भारतीय दिवाला और शोधन अक्षमता बोर्ड
Insolvency and Bankruptcy Board of India

सत्यमेव जयते

75 Azadi Ka Amrit Mahotsav

# IBC

## Idea, Impressions and Implementation

## 2022

# ABOUT THE PUBLICATION

The Insolvency and Bankruptcy Code, 2016 (Code) is the umbrella legislation for insolvency resolution of corporate persons, partnership firms and individuals. The Code hailed as a paradigm shift from the erstwhile insolvency regime in India in terms of its design and architecture as it strives to maximise the value of the corporate debtor's assets while balancing the interests of all stakeholders during the process. The Code aims at developing a robust stressed assets market and providing a graceful exit to the genuine business failures. The outcomes of the Code in the initial years of its enactment have been truly inspiring and note-worthy.

Marked by six amendments till date, the Code has achieved institutional milestones and built a sense of hope and optimism among the stakeholders. The evolution of the Code with the constantly changing market dynamics and emerging realities makes it a rightful example of a 'living law'. The exciting journey of the Code is hence worth to be penned down for the benefit of the readers as well as the stakeholders. As a part of its Annual Publication series, the Insolvency and Bankruptcy Board of India is set to release its fourth annual publication on the momentous occasion of six years of its establishment on October 1, 2022. The publication presents stimulating thoughts and viewpoints of various stakeholders and contributors on the ever emerging insolvency landscape in our country.

The theme of this year's publication is *'Idea, Impressions and Implementation'*. It details the path the law has taken in terms of its evolution and emerging jurisprudence; the continual improvements during the past six years; contribution of the key pillars and stakeholders in its effective implementation; the impact that the law has created; and lastly peeps into what lies ahead. Practitioners, policymakers, lawyers, subject experts, and academicians have graciously shared their thoughts in the publication around this theme.

# IBC

## Idea, Impressions and Implementation

2022

**Insolvency and Bankruptcy Board of India**

7th Floor, Mayur Bhawan, Shankar Market, Connaught Circus, New Delhi -110001

www.ibbi.gov.in

9788194753728

*Title:* **IBC: Idea, Impressions and Implementation**



*Published by:*

**Insolvency and Bankruptcy Board of India**
7th Floor, Mayur Bhawan, Connaught Circus, New Delhi - 110001
Email: research@ibbi.gov.in

*ISBN*: **978-81-947537-2-8**

*Designed by:*
**M/s. Digi Vaarta India Pvt. Ltd.**
New Delhi, India

*Printed & Bound by:*
**M/s. Daksh Advertising and Marketing**
New Delhi, India



Any views and feedback on the publication may be mailed at research@ibbi.gov.in

# ACKNOWLEDGEMENTS

The Insolvency and Bankruptcy Code, 2016 (IBC/ Code) enacted in the year 2016 has proved to be a comprehensive 'one stop shop solution' for resolving insolvency of corporate businesses. This greatest market reform legislation of the recent past, has had profound impact, which is felt across the business environment. The Code has made the exit of firms equally easy as its entry and sustenance in the market, thus completing the cycle of freedom of entry, competition and exit of businesses. The reallocation of idle resources by putting it to more viable uses, has been made possible with the implementation of the Code, as it enables the firms to restart in the hands of new management, if feasible, or to liquidate its assets and put it to new uses.

The IBC presented itself as a ray of hope to the situation of rising non-performing loans in India. It facilitated a collective mechanism for resolution of distressed assets while maintaining a delicate balance for all stakeholders to preserve the economic value of the process in a time bound manner. The Code has repeatedly withstood judicial scrutiny and in over six years of its enactment, has strengthened the rights of creditors and reinforced the confidence of investors. The Code has continued to evolve with the changing dynamics of the market and emerging challenges. A few watershed moments in the exciting and eventful journey of the Code, so far, include recognising homebuyers as financial creditors, introduction of section 29A making defaulting promoters ineligible to re-enter as resolution applicants, introduction of insolvency resolution process for financial service providers and pre-packaged insolvency resolution process etc. The constant endeavour of the Government and the Insolvency and Bankruptcy Board of India (IBBI) to urgently address the upcoming challenges, has transformed IBC into a future ready and relevant in time, legislation.

This annual publication of the IBBI, fourth in the series, gives a glimpse of the journey of the Code and provides a thoughtful perspective on the potential reforms. It assembles the experiences and insights of experts, stakeholders, researchers, and IBBI officials who have been an integral part of this exciting journey of the implementation of the Code and have plenty to share to induce enriching discussions. We are thankful to all the contributors for their insightful contributions, generosity, and expertise utilised for this publication, adding to the current understanding of the law and building a new perspective on the forthcoming reforms.

