INSOLVENCY & BANKRUPTCY CODE: A MAJOR MODE OF N.P.A. RECOVERY

A DISSERTATION TO BE SUBMITTED
IN PARTIAL FULFILMENT OF THE
REQUIREMENT FOR THE AWARD OF
DEGREE OF MASTER OF LAWS

SUBMITTED BY
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CERTIFICATE

This is to certify that the dissertation titled, "Insolvency & Bankruptcy Code: A Major Mode Of N.P.A. Recovery" is the work done by Aakanksha Tiwari under my guidance and supervision for the partial fulfilment of the requirement for the Degree of **Master of Laws** in School of Legal Studies Babu Banarasi Das University, Lucknow, Uttar Pradesh.

I wish her/his success in life.

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Date - **AAKANKSHA TIWARI**

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LIST OF ABBRIEVIATIONS

AA	Adjudicating Authority.
AAIFR	Appellate Authority For Industrial & Financial Reconstruction.
AIR	All India Reporter.
AM/NS India	Arcelor Mittal Nippon Steel India.
AR	Authorised Representative.
ARC	Asset Reconstruction Corporation/Company.
BIFR	Board For Industrial & Financial Reconstruction.
BLRC	Bankruptcy Legislative Reforms Committee.
CCI	Competition Commission Of India.
CDR	Corporate Debt Restructuring.
CIRP	Corporate Insolvency Resolution Process.
Co.	Company.
CoC	Committee Of Creditors.
COPRA	Consumer Protection Act.
CRISIL	Credit Rating Information Services Of India Limited.
DB	Doing Business.
DIP	Debtor In Possession.
DRAT	Debt Recovery Appellate Tribunal.
DRT	Debt Recovery Tribunal.
e.g.	exempli gratia.
EODB	Ease Of Doing Business.
EU	European Union.
FI	Financial Institutions.
GNPA's	Gross Non-Performing Assets.
GOI	Government Of India.
i.e.	id est (that is).
IBBI	Insolvency & Bankruptcy Board Of India.
IBC	Insolvency & Bankruptcy Code.

IDRA	Industrial Development & Regulation Act.
INR	Indian Rupees.
InSO	German Insolvency Code.
IP's	Insolvency Professionals.
IPA's	Insolvency Professional Agencies.
IPE's	Insolvency Professional Entities.
IRP	Insolvency Resolution Professional.
IRP	Interim Resolution Professional.
IU's	Information Utilities.
JLF	Joint Lenders Forum.
JPC	Joint Parliamentary Committee.
LLP	Limited Liability Partnership.
LTD.	Limited.
NCLAT	National Company Law Appellate Tribunal.
NCLT	National Company Law Tribunal.
No.	Number.
NPA	Non-Performing Assets.
PSB's	Public Sector Banks.
QFC	Qualifying Floating Charges.
RBI	Reserve Bank Of India.
RDDBFI	Recovery Of Debts Due To Banks & Financial Institutions.
Rs.	Rupees.
S4A	Scheme For Sustainable Structuring For Stressed Assets.
SARFAESI	Securitization & Reconstruction Of Financial Assets & Enforcement Of Security Interest.
SBI	State Bank Of India.
SC	Supreme Court.
SCB's	Scheduled Commercial Banks.
SCC	Supreme Court Cases.
SDR	Strategic Debt Restructuring.
Sec	Section.
SIC	Sick Industrial Company.

SICA	Sick Industrial Companies Act.
U.K.	United Kingdom
U.S.	United States.
U/S	Under Section.
UNCITRAL	United Nations Commission On International Trade Law.
UOI	Union Of India.
Vs.	Versus.

EXECUTIVE SUMMARY

Chapter 1 : Introduction.

A brief introduction of the Insolvency and Bankruptcy Code, defining the terms Insolvency and Bankruptcy along with examples for a better understanding and also bringing out the differences between the two. Lastly listing down the aims/objectives of the study.

Chapter 2 : Need Of Enacting Insolvency & Bankruptcy Laws.

A brief introduction of numerous organisations and multiple legislations prior to the enforcement of this Code, that dealt with issues connected to debt, defaults, and insolvencies and as to how the resolution of insolvencies was sometimes delayed, complicated, and expensive. Further the history and evolution of Insolvency and Bankruptcy Laws in India has been discussed and also the legislations that were repealed and amended.

Chapter 3 : Insolvency & Bankruptcy Laws In Other Countries.

How the Indian IBC 2016 compares to other insolvency rules is one of the most frequent queries. Since international insolvency and bankruptcy laws have been around for a while and have dealt with a wide range of situations, a closer look at their rules might offer more clarity. To add on, insolvency framework of other countries i.e. Japan, UK, US and Germany has been mentioned and a Cross Country Comparison among them, lastly by concluding the chapter.

Chapter 4 : Insolvency & Bankruptcy Law In India.

The Insolvency and Bankruptcy Code, 2016 (IBC) establishes a unified framework for the regulation of insolvency and bankruptcy processes for businesses, partnership entities, and private individuals. This chapter includes its enactment and applicability in the introduction and there on mentioning the major provisions of the act along with all the amendments made from 2016 till date thereafter concluding it by laying down the effective mechanism under the code.

Chapter 5 : Effectiveness Of IBC In NPA Recovery.

In the preceding chapters, the intent behind the implementation of the Insolvency and Bankruptcy Code of 2016 was discussed; in this chapter, how IBC has changed the bank's NPA recovery procedure has been mentioned – starting by giving a brief history of Non Performing Assets Classification and then moving on to the Impact of IBC in NPA Recovery and to support the same various reports have been cited, furthermore the shortcomings of IBC has also been laid down. Later, the status of the 12 large default cases along with their current updates have been mentioned – thereby concluding how IBC is effective in NPA recovery.

Conclusion & Suggestions.

As the name suggests it is Conclusion of the overall research, moreover a small survey in 3 banks regarding IBC and its effectiveness in recovery of NPA was done whose analysis report has been attached finally concluding it with findings.

CHAPTER – 1

INTRODUCTION

CHAPTER: 1 – INTRODUCTION

The IBC or the Insolvency & Bankruptcy Code 2016, was passed to address the alarming flaws in the country's disparate insolvency laws and unify them, is positioned to face a massive task and great expectations. According to the data from the World Bank in 2016, the average time for India to resolve an insolvency case was 4.3 years, compared to 1 year, 1.5 years and 2 years for the United Kingdom, USA, and South Africa respectively. In terms of how easy it is to resolve insolvency, India was ranked 135th out of 190 nations in the 2015 World Bank Ease of Doing Business Index. Thus, it is clear that the Code is possibly one of the most important laws passed in recent years that has an impact on easy it is to do business in India.

As every aspect of the law's implementation has the potential to significantly affect how easy it is to do business (Ease Of Doing Business) in India, economists, lawyers, businesspeople, and investors are closely following the Insolvency and Bankruptcy Code 2016, which was passed to fundamentally alter the way insolvency is resolved in India.

It is a comprehensive Code enacted as the Preamble states,

“to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto”.

However, it is important to understand that the IBC i.e. the Insolvency & Bankruptcy Code deals with provisions that lay down the process as what is to be done in case of both insolvency as well as bankruptcy, it is vital to know that both the terms are different from each other and have different meanings.

INSOLVENCY VERSUS BANKRUPTCY

Insolvency

A state of being financially insolvent is termed as insolvency. When one files for bankruptcy, that person is declaring insolvency because he/she is unable to make debt payments when they are due. Insolvency can relate to either a person or a business, but businesses are the ones most frequently mentioned when the phrase is used.

A business can become insolvent in one of two ways, or both at the same time:

• Cashflow insolvency: When one has illiquid assets but not enough readily available cash to pay off his debt.

• Insolvency on the balance sheet: When a company's obligations exceed its total assets (liquid and illiquid).

Examples Of Insolvency

• A cash flow issue, such as when one spends too much or discovers that clients are paying late

• Loss of a business: A major client switches suppliers.

• Loss of customers: As requirements and markets change, one’s clients may switch to a different product or stop using the services.

Insolvency can also result from unforeseen and unaccounted-for expenses like legal fees. If a company is sued, it would have to pay out a lot of money in damages, which may bankrupt it if it didn't have the right insurance.

Bankruptcy

A company files for bankruptcy when it is unable to pay its creditors or honour its financial commitments. All of the company's outstanding debts are calculated and paid off, if not entirely, from the company's assets, according to a petition that has been filed with the court. Bankruptcy is a legal procedure.

A legal action performed by the corporation to release itself from debt commitments is filing for bankruptcy. Owners are absolved of any debts that are not fully paid to creditors. The process for filing for bankruptcy differs by nation.

If one declares bankruptcy in India, it would likely negatively affect his credit rating, making it more difficult for him to obtain a new loan if he wants to start over. He however would avoid any financial difficulties.

Example Of Bankruptcy

The Essar group, founded in 1969 and owned by the Ruia family, included Essar Steel. The corporation was originally caught in a debt cycle in 2002, when a debt of Rs. 2,800 crore required corporate debt restructuring. Fortunately for Essar, the business survived and resumed operations by 2006.

Essar took on its ambitious growth objectives once more. Sadly, delays in environmental permissions and the lack of natural gas prevented these plans from moving forward. By 2015, Essar had fallen into a debt trap once more, only this time it cost Rs 42,000 crore.

The Essar was included on the RBI's list of 12 stressed accounts that would need to go through bankruptcy proceedings in order to comply with the IBC in June 2017. The company was then brought under the National Company Law Tribunal (NCLT). Essar Steel was put up for auction, and ArcelorMittal and Nippon Steel of Japan ultimately bought it together

ArcelorMittal Nippon Steel India (AM/NS India) is the new name of the organisation. Company's rescue attempts were thwarted by falling commodities prices.

Difference Between Insolvency & Bankruptcy

• Insolvency is a state of financial trouble, whereas bankruptcy is a legal procedure or court order.

• Filing for bankruptcy isn't one's sole option if he/she is insolvent.

• Only individuals and single proprietors with unlimited liability are eligible for bankruptcy. Both businesses and people can become insolvent.

Research Problem:

This research intends to answer the questions which are mentioned as follows:

1. What is Insolvency & Bankruptcy and how are they different from each other?
2. What were the previous legislations through which insolvency and bankruptcy were governed?
3. What are the legislations related to Insolvency & Bankruptcy around the world?
4. What are the key features of IBC, 2016?
5. How is IBC a major mode of N.P.A. Recovery?

Objectives:

This study aims to study the Insolvency and Bankruptcy Code 2016 and to evaluate its effectiveness as a mode of NPA recovery. The study, inter alia, aims to cover the following points:

1. To evaluate the DRT, SARFAESI ACTS, and other legislation' issues;
2. To research about Insolvency & Bankruptcy Laws in Developed Countries;
3. To determine whether the 2016 Insolvency and Bankruptcy Code should be implemented;
4. To assess how the IBC rule has affected the banks' ability to recover from NPAs.
5. To assess the state of India's banks' recovery from NPAs.

Research Hypothesis:

The present study has the following hypothesis:

- Earlier laws governing Insolvency & Bankruptcy were ambiguous in nature which led to confusion resulting in delay of the settlement.
- Insolvency & Bankruptcy laws around the world in countries having lower rates of N.P.As.
- Is the I.B.C. exhaustive in nature.
- I.B.C. acting as a major mode of N.P.A. Recovery.

METHODOLOGY:

The present Dissertation is aimed at carefully analysing the methods of recoveries for N.P.A. The research methodology adopted for the purpose of present work is **partially empirical and partially doctrinal**.

The researcher framed a questionnaire and collected responses from various banks and analysed them. The researcher has also been inspired by her own practical experiences that she has gained during her research process and at the time of internship at R.B.I. The researcher has closely studied the phenomena relating to loans and as to how the loans turn into bad loans becoming N.P.A. The researcher has also closely studied as to how those N.P.A's are recovered.

The researcher has also studied the reaction of the judiciary of the country to such cases. Both primary and secondary sources have been utilized during the course of present research. Various statutes have been studied. Support has also been drawn from numerous precedents and case laws to derive propositions concerning the issues at hand. The researcher has inculcated and discussed in this work, various significant decisions of numerous forums that have added certainty to the law relating to subject. It is undeniable that the practice of law is becoming increasingly more reliant on electronic sources of information and keeping in mind the contemporariness of the subject of deliberation in the present work, the researcher has made appropriate use of these resources as well. Thereafter, the historical method has been deployed to understand the evolution of law governing to Insolvency & Bankruptcy.

All the laws that were used prior to IBC has also been mentioned and a brief of cross-country comparison has also been done. Further moving on the important provisions of the act have also been mentioned. Moreover, it has also been analysed as to how IBC plays a major role in recovering NPA's and then concluding by suggestions.

CHAPTER – 2

NEED OF ENACTING INSOLVENCY & BANKRUPTCY LAWS

CHAPTER: 2 – EVOLUTION OF INSOLVENCY & BANKRUPTCY LAWS

2.1 INTRODUCTION

Prior to the enforcement of this Code, there were numerous organisations and various acts that dealt with issues connected to debt, defaults, and insolvencies. As a result, the resolution of insolvencies was sometimes delayed, complicated, and expensive. The Legislature was of the opinion that the current framework for insolvency and bankruptcy always resulted in inadequate and ineffective results with unnecessary delays in resolution of the matters relating to insolvency after taking the process involved in insolvency resolution into consideration. Because of this, the government adopted a number of changes, including this code, emphasising the ease of doing business in India. The phrase "ease of doing business" refers to more than just quick entrance and smooth company operations.

Before the IBC, there were a number of dispersed bankruptcy and insolvency laws. India's bankruptcy law, the Insolvency and Bankruptcy Code, 2016 (IBC), aims to unify the existing framework by establishing a single statute for insolvency and bankruptcy.

The Insolvency & Bankruptcy Code was created with the goal of consolidating regulations relating to value maximisation, prompt resolution, and insolvency resolution. Apart from the topic of recovery, the data on insolvency resolution demonstrate that the statute still has a lot to accomplish.

According to the data pertaining to IBC only 1604 of the 3774 petitions made for insolvency resolution have resulted in cases being settled. It is more concerning to note that, of all the cases that have been settled, 58.9% of them result in a settlement. The question of "why was IBC enacted in the first place?" must be considered in light of the material previously provided. What is the current scenario of resolution under the code and how is it different from previous legislations? Has it been able to achieve the goals set forth in it?

2.2 HISTORY

Any capitalist system must have bankruptcy rules. They serve as the framework for the orderly termination or restructuring of a variety of company structures, including sole proprietorships, partnerships, and limited liability companies. Therefore, from an economic standpoint, bankruptcy laws enable effective re-allocation of capital trapped in a failing enterprise. Any bankruptcy procedure will inevitably have distributional effects because bankruptcy laws require juggling the competing interests of numerous parties, including banks, suppliers, employees, operational creditors, bondholders, and the government. As a result, bankruptcy rules are responsive to both political and economic pressures.

Because of this, it is important to consider the socioeconomic (demand for law) and political (supply of law) conditions in which bankruptcy laws were developed in order to accurately trace their historical development. In that regard, the 25-year post-reform period beginning in 1993, or the history of bankruptcy and insolvency legislation, has been explored.

But it should be noted that the long history of similar laws in India goes back far further than 1993.

Hishikar et al. (2019) have argued that laws on debt recovery or bankruptcy had a history of 2000 years of evolution in India. Their work has tried to correct the perception that India had no bankruptcy laws before British efforts in the late 1800s and early 1900s. They argued that many of modern principles of bankruptcy can be found in ***Smriti*** **traditions of India**.

However, during the Muslim and British eras, respectively, this lengthy and rich history experienced two exogenous shocks. Unlike the Muslim era, which had no legal transplants, the British era saw widespread adoption of common law practices.

The procedures for insolvency and bankruptcy were deeply rooted in common law traditions by the time the British withdrew in 1947. After Independence, discussions on the function of the private sector in a system of socially regulated industrialization influenced the development of bankruptcy and insolvency laws. Since the State owned all significant means of production and distribution under socialism, bankruptcy was often disregarded. Insolvency would not be seen as a legal issue in a planned economy since the majority of trading risks are excluded.

As a result, personal insolvency laws largely remained unchanged. The bankruptcy/winding-up provisions of company laws were not influenced by economic compulsions of socialism and followed the same path during the colonial period as evident from recommendations of the **Bhabha Committee, 1952**. However, in practice, the thrust of legislative wisdom was to experiment with debt recovery laws rather than bankruptcy laws.

The legal framework for dealing with corporate insolvency and bankruptcy in India immediately after Independence consisted of only two major laws: **Industrial Development and Regulation Act, 1951** and the **Companies Act, 1956**. Under both the laws, matters concerning insolvency and bankruptcy were assigned to the high courts. The procedures under these laws were plagued by many issues such as lack of time frame for completion of proceedings or to prescribe an insolvency cost, lack of competency in official liquidator, limited information about the organization or its business and technology. Creditor's recourse to the liquidation of an insolvent company was nearly missing.

The Fourth and Fifth Plan phase (i.e., 1965–1975) was a period of acute industrial stagnation. The mounting unpaid loans with banks prompted the passage of **Sick Industrial Companies Act, 1985 (SICA).** SICA created the Board for Industrial and Financial Reconstruction, and the first-time matters relating to insolvency and bankruptcy were diverted away from the high courts. SICA was preventive legislation with first preference for restructuring rather than winding up. SICA had several shortcomings–notably the abuse of **Section 22** which allowed companies to seek a bar on proceedings for execution, arbitration, recovery suits, enforcement of security interest, etc. The recovery rate under SICA as per the Eradi Committee was only 19 per cent.

Debt Recovery Laws In The Post-Reform Period

Three factors led to the post-reform period's legislative measures to recover debts from failed businesses: the 1993 balance of payments crisis, the Narasimham Committee- suggestion's for extensive financial sector reforms, and the failures of the past as outlined above (1991). These initiatives can also be divided into two groups: those made by the Reserve Bank of India and those made by the Government of India. To hasten the collection process, the government passed the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBFI). Debt Recovery Tribunals (DRTs) were established as a result of this Act. At first, the system ran smoothly. However, eventually DRTs would become overworked by the sheer volume of

open cases. There were around 93000 cases outstanding before all DRTs nationwide at the end of 2016.

