Insolvency and Bankruptcy Framework: India Perspective

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I. Introduction

II. Need for a Strong Insolvency and Bankruptcy Regime

III. Insolvency and Bankruptcy in India – Historical Perspective

IV. Insolvency and Bankruptcy Code, 2016 – Indian Law on Insolvency and Bankruptcy
   A. Approach and Handling of Insolvency and Bankruptcy under IBC
   B. Institutional Mechanism for Effective Implementation of IBC
   C. Progress under IBC
   D. Impact of IBC
   E. Impact on Ease of Doing Business Ranking of India

V. Concerns about Insolvency and Bankruptcy Code in a Corporate Resolution and Insolvency

VI. Future Agenda for Reforms in IBC in India

VII. Conclusion

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Abstract

Insolvency or Bankruptcy is a state where an individual or an entity is unable to pay its debts as and when they fall due or when the realizable value of assets are insufficient to meet the liabilities. A strong insolvency and bankruptcy regime should provide for resolution/reorganization to enable the entity to become financially sound in a time-bound manner. If this is not possible, it should ensure that a quick liquidation/bankruptcy mechanism is put in place to enable take over and disposal of assets and make payment of the proceeds to creditors. India has enacted comprehensive legislation called Insolvency and Bankruptcy Code 2016 (IBC) for dealing with insolvency resolution and liquidation of corporate entities and insolvency resolution and bankruptcy for non-corporate entities like individuals and firms. A separate regulatory body, the Insolvency and Bankruptcy Board of India, has been set up for overseeing the process and also to regulate the entities involved in the process, i.e., insolvency professional agencies and professionals, information utilities, registered valuers, etc. Special courts, i.e., National Company Law Tribunal and National Company Law Appellate Tribunal, have been set up for handling matters relating to Insolvency and Bankruptcy of corporates. While the corporate insolvency process has been implemented, the provisions of the Code relating to individuals and firms would be implemented in a phased manner. With the enactment and implementation of IBC, the necessary infrastructure – legal, regulatory, institutional and capacity building – for handling insolvency and bankruptcy in the country under single legislation has been put in place. This important reform has helped India leap significantly in the ranking in World Bank's Ease of Doing Business and resolving insolvency. IBC has shown promising results in facilitating the resolution/reorganization of companies in distress and recovery of money from the sale of business and take over and sale of their assets. Simultaneously, there are several concerns in effective resolution and liquidation making it necessary for further reforms to make the law more effective.

The paper discusses the historical perspective, key aspects of Insolvency and Bankruptcy Code of India, its performance and the progress made, issues faced and the future agenda, including suggestions to improve the system.

Keywords: Insolvency and bankruptcy, ease of doing business, liquidation, resolving insolvency.

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I. Introduction

Insolvency or bankruptcy is a state when the debtor is generally unable to pay his debts as they mature or when its liabilities exceed the value of its assets.[1]The inability to repay debts in insolvency could be because of liquidity issues (i.e., not having money to repay dues on time) or because of solvency issues (i.e., the realizable value of assets is less than the amount of liabilities). It implies the inability or lack of means to pay one's debt and signifies acute financial distress. The issue of insolvency or bankruptcy if faced by individuals or by corporate entities impacts the creditors and thereby the economy. A legal regime to handle insolvency or bankruptcy is of utmost significance to the financial system because the most important creditors in the economy are the financial intermediaries, most of whom are banks or other institutions like non-banking financial companies or term lending financial institutions. Where the inability to pay is temporary like due to liquidity problems, attempting for resolution through the means such as rescheduling the loan, infusion of capital, change of management, and merger/amalgamation, can help the entity to turn around without the need for liquidation and remain a going concern. However, if the financial problem is not temporary and has reached a point where no resolution would help to restore the financial health of the entity, it would be better to liquidate the entity to salvage as much as possible from the disposal of assets. Thus, the legal regime for insolvency and bankruptcy must be able to handle a liquidation situation.

II. Need for a Strong Insolvency and Bankruptcy Regime

Financial crises like the Asian financial crisis of the 1990s and the global financial crisis of 2008 resulted in reduced demand for goods and services, non-availability of finance, and reduction in the investments which affect the liquidity and profitability, thereby forcing business entities into insolvency. The increased instances of insolvency prompted most of the countries to have a relook at their legal systems of insolvency and bankruptcy given the need to increase their effectiveness to combine reorganization and liquidation laws, as

1) United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Insolvency Law (2012).

well as bring in the efficiency of the judicial system to enforce these laws better. The efficient resolution of insolvency involves reorganizing viable firms and liquidating the unviable ones at a low cost so as to enable inefficient firms to exit and encourage entrepreneurial activity through new firm creation.[2] Such an insolvency regime would be useful to the creditors as they are able to assess not only the worth and working of the enterprise but also the ease and extent of realization of dues in case the enterprise fails. Accordingly, creditors are *"more willing to lend because they are more likely to recover their loans. Additionally, nations that reform their insolvency law to provide a mechanism for business rescue may reduce the failure rate among firms, help maintain a higher overall level of entrepreneurship in the economy and preserve jobs."*[3] By facilitating the efficient business exit and liquidation of non-viable companies, an insolvency framework supports the efficient reallocation of resources across the economy.[4] For these reasons, a sound Insolvency and Bankruptcy regime is an important element in the ease of doing business (laws, regulations, and institutional arrangements for doing business) in any nation.