We thank the team at IBBI comprising of Mr. Sudhaker Shukla, Mr. Jayanti Prasad, Mr. Ritesh Kavdia, Mr. Shiv Anant Shanker, Mr. Deepak Rao, Mr. Sushanta Kumar Das, Ms. Pooja Singla and Ms. Medha Shekar for their commitment, enthusiasm, and exacting diligence in putting this publication together.

We are hopeful that this publication will provide the readers a new outlook of what has happened, how did it happen and what is set to happen next. It is our hope that the visionary thoughts expressed in the publication will drive the future policy discourse.

**Ravi Mital**
Chairperson
Insolvency and Bankruptcy Board of India

# CONTENTS

# FOREWORD

Acting as the third pillar of economic freedom, the Insolvency and Bankruptcy Code, 2016 (Code) has been a game changing endeavor to provide a market driven and time bound mechanism for resolution of insolvency cases in the country. It has facilitated a collective effort not only to keep a distressed entity alive but also to maximise the value of its assets while exploring the best possible avenues for tackling such state of distresses. Initiated as one of the greatest economic legislations in the recent past, the Code has had a profound impact on the creditor-debtor relationships and their behavior in India. It has marked a radical departure from the prevalent approaches as it embraced the 'creditor-in-control' model as against the 'debtor-in-possession' model that had failed to produce significant improvements in the credit discipline in the country.

2. Since its implementation in the year 2016, like any other law, the Code too has experienced its own learning curve. It, however, has managed to adapt to the ever-changing needs of the market. Marked by six amendments till date, the Code has achieved institutional milestones and has built hope and optimism among the stakeholders. It has improved the business climate in the country by making it easier for enterprises to exit in case of difficulties, thereby boosting the startup culture in the country. The Code responded in time to the market disruptions caused by COVID-19, by suspending the recourse to the Code under Sections 7, 9 and 10, with the objective to prevent operationally and economically viable firms from being pushed into insolvency.

3. The IBC has been a landmark legislation which has borne fruits of economic transformation in its initial years itself. It has established institutions to address the issue of rising NPAs effectively and efficiently in the economy. Through time-bound and effective insolvency resolution procedures, the Code has encouraged promoters of Corporate Debtors (CD)/ entities facing genuine business failures to come forward and make an honest attempt to restart. It has reduced the stigma associated with the terms 'insolvency' and 'bankruptcy', thus making it a 'new normal'. The number of resolutions approved under the Code has proved that the entity/CD facing business failures are given an opportunity to revive and stand on its feet. The Code has given a new dimension to creditor's rights and has resulted in increased flow of credit into the economy. Entering its sixth year of operation, the Code, once nascent, has now evolved into a future ready legislation.

4. With a view to enhance the efficacy of insolvency resolution process under the Code, the Government and the Insolvency and Bankruptcy Board of India (IBBI) have been continually making concerted efforts to overcome barriers in terms of delays in the resolution process and resultant value erosion of assets of the corporate debtor. The IBBI is committed to make the processes simpler and quicker with an aim to preserve the value of the business while it undergoes resolution. The proactive regulatory interventions by the IBBI shows its keenness to ease the compliance burden on the service providers and to cut short the timelines, wherever feasible.

5. While continuous efforts are being made to further finetune the resolution process, the contribution of the judiciary has proved to be equally important in the success of the Code. Evolution of jurisprudence in form of judgements and orders has indeed been significant as various contentious issues were addressed by such judicial pronouncements. Some of the important issues so addressed include, inter-alia, constitutional validity of the Code, the primacy of commercial wisdom of the committee of creditors, protection of inter-se priorities of secured creditors, effect of moratorium on the guarantors, treatment of the homebuyers in Corporate Insolvency Resolution Process (CIRP), applicability of the Limitation Act, 1963 to the proceedings under the code etc. While the Code has had a remarkable journey so far, going forward, evolving with changing scenarios and responding to new challenges in future will be critical.

6. As the code evolves further, it needs a careful evaluation, analysis, through comparison of its actual achievements with the desired outcomes as laid down in the Code. With a view to streamline the processes under the Code and to facilitate faster exit of firms, the IBBI has been engaging with stakeholders to build discourse around critical aspects and best practices webbed around the insolvency space in the country. Academic knowledge, empirical evidence based on rigorous analysis and domain expertise etc. can collectively lead to further refinement in the formation and implementation of the policies of the Government. Towards this objective, this publication titled '*IBC: Idea, Impressions and Implementation*', the fourth in the series, contains thought provoking knowledge articles by academicians, policy experts, researchers and subject experts, which have been organised under five parts in the Publication. I am confident that this year's publication will not only add to the current understanding of processes, outcomes, and impact but will also provide an insight into the future version of the Code.