Under the previous rules, the World Bank reports that it took 4.3 years on average in India to resolve insolvency, almost twice as long as it was in China.

To protect the interests of secured creditors, the government passed the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, 2002) within ten years. The establishment of asset reconstruction corporations (ARCs) in India was made possible by the SARFAESI Act.

On the other hand, the RBI established the Corporate Debt Restructuring (CDR) mechanism in August 2001 to allow debt restructuring without the necessity for an asset quality downgrade if certain requirements were met. The basic justification for CDR was that restructuring plans were necessary since the nation lacked a competent bankruptcy law. In essence, the schemes established a structure for a settlement that would typically take place under the auspices of an insolvency and bankruptcy law.

The CDR mechanism initially performed effectively. Later, it was utilised less for the effective resolution of stressed assets and more as a strategy for avoiding the acknowledgment of their non-performance. Therefore, with effect from 1 April 2015, the RBI revoked the forbearance on asset classification in May 2013. However, the RBI permitted asset classification benefits for some kinds of restructuring programmes in response to the rising non-performing assets (NPAs). These included the Strategic Debt Restructuring, the Scheme for Sustainable Structuring of Stressed Assets, and flexible project loan structuring.

Restructuring	**CDR, SDR, JLF, S4A**	**Onus on banks to restructure the advances with or without change in ownership**	▪ **Time Consuming** ▪ **Issues in Consensus Building** ▪ **Difficulty in arriving at Fair Value** ▪ **Suit prone and investigation prone**

As a result, 60 years after the declaration of independence, no comprehensive framework or plan to deal with insolvency and bankruptcy proceedings has been developed. The majority of the prior acts and/or plans dealt with business recovery and/or restructuring, therefore it might be said that the socialist legacy of bankruptcy and debt recovery legislation was well-entrenched during the reform phase.

2.3 REPEALED LEGISLATIONS

Prior to IBC

"Prior to the enactment of the IBC, there were multifarious statutes including the aspects of debt or insolvency resolution" among which some of them are however now repealed and the rest have been amended, such previous legislations are discussed as follows:-

The first insolvency court was established in the Presidency-Towns in 1828. These courts were essentially intended to aid Insolvent Debtors. They served as both individual and record-keeping courts. Any person who is dissatisfied with the decision made by the aforementioned court may appeal or proceed to the Supreme Court, which is thought of as being above all. The Supreme Court established the power to hear collections and transfers of these kinds of demands, defining them as reasonable, fair, and identical requests that must be postponed through the legal system for the benefit of the insolvent or the borrower. The Supreme Court placed its trust in the insolvency court staff. One of these officials was thought to be a "regular appointment." The property interest of the obligated was handed to the straightforward chosen one by the uprightness of the request in the event that an appeal for mediation was begun or originated by one lender and also an order for arbitration was made. Further agreement was reached about the break guarantee orders.

Indian Insolvency Act, 1848

The previous permits were cancelled and a new law known as the Indian Insolvency Act, 11 and 12 Vict. c. 21, was adopted in the year 1848. The Act specifically referred to all merchants and non-brokers when storing the requirements. By means of this Act, the Courts established by the Act of 1828 exclusively for the relief of insolvent debtors were to be relocated, but only under the continued supervision of Supreme Court judges.

Administration Towns Insolvency Act, 1909

The Indian Insolvency Act of 1848 was chosen, or perhaps we should say nominated, to develop a distinct legislation based on English Bankruptcy Acts because it was thought, in advance of agenda in the twentieth century, that it had proven to be archaic. The same Act, the Act of 1848, was perceived as being worthless or so-called voided, and as a result, a second,

independent Act, the Presidency-Towns Insolvency Act, which took into account the Bankruptcy demonstration of 1883 and the Bankruptcy Act of 1890, was adopted in 1909. The Indian Insolvency Act, like everything else, had defects of its own. One of the primary and significant shortcomings was that the Act mostly benefited debtors at the expense of lenders. The legal assignee's troops were quite restrained. He didn't have the strength to think through the measures, simply bring the assets together. The courts were granted a lot of power through the new Act to push for the disclosure of the debt-related property. In accordance with Section 79, the official trustee must look into the bankruptcy case, examine it, and respond to any requests for release by informing the court whether there is reason to believe that the debtor who was discharged had committed any of the crimes listed in Sections 421 to 424 of the Indian Penal Code that would prevent, impede, or restrict the court's ability to act.

Since various laws were in effect before the Insolvency & Bankruptcy Code was passed in 2016 but later repealed or altered, there is a reason the IBC is a code rather than an act: it contains all the provisions relevant to insolvency and bankruptcy.

- **Sick Industrial Companies (special provision) Act, 1985 ("SICA")**

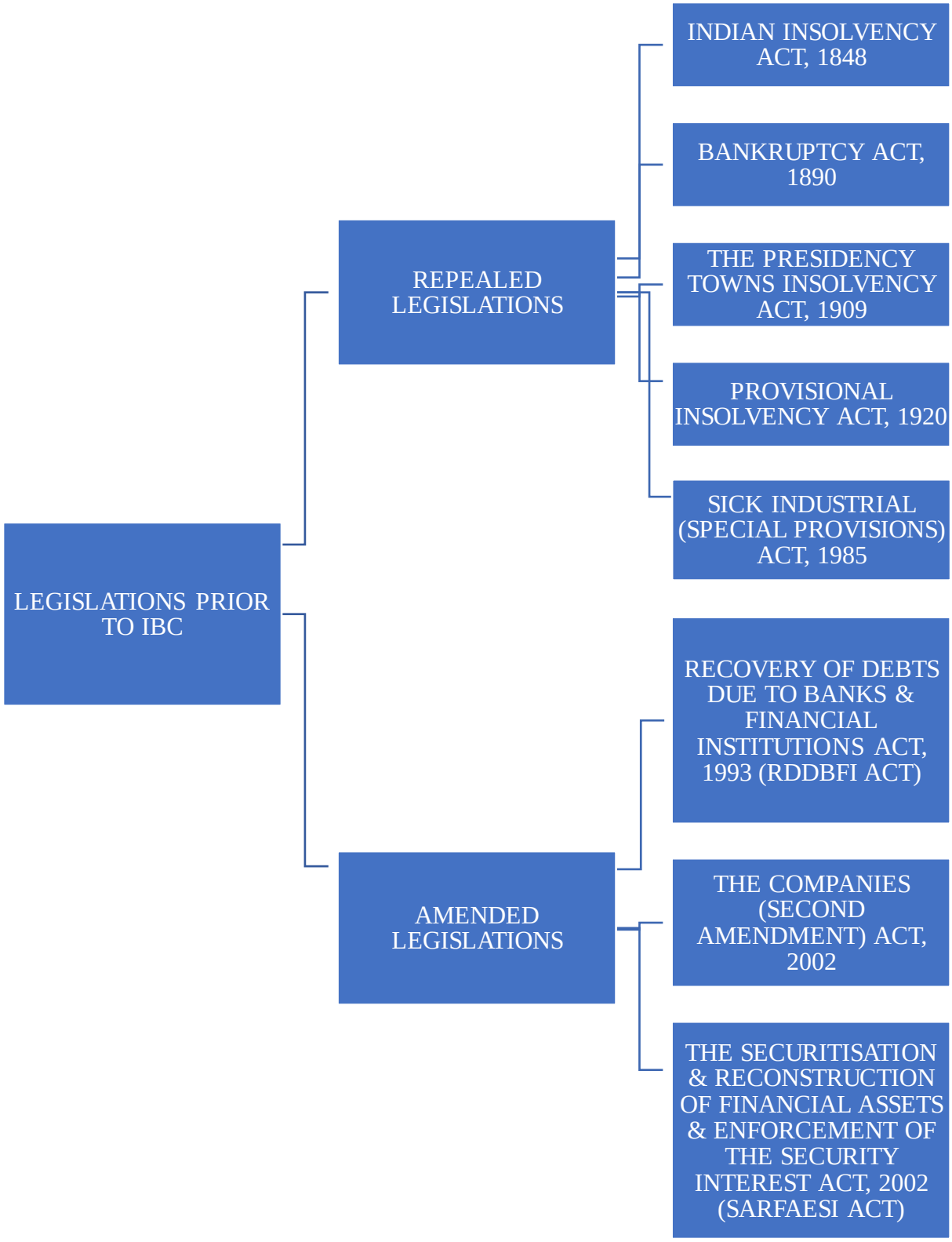
SICA was established to monitor ailing and potentially ailing businesses and to implement corrective measures for the revival or closure of failing businesses. In accordance with SICA's requirements, the debtor company submitted the application directly to the SICA's adjudicating body, the Board of Industrial & Financial Reconstruction (B.I.F.R.). This led to an anomaly because the ill company held the power to decide whether to file an application and control over the firm's assets throughout the act's proceedings. As a result, businesses frequently used it improperly.

The debtor corporation blatantly abused SICA by filing a reference with BIFR to request an automatic stay against creditors' collection efforts. The hospice's moratorium served as an effective cover for the promoter, allowing him to happily carry on with his/her business as usual while further bankrupting the firm or robbing it of its assets. Instead of offering real rehabilitation and restructuring, SICA protected the debtor company from creditor enforcement. While there aren't any complete statistics for the full existence of SICA, in the first fifteen or so years, or from Dec. 2000 to then, BIFR had registered 3,296 instances, of which it had only approved rehab programmes for 557 units, or slightly over 17%.

The Provisions Act of 1985, often known as SICA, was passed in response to the unhealthy industrial climate that dominated the nation in the 1980s.

SICA's primary goals are to identify disease, speed up the revival of possibly viable units, and close down nonviable units (Units herein refers to a Sick Industrial Company). The SICA, 1985 was passed with the intention of ensuring the prompt identification of ill and potentially ill industrial undertaking-owning companies, as well as the prompt determination by a body of experts of the preventive, remedial, and other measures that must be taken with respect to such companies.

The Board for Industrial and Financial Reconstruction (BIFR), an expert board, was established in January 1987 and became operational on May 15, 1987. AAIFR was established in April 1987 as the Appellate Authority For Industrial And Financial Reconstructions. The SICA's main drawback was that it only applied to ill industrial companies, excluding those engaged in trading, service, or other businesses. However, due to a number of circumstances, including SICA's inapplicability to small/ancillary businesses and non-industrial organisations, the whole experience was not pleasant.


LEGISLATIONS PRIOR TO IBC
REPEALED LEGISLATIONS
INDIAN INSOLVENCY ACT, 1848
BANKRUPTCY ACT, 1890
THE PRESIDENCY TOWNS INSOLVENCY ACT, 1909
PROVISIONAL INSOLVENCY ACT, 1920
SICK INDUSTRIAL (SPECIAL PROVISIONS) ACT, 1985
AMENDED LEGISLATIONS
RECOVERY OF DEBTS DUE TO BANKS & FINANCIAL INSTITUTIONS ACT, 1993 (RDDBFI ACT)
THE COMPANIES (SECOND AMENDMENT) ACT, 2002
THE SECURITISATION & RECONSTRUCTION OF FINANCIAL ASSETS & ENFORCEMENT OF THE SECURITY INTEREST ACT, 2002 (SARFAESI ACT)

2.4 AMENDED LEGISLATIONS

- **The Companies (Second Amendment), Act 2002**

Pursuant to the Companies (Second Amendment) Act, 2002, the tribunal named as National Company Law Tribunal (NCLT) was formed, which was to further exercise the powers of BIFR. Though such changes were never enforced and it took 12 years for the functioning of NCLT to start.

SECTION 2 Amendment of section 2.- In section 2 of the Companies Act, 1956 (1 of 1956) (hereinafter referred to as the principal Act)-

(a) after clause (1A), the following clause shall be inserted, namely :- (1B) "Appellate Tribunal" means the National Company Law Appellate Tribunal constituted under sub-section (1) of section 10FR;';

(g) after clause (49), the following clause shall be inserted, namely :- ' (49A)" Tribunal" means the National Company Law Tribunal constituted under sub- section (1) of section 10FB;'.

SECTION 5. Insertion of new section 10FA- After section 10F of the principal Act, the following section shall be inserted, namely :- " 10FA. Dissolution of Company Law Board- (1) On and from the commencement of the Companies (Second Amendment) Act, 2002, the Board of Company Law Administration constituted under sub- section (1) of section 10E shall stand dissolved.

(3) All matters or proceedings or cases pending before the Company Law Board on or before the constitution of the Tribunal under section 10FB, shall, on such constitution, stand transferred to the National Company Law Tribunal and the said Tribunal shall dispose of such cases in accordance with the provisions of this Act.".

SECTION 6. Insertion of new Parts IB and IC.- After Part IA of the principal Act, the following Parts shall be inserted, namely:-' PART IB NATIONAL COMPANY LAW TRIBUNAL

10FB. Constitution of National Company Law Tribunal.- The Central Government shall, by notification in the Official Gazette, constitute a Tribunal to be known as the National Company Law Tribunal to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force.

10FR. Constitution of Appellate Tribunal.-

(1) The Central Government shall, by notification in the Official Gazette, constitute with effect from such date as may be specified therein, an Appellate Tribunal to be called the" National Company Law Appellate Tribunal" consisting of a Chairperson and not more than two Members, to be appointed by that Government, for hearing appeals against the orders of the Tribunal under this Act.

(2) The Chairperson of the Appellate Tribunal shall be a person who has been a Judge of the Supreme Court or the Chief Justice of a High Court.

(3) A Member of the Appellate Tribunal shall be a person of ability, integrity and standing having special knowledge of, and professional experience of not less than twenty- five years in, science, technology, economics, banking, industry, law, matters relating to labour, industrial finance, industrial management, industrial reconstruction, administration, investment, accountancy, marketing or any other matter, the special knowledge of, or professional experience in which, would be in the opinion of the Central Government useful to the Appellate Tribunal.

- **Recovery of Debts due to Banks and Financial Institutions Act, 1993 ("RDDBFI Act")**

  Transactions involving intangible assets, conditional sales, and financial leasing were added to the definition of property and security interest.

  Asset reconstruction firms and debenture trustees were included to the definitions of "financial institutions" and "secured creditors."

  The DRT Act was modified to include obligations related to debt securities and security interests.

  You may appeal a DRT order before the DRAT with a 50% pre-deposit as opposed to a 75% first payment.

It is proposed that the DRT Act's presiding officer also serve as an adjudicating authority under the 2016 Insolvency and Bankruptcy Code.

The DRAT Chair will also serve as the Insolvency Code's Appellate Authority. The Act's primary goal is to create Tribunals for the swift adjudication and collection of debts owed to banks and financial institutions. Act now applies to all of India.

Debt Recovery Tribunal

According to **Section 3**, a Debt Recovery Tribunal (DRT) shall be established by notification from the Central Government for the purpose of carrying out the jurisdiction, powers, and authority granted to such tribunal under the RDDBFI Act. In the year 1994, the first DRT was constructed in Kolkata. There are currently 33 DRTs operating across India, and 6 more DRTs are also being established. According to **section 4**, the DRT only has one member, the Presiding Officer. According to **Section 5**, a person who has served as a district judge or is eligible to do so may be appointed to the position of DRT's presiding officer. According to **Section 6**, the Presiding Office's tenure end five years from the appointment date, and the incumbent is eligible for reappointment as long as he is under the age of sixty-five.

Debt Recovery Appellate Tribunal

The establishment, qualification, and tenure of the Chair Person of the Debt Recovery Appellate Tribunal are covered in **Sections 8 to 11**. (DRAT). DRAT was created to carry out the control and authority granted under the RDDBFI Act. DRAT only has one member, who will be the chairperson. A person who has served as or is qualified to serve as a High Court judge, who has been a member of the Indian Legal Services and held a Grade 1 post as such member for at least three years, or who has served as the Presiding Officer of the Tribunal for at least three years is eligible to become a chairperson. The DRAT Chairperson can serve in that capacity for a term of five years and is eligible for reappointment as long as he is under the age of 70. There are five DRATs in India at the moment, located in Delhi, Chennai, Mumbai, Allahabad, and Kolkata. DRAT has appellate and administrative authority over DRTs.

Who can recover money from DRT under RDDBFI Act

Section 1(4) of the RDDBFI Act states that the provisions do not apply in cases where the debt owed to a bank, financial institution, or group of banks and financial institutions is

less than Rupees ten lakh or any other amount not less than Rupees one lakh, as specified by the central government in a notification. The minimum debt that must be recovered from DRT should thus, in essence, not be less than Rupees ten lakh. If an asset is designated as a non-performing asset (NPA) under the SARFAESI Act, qualified banks and financial institutions can recover any leftover funds that are over Rupees One Lakh under the RDDBFI Act after enforcing security.

What type of debt can be recovered under the RDDBFI Act

According to **section 2(g),** a debt is any obligation, including interest, that a bank, financial institution, or group of such institutions asserts it is owed by a person. Any obligation to pay under a court order, arbitration decision, or mortgage may be secured, unsecured, or assignable. Such a liability must exist and be legally recoverable on the application date.

The obligation to pay debt securities that have not been fully or partially repaid after receiving notice of ninety days from the debenture trustees or another authority in whose favour a security interest has been created for the benefit of the holder of the debt security is also included in the obligation to pay debt securities. Debt securities are described as securities listed in compliance with SEBI regulations under the Securities and Exchange Board of India Act, 1992, according to **clause 2(ga).**

Jurisdiction, Powers, and Authority of DRT and DRAT

The DRT is given jurisdiction, power, and authority under section 17 of the RDDBFI Act to consider and make decisions regarding requests from banks and financial institutions to recover debts owed to those institutions. Additionally, section 17A grants DRAT appellate jurisdiction as well as general supervision and control powers. A case may be transferred from one DRT to another DRT through DRAT. Additionally, DRAT has the authority to request information from DRT regarding active and closed cases. Additionally, DRAT has the authority to call a meeting of the presiding officers. Additionally, it has the authority to investigate the Presiding Officer and advise the Central Government on the best course of action. Except for the High Court and Supreme Court while they are exercising their writ jurisdiction under Articles 226 and 227 of the Constitution of India, Section 18 prohibits the jurisdiction of any civil court or authority for the recovery of debt. Thus, in essence, the High Court or Supreme Court's writ jurisdiction allows for the challenging of the DRAT order.