III. Insolvency and Bankruptcy in India – Historical Perspective

There was no single law dealing with insolvency and bankruptcy of corporates, firms, and individuals in India. The provisions relating to winding up of companies, including voluntary winding up, were contained in the general legislation dealing with companies, i.e., Companies Act. However, there was no legal framework for resolution of financial distress except through debt restructuring schemes of the banks or financial institutions as per the directions of Reserve Bank of India ("RBI"). The recovery of dues was through civil suits, which were fraught with the problems of delay owing to huge pendency of cases before the Courts and appellate process which would increase the delay further,

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2) Cirmizi, Elena, Klapper, Leora, and Uttamchandani, Mahesh, *The Challenges of Bankruptcy Reform*, Policy Research Working Paper 5448, The World Bank Development Research Group Finance and Private Sector Development Team) (2010).

3) Resolving Insolvency - Measuring the strength of insolvency laws, (Doing Business 2015), available at https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency/reforms (visited Oct. 11, 2019).

4) *Id., Supra* note 2.

making the immediate recovery of dues virtually impossible.

Sick Industrial Companies Act 1985 ("SICA") was enacted for the rehabilitation of companies which were identified as to be sick or potentially sick. The industrial sickness was addressed through rehabilitation and revival of viable companies and liquidation of unviable companies by the Board for Industrial and Financial Reconstruction. Though enacted with the objective of addressing industrial sickness, it was largely ineffective in quick resolution of viable companies and delayed liquidation of unviable companies. There was no such mechanism for individuals in financial distress.

The legal framework for expeditious recovery of debts due to banks and financial institutions was introduced in 1993 through the Recovery of Debts Due to Banks and Financial Institutions Act. The Debt Recovery Tribunals were set up under this Act for expeditious disposal of cases pertaining to dues owed to banks and financial institutions. Since this did not solve the problem, the Government enacted Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 to enable recovery of dues in respect of secured loans through enforcement of security interest and sale or taking over management of assets given as security. The Act also provided for resolution through asset reconstruction. However, this was also not effective in dealing with companies in financial distress and which could not be resolved through asset reconstruction or reorganization. The only solution in such cases was liquidation for recovering the value of assets to settle claims. This had to be done through the Companies Act for companies. In the case of individuals and firms, the insolvency and bankruptcy process was handled by the Courts through the Presidency Towns Insolvency Act 1909 and Provincial Insolvency Act 1920. The absence of an effective resolution framework and the delay in the legal process of recovery of dues through the sale of assets was common to individuals and firms also as in the case of companies.

With the Asian financial crisis and the more recent global financial crisis, underlining the importance of reforms in the insolvency regime to have a sound legal regime for insolvency and bankruptcy of companies, individuals, firms, etc., changes were initiated in India too. However, the snowballing of the non-performing assets in the financial system in general and the banking system, in particular, brought in the sense of urgency to the introduction of comprehensive legislation on insolvency and bankruptcy, especially for corporate entities. The Insolvency and Bankruptcy Code 2016 was brought in as a comprehensive code for resolving insolvency of companies, firms and

individuals and liquidation, and bankruptcy if resolution fails. SICA stands repealed by the new Insolvency and Bankruptcy Code. The provisions of the IBC replaced the provisions of Companies Act dealing with the process of winding up and liquidation of companies. The provisions of IBC would have eventually substituted the procedure for bankruptcy of individuals and firms under Presidency Towns Insolvency Act 1909 and Provincial Insolvency Act 1920.

The studies have been attempted to examine the position of Insolvency and Bankruptcy in India, especially after the enactment of Insolvency and Bankruptcy Code, 2016.