**Tarun Bajaj**
Secretary to Government of India
Ministry of Corporate Affairs

# PREFACE

Businesses fuel the economy with production of goods and services, generating employment and economic activity and resultant increased revenues to the Government. It is an accepted principle that economic freedom and economic performance have significant correlation. Optimal business environment and related regulations yield better performing businesses, which results in higher economic wellbeing of the country. It is, therefore, the endeavour of different economies to ease its business regulations. A firm needs freedom broadly at three stages of a business - to start a business (free entry), to continue the business (free competition) and to discontinue the business (free exit). The first stage ensures allocation of resources to the potentially most efficient use, the second stage ensures efficient use of resources allocated, and the third stage ensures release of resources from inefficient uses for fresh allocation to competing uses - and consequently the highest possible growth.

After a multitude of insolvency legislation which were sub-optimal, the Insolvency and Bankruptcy Code, 2016 (IBC/ Code) was enacted by the Government in the year 2016, as the third pillar of economic freedom, i.e., freedom to exit. The Code proved to be a landmark legislation which provides for institutionalised mechanism for insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner with the objective of maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit, while balancing the interests of all the stakeholders. This legislation, as one of the most important economic legislations of the recent times, contributed significantly to the remarkable improvement in easing India's business environment. As per the latest World Bank's 'Doing Business' Report, India's overall ranking in the ease of doing business had jumped to 63 from its earlier rank of 142 pertaining to the year 2015. Post initiation of the IBC, India's rank relating specifically to the 'Insolvency Resolution' indicator, had improved to 52 from the earlier 137, during the same period.

The IBC, in no time, has established itself as the most effective remedy for resolution of stressed assets. It has brought a remarkable transformation in the creditor-debtor relationships and overall credit culture in the economy. Like any other economic law, the Code too has undergone several revisions as and when market dynamics so warranted. With evolving market conditions, the legislative interventions and evolving jurisprudence have imparted further depth and maturity to the once nascent legislation.

The Code facilitates a collective effort to revive the firm and to keep it going, wherever viable and promotes ease of exit, wherever required. It enables optimum utilisation of resources, either through resolution or liquidation. All processes envisaged under the Code are largely market driven and primacy is accorded to the commercial wisdom of the committee of creditors. Liquidation is, however, to be considered as a last resort. The outcomes of IBC can be gauged from the fact that out of a total of 5,636 cases, which had commenced till June 2022, closure has been achieved in 3,637 cases. Of the cases closed, while 1,934 companies (53% of total closed cases) got rescued, 1,703 cases have ended in liquidation. Out of the rescued cases, 774 cases have been closed on appeal or review or settlement; 643 cases have been withdrawn; and 517 cases have yielded approved resolution plans. Of the resolved cases, 34% of cases were earlier with Board for Industrial and Financial Reconstruction and/or were defunct. The data shows that the Code has made it possible for even defunct companies to get another chance of survival, which otherwise would have been liquidated. Under the resolution plans, the creditors have realised ₹ 2.35 lakh crore, whereas the liquidation value of the assets of the corporate debtor (CD) was only ₹ 1.31 lakh crore, though they owed ₹ 7.67 lakh crore. This translates into the fact that the creditors have achieved more than 178% of the liquidation value and 30% of the total admitted claim. Over more than 22,400 applications having an underlying default of ₹ 7.10 lakh crore were settled even before admission. This is testimony of behavioural change in debtor-creditor relationship that the Code has triggered.

The IBC was enacted as a critical building block of India's progression to a mature market economy. It addressed the growing need for a comprehensive law that would be effective in resolving insolvency of debtors, maximising the value of assets available for creditors and easing the closure of unviable businesses. The objective was to ease the exit of firms to reallocate the freed resources to more efficient uses. The Code read with rules and regulations made thereunder prescribes timelines at various stages of the process starting from admission till completion of the resolution/liquidation process. The adherence to these timelines requires a collective effort by all the stakeholders.

In the words of Robert T. Kiyosaki, '*Today, wealth is in information. And the person who has the most timely information owns the wealth*'. Information is a crucial asset for any organisation and more so if the company is in a distressed state.

Information asymmetry tilts the balance of power in favour of the party having the information at the expense of other who goes for financial contract without gauging the market pulse. In case of a distressed company, its shareholders and promoters are better informed of the asset value than the creditors. Incomplete or missing information delays decision making, exacerbates value erosion and increases the costs associated with re-organisation of the firm. Considering the paramount significance of information availability in case of a distressed CD, the Insolvency and Bankruptcy Board of India (IBBI) amended various regulations to facilitate the submission of information at the time of filing/admission as well as during the process by personnel, promoters, management, and creditors of the CD.