The massive volume of NPAs pertaining to banks and financial institutions was the reason the RDDBFI Act was passed. Tribunals created in accordance with the Act have the authority to rule as a quasi-judicial body. The Act's main components are the criminal penalties against the Defendants and the sale of the Defendants' Movable and Immovable Property.

Chapter V of the act – comprising of 6 sections i.e. Sec 25-30 lays down provisions for Recovery of Debt Determined by Tribunals –

Sec 25 – Modes of recovery of debts

Sec 26 – Validity of certificate and amendment thereof

Sec 27 – Stay of proceedings under certificate and amendment or withdrawal thereof

Sec 28 – Other modes of recovery

Sec 29 – Application of certain provisions of Income-tax Act

Sec 30 – Orders of Recovery Officer to be deemed as orders of Tribunal.

While Chapter IV of the act – comprising of 6 sections i.e. Sec 19-24 lays down provisions for Procedure of Tribunals –

Sec 19 – Application to the Tribunal

Sec 20 – Appeal to the Appellate Tribunal

Sec 21 – Deposit of amount of debt due, on filing appeal

Sec 22 – Procedure and powers of the Tribunal and the Appellate Tribunal

Sec 23 – Right to legal representation and Presenting Officers

Sec 24 – Limitation.

In U.P and Uttarakhand vs. Allahabad Bank and others[1] (reported in 2013 4 SCC 381) it was held that RDDBFI Act has precedence over the Companies Act, 1956. The Companies Court has no jurisdiction to set aside the order of Recovery Officer under the RDDBFI Act.

- **The Securitization and Reconstruction of Financial Assets and Enforcement of the Security Interest Act, 2002 (SARFAESI Act)**

The SARFAESI Act was passed in order to recover securitized loans using particularly novel methods, such as auctioning off the defaulters' personal and business belongings. The RBI is responsible for enforcing the Act's regulations. In contrast to the SICA Act and RDDBFI Act, the SARFAESI Act operates under an inquisitorial system where creditors have considerable control over the operation of the firm as well as the securitized assets.

However, the major drawbacks under the Act are the low recovery rates and clash of jurisdiction with other statutes.

The SARFAESI Act was enacted with the intention of allowing banks and other financial institutions (FIs) to recuperate on NPAs without the intervention of a court. The non-performing assets are defined under Section 2(1) of the Act.

The SARFAESI Act's secondary goal is to enable the enforcement of security interests, which means seizing possession of the assets pledged as loan collateral. The Act's Section 13 provides specific guidelines for how a lender (also known as a "secured creditor") may take possession of the borrower's security.

Methods for recovery under the SARFAESI Act

According to the SARFAESI Act of 2002, the RBI is in charge of regulating and registering enterprises that engage in securitization or reconstruction. These companies are authorised to raise funds by offering security receipts to a suitable institutional buyer. In order to assume management in the case of a failure, this has given banks and other financial institutions the power to seize ownership of securities that were issued in exchange for financial support and sell or lease them. The SARFAESI Act outlines the following two fundamental methods for recovering non-performing assets:

[1] **reported in 2013 4 SCC 381**

- Asset reconstruction: The SARFAESI Act gave rise to the asset reconstruction sector in India. According to the Act's Section 2(1)(b), it is defined. It can be done through the proper management of the borrower's company, acquisition of the company, sale of all or a portion of the company, rescheduling of debt payments due from the borrower, or the enforcement of a security interest in accordance with the terms of this Act.
- Securitization: Securitization is the process of producing marketable securities backed by a pool of prospective assets, such as auto or mortgage loans. It is outlined in Section 2(1)(z) of the Act that once an asset has been transformed into a marketable security, it is sold. A company that specialises in securitization or reconstruction can get cash from only QIB by creating schemes for acquiring financial assets (Qualified Institutional Buyers).

Offences and penalties under the SARFAESI Act

The following offences are defined by the SARFAESI Act's Chapter-V under Section 27-30D:

- failure to provide information about transactions involving the securitization of assets, the reconstruction of assets, and the creation of security interests
- failure to provide the amendment's details.
- failing to give sufficient details or clues.
- Failure of SCO and RCO to adhere to RBI directives.
- Any violation of the SARFAESI Act's provisions or any rules made under it, including attempting to violate or encouraging a violation.

The following fines are imposed by the SARFAESI Act's Section 27:

- Each company, each officer of the company, each lender, and each officer of the lender would be subject to a fine of up to Rs. 5000/- for each day the default persists for failing to file the necessary information regarding the aforementioned transactions.
- For each firm and each officer of the company that violates RBI instructions, there is a potential fine of up to Rs. 5,00,000 as well as an additional fine of Rs. 10,000 for each day the default continues.
- Any infringement of a SARFAESI Act provision is subject to a maximum one-year prison sentence, a fine, or both.

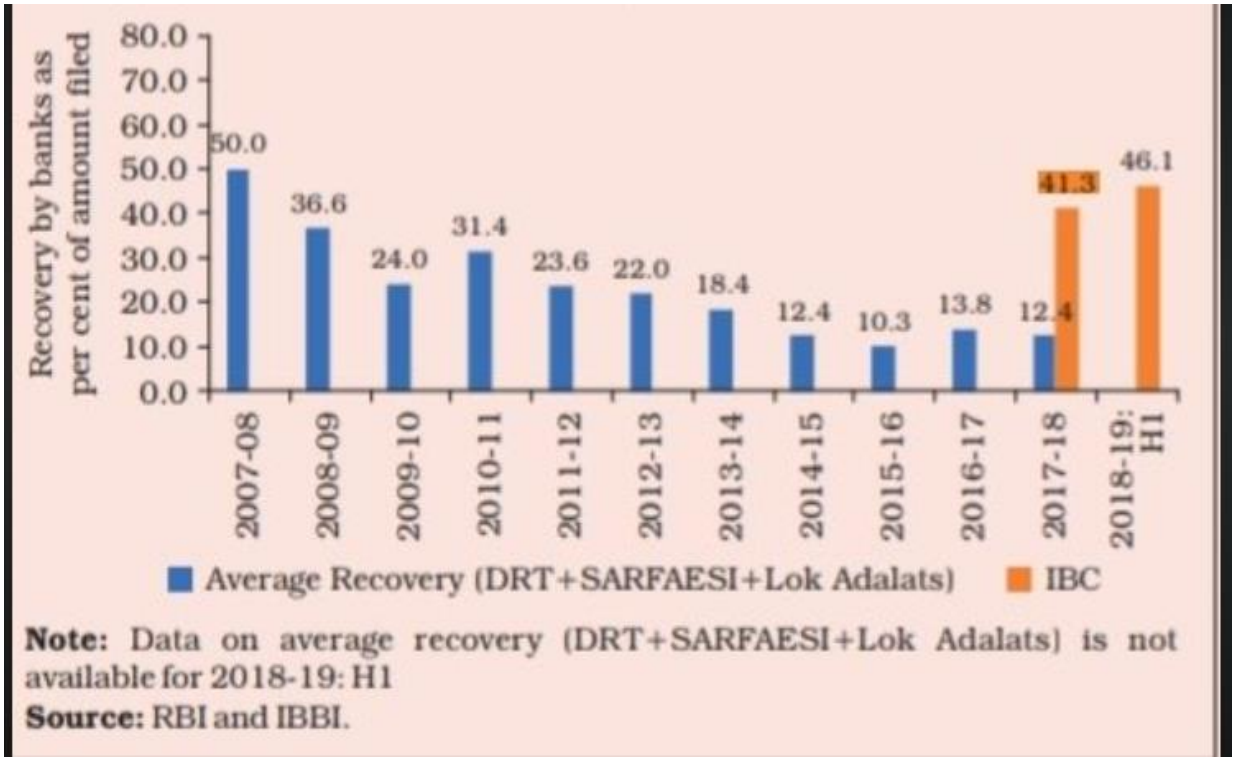
Only a Metropolitan Magistrate or a Judicial Magistrate of the First Class is authorised to take cognizance of and conduct a criminal trial under the SARFAESI Act.

Type	Framework	Summary	Key Issues
Insolvency and Bankruptcy	**Companies Act**	Matter of insolvency referred to High Court; due process relegated to court appointed liquidator	▪ Multiple legislations with complex interplay ▪ Different powers of lenders and borrowers ▪ Lack of commercial understanding ▪ Inexperienced liquidators, with limited knowledge of business and related theory ▪ Easily Manipulated ▪ High recovery time and low recovery rate
	SICA, 1985	Board of Industrial and Financial Reconstruction (BIFR) assesses the viability and refers an unviable company to the High Court	
Recovery	**RDDBI, 1993**	Establishment of Debt Recovery Tribunals empowered to pass 'Certificate of Recovery'	▪ SICA had preference ▪ Lacked powers for considering rehabilitation or dissolution ▪ Parallel jurisdictions encouraged 'Forum Shopping' ▪ Suit prone
	SARFAESI Act, 2002	Expedited recovery of secured assets without intervention of the court	

2.5 CONCLUSION

There were multiple organisations and countless legislation that dealt with issues related to debt, defaults, and insolvencies prior to the implementation of this Code. As a result, insolvency resolution was occasionally time-consuming, challenging, and expensive. After considering the procedure involved in insolvency resolution, the Legislature came to the conclusion that the current framework for insolvency and bankruptcy always produced poor and ineffective results with excessive delays in resolution of the cases connected to insolvency. With the adoption of the new Insolvency and Bankruptcy Code (IBC) law in 2016, India has begun a new era of insolvency resolution. Insolvency law in India has changed from "Debtor in Possession" to "Creditor in Control." The finance ministry referred to this as the "largest economic reform" in the nation. For the first time in Indian history, all of the post-independence insolvency laws have been consolidated under one roof.

This code's primary goal is to quickly resolve stressed assets, which was highly challenging under previous insolvency regulations. Although numerous committees have been established since 1964 to revise insolvency laws, the Insolvency and Bankruptcy Code of 2016 is the only one to fully implement those revisions (The report of the Bankruptcy Law Reforms Committee, Volume I). The enormous issue of increasing NPA was causing the government concern. The troubled assets were only growing as a result of the procedural delays in the preceding insolvency procedures. One of the key causes of the rise in NPAs is India's inadequate insolvency laws. Prior to IBC, the recovery (of debt) rate was roughly 26%, and it took more than four years to resolve a case. IBC altered this. Currently, the average recovery percentage for financial creditors is 43%, and the average recovery rate for operational creditors is 49%. In contrast to previously, when it took 4.3 years, the average period under IBC is now 1.6 years. The cost of resolution decreased from 9 percent during the previous resolution regime to 1 percent after the IBC. After 2016, the code changed quickly, and significant efforts were made to gather and publish statistics on how it was being used. This gave the code a foundation for careful examination. To the benefit of creditors, every effort is taken to maintain the asset's worth.



Note: Data on average recovery (DRT+SARFAESI+Lok Adalats) is not available for 2018-19: H1

Source: RBI and IBBI.

CHAPTER – 3

INSOLVENCY & BANKRUPTCY LAWS IN OTHER COUNTRIES

CHAPTER: 3 – INSOLVENCY & BANKRUPTCY LAWS IN OTHER COUNTRIES

3.1 INTRODUCTION

How the Indian IBC 2016 compares to other insolvency rules is one of the most frequent queries. Since international insolvency and bankruptcy laws have been around for a while and have dealt with a wide range of situations, a closer look at their rules might offer more clarity.

India's IBC is still fresh and developing because, as far as we are aware, it was only passed in May 2016. The regulator, the Insolvency and Bankruptcy Board of India (IBBI), has commendably responding to every new circumstance by drafting rules and regulations to address various scenarios.

The Doing Business (DB) programme of the World Bank offers useful data on each country's rankings for the ease of doing business and advises measures to enhance performance in each of the indicator areas. DB looks into domestic bankruptcy processes' duration, cost, and results as well as the laws governing their liquidation and reconstruction.

The information for resolving insolvency indicators is derived from the questionnaire responses of local insolvency practitioners and verified by a review of applicable laws and regulations as well as information on insolvency systems.

Every year, the World Bank's Doing Business report evaluates 190 economies on eleven criteria, including:-

1. Starting a Business
2. Dealing with Construction Permits
3. Getting Electricity
4. Registering Property
5. Getting Credit
6. Protecting Minority Investors
7. Paying Taxes
8. Trading Across Borders
9. Labour Market Regulation
10. Enforcing Contracts
11. Resolving Insolvency

3.2 LAWS OF OTHER COUNTRIES

Lets see some of the countries that perform better than India in terms of Ease Of Doing Business as well as resolving insolvency.

3.2.1 Insolvency Framework in Japan

In general, Japanese insolvency law outlines four types of procedures for in-court insolvency cases, each of which is subject to its own set of laws and can be categorised into one of two general types depending on whether the proceedings are intended to liquidate a debtor (liquidation-type proceedings) or to rehabilitate a debtor (rehabilitation-type proceedings). Bankruptcy proceedings under the Bankruptcy Act are the most prevalent and broad sort of liquidation-type proceedings.

HEADS	**INSOLVENCY IN JAPAN**
Who can start Insolvency & Bankruptcy Process	• A debtor • A director of a debtor • A creditor
Moratorium	Yes, upon the commencement of bankruptcy proceedings**.**
Period for Insolvency Process	Not specified
Management Control during Insolvency Proceeding	Trustee Appointed by court
Sale of Assets during Insolvency	Yes, with the permission of the court
Insolvency Proceeding Costs	Cost is payed by debtor.
When does the process comes to an end	Corporate reorganization proceedings are concluded when the court issues an order of termination, which shall be issued when

	(i) the reorganisation plan is all performed (ii) two-thirds or more of the monetary claims under the reorganisation plan have been paid to the creditors without payment default (iii) the court confirms that the reorganisation plan will definitely be carried out.
Priorities of the payments – to be read from top to bottom in the order of priorities	• Secured creditor • Claim for tax and fine • Employee • Equity holders
Cross Border Insolvency	Local court in Japan may recognise foreign restructuring or insolvency procedings.

3.2.2 Insolvency Framework in United Kingdom

The majority of legal systems around the world are based on English Common Law. As a result, it's no surprise that the code closely resembles the United Kingdom's Insolvency Regime. Despite the fact that the Indian Insolvency and Bankruptcy Code is based on the UK structure, India has identified critical components of the legislation that may not operate in an Indian context and has so tailored it adequately for India.

HEADS	**PROVISIONS IN UK INSOLVENCY ACT, 1986**
Who can start Insolvency & Bankruptcy Process	• Creditors; or • Debtor Company; or • Holders of Qualifying Floating Charges (QFC)
Moratorium	Yes, after the court appoints administrator.
Period for Insolvency Process	12 months with creditors consent / court's approval it can be extended up to 6 more months.
Management Control during Insolvency Proceeding	Management Control passes to insolvency practitioner or administrator. However, the daily operations of the company remains in the hands of the Directors.
Resolution Plan	8 Weeks of Administration appointment or extended period as court may allow. The resolution plan approval requires a simple majority in value of those creditors present and voting.

Sale of Assets during Insolvency	Administration is like an agent of the company, who has the power to contract without personal liability. They have the power to sell any of the debtor property without the permission of the court.
Insolvency Proceeding Costs	Cost is borne by debtor.
When does the process comes to an end	Administration ceases: one year or any extended time and if Administrator either applies that process objective is achieved or Administrator application saying that no purpose can be achieved hence liquidation.
Priorities of the payments – to be read from top to bottom in the order of priorities	1. Secured Lenders 2. Expenses of the insolvent estate 3. Employees – 4 months prior to insolvency 4. Prescribed Part protected portion of the money to unsecured creditors – a formulae 5. Floating Charge Creditors 6. Unsecured Creditors 7. Equity Holders.
Cross Border Insolvency	• Inside EU – EU Insolvency Regulation • Outside EU – UNCITRAL Model Law on Cross Border Insolvency Proceedings.

3.2.3 Insolvency Framework in United States

The US Bankruptcy Code's Chapter 11 prioritises going concern or reorganisation value over liquidation value. As a logical extension, Chapter 11 assumes that the most effective way to accomplish that goal is to keep management on board and facilitate a variety of outcomes through a plan of reorganisation, a series of going-concern sales, or even a liquidation plan. A variety of ideas can be included in a reorganisation plan under Chapter 11, including having the business and its management survive the procedure. The "freefall" case and a pre-packaged or pre-negotiated case are the two main categories of Chapter 11 cases. In the former, relief is requested under Chapter 11 of the Bankruptcy Code without the company and at least a critical mass or core group of creditors having reached an agreement on an exit strategy. The latter is distinguished by starting a Chapter 11 case after reaching an agreement on how the case will turn out.

HEADS	**PROVISIONS IN CHAPTER 11 OF US BANKRUPTCY CODE**
Who can start Insolvency & Bankruptcy Process	Debtor Company.
Moratorium	Yes, after filing the petition in Bankruptcy Court.
Period for Insolvency Process	Period of 120 days extendable up to 18 months on sound reasons.
Management Control during Insolvency Proceeding	Management continues. Debtor in Possession (DIP) approach is adopted.
Resolution Plan	Debtor has an exclusive period of 04 months (extended up to 18 months) to propose and seek approval from

	impaired creditors and shareholders within two months. Each class of creditors whose rights have been impaired to vote in favour by majority and 2/3 in amount actually voting.
Sale of Assets during Insolvency	Sec 363 allows a debtor to sell substantially all of its assets free of liens. This allows assets to be sold quickly and avoids further erosion of the value due to losses.
Insolvency Proceeding Costs	Cost is born by Debtor. Lender may provide finance to debtor against lien (superior) over assets which are not pledged to other lenders.
When does the process comes to end?	Resolution Plan confirmation discharges debtor's pre obligation other than what is proposed in the plan. If plan is not confirmed then conversion to Bankruptcy Proceeding as per Chapter 7.
Priorities of the payments – (to be read from top to bottom in the order of priorities)	- Secured Creditors - Insolvency Proceedings Cost - Claims arising during the period - Employees wages & benefits - Deposit Claims - Govt. Tax Claims - Unsecured Claims - Equity Interest.
Cross Border Insolvency	Chapter 15 of US Bankruptcy Code deals with the Cross Border

	Insolvency. US has also substantially implemented UNCITRAL Model Law on Cross Border Insolvency into their domestic legislation.