IV. Insolvency and Bankruptcy Code, 2016 – Indian law on insolvency and bankruptcy

Insolvency and Bankruptcy Code 2016 ("IBC") was enacted on May 28, 2016, as the law governing insolvency and bankruptcy in India. The Act was implemented from December 1, 2016, to provide the much needed robust, modern, and sophisticated insolvency framework for resolving insolvency through resolution, reorganization, and liquidation. It is the culmination of several expert committees[5] recommending a comprehensive framework for resolving insolvency to enable speedier resolution or liquidation of business entities. The trigger for decisive action was the ballooning of non-performing assets ("NPAs") in the financial system in general and the banking system in particular to such proportions that it was seriously impacting the delivery of credit. Finally, based on the recommendations of the Bankruptcy Law Reforms Commission (Chairman: Dr. TK Viswanathan), IBC was enacted as consolidated legislation for insolvency and bankruptcy of corporates, firms, and individuals. The financial service providers like banks, insurance companies, and non-banking financial companies have been kept out of the purview of IBC as they are likely to be covered under a separate Act, which is in the process of being legislated.[6]

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5) Committee on Banking Sector Reforms 1991 and 1998 (Chairman: M. Narasimhan); High Level Committee on Insolvency and Winding up of Companies 2000 (Chairman: Justice V. Balakrishna Eradi); High Powered Expert Committee on Making Mumbai an International Financial Centre 2007 (Chairman: Percy S. Mistry); Committee on Financial Sector Reforms 2008 (Chairman: Dr. G. Raghuram Rajan) and Financial Sector Legislative Reforms Commission 2013 (Chairman: Justice B. N. Srikrishna).

A. Approach and Handling of Insolvency and Bankruptcy under IBC

Non-performing assets in the financial sector, most of which are loans to the corporate sector, are the biggest challenge facing the Indian economy.[7] The approach of IBC has been to explore every possibility of resolution of corporate debtors ("CDs") in distress within a time-bound manner with the decision for resolution or liquidation to be taken by the Committee of Creditors ("COC") in which Financial Creditors ("FC") have been provided with greater role and powers given their higher stake. In case the endeavor for resolution fails, IBC aims to complete liquidation in a time-bound manner. Both resolution and liquidation would be overseen by the National Company Law Tribunal ("NCLT"), the manner of doing so being markedly different, i.e., in a non-intrusive manner. Once the IBC provisions are invoked, the management and control of assets of the entity are assigned to an Insolvency Professional ("IP") who is responsible mainly for running the enterprise as a 'going concern' acting in place of the management of the enterprise and managing the corporate insolvency resolution process ("CIRP"). IP makes a public announcement of CIRP within 3 days of his appointment; appoints assessors/valuers within 7 days for assessment of the value of the assets of the enterprise; collects, verifies and collates the claims of creditors received in pursuance of announcement; gets the liquidation value of assets from assessors; constitutes the Committee of Creditors and reports to NCLT of it; convenes the meeting and submits a memorandum giving relevant information for formulating a Resolution Plan ("RP"); receives and examines RPs; puts up the plans to COC for their approval; and on approval, submit the same to NCLT. The Resolution Plan passed by the COC becomes binding. CIRP has to be completed within 180 days and can be further extended by NCLT by order by not more than 90 days. If a resolution is not possible within such a period, the enterprise moves into liquidation.

In the case of liquidation of corporate entities, the IP handles the role of a liquidator. The process involves (a) giving a public announcement on appointment as liquidator; receiving and scrutinizing claims; listing and taking over assets and forming a liquidation estate; (b) getting the assets valued by

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6) Proposed Financial Resolution and Deposit Insurance Act which was placed before Parliament in 2017 (It has lapsed with the dissolution of Parliament for elections in 2019).

7) The value stood at about 13 lakh crores in the banking system as on March 31, 2018. Please see Economic Survey of Government of India 2019-20, Government of India (2019).

approved assessors; examining transactions to see whether they are preferential or undervalued and if yes, apply to NCLT for their avoidance; (c) taking possession of immoveable and moveable assets and or putting them for sale through public auction or private sale and collecting proceeds; and (d) settling claims of creditors as per the order of priority and dissolving the Corporate Debtor. He has to prepare and submit to NCLT (a) a preliminary report within 75 days from the liquidation commencement process; (b) an asset memorandum; (c) periodic progress report; (d) sale report; (e) minutes of consultation with stakeholders; and (f) the final report prior to dissolution.

The Code also provides for fast-track corporate insolvency process for companies in case of assets or income below levels notified by Government, or with a class of creditors and the amounts due as notified by Government or other categories of corporate persons as notified by Government.[8] Here, the time limit for completion of the liquidation process is 90 days. IBC also provides for Voluntary Liquidation of corporate persons.[9]

Part III of the IBC deals with insolvency and resolution of individuals and partnership firms. However, the commencement of this Part has not yet been notified by the Government.

B. Institutional Mechanism for Effective Implementation of IBC

The Corporate Resolution processes commenced from December 1, 2016. Some of the important steps taken for the implementation of IBC effectively are listed below:

a) National Company Law Appellate Tribunal ("NCLAT"), the Principal Bench of NCLT at New Delhi, and 11 benches of NCLT were constituted by Government in June 2016.
b) For the purpose of framing regulations and oversight over the various professional agencies involved in the IB process, another regulator, i.e., Insolvency and Bankruptcy Board of India ("IBBI"), was established on October 1, 2016. IBBI, in turn, took steps to operationalize IBC as follows:
   i. Registering three Insolvency Professional Agencies in November 2016.[10]

8) Insolvency and Bankruptcy Code, Chapter IV (2016).

