resolution is an important parameter. Though the code is a well intended piece of legislation but in some aspects it seems over ambitious. The code goes to the extent of amending 11 legislations and makes institutional innovations like "National Company Law Tribunal" (NCLT), "National Company Law Appellate Tribunal" (NCLAT) and the "Insolvency and Bankruptcy Board of India" in spite of the intense dearth of infrastructure. The constitutional powers of the High court and the Supreme Court are rightly left untouched by the IBC, 2016, therefore, a scope remains for DRT and NCLT orders to be brought before the High Court and Supreme Court for challenge even though alternative remedy of appeal lies before the DRAT and the NCLAT, if the court can be satisfied regarding an urgent necessity. Moreover appeals from DRAT and NCLAT are bound to come to the Supreme Court ultimately amplifying the already existing docket explosion in the country. Further the legislature is burdened with the job of amending all the statutes that has been amended by the 11 schedules annexed to the Insolvency and Bankruptcy Code, 2016.

But, all these on one side, it is contemplated that if the Code is implemented successfully it will indeed lead to a positive growth in the credit market, especially the unsecured credit market due to the increased confidence of recovery. Further the Individuals and Corporate by taking calculated risk can endeavor to transform their business or other ideas turn to reality as they will be confident that if by the turn of fate their ideas do not fructify, there is a efficient and effective framework for insolvency resolution if possible or ease of exit if required.

The consistent endeavor and commitment of the government of India have been acknowledgement in the recently published "World Bank Doing Business' Index 2018". The index shows India as one of the top 10 improvers. Albeit there are significant improvements in the insolvency resolution process in India, but the real test will be securing the implementation of the law in its true spirit. Perhaps it will be possible if the laws are systemically reviewed and evaluated over time and practical challenges to its implementation are cured.