3.2.4 Insolvency Framework in Germany

German bankruptcy proceedings are designed to mutually satisfy creditors by making use of assets, dispersing the proceeds, or deviating from an insolvency plan, with the goal of preserving the company in particular. Honest debtors are given the chance to discharge their outstanding obligations. The German Insolvency Code (InSO) governs the German Insolvency Regime. On a federal level, it is centralised. As a result, none of Germany's 16 independent states have a specific insolvency legislation that applies to them. The Insolvency Code ("Code"), which was passed on October 5, 1994, primarily regulates insolvencies in Germany. It is applicable to all debtors, regardless of the industry they are involved in.

HEADS	**GERMAN INSOLVENCY CODE ("InSO")**
Adjudicating Authorities	For the insolvency proceedings, the district court, in the district of which a regional court has its seat, is exclusively responsible as the bankruptcy court for the district this regional court. The sole jurisdiction is the insolvency court in whose district the debtor has his general place of jurisdiction. If the focus of an independent economic activity of the debtor is at a different location, then only the insolvency court in whose district this location is located is responsible. If more than one court has jurisdiction, the court that first

	applied for bankruptcy proceedings excludes the others.
Appointments of Insolvency Professionals in case of Resolution & Liquidation Process	• Formal Insolvency Proceedings – Preliminary Insolvency Administrator followed by Final Insolvency Administrator • Insolvency Plan Proceedings – Administrator • Self-Administration: Custodian • Liquidation – Liquidator • Voluntary Liquidation – Liquidator
Initiation of Resolution Process	Debtor company itself or creditors
Possession of the Insolvent Company's Assets in case of Resolution Process	• Formal Insolvency Proceedings – Insolvency Administrator • Insolvency Plan Proceedings: Insolvency Administrator • Self Administration – Debtor
Consent of Committee of Creditors in case of Resolution Process	Approval of the plan requires majority in each group of creditors along with the sum of the claims approving the plan exceeds half of the sum of all claims of the voting creditors in that group.
Priorities of the payments (to be read from top to bottom in the order of priorities)	- Creditors with rights of separation - Secured Creditors - Estate Creditors - Insolvency Creditors - Equity Holders

Cross Border Insolvency	The provisions of International Insolvency Law along with European Insolvency Regulation set the rules for cross-border insolvencies, in which the debtor has its centre of main interest in one of the Member States of the EU. UNICITRAL Model Law on Cross-Border Insolvency not adopted.
Group Insolvency Framework	Germany has group of insolvency systematic framework for group insolvencies.

3.3 CROSS COUNTRY COMPARISION

S No.	HEADS	JAPAN	UK	US	GERMANY
1.	Law Governing Insolvency.	Companies Act – Law No. 86 of 2005.	UK Insolvency Act, 1986.	Chapter 11 of US Bankruptcy Code.	German Insolvency Code (InsO).
2.	Who Can Start Proceedings.	Debtor, Director of a debtor, Creditor.	Creditors, Debtors, Holders of Qualifying Floating Charges (QFC).	Debtor Company.	Debtor Company or Creditors.
3.	Moratorium	Yes	Yes	Yes	Yes
4.	Management Control	Trustee appointed by Court.	Insolvency Practitioner but daily operations remains with the Directors.	Management Continues. Debtor in Possession (DIP) approach.	Debtor in case of Self Administration, else Debtor.
5.	Approval of Resolution Plan	Secured Creditors.	By simple majority in value of creditors.	By majority and 2/3 in amount actually voting.	By majority of creditors.

6.	Insolvency Proceedings Costs.	Born by debtor.	Born by debtor.	Borne by debtor.	Born by debtor.
7.	Cross Border Insolvency.	Local Court in Japan may recognise Foreign Restructuring or Insolvency Proceedings.	Inside EU – EU Insolvency Regulation, Outside EU – UNICITRAL Model Law.	UNICITRAL Model Law has substantially been adopted.	UNICITRAL Model Law is not adopted, own set of rules are complied.

3.4 CONCLUSION

Indian bankruptcy and insolvency law is a progressive statute that places a strong emphasis on the resolution process. One significant distinction between Indian law and US law is that Indian law envisions the management of the company through Insolvency Professionals, whereas US law mandates a "Debtor in Possession" method (management retains control over running the company).

The management of the company is best equipped to operate the company for a quick reengineering re-structuring plan rather than a new individual who will have their own learning curve and cost, as such, even if both cases have their own benefits, according to US regulations.

The company can be handled more effectively by an insolvency professional than by the former management, according to UK and Indian legislation. All legal frameworks favour continuing business operations over liquidation. It is impressive how the insolvency regulator IBBI is responding to the problem as it develops. Although IBC has changed corporate India's culture, this is still merely the beginning of the process.

CHAPTER – 4

INSOLVENCY & BANKRUPTCY

LAW IN INDIA

CHAPTER: 4 – INSOLVENCY & BANKRUPTCY LAW IN INDIA

4.1 INTRODUCTION

An Indian law known as the Insolvency and Bankruptcy Code, 2016 (IBC) establishes a unified framework for the regulation of insolvency and bankruptcy processes for businesses, partnership entities, and private individuals.

The Companies Act 2013, the Sick Industrial Companies (Special Provisions) Act, 1985, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Recovery of Debts Due to Banks and Financial Institutions Act (RDDBFI Act), 1993, and other laws are just a few examples of the numerous laws that made up the prior legal framework for insolvency and restructuring prior to the IBC, which is covered in Chapter 2. The Insolvency and Bankruptcy Code contains all of the rules and provisions pertaining to insolvency and bankruptcy because the word "Code" itself refers to a collection of already existing legislation.

On August 22, 2014, the Ministry of Finance established the Committee on Bankruptcy Legislative Reforms (BLRC). T. K. Viswanathan served as the chairman of the committee, which was tasked with creating a new bankruptcy law. On November 4th, 2015, the Committee turned in its report, which also contained a drafts law. Arun Jaitley, the finance minister, introduced the Insolvency and Bankruptcy Code, 2015 in the 16th Lok Sabha after revising the original legislation in response to public suggestions (Bill No. 349 of 2015). The proposal was submitted on December 23, 2015. The measure was referred to the Joint Parliamentary Committee (J.P.C.) on the Insolvency and Bankruptcy Code, 2015, for in-depth analysis. On April 28, 2016, the JPC turned in its report, which also contained an updated version of the Bill. The Lok Sabha approved it on May 5, 2016, and the Rajya Sabha approved it on May 11, 2016. It then obtained approval from President Pranab Mukherjee, was published in The Gazette of India, and went into effect on May 28, 2016. (as Act No. 31 of 2016).

The Insolvency & Bankruptcy Code was passed and put into effect with the intention that there would be a single framework that would address the issue of insolvency and bankruptcy for both businesses and people.

On August 14, 2017, the National Company Law Tribunal (NCLT) issued the first insolvency resolution order under this law in the Synergies-Dooray Automotive Ltd[2]. case. The company filed its insolvency petition on January 23, 2017. According to the code, the resolution plan had to be submitted to NCLT within 180 days. On August 2, 2017, the tribunal approved the settlement plan. The NCLT website posted the final judgement on August 14, 2017.

Applicability Of The Code:

The provisions of the Code shall apply for insolvency, liquidation, voluntary liquidation or bankruptcy of the following entities:-

1. Any company incorporated under the Companies Act, 2013 or under any previous law.
2. Any other company governed by any special act for the time being in force, except in so far as the said provision is inconsistent with the provisions of such Special Act.
3. Any Limited Liability Partnership under the LLP Act 2008.
4. Any other body being incorporated under any other law for the time being in force, as specified by the Central Government in this regard.
5. Partnership firms and individuals.

[2] AR Company Appeal(AT)(INS)NO.169-173 of 2017

- Companies (Governed by Companies Act, 2013 / under any other previous law)
- LLP (Limited Liability Partnership)
- Notified
- Partnership
- Individual

4.2 MAJOR PROVISIONS

BRIEF EXPLAINATION OF THE PROVISIONS OF THE CODE

The IBC has 255 sections and 11 Schedules. IBC is divided into 5 (Five) parts i.e.

- Preliminary (Part I);- Section 1 to 3
- Insolvency Resolution and Liquidation of Corporate Persons (Part II);- Section 4 to 77
- Insolvency Resolution and Liquidation of Individuals and Partnership Firms (Part III);- Section 78 to 187
- Regulation of insolvency professionals, agencies and information utilities (Part IV).- Section 188 to 223
- Miscellenous (Part V) – Section 224 to 25

As per the data provided by National Company Law Tribunal (NCLT), total 19,771 cases were pending with NCLT benches on 30.09.2019, which include 10,860 cases under Insolvency and Bankruptcy Code (IBC), 2016.

Definitions

Section 5 in this Chapter sets out definitions of terms used in Part II.

- Section 5(1) defines 'Adjudicating Authority' to mean the NCLT constituted under Section 408 of the Companies Act, 2013, for the purposes of Part II.

- Section 5(11) defines 'initiation date' to mean the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating the corporate insolvency resolution process.

- Section 5(12) defines 'insolvency commencement date' to mean the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under Sections 7, 9 or 10, as the case may be.

- Section 5(17) defines 'liquidation commencement date' to mean the date on which proceedings for liquidation commence in accordance with Sections 33 or 59, as the case may be.

- Section 5(20) defines 'operational creditor' to mean a person to whom an operational debt is owed and includes any person to whom any such debt has been legally assigned or transferred.

- 'Operational debt' is defined under Section 5(21). Originally, this definition was to the effect that an 'operational debt' meant a claim in respect of the provision of goods or services, including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government or any State Government or any local authority.

However, by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018, published in the Gazette of India, Section 5(21) of the Code was amended by substituting the word 'payment' for the word 'repayment'. Therefore, 'operational debt', as defined under Section 5(21) of the Code, presently means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any Local Authority.

The IBC Ecosystem: (Part IV of IBC)

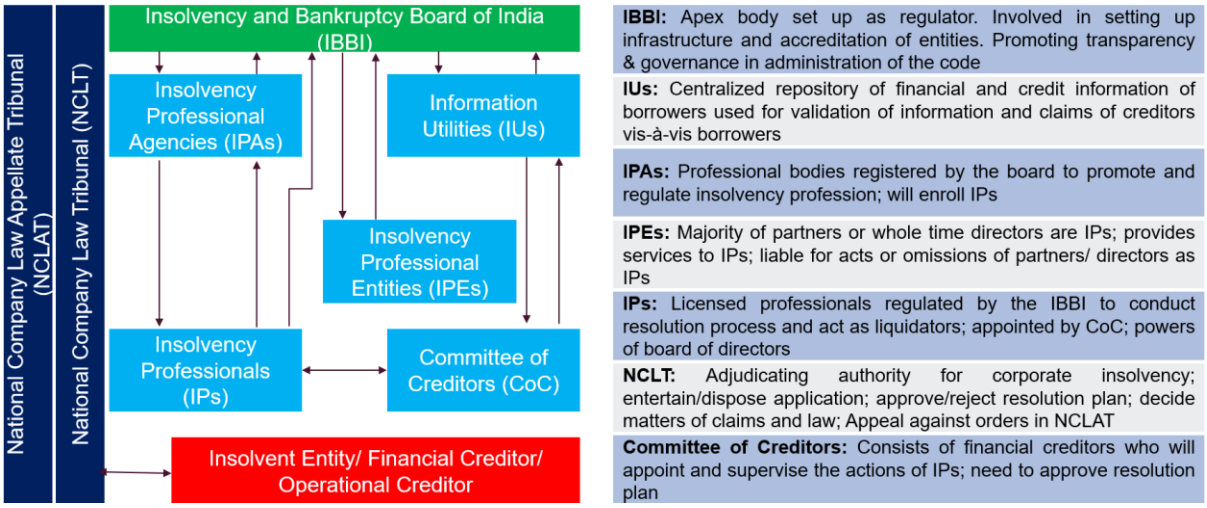


Figure 1 - The IBC Ecosystem

i. Insolvency and Bankruptcy Board of India (IBBI): (Part IV - Chapter I & II)

The regulator of this code is The Insolvency and Bankruptcy Board of India. This board look after the work and conduct of the Insolvency professional, Insolvency professional Agencies and Information Utilities which are the other pillars of the IBC. This board has the perpetual succession and having a common seal. It has the power to hold, dispose of property both movable and immovable, it can contract. All will be done subject to the provision of the IBC code. It can sue and be sued. The function of this body is to register, withdraw, suspend or cancel the registration of the IPA, IP, IU and tell minimum eligibility requirement for registration of this institutions, levy fees or charges for the same and lay down the regulation for examination of the insolvency professional.

ii. Insolvency Professional: (Part IV - Chapter IV)

Insolvency Professional means a person enrolled with an insolvency agency as a member and register itself with the board as an insolvency professional. Earlier the control and the running of the business use to be in the hand of the owner of the business now it has been given to the independent professional appointed by the committee of the creditor. The function of the Insolvency professional is to take action whenever there has been a bankruptcy, insolvency, liquidation, or fresh start process has been initiated against the corporate debtor. He has to submit a record copy of every proceeding before the adjudicating body. He has to manage the current day to day affairs of the business and handhold the entire resolution plan as per the rules laid down by the board.

iii. Information Utility: (Part IV - Chapter V)

A person who is registered with the board as an information utility under Section 210 of the IBC. The function of the IU is to create and store financial information of such debt and default of business which are undergoing resolution in such manner that can be accessed universally. It has to accept electronic submission of financial information of the person who are under the obligation to submit the same as specified under the section 215 of the code. Accept such submission, before storing it as information he has to check the

authenticity by various authority. It can also share the information to such person who need it in a manner specified in the code. This is done for easy availability of information and for authentic availability of financial data so that the smooth process can take place for insolvency resolution.

iv. Adjudicatory Authority: (Part III – Chapter VI)

There are different adjudicatory body for an individual, company and entity having unlimited liability and limited liability. So, the Debt Recovery Tribunal shall be the adjudicating authority for the individual and unlimited liability partnership firm. They can appeal to the Debt Recovery Appellate Tribunal if the party is not satisfied with the order of DRT. And the National Company Law Tribunal will be the adjudicatory body for companies and the limited liability companies. They may appeal to the National Company Law Appellate Tribunal. If the parties are not satisfied with the order of the NCLAT and DRAT they may appeal to the Supreme Court.

The practical procedure of filing application u/s 7

A. Filing of an application under section 7 of the IBC

1. **Person who can file an application under section 7-**
   A financial creditor: either by itself or jointly with other financial creditors.

2. **Govt. notified person:** Any other person on behalf of the financial creditor, as may be notified by the Central Government. Following persons has been notified who may file an application for initiating CIRP on behalf of the financial creditor:
   i. a guardian;
   ii. an executor or administrator of an estate of a financial creditor;
   iii. a trustee (including a debenture trustee); and
   iv. a person duly authorised by the Board of Directors of a Company.

3. **Depositors:** Where a financial debt is in the form of securities or deposits, an application for initiation CIRP shall be filed jointly by not less than 100 of such

creditors in the same class or not less than 10% of the total number of such creditors in the same class, whichever is less.

4. **Class of Creditors:** Where a financial debt is owed to a class of creditors exceeding the number as may be specified, refer Sec. 21(6A)(b), an application for initiation CIRP shall be filed jointly by not less than 100 of such creditors in the same class or not less than 10% of the total number of such creditors in the same class, whichever is less.
5. **Home Buyer:** The application shall be filed jointly by not less than 100 of such allottees under the same real estate project or not less than 10% of the total number of such allottees under the same real estate project, whichever is less.

In case the application is made jointly by financial creditors, they may nominate one amongst them to act on their behalf.

II. Persons not entitled to make application-

As per Sec. 11 of the Code, a Financial Creditors shall not be entitled to make an application to initiate CIRP who has violated any of the terms of resolution plan which was approved 12 months before the date of making of an application.

III. Minimum amount of default-

A financial creditor can file application before NCLT against a corporate debtors where the minimum amount of the default is one lakh rupees [Sec. 4].

Note: Vide Notification No. S.O. 1205(E) dated 24.03.2020, the default limit has been increased to 1 crore rupees.

IV. Application to be filed before NCLT-

The application for initiation of the CIRP can be filed before NCLT bench in the jurisdiction of the Corporate Debtors registered office.

B. Application Form and documents

As per Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, an application for initiating the CIRP against a corporate debtor under section 7 of the Code in Form 1, accompanied with following documents and records:

- Record of the default recorded with the information utility or such other record or evidence of default as may be specified;
- The name of the resolution professional proposed to act as an interim resolution professional;
- Where the applicant is an assignee or transferee of a financial contract, the application shall be accompanied with a copy of the assignment or transfer agreement and other relevant documentation to demonstrate the assignment or transfer.

The applicant shall dispatch forthwith, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.

Note: NCLT vide order dated 12.05.2020 directed to file default record from Information Utility along with the new petitions being filed under section 7 of Insolvency and Bankruptcy Code, 2016 positively. No new petition shall be entertained without record of default under section 7 of IBC, 2016.

Further, the Authorized Representative/ Parties in the cased pending (as on 12.05.2020) for admission under aforesaid section of IBC also directed to file default record from Information Utility before next date of hearing.

The Adjudicating Authority has no jurisdiction to direct the Corporate Debtor to deposit any amount to certain corpus or with regard to maintenance which may not be a subject matter of application under Section 7 NCLAT in Re *Vipul Ltd Vs. M/s. Vipul Greens Residents Welfare Association*[3].

C. Acceptance or rejection of the application

The Adjudicating Authority (NCLT) shall, within 14 days of the receipt of the application under Section 7, ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor.

[3] Ar/g Company Appeal (AT)(Insolvency)No.21 of 2020

Chapter II in Part II is titled 'Corporate Insolvency Resolution Process'.

- Section 6 therein states that where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate the corporate insolvency resolution process in respect of such corporate debtor in the manner provided in Chapter II.

- Section 7 deals with 'Initiation of corporate insolvency resolution process by a financial creditor' and sub-section (6) thereof stipulates that the corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5).