9) *Id*., at Chapter V.

10) Insolvency Professional Associations (IPAs) registered are Indian Institute of Insolvency Professionals of Institute of Chartered Accountants of India (IIIP of ICAI), the Institute of Company Secretaries of India's Institute of Insolvency Professionals (ICSI IIP), and the Insolvency Professional Agency of Institute of Cost Accountants of India (IPA of ICMAI), were registered.

ii. Providing a cadre of Insolvency Professionals by registration of persons with requisite professional qualifications and experience.
iii. Starting Limited Insolvency Examination ("LIE") on December 31, 2016.
iv. Framing regulations on various aspects of corporate insolvency processes.
v. Registering Information Utilities ("IU")[11] to collect financial information from creditors, get it authenticated by debtors, store and provide access to the resolution professional, creditors, liquidator and other stakeholders so that they can make informed decisions.

c) The Banking Regulations Act 1949 was amended[12]
i. to enable Central Government to authorize RBI to direct banks to initiate the insolvency resolution process under IBC in case of default.
ii. to empower RBI to give directions for resolution of stressed assets and set up authority(ies) or committee(s) to advise banks in this regard.

d) RBI took steps such as-
i. Constituting an internal committee to examine the NPAs and directed banks to initiate a resolution process for 12 and later 28 cases of NPAs, which constituted a major portion of the total NPAs in the banking system.[13]
ii. Allowing resolution applicants submitting resolution plans to raise external commercial borrowings under approval route from recognized lenders, for repayment of rupee term loans of the target company to enable funding for CIRP.
iii. Issuing a circular indicating the revised framework for resolution of stressed assets, which was later replaced by a circular on "Prudential Framework for stressed assets."[14]

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11) National e-Governance Services Limited (NeSL) was registered as the first IU by the IBBI.
12) Section 35AA of Banking Regulation Act, 1949 was introduced by Banking Regulation (Amendment) Act, (2017).
13) 12 accounts were those accounts which fulfilled the criteria of accounts where with fund and non-fund based outstanding amounts greater than Rs. 5,000 crore, with 60 per cent or more classified as nonperforming by banks as of March 31, 2016. Later, RBI sent a list of 28 more companies for taking up for resolution of NPAs of about Rs. 2.3 lakh crore.
14) The RBI circular on "Resolution of Stressed Assets – Revised framework" of February 8, 2018. Giving omnibus directions was struck down by the Honorable Supreme Court as ultra vires in its judgment dated April 2, 2019 in Dharani Sugars and Chemicals Ltd. v. Union of India. RBI later issued a circular on "Prudential framework for resolution of stressed assets" on June 7, 2019.

e) Securities and Exchange Board of India ("SEBI") amended its regulations to enable smooth implementation of the resolution plan.[15]
f) The Securities Contracts (Regulation) Rules, 1957 was amended to protect the interest of minority shareholders.[16]

The Honorable Supreme Court, in the Swiss Ribbons v. Union of India case,[17] upheld the constitutional validity of the Insolvency and Bankruptcy Code after examination of the provisions of the Act.

C. Progress under IBC

The key achievements in corporate insolvency resolution and liquidation process after implementation of the Code in December 2016 are as follows:[18]

a) The first case under the IBC was admitted by NCLT on January 17, 2017.[19]
b) The first insolvency resolution plan was approved on August 2, 2017.[20]
c) As of February 2019, 14,000 applications have been filed for the initiation of CIRPs under the IBC. Of these, 6079 cases involving a total amount of Rs. 2.84 lakh crores have been withdrawn before admission indicating a willingness to pay dues/settle to avoid IBC proceedings.
   · NCLT ordered the commencement of CIRP of 1,858 CDs of which 50% were filed by Operational Creditors (OC) and 40% by Financial Creditors (FC) and 10% by Corporate Debtors (CD).[21] This indicates the preference of IBC route for recovery by OCs (vendors, suppliers, etc.) and FCs (banks, financial institutions, etc.)
   · 40% of CDs are in manufacturing, 20% in real estate, and 10% in

15) Regulations regarding minimum public shareholding, preferential issue of shares, delisting of companies, open offer requirements, etc., were modified by SEBI. Requirements for listed companies like audit committee, nomination and remuneration committee and stakeholder's relationship committee, etc., were relaxed.
16) Time within which public shareholding has to be brought back to stipulated as a result of resolution plan was modified. If it per cent falls below 25 per cent - within three years; below 10 per cent - within 18 months.
17) Swiss Ribbons v. Union of India, 2019 SCC OnLine SC 73, (2019).
18) Quarterly Newsletter (March-June 2019), Insolvency and Bankruptcy Board of India (2019). Also see, Economic Survey 2018-19, Volume II, Chapter 3, Government of India (2018).
19) ICICI Bank Limited vs. Innoventive Industries Limited., 1 SCC 407 (2018).
20) Synergies-Dooray Automotive Ltd.
21) Operational creditors include employees; Central or State Government or local authority to whom dues are payable. Financial creditor means a person to whom financial debt is owed.

engineering, procurement, and construction, which are the major severely stressed segments of the economy. Again the resolution plan was approved in 94 cases (i.e., 13% of CIRPs were disposed).

- Time taken for resolution was more than 180 days in 5 cases; 180-270 days in 24 cases; and less than 270 days in remaining 65 cases indicating that there is scope for reduction of time within statutory limits which will be possible with more benches of NCLT and by inducting more members and using technology, increased use of IUs, etc.
- 91 cases were withdrawn of which about 60 cases are those where a settlement has been made or agreed to.
- Liquidation has commenced in 378 cases (53% of the CIRPs disposed) which includes 283 cases which were with the Board for Industrial and Financial Reconstruction and defunct. Of these, 314 cases were there where the Resolution value was equal to or less than the liquidation value (indicating that resolving these entities is of not much use anyway). 64 cases were such where the Resolution value was less than liquidation value indicating that RP was not approved in spite of that option being financially better. Cases of Appeal/review/settled are 102 and 1,143 Resolution attempts are in progress.

d) Of the 12 large NPAs of the total value of claims outstanding of Rs. 3.78 lakh crores and liquidation value of mere Rs. 73,220 crores, 6 have been resolved with the amounts realized in 5 of these cases being Rs. 52,519 crores indicating the effectiveness of IBC in not only ensuring the continuation of business but also the realization of amounts, especially to FCs (especially banks), much higher and much faster than on liquidation.

e) The amount of recovery through IBC was 43% while the recovery through other options like through Debt Recovery Tribunal, Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI) and Lok Adalat was only 23%.

f) There are 1260 IPs registered with IBBI (of which 4 have been cancelled for disciplinary reasons). Of these, 56% are Chartered accountants and 37% are company secretaries. About 9% of IPs are women.

g) There is one Information Utility registered with IBBI which has entered into an agreement with 179 FCs of which 114 have submitted information of about 13 lakh debtors with the value of about Rs. 42 lakh crores

h) There are 3 IP Agencies for developing and regulating the IPs.

I) There are 11 Registered Valuer Organizations having about 1,200 registered

valuers for the valuation of various classes of assets.

j) The Insolvency Law Committee, which is now a Standing Committee, is examining the implementation of provisions of IBC and making recommendations for changes for improvement.

k) The NCLTs (20) and NCLAT continue to play an important role as adjudicating and appellate authorities respectively for IBC. The government is considering opening additional benches of NCLT and Circuit Benches of NCLAT for handling the increasing load of cases/appeals.

l) NCLT is being strengthened through the appointment of more Judicial and Technical Members.

m) Digitization and e-filing is being introduced in NCLTs for better management of matters and timelines

n) A resolution scheme to resolve the problem of NPAs through a market-led approach, Sashakt, was introduced in July 2018 wherein participating banks work together under an Inter-Creditor Agreement (ICA).[22]

Thus, it is clear that IBC has shown promising results in its early days of implementation and the progress is being monitored by Government, IBBI, RBI and Committees/Working Groups for regulatory or legislative interventions to improve the same further. This has also been appreciated by the Honorable Supreme Court of India. While upholding the constitutional validity of the Code, the Court concluded that "the experiment conducted in enacting the Code is proving to be largely successful. The defaulter's paradise is lost. In its place, the economy's rightful position has been regained."[23]

D. Impact of IBC

In addition to the tangible results in handling of non-performing assets and failing companies indicated above, IBC has also helped in the following ways:[24]

a) Altering the creditor-debtor-promoter relationship making creditor more powerful and debtor and promoter more responsible;

b) Enabling greater cash and financial discipline without which a company could fail in its obligations to pay its dues triggering action under IBC;

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22) As per Economic Survey 2018-19 of Government of India, 35 banks had signed the ICA as of March 31, 2019.

23) *Id.,supra* note 17.