- Section 8 deals with 'Insolvency resolution by operational creditor' and Section 9 pertains to 'Application for initiation of corporate insolvency resolution process by operational creditor'. Section 9(6) makes it clear that the corporate insolvency resolution process shall commence from the date of admission of the application under sub-section (5) of Section 9. Similar provision is made in Section 10(5) in relation to corporate insolvency resolution process commenced at the behest of the corporate debtor itself.

Chapter III deals with 'Liquidation Process'.

- Section 33 thereunder provides for 'Initiation of liquidation'. Section 33(1) reads to the effect that where the Adjudicating Authority does not receive a resolution plan or rejects the resolution plan, it shall pass an order requiring the corporate debtor to be liquidated in the manner laid down in Chapter III; issue a public announcement stating that the corporate debtor is in liquidation; and require such order to be sent to the authority with which the corporate debtor is registered.

  Section 33(5) provides that, subject to Section 52, when a liquidation order has been passed, no suit or other legal proceedings shall be instituted by or against the corporate debtor, except with the prior approval of the Adjudicating Authority. Section 34 deals

with ‘Appointment of a liquidator’ and provides that where the Adjudicating Authority has passed an order for liquidation of the corporate debtor under Section 33, the resolution professional appointed for the corporate insolvency resolution process under Chapter II shall act as the liquidator for the purposes of liquidation, unless replaced by the Adjudicating Authority.

- The powers and duties of such liquidator are specified in Section 35 of the Code. One such power under Section 35(1)(f) is to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified.

- Section 36 deals with ‘Liquidation Estate’. Section 36(1) provides that for the purposes of liquidation, the liquidator shall form an estate of the assets mentioned in Section 36(3) which would be called the liquidation estate in relation to the corporate debtor.

- Section 52 provides protection to a secured creditor of the corporate person in liquidation. Section 52(1) provides that a secured creditor in the liquidation proceedings may either relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator in the manner specified in Section 53 or realize its security interest in the manner specified thereunder. Section 52(9) stipulates that where the proceeds of realization of the secured asset are not adequate to repay the debts owed to the secured creditor, the unpaid debts of such secured creditor shall be paid by the liquidator in the manner specified in clause (e) of Section 53(1). Section 53 deals with ‘distribution of assets’ by the liquidator.

- Section 54 deals with ‘Dissolution of a corporate debtor’ and provides that where the assets of the corporate debtor have been completely liquidated, the liquidator shall make an application to the Adjudicating Authority for the dissolution of such corporate debtor and upon such an application, the corporate debtor shall be dissolved by the Adjudicating Authority from the date of that order. A copy of such order shall be forwarded to the authority with which the corporate debtor is registered within seven days from the date of the order.

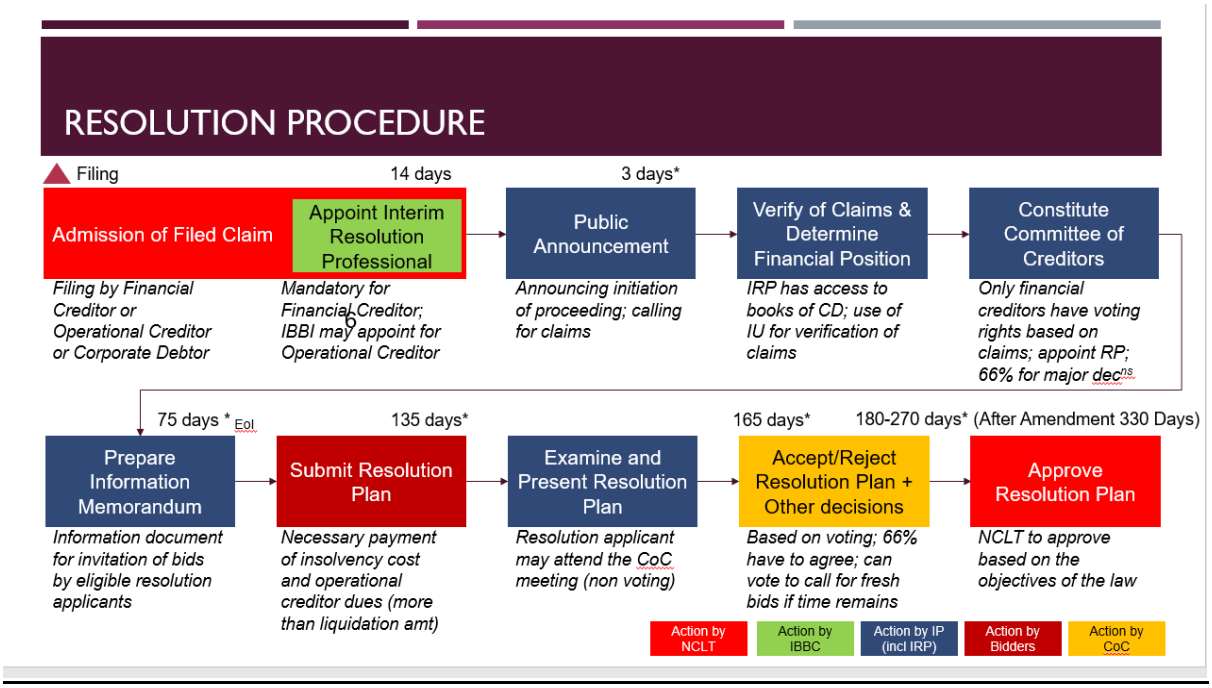
Part V of the Code deals with 'Miscellaneous' provisions (Sections 224 to 255.**)**

Section 238 stipulates that the provisions of the Code shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

PROCESS AND TIMELINE UNDER IBC

Corporate Insolvency Resolution Process under Part-II, Chapter-II of IBC

The maximum permissible time for completion of Corporate Insolvency Resolution Process (CIRP) shall be 180 days which can be further extended by another 90 days with the approval of NCLT upon an application made in this behalf by RP if instructed to do so by the Committee of Creditors (CC) by a vote of 75%.



Filing of application under CIRP

- Application for commencement of resolution process can be filed by Financial Creditor (FC), Operational Creditor (OC) or Corporate Debtor (CD)
- FC means any creditor to whom financial debt is owed by CD and covers
- Unsecured and Secured FC
- Money Borrowed against interest
- Lease or Hire Purchase Sale or Discounting of receivable, towards sale or purchase agreement, derivate transaction, guarantee, counter indemnity against any transaction having commercial effect of borrowing
- FC/CD can file CIRP application on commitment of default
- OC has to give a ten days demand notice before filing an application
- The CIRP applicant whether FC/CD/OC will propose an Insolvency Professional to act as the Interim Resolution Professional (IRP) while filing an application.

Admission of CIRP

- Within 14 days of filing an application, Adjudicating Authority (NCLT) will decide on the admission of the application
- On admission of application, the NCLT will pass an order Appointing the proposed IP as IRP
- Declare a moratorium (Section 14)- all suits, decrees, arbitration matters covered- stay on transferring, alienating, encumbering assets
- cause public announcement for initiation of CIRP and submission of claims
- Stay on SARFAESI Action- Stay on recovery of property held by CD on lease and in possession of CD
- Where application by OC and no proposed IRP is suggested NCLT to make reference to IBBI for recommending an IP to act as an IRP
- IRP term not to exceed 30 days from the date of appointment

LIQUIDATION PROCESS

Initiation of Liquidation

The NCLT shall pass a liquidation order in the following circumstances:

a) In case no resolution plan is received within the stipulated time of 180/270 days NCLT rejects the Resolution Plan
b) If RP intimates NCLT that CC with a vote of more than 75% has decided to liquidate the CD
c) Where Resolution Plan approved by the NCLT has been contravened by CD or any person other than the CD (scheme has failed)

Implication of liquidation order

- RP under CIRP to act as liquidator.
- No suit or other legal proceedings shall be instituted by or against the CD, provided that liquidator can, with prior permission of NCLT, institute a suit or legal proceeding.
- Liquidation order is deemed to be a notice of discharge to officers, employees and workers of the CD except when business of CD is continued during the liquidation process.
- Board of directors suspended and all the powers to vest in the liquidator.
- NCLT can replace the resolution professional in case resolution plan submitted by RP was not as prescribed by the law/rules or if the Board recommends replacement of RP.

Powers and Duties of Liquidator

- To receive and verify claims of creditors and admit or reject claims.
- To take into his custody and control all assets, properties and actionable claims of CD.
- To evaluate assets, property of CD.
- Protect and preserve assets, properties of CD.
- Carry on business of CD for its beneficial liquidation.

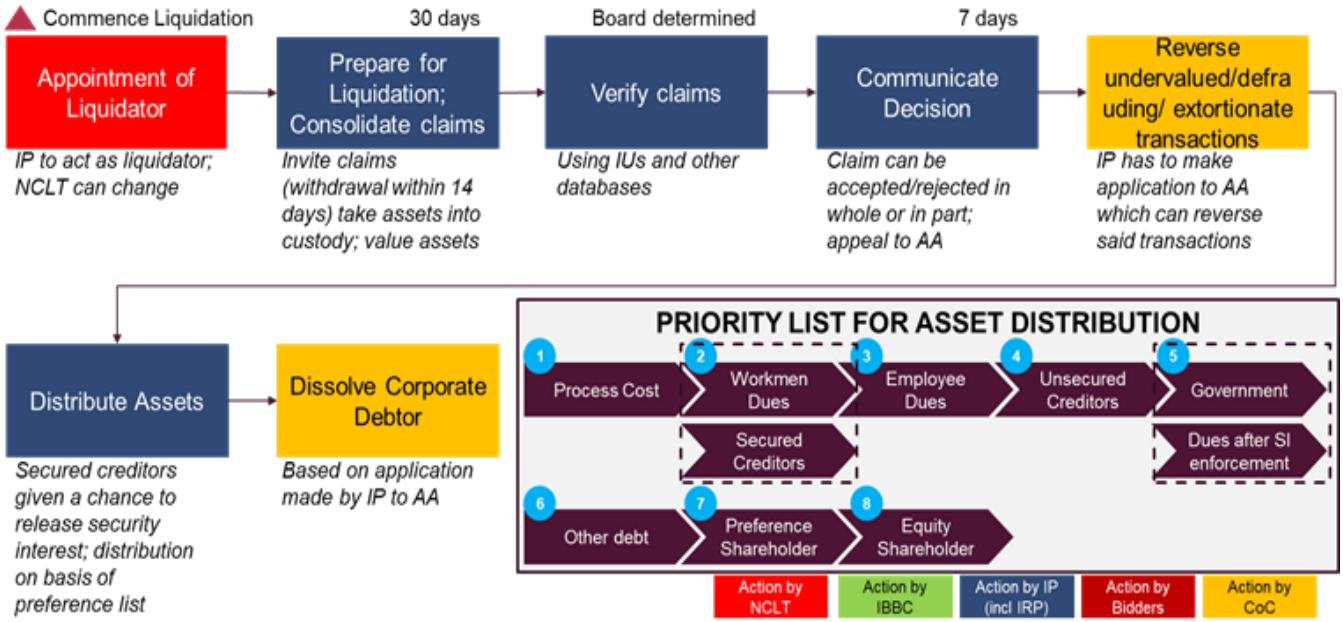
- File application for avoidance of preferential transactions, undervalued transactions, transactions for defrauding of creditors, extortionate credit transactions (normally one year and two years if it is to related party).

Secured creditor in liquidation proceedings

The secured creditor in liquidation proceedings may:

- [Section 52(1)(a)] relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets as per section 53.

- Realize its security interest in the following manner :
    a. Inform the liquidator of its security interest and identify assets subject to such security interest
    b. Liquidator to verify security interest and permit the secured creditor to realize such security interest, the existence of which is proved by the records of information utility or such other means as specified by the board
    c. Secured creditor can enforce, settle, compromise or deal with secured assets in accordance with law (including SARFAESI or execution proceedings in DRT etc.). In case secured creditor faces resistance from CD or any person connected therewith in taking possession, selling or disposing off assets, the creditor can approach NCLT for directions to facilitate the enforcement/sale etc
    d. Amount of Insolvency Resolution cost due from the secured creditor to be deduced from sale proceeds generated from sale of secured assets
    e. Where money recovered in excess of dues, the secured creditor shall account to liquidator and tender to him the excess funds
    f. Where money received is less than the debt due towards the secured creditor, the secured creditor to approach liquidator for recovery of balance dues in terms of waterfall mechanism as set out in Section 53



Distribution of Assets (Waterfall Mechanism) – Section 53

The sale of the assets of the liquidation estate shall be distributed in the manner and in the priority as set out below:

- Insolvency Resolution Process costs and Liquidation costs in full.
- Workers dues for a period of 24 months preceding liquidation commencement date and dues to secured creditor who has relinquished his security interest shall be distributed on pari passu basis.
- Wages and unpaid dues to employees (other than workman) for 12 months preceding the liquidation commencement date.
- Financial debt owed to unsecured creditors.
- Following debts on pari passu basis:
    a. Amount due to Central Government & State Government.
    b. Debts due to secured creditor remaining unpaid following the enforcement of Security interest.
    c. Any remaining debts or dues.
    d. Preference shareholders.

Offences & Penalties

There are mainly two categories of punishment or fine under Part II of the Code:

1. **Punishment for 3 to 5 years or a fine of Rupees 1 lakh to 1 Crore or both**

    - Officer of the Corporate Debtor within 12 months immediately preceding the insolvency commencement date or at any time after such date wilfully, fraudulently, concealed any property or transferred / disposed of the property for a security interest in the non-ordinary course of business;
    - Where any officer of the Corporate Debtor on or after the date of insolvency commencement date, misconducts in the course of insolvency resolution process, like does not disclose information, deliver property, books of accounts, other information to resolution professional or falsifies the books of Corporate Debtor or for wilful and material omissions from statements relating to affairs of Corporate Debtor or false representation to creditors;
    - Where Corporate Debtor wilfully and knowingly provides false information in application made by the Corporate Debtor. But where any other person other than Corporate Debtor furnishes false information in the application made by Financial Creditors, shall only be punished with a fine and not imprisonment.

2. **Punishment for 1 to 5 years or a fine of Rupees 1 lakh to 1 Crore or both**

    - Where any officer of the Corporate Debtor has transacted for defrauding creditors, like transfer of property in the form of gift / charge or other forms;
    - Where the Corporate Debtor or any of its official contravenes the moratorium or the resolution plan.

3. **Is there any imprisonment to debtor?**

    - No. There are no provisions of imprisonment for debtors in India and any such imprisonment shall be unconstitutional. However, you / debtors may be imprisoned if they commit any fraud relating to the debts they owe. For example, if you take a housing loan using fake papers or you take a business loan but transfer the amount to a friend showing fake expenses, you can be prosecuted against for fraud.

4.3 AMENDMENTS IN IBC

1. Insolvency and Bankruptcy (Amendment) Act, 2017

In a continuous effort of ease of doing business, the Government of India is trying every possible means to smoothen the role played by the RP during the CIRP and disqualified debtors/creditors do not take part in the Insolvency process. The amendment was brought forth to exclude certain persons from taking part in the resolution plan and reviving the Company. The object of the Code is to avoid court interference and have a speedy adjudication of the dispute. "The consequent increase in the number of firm insolvencies in the corporate sector highlights the need for commercial bankruptcy laws to liquidate efficiently unviable firms and reorganize viable ones, so as to maximize the total value of proceeds received by creditors, shareholders, employees, and other stakeholders."

Hence, the amendment was made by the parliament so that the object and essence of the Code are not diffused and it came into force on January 19, 2018. Major Changes that were made in the code are:

Personal Guarantors, partnership firm, proprietorship firm, individuals have now been included under the heads 'applicability'.

This is done to avoid frivolous applications that will be made by the personal guarantor when the moratorium period is declared under the act as only personal assets of the corporate debtor were covered before. In the case of *Sanjeev Shriya v. State Bank of India*[4], it was held by the court that personal guarantor of the corporates, which may include promoter will be covered U/S 14 of the Code.

- Resolution Applicant may now be an individual or may jointly submit the application (resolution plan) when invitation is made u/s 25(2) of the Code.
- Resolution Plan will now only be submitted by the Resolution Applicant.

[4] Writ No- 30285 of 2017

- The scope of the duty of Resolution Professional has been broadened and he/she has not to be more vigilant as to who is submitting the resolution plan. The person submitting has to be well versed with the functioning and complexities of the company's operation. Further, the criteria of selecting the resolution application that is set by the Resolution professional has to be approved by the CoC as their interest is at stake.
- Section 29A has been inserted in the Code as a person not eligible to submit the resolution plan. List included undischarged insolvent, disqualified for the post of director, convicted of an offense, account declared NPA, wilful defaulter, etc. This disqualification of whose account has been declared NPA can still submit the resolution plan if he pays his dues within 30 days and is no more a defaulter.
- In a case where the public auction is done, the movable or immovable property will not be sold to persons who are not eligible u/s 29A.

The amendment reduced the court interference and initiated a better CIRP. No sooner was the changes been made in the code, parliament passed the second amendment which came to force on June 6, 2018.

2. Insolvency and Bankruptcy (Amendment) Ordinance, 2018

"The evolution of the laws for corporate insolvency resolution as described above, has resulted in a complex and fragmented environment for both creditors and debtors. In a landscape dotted with multiple laws and special provisions, there is a lack of clarity on what holds precedence in a given situation. In India, this has been a subject of significant litigation." Though the Code was implemented and was enforced for the benefit of the Creditors and other connected parties the loopholes in the law were leading to the same old problem of judicial interference and failure of RP to revive the company.

Stringent voting threshold, ambiguity in the application of the Moratorium period and public announcement, appointment process of RP, ineligible person submitting the resolution professional have all lead to the amendment in the IBC, 2016. The changes made are:

- One of the major amendment that was done in the IBC, 2016 was adding home buyers under the definition clause. Now, the home buyers will also fall under the definition of financial creditors and will be able to recover the amount paid as an advance. Before,

they were to take recourse of the COPRA which was a lengthy and time taking litigation and usually the buyers had to undergo loss.

In the case of *Chitra Sharma v. Union of India*[5], the amount paid by the home buyers as an advance was more than the bank dues of the seller (real state). Even though, the dues of home buyer were more they not being a financial creditor was not given preference and bank was in a favorable position.