24) Economic Survey 2018-19, Volume II, Chapter 3, Government of India (2018).

c) Ensuring better corporate governance given that any shortcomings in management could result in the management being replaced in the insolvency resolution process, thereby divesting the management of their control;
d) Strengthening the position of operational creditors like employees, vendors, suppliers, etc. in getting their dues cleared promptly failing which they can take the business to insolvency;
e) Ensuring prompt payment of dues to prevent an asset from becoming a non -performing asset thereby ensuring that IBC is not invoked;
f) Ensuring payment of dues in case of existing NPAs for the upgrading of NPAs into standard assets so that the IBC is not triggered;
g) Opening new areas of opportunity and engagement/employment for professionals like Chartered Accountants, Company Secretaries, Cost and Work Accountants, advocates, etc. as Insolvency Professionals; and for valuers, process advisors, turnaround specialists, security services providers, lawyers, etc.;
h) A new career option as IPs for the young people through Graduate Insolvency Programme (GIP) launched recently by IBBI;
I) Providing scope for research and review of law and practice of insolvency and bankruptcy so as to improve the legal, institutional and infrastructural framework adopting the best practices working well internationally.

E. Impact on Ease of Doing Business Ranking of India

One of the most significant outcomes of reforms in the insolvency and bankruptcy regime through IBC in India is the improvement of India's ranking in the Ease of Doing Business ("EDB") published by World Bank. With the enactment of IBC, India has leapfrogged in the EDB rankings from 130 in 2017 to 100 in 2018 and 77 in 2019.[25]

Doing Business Report also contains ranking of countries on the basis of ease or simplicity of resolving insolvency after examining the time, cost and result of insolvency proceedings involving corporate and individuals operating within the country and the effectiveness of legal framework relating to resolution,

25) Doing Business, 2019 – Training for reform,16 World Bank Group, available at https://www.worldbank.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf (visited Jun. 28, 2019). The ranking is amongst 190 countries studies for the report.

reorganization and, if both fail, liquidation of business concerns. The information about resolving insolvency indicators are obtained through responses to questionnaires from insolvency professionals of the country and verifying these based on the study of the applicable regulatory framework (laws, regulations, rules, etc.) as well as information in the public domain about insolvency systems. The resolving insolvency score is a combination of a score of recovery of debt and the strength of the insolvency framework. The former is assessed based on time for resolution (number of years to recover debts), cost of resolution proceedings (fees for courts, advocates, insolvency professionals, assessors, auctioneers, etc.) and outcome of insolvency proceedings (the company becomes a going concern or is liquidated). The latter is determined by aspects measured as indices of commencement of proceedings, management of debtor's assets, reorganization proceedings and creditor participation. The reforms taken in the legal framework of resolution and changes for increasing operational efficiency of the resolution and insolvency are also considered.

In Resolving Insolvency rankings, India moved up from 136th in 2017 to 103rd, a 33rd position jump in 2018. However, it declined by five spots to 108th in 2019. The critical tests on the ground relating to the efficiency of the insolvency regime are (a) the ability to resolve a company in distress to transform it into a going concern than to take the entity to liquidation and (b) the speed and proportion of recovery of the amount. In both these areas, India has to make significant progress. From the data relating to performance of IBC, it was seen that the proportion of cases taken for liquidation is more than those resolved. With the economic turn-around, the general improvement of NPA position in banks and financial institutions, with the experience gained in the process of implementing IBC and the success in liquidation of long-pending cases, the proportion of cases under IBC which will be resolved, in all likelihood, would increase.

Another parameter of efficiency is the recovery speed (i.e., the time taken for the proceedings to culminate in the recovery of part or whole of the amount due measured in years) and recovery rate (i.e., the proportion of the present value of amount recovered to the amount due to secured creditors less cost incurred for recovery). As per the Doing Business Report 19 of the World Bank, the time for recovery in India is 4.3 years and the recovery rate is 26.5 cents/dollar whereas the time for Japan which ranks highest in the ranking for insolvency is 0.6 year and 92.5 cents/dollar.[26] The Insolvency and Bankruptcy system in India has not significantly improved the speed and rate of recovery yet because of the number of benches NCLT and NCLAT and a large number of cases filed in relation to the various provisions of Code which are pending before the Tribunals or in Appellate Fora like NCLAT or Supreme Court. The increase in number of

26) *Id.*

NCLT and NCLAT benches would augur well to address the issue of handling the large volume of litigation and thereby reduce delays.

India has made concerted efforts for capacity building through the Insolvency Board and Institute of Corporate Affairs. Judges are trained in emerging fields like IBC through continuing education programs at National Judicial Academy. Several institutions are training lawyers also in the nuances of insolvency law, and interested lawyers are becoming insolvency professionals after fulfilling the requirements including qualifying in an examination for this purpose. Thus, there is no dearth of insolvency professionals.

A concerted effort to have a relook at the entire process of resolving insolvency vis-à-vis the system and practice in Japan which ranks highest in this parameter in EDB rankings can help India align the IBC with the international best practices in insolvency and bankruptcy.

V. Concerns about Insolvency and Bankruptcy Code in Corporate Resolution and Insolvency

During the course of more than two years of implementation of the IBC for handling corporate insolvency, there were several concerns, legal and operational, and several cases/appeals filed before NCLT, NCLAT and Supreme Court challenging action under the IBC. The concerns would indicate the areas of improvement in the IBC framework, thereby setting the future agenda for action and reform in making insolvency and bankruptcy law more effective.

The Government constituted the Insolvency Law Committee (Chairman: Shri Injeti Srinivas, Secretary Ministry of Corporate Affairs) to examine the suggestions/references received from various quarters and related matters and make recommendations. Based on these recommendations, IBC has been amended twice. However, the following issues also require urgent attention to make IBC serve the purpose for which it has been enacted more effectively:[27]

a) Resolution professional replacing Board of Directors – Once an application

27) Tanya Thomas, Key stakeholders point to chinks in Insolvency and Bankruptcy Code, livemint, available at https://www.livemint.com/companies/news/key-stakeholders-point-to-chinks-in-insolvency-and-bankruptcy-code-1552349146275.html (visited Jun. 25, 2019); Maulik Vyas, Shayan Ghosh, Liquidation under insolvency and bankruptcy code a long and tedious journey, livemint, available at https://www.livemint.com/Companies/yVhg4tc7HKIr8e2njiqN4K/Liquidation-under-insolvency-and-bankruptcy-code-a-long-and.html (visited Jun. 25, 2019); and Pratik Datta, Value Destruction and Wealth Transfer under the Insolvency and Bankruptcy Code, 247 National Institute of Public Finance and Policy New Delhi Working paper series (2016), available at https://www.nipfp.org.in/media/medialibrary/2018/12/WP_247.pdf (visited Jun. 25, 2019).

is admitted by NCLT and IP is appointed, the Board of Directors is suspended and the IP as Interim Resolution Professional ("IRP") takes over the management of the company. The challenges in this regard are the workload for the IP, his professional competence to handle the multifarious responsibilities of the company, his being appointed as IP for other companies, conflict of interests on such appointment, IP himself using the services of the firms where he is associated, and the competence of persons so handling the task on behalf of IP. There have been instances where the integrity of the IPs has also been questioned.

b) Taking and handing over charge – The process takes place twice at least, once when IP takes over as IRP and the second time when he is handing over to the new management (provided that the IP continues and the CIRP culminates in resolution rather than liquidation). Since the Committee of Creditors can elect someone other than IRP as Resolution Professional ("RP"), there will be a handing over and taking over charge between IRP and RP. An absence of a well-defined mechanism for this process including, handing over of the records, title deeds and property; drawing up accounts and audit of such accounts by the statutory auditors, so that the process does not leave any doubts in assets transferred, obligations transferred, etc.

c) Long-drawn resolution process – While the time specified for resolution is 180 days extendable to 270 days, there is no time period specified for NCLT to approve the resolution plan approved by the Committee of Creditors. Further, is the resolution participant who has accepted resolution backs off, the process has to be restarted, which again adds to the time taken. The delay results in difficulties in carrying on the business of the company in the interregnum, especially funding; and ambiguity of the position of management after the expiry of 270 days period. Backing out of a resolution participant after approval defeats the purpose and creates uncertainty about the finality of resolution in addition to causing further delay.

d) Difficulties in release of assets – The secured creditors relinquishing charge on the assets given as security for lending has been a problem resulting in a delay in steps for realization, especially when a part of property is in the name of the company and a part is in the name of promoters. In such cases, putting the asset to sell and realizing a good price is affected.

e) Attachment of assets by other agencies/authorities and realization of dues – Income tax, service tax and enforcement authorities and regulators like

SEBI are litigating regarding attachment of assets for non-compliances with respect to their respective legislations and also filing cases making it difficult for RP to take over assets and go ahead with the liquidation process. In fact, SEBI has approached the Supreme Court against NCLT in regard to a CD challenging the overriding effect of IBC and decision of NCLT/NCLAT. Recovery of dues/receivables where parties are involved in litigation with the CD is adding to the problem.

f) Viable companies could be pushed to liquidation – Differences in perception of creditors about resolution could lead to a situation where certain creditors would be interested in getting money preferring liquidation even though with some effort the company can be restored. Evidence of this tendency is already seen in the implementation wherein only 20% of the companies have been resolved while 80% have been taken up for liquidation. This may be a factor prompting many companies to pay up the amounts due and seek withdrawal of applications under IBC. However, given the seriousness of NPA problem, IBC could be unwittingly driving companies to liquidation rather than resolution /reorganization, thereby resulting in value destruction.