- CIRP may now be triggered even by the guardian, administrator or the executor of the financial creditor. Further, the word dispute u/s 8 of the code to now include even the pending suit or arbitration proceedings.
- Submitting a certificate from a financial institution by the operational creditor to proof the existence of debt has been optional. Further, they have to submit a proof of its debt and that it is still unpaid.
- At least 3/4th of the partner of the corporation should vote in favour of CIRP before they opt for the same. The proposed RP should not have any disciplinary proceeding against him.
- Voting threshold has been reduced to 66% from 75% for extending the time period of CIRP by the CoC. Post admission of CIRP, AA may allow the withdrawal if 90% of CoC vote in favour of withdrawal subject to the approval of all the debtors and creditors.
- Moratorium will have an application only on the assets which are within the ownership of the corporate debtor subject to the clause that a personal guarantor if is a connected party to the debt would be included.
- IBBI to specify the last date of submitting the claims after the public announcement of CIRP is done as the code is unclear of the time period.
- Unlike the previous law, IRP will continue to hold the post till the appointment of RP and his consent will be mandatory in the appointment of RP by the CoC (with a voting threshold of 66%) and even when the committee thinks of continuing the IRP as an RP.
- 51% of the vote is required for the approval of the decision of routine nature in CoC.

[5] WP No- Civil 744/2017

- Authorized representative (AR) of the Creditor will have the right to vote in the meeting of CoC, further AR who are related party to corporate debtor is barred from being a part of CoC.
- Approval of 66% of the CoC is required for approving the resolution plan submitted by the resolution applicant.

"IRP is responsible for managing the company, appointing and coordinating creditor's committee proceedings, entering into contracts on the behalf of the company, securing interim financing for the company and completing many other critical tasks with substantial financial and strategic implications." Hence, to lessen the burden of the IRP and reduce the rate of litigation amendment has been done in IBC, 2016.

3. Insolvency and Bankruptcy (Second Amendment) Bill, 2018

As the status of home buyers was not clear, Lok Sabha has made it final on August 10, 2018 that they'll now be a financial Creditors. Further, prior approval of Competition Commission of India is required when the creditors finalize the resolution plan. Aim of such amendment is to reduce the chance of extending the time of CIRP, i.e., asking for a 90 days extension.

The overarching objects as set forth in the statement of objects and reasons are laudatory and indeed much needed for reform of the resolution, insolvency and bankruptcy regime governing corporate persons as well as individuals and partnership firms. Hence, with the changing situation and corporate deadlock, the parliament will keep amending the code to meet the market failure, if any.

4. Insolvency and Bankruptcy Code (Amendment Bill), 2019

The Union Cabinet approved the proposal to introduce a Bill dated 19th July, 2019 in the Parliament to carry out amendments to the Insolvency and Bankruptcy Code, 2016.

The amendments aim to fill critical gaps in the corporate insolvency resolution framework as enshrined in the Code, while simultaneously maximizing value from the Corporate Insolvency Resolution Process (CIRP).

The Government intends to ensure the maximization of the value of a corporate debtor as a going concern while simultaneously adhering to strict timelines.

Amendment of Section-5

The Insolvency and Bankruptcy Code, 2016 (31 of 2016) (hereinafter referred to as the principal Act), in clause (26), the following Explanation shall be inserted, namely: –

"Explanation. – For the removal of doubts, it is hereby clarified that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger;".

Amendment of Section-12

"Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor:

Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within a period of ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019.".

Amendment of section 25A

"(3A) Notwithstanding anything to the contrary contained in sub-section (3), the authorised representative under sub-section (6A) of section 21 shall cast his vote on behalf of all the financial creditors he represents in accordance with the decision taken by a vote of more than fifty percent of the voting share of the financial creditors he represents, who have cast their vote:

Provided that for a vote to be cast in respect of an application under section 12A, the authorized representative shall cast his vote in accordance with the provisions of sub-section (3)".

Amendment of Section 30 of the principal Act,–

(a) in sub-section (2), for clause (b), the following shall be substituted, namely:—

"(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than–

i. the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or
ii. the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,

whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Explanation 1.– For the removal of doubts, it is hereby clarified that distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

Explanation 2.— For the purposes of this clause, it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor–

i. where a resolution plan has not been approved or rejected by the Adjudicating Authority;
ii. where an appeal has been preferred under section 61 or section 62 or such an appeal is not time-barred under any provision of law for the time being in force; or
iii. where a legal proceeding has been initiated in any court against the decision of the Adjudicating Authority in respect of a resolution plan;";

(b) in sub-section (4), after the words "feasibility and viability,", the words, brackets and figures "the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor" shall be inserted.

Amendment of Section 31 of the principal Act, in sub-section (1), after the words "members, creditors," the words "including the Central Government, any State Government or any. local

authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed," shall be inserted.

Amendment of Section 33 of the principal Act, in sub-section (2), the following Explanation shall be inserted, namely:–

Explanation.-– For the purposes of this sub-section, it is hereby declared that the committee of creditors may take the decision to liquidate the corporate debtor, any time after its constitution under sub-section (1) of section 21 and before the confirmation of the resolution plan, including at any time before the preparation of the information memorandum.".

Amendment of Section 240 of the principal Act, in sub-section (2), in clause (w), for the words "repayment of debts of operational creditors", the words "payment of debts" shall be substituted.

The salient features of the amendments are:

a. Clarity on allowing comprehensive corporate restructuring schemes such as mergers, demergers, amalgamations etc as part of the resolution plan.
b. Greater emphasis on the need for time bound disposal at application stage.
c. A deadline for completion of CIRP within an overall limit of 330 days, including litigation and other judicial processes. The current timeline of 270 days has been extended in a number of cases with lawyers seeking to exclude time taken for litigation.
d. Votes of all financial creditors covered under section 21(6A) shall be cast in accordance with the decision approved by the highest voting share (more than 50%) of financial creditors on present and voting basis.
e. A specific provision that financial creditors who have not voted in favor of the resolution plan and operational creditors shall receive at least the amount that would have been received by them if the amount to be distributed under the resolution plan had been distributed in accordance with section 53 of the Code or the amount that would have been received if the liquidation value of the corporate debtor had been distributed in accordance with section 53 of the Code, whichever is higher. This will have a retrospective effect where the resolution plan has not attained finality or has been appealed against.

f. Inclusion of commercial consideration in the manner of distribution proposed in resolution plan, within the powers of the Committee of Creditors.
g. Clarity that the plan shall be binding on the all stakeholders including the Central Government, any State Government or local authority to whom a debt in respect of the payment of the dues may be owed.
h. Clarity that the Committee of Creditors may take the decision to liquidate the corporate debtor, any time after constitution of the Committee of Creditors and before the preparation of Information Memorandum.

Faster Resolution : The changes are expected to lead to timely admission of applications and timely completion of the Corporate Insolvency Resolution Process, greater clarity on permissibility of corporate restructuring schemes, manner of distribution of amounts amongst financial and operational creditors, clarity on rights and duties of authorized representatives of voters and applicability of the resolution plan on all statutory authorities.

Analysis of data available demonstrates that there are delays in admission of applications and spillage of CIRP cases well over the time limits presently laid down in the code. The amendments are expected to address the issue of sanctity of timelines for completion of the entire corporate insolvency resolution process and also maximize the outcomes envisioned in the Code.

The proposal is in line with the overall objective of the government to achieve the outcomes envisioned in the Insolvency and Bankruptcy Code and seeks to ensure speedier resolution of cases involving corporate debtors.

Advantage for Homebuyers: The government has also addressed a longstanding demand of homebuyers who have filed cases against builders for non-delivery of flats. A proposed amendment will ensure that a majority vote from creditors such as homebuyers will be counted as a 100% vote from that class of creditors in favor of or against a resolution plan. For example, if out of 100 homebuyers, half or more of those present and voting back a resolution plan, then all homebuyers would be considered to have voted for it. This is likely to impact insolvency cases such as that of Jaypee Infratech.

The government has also sought to reduce delays at the beginning of insolvency proceedings initiated by financial creditors by requiring NCLT benches to explain why an application has not been admitted or rejected within 14 days.

In a recent ruling by the National Company Law Appellate Tribunal (NCLAT) in the Essar Steel Resolution Case, Homebuyers have also been given a stronger voice in the bankruptcy resolution plans of developers that haven't delivered projects.

The NCLAT had modified Rs 42,000-crore ArcelorMittal resolution plan for Essar Steel to treat various classes of creditors equally and provided 60.7% recovery of their admitted claims. However the order has been challenged in the Apex Court by Essar Steel's financial creditors, which had been set to recover around 92% of their claims under the resolution plan that had been approved by the National Company Law Tribunal (NCLT).

4.4 CONCLUSION

It is accurate to state that India's insolvency laws have remained a complete conundrum. A bankruptcy regime has risen and fallen, each of which essentially replicated the previous one without adding anything new. The IBC was created as a one-stop solution that outperformed the previous insolvency regime and adopted a projected cash flow approach with strong foundations for support.

The Code is better described as a "Unified process" that protects the positive aspects of every unsuccessful insolvency regime. It has truly been a historic moment thanks to the model time line, the adjudicating authorities' function, the IBBI, and the rational approach based on which the code has built itself.

In addition, there appears to be almost little relationship between any of the current insolvency legislation now that the IBC has been passed. All previous regimes had promising beginnings but were unable to keep the unity. A much-needed reform will be brought about by the IBC, and hopefully only by the IBC.

Different statutes, including those for partners, corporations, and individuals, are currently in effect in India for the resolution of bad debts. The sheer number of different statutes made it extremely difficult to carry out any law. India adopted the same insolvency and bankruptcy code as the United States in order to overcome this complexity and streamline the overall debt resolution procedure. This code governs all other laws and applies to all types of business entities, including sole proprietorships, partnerships, and corporations. The goal of this code is to balance the interests of different stakeholders and lessen the loss they are experiencing. Additionally, it aims to revitalise the company that contributes most to the expansion of the economy.

The effective mechanism under this code:

i. Time bound: the best part of this code is that it is time bound. It has been specified under the code that the entire resolution process has to be completed within 330 days. An additional 90 days can be given if the process is not completed within the specified period. Also the reason has to be given in writing by the resolution professional for such delay. This has been done to speed up the mechanism. As it has been stated in the World bank's Doing Business Report 2016 that earlier when IBC was not there the whole process of debt recovery use to take about 4.3 year to conclude. So, to get rid of this situation such time frame has been provided under the IBC code.

ii. Default Amount: under this code default means the non-payment of the debt either wholly or in part, any instalment which has to be paid by the debtor or corporate debtor but has not been paid. The amount of default for initiation of process under IBC code should be Rs. 1 crore. Earlier it was 1 lakh now it has been raised to 1 crore in the 2020 amendment.

CHAPTER - 5

EFFECTIVENESS OF IBC

IN NPA RECOVERY

CHAPTER: 5 – EFFECTIVENESS OF IBC IN NPA RECOVERY

5.1 INTRODUCTION

While operating a business, the businessmen face numerous obstacles. Lack of resources is one of their main problems. Every country tries to establish several organisations that can lower their barriers to alleviate the ease of doing business.

Banks are one of those organisations that provides financial aid to persons in need in exchange for a security. When a borrower defaults on a loan, the bank may be left holding a substantial bad debt as well as stressed assets that become Non-Performing Assets (NPAs).

The bank has many options to recover the past-due payment under various laws, including the SARFAESI Act.

We'll attempt to ascertain the bank's potential to recover NPAs under various legal measures in this chapter.

In the preceding chapters, the intent behind the implementation of the Insolvency and Bankruptcy Code of 2016 was discussed; in this chapter, we'll see how it has changed the bank's NPA recovery procedure.

The economy of each country plays a major role in its expansion and development. There are several contributing elements. The development of the national economy is significantly aided by the banking sector. Without a sound financial system, no country can have a robust economy. It aids in channelling savings to investments and fostering economic growth by allocating money to investments with the potential to yield higher returns. The Indian banking system is composed of commercial banks and cooperative banks. Scheduled and non-scheduled commercial banks are both classified as commercial institutions. Schedule banks further divide into private, public, foreign, and regional rural banks.

The responsibilities of these banks include receiving deposits and disbursing loans as needed. Because a deposit is made with public funds and the bank is required to refund it upon request, keeping one is fully risk-free. In contrast, there is often a considerable risk when a bank lends money to the general public because there is never a guarantee that they will be reimbursed and if they are not, the bank will end up with non-performing or stressed assets.

The financial performance and profitability of the bank are impacted by nonperforming assets. A non-performing asset is any asset that does not generate revenue for the bank.

Thus, a loan or advance that is in default or in arrears is classified as a non-performing asset (NPA). When principal or interest payments are late or missed, a debt is in arrears. The loan is in default when the lender thinks the conditions have been broken and the borrower is unable to meet his obligations.

History Of Non-Performing Assets Classification:

Before 1985, there was no structure in place in the Indian banking sector for classifying assets into loans and advances. This asset classification, known as the "Health Code System," was the result of the Ghosh Committee's proposal about the final accounting system. The loan accounts were then further separated into eight different categories. But afterwards, the Narsimham Committee on Financial System recommended that this asset classification, in comparison to their health system, is not in line with international norms. Consequently, they recommended that the banks categorise their advances as standard assets, sub-standard assets, dubious assets, and loss assets.

The asset of the loan of bank are classified into two:

a. Performing Assets: assets which are performing and paying regularly. It means the borrowers are repaying the loan given by the bank.

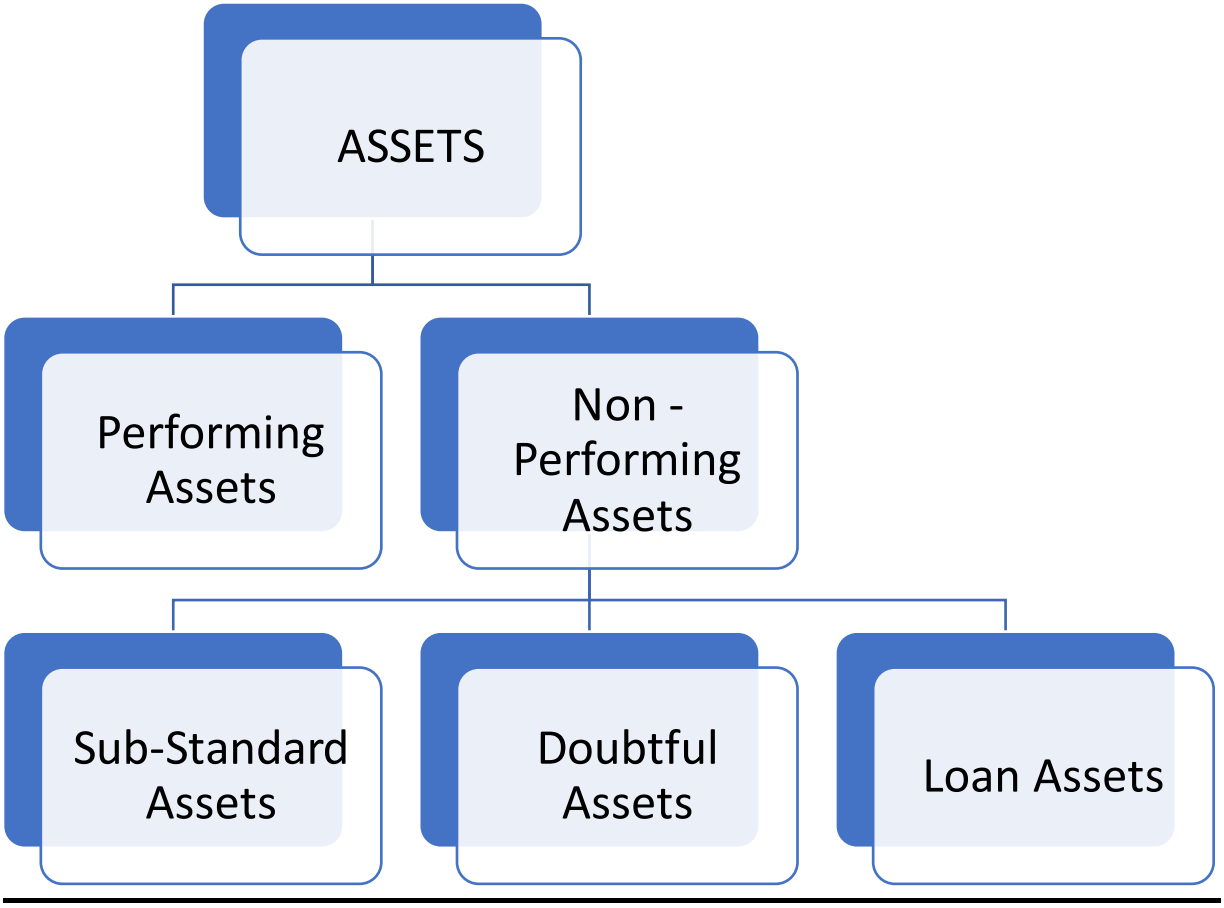
b. Non-Performing Assets: assets or leased asset, which is becoming non- performing asset because the borrower is not repaying the principle or the interest amount and it ceases to generate income for the bank.

Non-performing assets are further classified into:

i. Sub-standard assets: Assets or loan account which remain Non-Performing for year or less than a year. And in such cases the current market value of security charged are not sufficient to ensure recovery of debt and the account will fall under loss if deficiencies are not corrected in time.

ii. Doubtful asset: where the asset or the loan given remain Non-Performing beyond one year and the recovery is highly questionable and seems impossible.

iii. Loss assets: here the asset is considered to be uncollectable and unrecoverable. But it is not wholly written off by the bank. it remains to be bank asset though it seems very less chance of recover.



5.2 IBC'S IMPACT ON NPA RECOVERY

Before the IBC was passed, as is already known, there were various statutes for recovering the debt. There were various laws, including the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act of 2002 and the Recovery of Debts Due to Bank and Financial Institutions (RDDBFI) Act of 1993. The banks used these two acts to file a lawsuit against the debtor to recover unpaid debts. Other laws, such as the Sick Industrial Companies Act (SICA) of 1985 and the Companies Act of 1956 (winding up clause), allowed bank and non-bank creditors as well as corporate debtors to file a lawsuit in an effort to resolve their insolvency collectively. There were further mechanisms as well for corporate debtor.

The Tiwari Committee was created in 1981 and proposed broad-based legislation to deal with industrial sickness. As a consequence, SICA came into existence in 1985, and BIFR - Board for Industrial & Financial Reconstruction was formed under SICA in January 1987. The AAIFR – Appellate Authority for Industrial & Financial Reconstruction was founded in April 1987. However, both of them got dissolved on 30th November, 2016. The Eighth Schedule of the IBC makes it clear that if matters that are already pending before the BIFR and AAIFR are re-instituted before the NCLT under the IBC, the cases that are currently pending before the BIFR and AAIFR shall be relieved. 180 days from the start of the IBC 2016 must pass before the case under the IBC is started, also eligible to be started as new cases under the IBC are other cases that were before the DRT or winding up cases that were before the High Court and admitted under the Companies Act of 2013.

All creditors, both financial and operational, whether banks or non-banks, may file a corporate insolvency action under Section 6 of the IBC. Additionally, since a deadline of 330 days has been set for the resolution of the procedure, even non-bankers who are dealing with prolonged delays can file a lawsuit with the NCLT. At that point, the bank will have no alternative but to take part in the proceeding. IBC is therefore feasible for current NPAs on a broad scale.

An automatic moratorium period begins for the 180-day length of the IRP once an Insolvency Resolution plan for a corporate debtor is accepted by the NCLT. All ongoing legal proceedings

against the corporate debtor in front of the DRT, Civil Court, or High Court are stayed at this time.

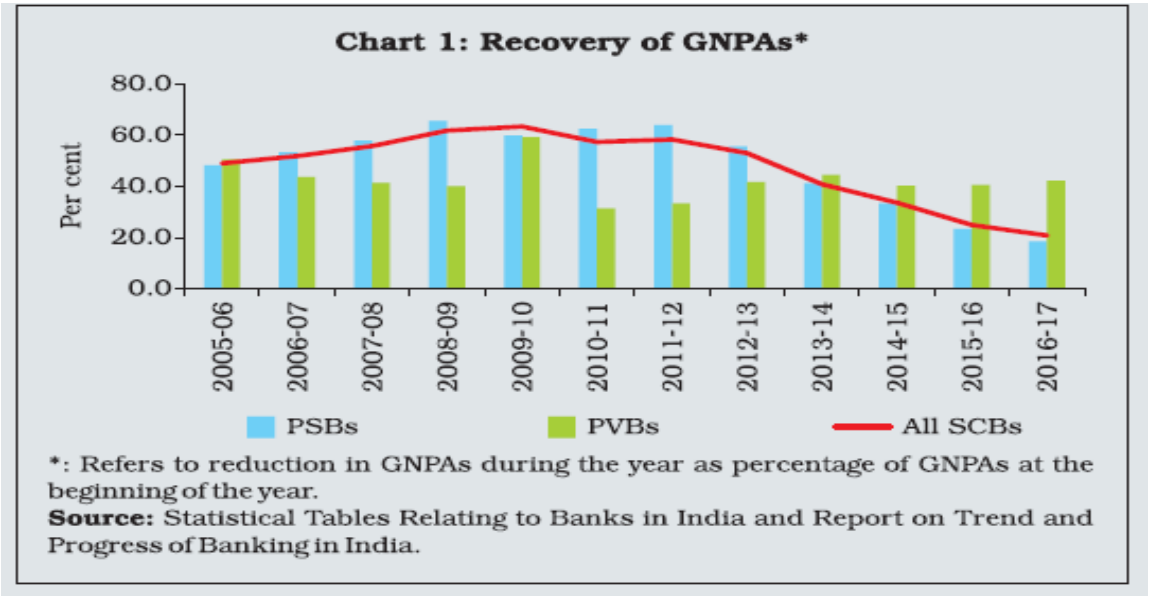
A committee of creditors will be established, made up of all of the company's financial creditors. The COC then votes by value with a 66% supermajority to accept the company's resolution plan - (Section 30 (4) of the IBC) All matters that are pending in various forums must be dropped if the plan is accepted by the COC and the NCLT, and the resolution plan will be put into action. In accordance with section 33 (1) of the IBC, the NCLT will issue a liquidation order if the COC does not accept it within 180 days. Therefore, once the liquidation process starts, all recovery will be achievable only through the liquidation process, while other mechanisms and recovery processes that were taking place in other forums will stop.

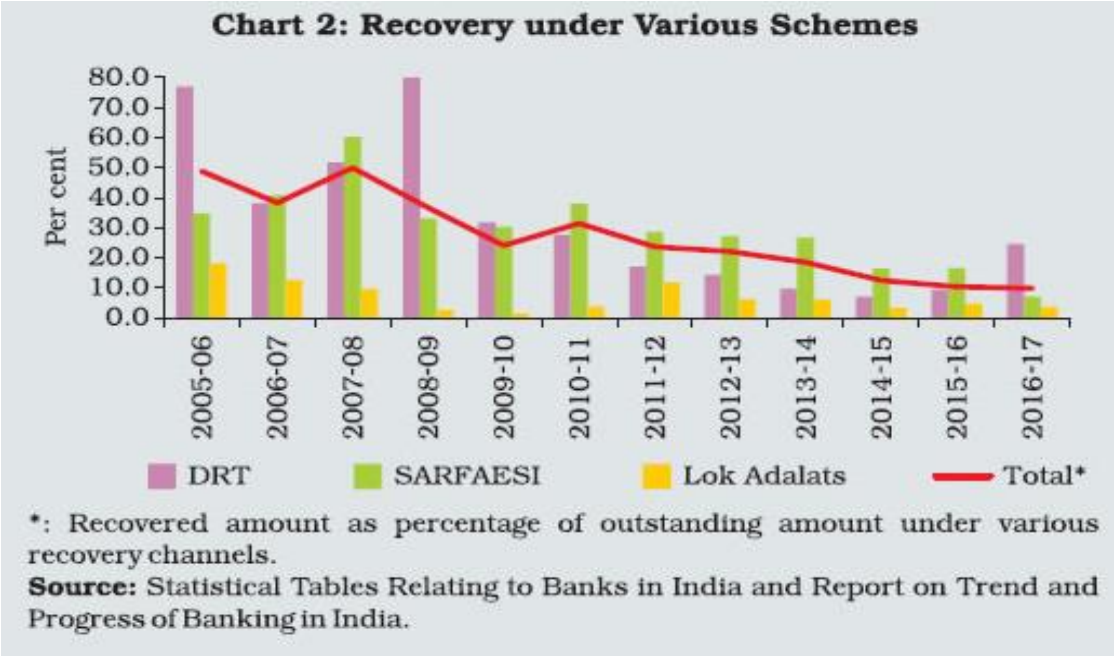
“Non-performing assets (“NPAs”) recovered by scheduled commercial banks by way of CIRP under the IBC increased to about 61 per cent of the total amount recovered. IBC, under which recovery is incidental to the rescue of companies, remained the dominant mode of recovery, according to RBI’s Report on Trend and Progress of Banking in India 2019-20.

According to World Bank estimates, India rose from 108th to 52nd place in 2019 in terms of "resolving insolvency." The 2016 Insolvency and Bankruptcy Code has been given credit for this advancement. Additionally, the recovery rate under the newly enacted law is 42.5 percent for the year 2018, compared to 14.5 percent and 3.5 percent under SARFAESI and DRTs, respectively.

- During 2015-17, the average recovery ratio of Indian banks was 26.4 per cent with recovery by private sector banks (PVBs) (41.0 per cent) being much higher than by public sector banks (PSBs) (25.1 per cent). During this period, the average amount recovered through various existing legal recovery channels, i.e., SARFAESI Act 2002, DRTs and Lok Adalats was only 10.8 per cent of the total amount involved. Various micro (loan specific) and macro (economy specific) factors have been identified as determinants of recovery of stressed assets – higher quota of collateral; the size of the company (Grunert and Weber, 2009); the state of the business cycle (Frye, 2000); and growth in GDP and loan supervision (Dermine, et al., 2006; Bello, et al., 2013). In the case of India, recovery of bad loans was found to be positively associated with secured loans, term loans and banks’ exposure to real estate (Misra, et al., 2016).

- Panel data regression on recovery (measured as reduction in NPAs) at the bank level using a random effects model for a set of 71 banks for the period 2001-17 shows that a high proportion of secured loans and term loans, improvement in the insolvency regime, availability of alternative sources of funds such as debentures issued by corporates and an easing of the monetary policy stance improve the recovery of stressed assets. Factors such as term loans or secured loans assume importance in case of PSBs whereas the ability to raise resources from alternative sources like debentures matter in the case of PVBs. Moreover, loan write-offs, the insolvency environment and the macroeconomic environment were found to be equally important for both the bank groups. - RBI Circular, 2017
- In liquidation proceedings, IBC, 2016 provides secured creditors the right to choose between (i) enforcing / realising/ settling / compromising / dealing with their security interests and applying the proceeds to recover the debts due to it, or (ii) relinquishing rights on these assets to the liquidation trust and receiving the proceeds obtained from the liquidator's sale of assets. It also provides for the contingency that the secured creditor may not be able to recover all the debt through the proceeds obtained from the sale of encumbered assets. Such creditors find a place in the liquidation waterfall, albeit junior to unsecured creditors and other secured creditors, and may get back additional amounts through proceeds of overall liquidation. The time-bound and creditor-friendly nature of the process are expected to raise the level of bank recovery going forward. – RBI Circular, 2017





RBI & Insolvency Resolution Through IBC

- There was a great deal of discussion when the RBI released one circular in 2018. If the bank is unable to implement a resolution plan within 180 days of the default, the RBI mandated that all banks and financial institutions initiate a Corporate Insolvency Resolution Plan against the borrower (the defaulting firm) who has a loan exposure of more than Rs. 2000 Cr.
- According to the circular, banks were required to quickly identify and classify stressed assets as special mention accounts, report to the RBI, and put resolution plans into place, even if there was only a single day's worth of late payments. The current mechanisms, including corporate debt restructuring and strategic DR, have been eliminated by this circular. - According to RBI Guidelines For Application Of IBC On NPAs.

Petition Filed Against The RBI Circular:

The one-day default norm that was mentioned in the circular raised some concerns. As a result, petitions were submitted by the textile, power, and other industries, alleging that the decision was arbitrary and discriminatory since it did not adhere to several conditions, such as setting a deadline of 180 days without taking into account the problems experienced by other sectors. Additionally, it did not obtain the previous approval from the federal government as required by Section 35AA of the Banking Regulation Act. The RBI was given authority to direct any banking companies to start IRPs against any defaults by Section 35AA of the BR Act. To enact a circular under section 35AA, however, prior consent from the central government was required. Therefore, the Supreme Court ruled that section 35AA of the BR Act was violated by this circular.

- The RBI issued a revised circular in 2019 for resolving stressed assets by giving banks or lenders a thirty-day period to label an account as a non-performing asset, two months after the Supreme Court invalidated the RBI 2018 Circular, which required the Bank to start the IRP even in case of one day default. The design and implementation of the resolution plan will be entirely at the lenders' discretion under the new circular. With 30 days of the default, the IBC process may be initiated. The inter-creditor agreement, which stipulates a majority decision-making standard, must be signed by the lenders. Additionally, RBI modified its criterion for a creditor's unanimous approval. Any decision made by the lenders representing 75% by value of the total outstanding loan facility and 60% by number shall be binding on all lenders and provided by the ICA. - RBI Circular, 2018

Impact of IBC in NPA Recovery

The Insolvency and Bankruptcy Code (IBC), which went into effect five years ago, has contributed to the recovery of Rs. 2.5 lakh crore (For the 396 instances that were settled out of the 4,541 admitted cases as of June 30, 2021, IBC had enabled recovery of Rs 2.5 lakh crore against admitted financial claims of Rs 7 lakh crore, corresponding to a recovery percentage of 36%. The remaining cases were divided into 1,349 under liquidation, 1,114 closed under

review, settlement, or withdrawal, and 1,682 pending cases.), or roughly one-third of the admitted financial claims from insolvent firms, signalling a significant change in India's insolvency resolution procedure and credit culture. The efficiency of IBC in NPA resolution can be gauged by the following:

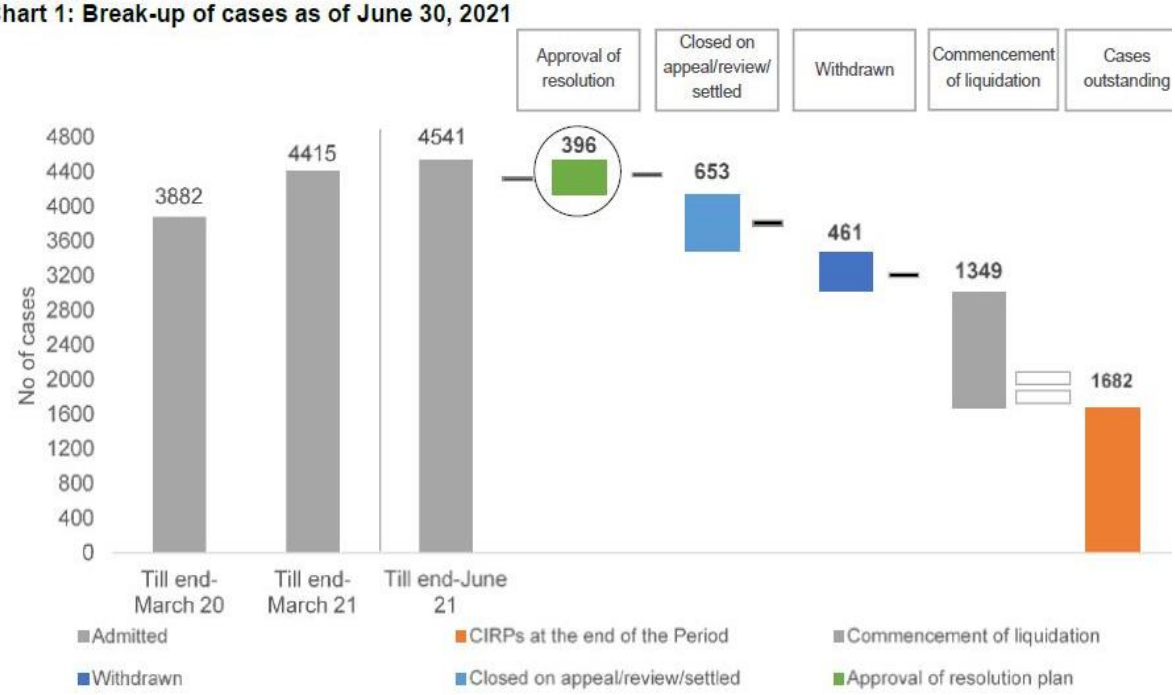
- **Recovery via IBC vs other Laws:** The amount collected by the IBC in fiscal 2019 was Rs 70,000 crore, or twice the amount recovered in fiscal 2018 (*As per the Reserve Bank of India's report on Trend and Progress of Banking in India 2017-18)* through alternative resolution mechanisms like the Debt Recovery Tribunal, Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, and Lok Adalat.
- **Recovery Rate of Cases Resolved through IBC:** The recovery rate for the 94 cases resolved through IBC by fiscal 2019 is 43%, compared with 26.5%. The recovery rate is also twice the liquidation value for these 94 cases, which underscores the value maximisation possible through the IBC process.
    - The recent resolution of a large financial services firm with a recovery of ~Rs 37,000 crore against admitted financial claim of ~Rs 87,000 crore, translating to a recovery rate of ~43%, underscores the efficacy of IBC. The resolution value was ~1.4 times the liquidation value – Dewan Housing Finance Case
- **Balance of power shifted from the borrower to the creditor:** 4,452 cases involving over Rs 2.02 lakh crore in debt were settled before entering the IBC process because the debtors paid the creditors the sums that were in default.
- **Time taken for Resolution:** The average case resolution period for cases settled through the IBC is 324 days, which is longer than the 270 days specified in the code but substantially better than the 4.3 years before.

5.3 SHORTCOMINGS IN THE IBC PROCESS

A closer examination of the data reveals that the recovery rate and resolution timelines still have a great deal of room for improvement. This necessitates the essential need for ongoing Code strengthening and ecological stabilisation.