VI. Future Agenda for Reforms in IBC in India

In addition to strengthening the NCLAT, NCLT and addressing the concerns indicated in the previous section through appropriate legal and procedural changes, the following have been indicated by the Government[28] as the way forward in effective implementation of IBC to make it on par with international best practices:

a) Providing a regulatory framework of Cross Border insolvency on the basis of UNCITRAL Model Law.
b) Providing a regulatory framework for Group Insolvency. A working group under former SEBI Chairman Mr. U. K. Sinha has been set up for examining the issue and making recommendations.
c) Insolvency and Bankruptcy of Individuals. A Working Group under Mr. P. K. Malhotra, former law secretary, has been set up to recommend the strategy and approach for implementation of the provisions of Part III of

28) Economic Survey 2018-19, Volume II, Chapter 3, Government of India (2018).

IBC dealing with insolvency and bankruptcy of individuals.

d) Improving Capacity of IPs, NCLTs.

e) Greater application of technology across the IBC chain – IPs, IUs, NCLT, IBBI etc. – to enhance reporting, case management, timekeeping, data mining and analysis thereby building operational efficiency, better monitoring, conducting research and analysis and thereby getting inputs to improve the effectiveness of IBC.

VII. Conclusion

The insolvency and bankruptcy laws provide a legal mechanism for ensuring that viable entities facing temporary financial distress or business cycle blips be resolved and those unviable entities with serious solvency problems be smoothly and quickly liquidated taking care of the interests of the economy at large; business environment; financial system and markets, and various stakeholders involved. While individual insolvency is important yet easier to handle, corporate insolvency is much more complex and sensitive given the different categories of stakeholders and significant financial and public interest involved.

In India, a beginning has been made through the enactment of IBC and the stakeholders are leaving no effort in making the system work efficiently and effectively. The government has been diligent in creating the enabling environment, setting up courts/benches and staffing them, monitoring the progress and making amendments to law wherever warranted. Insolvency and Bankruptcy Board of India is handling the regulatory jurisdiction registering and monitoring the insolvency professional, IP agencies, etc. handling data collection and dissemination, training and research. In spite of the volume of NPAs and their impact on the economy, the efforts of resolving insolvency through IBC will be meaningful only if every attempt for resolution should be done and only if it fails should liquidation be resorted to. The insolvency professionals must exercise diligence in their conduct and ensure that they do their job efficiently and without giving scope for allegations of malpractices. Both resolution and liquidation have to be speeded up so as to not only achieve compliance with the timelines in the IBC but also ensure that there is no value reduction. In this way, India can continue to improve not only on the Resolving Insolvency rankings but also improve on the ease of doing business ranking, thereby taking its rightful place as the most sought after business destination in the world.

Bibliography

Reports, Survey and International Documents

Economic Survey 2018-19, Government of India (2018).
Economic Survey 2019-20, Government of India (2019).
Insolvency and Bankruptcy News, October - December 2018 (2018).
Quarterly Newsletter (March-June 2019), Insolvency and Bankruptcy Board of India (2019).
United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Insolvency Law (2012).

Cases

Swiss Ribbons v. Union of India, 2019 SCC OnLine SC 73 (2019).
ICICI Bank Limited vs. Innoventive Industries Limited, 1 SCC 407 (2018).

Regulations and Other Legislative Materials

Insolvency and Bankruptcy Code (2016).
Banking Regulation (Amendment) Act (2017).

Working Paper Series

Pratik Datta, Value destruction and wealth transfer under the Insolvency and Bankruptcy Code 2016, 247 NIPFP Working Paper Series (2018).
Cirmizi, Elena, Klapper, Leora, and Uttamchandani, Mahesh, The Challenges of Bankruptcy Reform, Policy Research Working Paper 5448, The World Bank Development Research Group Finance and Private Sector Development Team) (2010).

Internet Sources

Resolving Insolvency - Measuring the strength of insolvency laws, (Doing Business 2015), available at https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency/reforms (visited Oct. 11, 2019).
Doing Business, 2019 – Training for reform, 16 World Bank Group, available at

https://www.worldbank.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf (visited Jun. 28, 2019).

Tanya Thomas, Key stakeholders point to chinks in Insolvency and Bankruptcy Code, livemint, available at https://www.livemint.com/companies/news/key-stakeholders-point-to-chinks-in-insolvency-and-bankruptcy-code-1552349146275.html (visited Jun. 25, 2019).

Maulik Vyas, Shayan Ghosh, Liquidation under insolvency and bankruptcy code a long and tedious journey, livemint, available at https://www.livemint.com/Companies/yVhg4tc7HKIr8e2njiqN4K/Liquidation-under-insolvency-and-bankruptcy-code-a-long-and.html (visited Jun. 25, 2019).

Pratik Datta, Value Destruction and Wealth Transfer under the Insolvency and Bankruptcy Code, 247 National Institute of Public Finance and Policy New Delhi Working paper series (2016), available at

https://www.nipfp.org.in/media/medialibrary/2018/12/WP_247.pdf (visited Jun. 25, 2019).