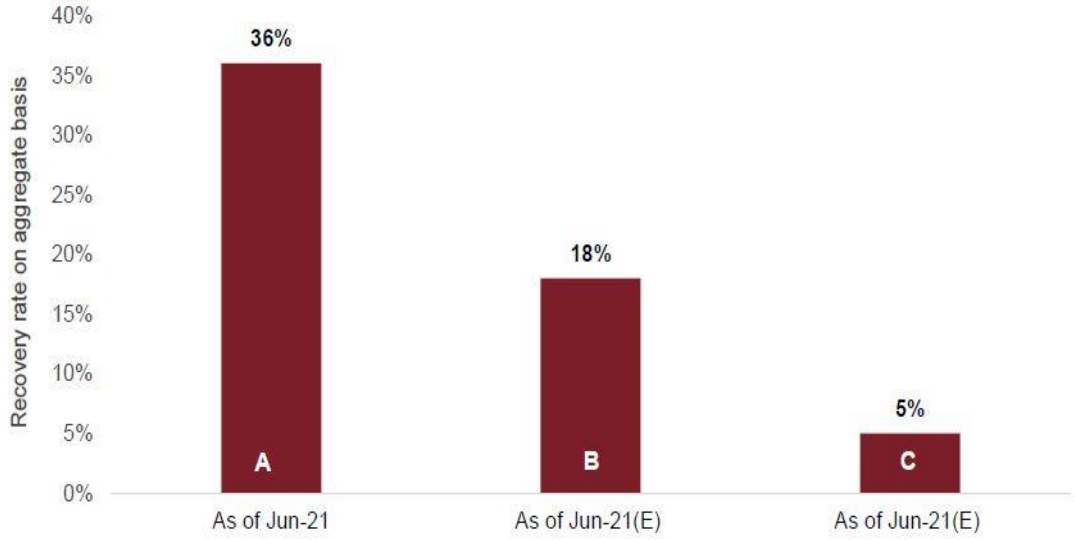
- As of March 31, 2019 - 1,143 cases were still pending under the IBC, with 32% of those cases' resolutions still awaiting action even after 270 days. Liquidation can also be triggered by sizable delays. There are also a couple large accounts whose resolution has been pending for more than 400 days. Other issues that need to be addressed include the National Company Law Tribunal's workload, the clarity surrounding claim priority, the dearth of information utilities, and the development of a secondary asset market.
- **Low recovery rate in small value cases:** The recovery rate drops to 18% when the top 15 instances (by resolution value) are taken out of the 396 resolved cases. (Graph 2)
- **Persistent Delays:** Compared to the permitted maximum of 330 days, the average resolution time for the abovementioned solved cases is 419 days. The majority of unresolved cases—roughly 75%—have already been outstanding for more than 270 days.
- **High Number of Cases for Liquidation:** Besides low recovery rate and longer timeframe, a key challenge is the high number of cases going to liquidation. As of June 30, 2021, nearly one-third of the 4,541 admitted cases had gone into liquidation, with a recovery rate estimated at merely 5%. That said, around three-fourths of these cases were either sick or defunct. With closure of these vintage cases, recovery rate as well as timelines are expected to get better. – CRISIL Report, 2021

Chart 1: Break-up of cases as of June 30, 2021



Note: CIRP: Corporate insolvency resolution process
Source: Insolvency and Bankruptcy Board of India (IBBI) newsletter, June 2021

Chart 2: Recovery rates for resolved and liquidation cases



*Note: **A:** Aggregate recovery rate (actual) for 396 resolved cases; **B:** Recovery rate excluding the top 15 of the 396 resolved cases; **C:** Recovery rate for 1,349 liquidation cases **E**: Estimated*
Source: IBBI, CRISIL Ratings estimates

5.4 JUDICIAL DECISIONS

Case	Dues	Summary
Jyoti Structures	Rs 7364 cr	Only one RP with upfront Rs 150 cr and remaining to be paid over 15 yrs; not approved; IP asked time extension; 81% approval 4 days after timeline; secured creditor moved NCLT; liquidation ordered; employees and bidder moved NCLAT; stay on liquidation; bidder asked to reconsider bid. A SC Bench led by Justice R F Nariman has now dismissed DBS Bank's appeal against the NCLT order which accepted the amended resolution plan for Jyoti Structures. The NCLAT had on March 19 set aside the July 31, 2018, NCLT-Mumbai order to liquidate Jyoti Structures and remitted the case back to the tribunal. It has however gone under liquidation.
Essar Steel[6]	Rs. 49000 cr	Bidders ArcelorMittal(AM), Numetal(NM), Vedanta(VD); AM and NM were initially disqualified as AM had NPA in Uttam Galva and KSS Petron, and NM had Rewant Ruia as promotor, whose father Ravi Ruia was promotor of Essar Steel; SC exercised its powers and declared both eligible if they pay off dues and divest their stake; CoC selected AM with 92%; Promoters want to buy back and stop proceedings; current plan leaves some operational creditors with unfulfilled dues; matter in Supreme Court. The Supreme Court correctly reinforced the supremacy of the financial creditors in decisions relating to the assets, liabilities and business of the corporate debtor (including the distribution of proceeds among creditors), and clarified the narrow confines within which courts may interfere. Aecelor – Mittal Nippon was the successful bidder.

[6] Civil appeal no-8766-67 of 2019

Era Infra Engineering[7]	Rs. 10000 cr	Under process; started May 8, 2018; Was referred to NCLT against decision by RP to reject contractual commitments such as put options as financial debt; NCLT upheld the claims on the basis of Contracts Act. However currently the case is in Supreme Court and no judgement has been passed.
Monnet Ispat & Energy[8]	Rs 11000 cr	Taken over by JSW Steel-AION Investments consortium (70%-30%); lenders took a haircut of 75%; approval by 98% CoC; coal mine licence cancelled; offer now stands at Rs 2,875 crore with an additional Rs 1,000 crore pledged as equity and working capital requirements (75 crore to small operational creditors). Consortium of JSW and Energy Limited AION Investments Pvt. Ltd was the successful bidder with realised amount of Rs 2892 Cr.
Alok Industries[9]	Rs. 29500 cr	RIL and JM Financial were only bid; only 70% approval in CoC; IP recommended liquidation; Government came out with reduced cut-off (66%); lenders taking 83% haricut; Rs 5050 cr recovered; challenged in NCLAT and dismissed; about to be finalized. Reliance Industries Ltd Limited JM Financial Asset Reconstruction Company Ltd, JMFARC – March 2018 – Trust was the successful bidder with realised amount of Rs 5052 Cr.
Electrosteel Steels[10]	Rs 13395 cr	NCLT cleared Rs 5320 bid by Vedanta Steel(VS); Tata Steel(TS) and Renaissance Steel(RS) were two other bidders; RS sought to disqualify VS and TS based on criminal misconduct clause punishable by imprisonment; VS subsidiary in Namibia and TS in UK; SC ruled there was difference between 'fine or imprisonment' and 'fine and imprisonment'. Vedanta was the successful bidder with realised amount of Rs 5320 Cr.

[7] Appeal n0-CA No-997(PB)/2018
[8] Civil Appeal No-3285/2009
[9] Ciil Appeal No-4213-4219 of 2020
[10] Diary no-11168 of 2020

Amtek Auto/ Adhunik Metaliks/ ABG Shipyard [11] / Castex Tech	Rs. 44314 cr	Liberty House Group (LHG) had offered to pay Rs 4,810 crore for both Amtek Auto and Adhunik, while for ABG Shipyard the company has reportedly offered Rs 5,200 crore; bid value for Castex is unknown; differences in valuation; allegation of irregularities and incorrect information shared by IP; LHG seeks to modify RP; not possible by law; Amtek seeks fresh bids; issue of performance-based guarantee (PBG) in Castex Tech case; all may go into liquidation. NCLT has approved the resolution plan.
Lanco Infratech[12]	Rs. 50000 cr	CoC rejected bid by Thriveni Earthmovers, revised bid also rejected; NCLT ordered liquidation. Currently under liquidation.
Bhushan Steel[13]	Rs. 56000 cr	Offer by Tata Steel of Rs 32500 crore with Rs 1200 cr to be paid over 12 months and conversion of remaining debt to equity; promoters and L&T as operational creditors approached NCLAT against the order but were turned down. Bamnipal Steel Ltd was the successful bidder with realised amount of Rs 35571 Cr.
Bhushan Power and Steel[14]	Rs 45000 cr	Tata Steel (Rs 17000 cr); Liberty House Group (Rs 18500 cr); and JSW Steel (Rs 11000 cr revised to Rs 19700 cr); promotor initially in the race but disqualified based on section 29A of IBC; challenged the article in court; Tata Steel moved against LHG bid. JSW Ltd. was the successful bidder with realised amount of Rs 19350 Cr.
Jaypee[15]	Rs. 9800 cr	Process underway; Supreme Court ruled homebuyers be included in CoC; 5 EoIs from interested parties received. Suraksha Group has won the bid against NBCC with 98.66% votes.

[11] I.A.(I.B.C.) 1020/2020
[12] I.A.(I.B.C.) 561/2021
[13] CA No 254(PB) 2019
[14] CA No 254(PB) 2019
[15] IB-77/ALD/2017

5.4 CONCLUSION

The SARFAESI Act has become the second most effective way to recover loans and NPAs which have financial institutions and banks as major lenders. The IBC was primarily enacted to help banks recover a higher amount of bad loans than they had earlier. With its time bound procedures, the IBC (though it is still evolving) has paved the way for a better and more efficient mode for recovery of debts."

Despite the difficulties, the IBC has thus far been essential in helping stressed assets be resolved. Given the significant amount of stressed assets in the Indian financial system, its effectiveness will continue to be put to the test (CRISIL Ratings estimates stressed assets in the Indian banking system, comprising gross NPAs and loan book under restructuring, at ~10-11% by March 2022.) In this environment, the government has taken the initiative to solve problems that different stakeholders are having. The Standing Committee on Finance submitted suggestions to strengthen the IBC and the surrounding environment in August of this year.

The crucial suggestions include:

1) creating specialised National Company Law Tribunal (NCLT) benches to hear only International Business Code (IBC) matters;

2) establishing a professional code of conduct for committee of creditors (CoC);

3) enhancing the role of resolution professionals; and

4) digitising IBC platforms to speed up the resolution process and maximise the realisable value of assets.

The government has already approved the nomination of 18 new NCLT members. Similar to this, public perception has been sought to improve CoC operation. It can be said that prompt execution of these suggestions will significantly strengthen the Code. The scope of IBC will be further expanded by the prompt implementation of insolvency frameworks for group/cross-border, financial service providers, and personal insolvency. - CRISIL Report, 2021.

It has greatly improved the sense of credit discipline. Due to the real threat of losing their asset if the resolution procedure fails, defaulting debtors now feel a sense of urgency and severity.

CHAPTER – 6

CONCLUSIONS & SUGGESTIONS

CHAPTER: 6 – CONCLUSIONS & SUGGESTIONS

One of the main goals of a good insolvency law is to offer a variety of tools to assist businesses in dealing with various phases of financial hardship.

An insolvency law should focus on restructuring viable enterprises and making it easier for non-viable businesses to close their doors. The IBC offers such a framework with a time-limited procedure for liquidating a company's assets or restructuring it through a CIRP. It was a significant legislative change that improved India's insolvency laws, assisted in addressing non-performing loans, and raised total creditor recovery.

The operationalization of the insolvency legislation is supported by four pillars that were introduced by the IBC, 2016:

i. IBBI which has regulatory oversight over the IPs, IPAs, IPEs and IUs;

ii. regulated and qualified IPs;

iii. IUs and

iv. AAs.

The IBC has made significant progress in a short period of time in providing a reliable framework that aspires to offer prompt, effective, and impartial resolution of viable enterprises and a clear liquidation procedure that respects the importance of claims and existing creditor rights.

The IBC has fundamentally altered the landscape of economic legislation. The establishment of a thorough "one-stop-shop" for insolvency resolution has opened the way for a simple exit in the event of an honest corporate collapse. The results under it have been more than promising five years into operation. Saving the lives of corporate debtors (CDs) in trouble is the Code's main goal. Through resolution strategies, The Code has saved 396 CDs as of June 2021, of which a third were in severe distress. 1349 CDs have been referred to liquidation, nonetheless. When they were admitted to CIRP, the CDs that were saved had assets valued at INR 1.46 lakh crore, whilst the CDs that were designated for liquidation had assets valued at INR 0.49 lakh crore. As a result, around three-fourths of distressed assets were saved in terms of value. One-

third of the enterprises that were saved were either ailing or defunct, compared to three-fourths of the CDs that were sent for liquidation.

As a percentage of claims, scheduled commercial banks (SCBs) were able to recover 45.5% of the amount involved using IBC for the financial year 2019–20, which is the greatest compared to recovery under other modes and legislations, according to the Economic Survey 2020–21, citing RBI statistics. The World Bank Group noted in its "Doing Business 2020" report that India's administrative reform initiatives have focused on paying taxes, engaging in cross-border trade, and resolving insolvency, among other areas measured by "Doing Business." India's rating in the ease of resolving insolvency metrics has improved as a result of the Code's results. India's ranking in the Global Innovation Index 2021 for "Ease of Resolving Insolvency" increased from 111 in 2017 to 47 in 2021. Thus, IBC has improved the "ease of doing business in India" and has proven to be a successful reform in the country's financial sector. The serious flaws in India's current staggered insolvency rules have been remedied by the IBC, which has unified them.

Therefore, it is clear that the IBC is one of the most important laws passed in the previous ten years, positively affecting the "ease of doing business in India" and serving as an efficient stimulant for speeding the Indian economy. IBC will soon have to contend with a big hurdle and similarly sizable expectations for consistent and quicker execution. It is highly anticipated that the IBC would overcome all obstacles and continue to lead the Indian economy down the path of fairness, stability, and prosperity given the progress it has made thus far.

Findings:

1. As per the Economic survey report 2020, Insolvency and bankruptcy code has improved the resolution process in India as compared to the other earlier mechanisms. The recovery rate of NPA cases under the IBC is 42.5% of the amount involved as compared to 14.5% under the SARFAESI Act.

2. The Economic Survey Report 2020, Also says that within 340 days the cases are being resolved under the IBC and earlier it use to take 4.3 years to resolve the case under different mechanism.

3. The World Bank's 'Ease of Doing Business'2020 report says India has moved up 14 positions to 63rd position as compared to 77th position in 2018. In the resolving insolvency index, India rank jumped 56th place to 52 in 2019 from 108 in 2018.

4. The recovery rate in 2018 was 26.5% where as in 2019 it was 71.6%. The time taken for recovery has also improved from 4.3 year in 2018 to 1.6 year in 2019.

5. India is also among the Top 10 Improvers.

Suggestions

The Adjudicating Authority (NCLTs), the Appellate Authority (NCLAT), the Honourable High Courts, and the Honourable Supreme Court have all issued a number of historic decisions and judgements addressing various conceptual concerns, resolving disputed matters, and resolving grey areas since its formation. In India, the field of knowledge known as insolvency is currently becoming well-established. The committee of creditors (CoC), creditors and corporate debtors, bankruptcy resolution specialists (RPs), valuers, assessors, bidders, and other participants in the value chain are all becoming more adept at protecting the underlying value. They are accelerating the procedure to stay on schedule, although significant delays are frequently seen because of unrelated factors. The IBC will be able to effect change and is anticipated to work on resolution of troublesome units rather than ordering liquidation of companies moving ahead with a greater understanding of the CIRP process.

The haircuts might also be reduced if the deadlines are met and the bidding process is improved. With the percentage of recovery increasing, using IBC as a means of debt resolution will become the default option. By planning intensive training, strengthening standard operating procedures (SOPs) for CoC, and developing expertise in applying the tool to quickly rescue failing units, banks should be able to foster capacity building. It will be crucial to develop a debt resolution cadre within banks and non-banks.

IBBI recently posted a draught plan to make significant changes to CIRP that would increase technology, openness, and speed in an effort to make the system more compatible. When the reforms are finalised, they will mandate the inclusion of CIRP applications if default is discovered. To establish default, the information utility (IU) is going to be redesigned. Penalties may be imposed by adjudicating authorities. Settlements outside of court will be encouraged informally. If the pre-packaged insolvency system is to be expanded beyond MSMEs and CoC, then these organisations must be able to capitalise on the potential of IBC by embracing the challenge of completing their respective tasks on time. IBC will play a key differentiating role in controlling asset quality as a result of these advancements.

ANALYSIS OF SURVEY RESPONSE

At what stage are accounts referred to IBC

D3, Loss and Fraud – Most common

Referral to SARFAESI

Across categories

Referral to DRT

Across categories

IBC usually invoked for large accounts with outstanding more than ₹5 crores

Cases being resolved before starting the insolvency process: up to 20% across banks

Time taken to resolve cases ~ 6 months under SARFAESI provided secured loans and no appeal made to DRT under section 17 of the Act

And DRT ~1-5 years

IBC takes ~1-2 years

As per banks, **formation and approval of CoC by NCLT and the voting process on resolution plan** take the maximum time

Current issues pertain **to judicial intervention at various stages** and granting of stays to borrowers on non-substantiated grounds, execution of recovery certificates by recovery officers

Betterment of current structure – if DRT authorized to take information from Income Tax department regarding the borrower and if CERSAI is integrated with PAN and Aadhaar.

All the banks have submitted that IBC process has sped up the insolvency resolution process

Haircuts prior to IBC: 20-40%

Haircuts after IBC: 20-40%; 40-60% for SBI

Liquidation under IBC: 0-20%; SBI has submitted that around 60-80% of the cases go under liquidation, which might be the reason for them taking high haircuts;

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APPENDIX

Given below is the questionnaire attached that had been circulated for survey in banks.

QUESTIONNAIRE

1. Account Classification Under Which The Account Is Referred To NCLT under IBC –

Account Type	Extremely Likely	Likely	Neutral	Unlikely	Extremely Unlikely
Substandard					
D1					
D2					
D3					
LOSS					
FRAUD					

2. Account Classification Under Which The Account Is Referred To SARFAESI –

Account Type	Extremely Likely	Likely	Neutral	Unlikely	Extremely Unlikely
Substandard					
D1					
D2					
D3					
LOSS					
FRAUD					

3. Account Classification Under Which The Account Is Referred To DRT –

Account Type	Extremely Likely	Likely	Neutral	Unlikely	Extremely Unlikely
Substandard					
D1					
D2					
D3					
LOSS					
FRAUD					

4. What Is The Major Mode Of NPA Recovery For Following Category Of Account –

Amount	SARFAESI	DRT	IBC	Securitization	Others
0-5 Crores					
5-25 Crores					
25-50 Crores					
50-100 Crores					
100-500 Crores					
>500 Crores					

5. How Many Accounts Have Been Referred To NCLT Since 2016 –

- <5
- 5-10
- 10-20
- 20-50
- 50-100
- >100

6. How Many Cases (approximate %) Got Resolved Before Starting The Process (Referring To The Above Question) –

_____

7. What (Approximate) Time Do The Following Acts Take To Resolve Insolvency –

SARFAESI - _____

DRT - _____

IBC - _____

8. Which Step in IBC Takes The Longest –

_____

9. Key Issues in current system that hamper effective resolution –

_____

_____

10. What change in the current legislation would make the system more effective -

_____

_____

11. The Enforcement Of The Insolvency & Bankruptcy Code, 2016 has –

- Speed Up The Process Of Resolving Insolvency
- Slow Down The Process Of Resolving Insolvency
- Same Effect As Earlier Acts.

12. What Is The Average Percentage Of Haircuts That your bank Took Prior The Enactment Of IBC –

- 0% - 20%
- 20% - 40%
- 40% - 60%
- 60% - 80%
- More Than 80%

13. What Is The Average Percentage Of Haircuts That Banks Have Taken After The Enactment Of IBC –

- 0% - 20%
- 20% - 40%
- 40% - 60%
- 60% - 80%
- More Than 80%

14. With reference to the cases referred to NCLT under IBC, what % (approx.) are liquidated -

- 0% - 20%
- 20% - 40%
- 40% - 60%
- 60% - 80%
- More Than 80%s

15. Any Other Suggestions - _____

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