Any economic law must keep responding to emerging market conditions and challenges, to continue to remain relevant. The IBC is no different and as a key economic reform, has evolved itself, in short span of time, as a credible instrument which has brought about perceptible transformation in the prevailing credit culture in the country.

This is the fourth annual publication of the IBBI, being released on completion of six years of its establishment. It presents thought provoking experiences and insights which apart from capturing the progress of the Code and its institutions, provides a multi-disciplinary perspective on the outcomes, jurisprudential developments, and impact of the Code and the potential reforms that may be required in future.

The publication has been divided into five Parts. Articles in Part I, titled **'Initiation and inflections'** present the journey of IBC over past six years. Authors pen down their thoughts on the evolution of the market for distressed assets in India and emerging jurisprudence, providing an overall view of the accomplishments of the insolvency reforms so far and a glimpse of the road ahead.

While the Code has laid down robust mechanisms and processes for resolution of stressed assets, continuous improvements are part and parcel of any economic reform. In Part II, **'Improvement in Processes'**, the authors suggest ways to further strengthen the existing processes in the interests of all stakeholders and time bound resolution of the distressed assets.

Part III, **'Institutions and Interdependencies'**, presents the view of the authors on the indispensable institutions created by IBC and suggests ways to further strengthen these.

Part IV, **'Imprint, Impact and Insight'**, traces the achievements of the Code and discusses its far-reaching impact on the credit markets and overall economic growth.

The Part V titled **'Ideas, Ideals, and Inspiration'**, discusses unchartered territories such as treatment of intellectual property licenses, resolution of group insolvency and cross border insolvency, use of mediation in insolvency resolution, insolvency framework for a digital economy and implementing the remaining provisions of the Code viz. individual insolvency.

We are extremely grateful to all the authors for sharing their experience and expertise through their insightful contributions to this publication.

We are hopeful that this publication would trigger further knowledge discourses amongst the practitioners of the Code and all stakeholders towards improving the efficacy of the IBC, even further.

**Jayanti Prasad**
Whole Time Member
Insolvency and Bankruptcy Board of India

# Part I
# Initiation and Inflections

1

# INSOLVENCY AND BANKRUPTCY CODE: A PATH WELL TRAVELLED

*V. Anantha Nageswaran and Aakanksha Arora*

The economic arguments for the ease of doing business are plenty - including attracting higher investments, development of competitive environment and innovations. However, it is important to note that ease of doing business is not only about this, but also about 'Ease of Exit'. While entry barriers determine the ability of competition to make inroads in business, exit barriers determine the competitive structure that persists among the incumbents within the industry. It is an equally essential aspect of the ease of doing business, as much as entry into business.

Over the years, the Government has passed laws and set up various mechanisms to resolve the systemic problems stemming from borrowers unable to service loans received from financial institutions. The Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) was passed more than three decades ago to resolve bankruptcies and the Bureau of Industrial and Financial Reconstruction (BIFR) was set up under SICA. However, the resolution process was found to be very slow. Later on, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) was approved by Parliament. These regimes did not turn out to be sufficient for providing quick resolution. Not only was the process very time-consuming, but the recovery rates were also very low.[1] The Economic Survey 2015-16 also noted this and called this a '*Chakravyuha* challenge'. The survey argued that India had made great strides in removing the barriers to the entry of firms, talent, and technology into the Indian economy. However, much less progress had been made on exit processes.

Recognising that ease of exit is an important part of doing business and there was a need for developing a robust mechanism for the same, the Insolvency and Bankruptcy Code, 2016 (IBC/Code) was enacted. The Code has been successful in bringing about an overhaul in the resolution process. The Table below shows that the amount recovered has been much higher than under any other method in 2019-20 and even for the period 2020-21 where there were restrictions on initiation of proceedings under IBC[2], it accounted for almost 43% of the amount recovered, showing its success. The amount recovered as a percentage of amount involved was 46.3% under IBC, higher by a very large margin as compared to other methods in 2019-20. In comparison, it was 17.4% under the SARFAESI Act, which had the second highest recovery rate. The same trend was true for the previous two years as well (2017-18 and 2018-19), although this was not so in 2020-21 largely due to suspension of proceedings on account of pandemic. This is a noteworthy achievement considering it has been less than six years since inception of the Code.

**Table: Non-Performing Assets of Scheduled Commercial Banks recovered through various channels**

| Channel | 2019-20 | | | | 2020-21 | | | |
|---|---|---|---|---|---|---|---|---|
| | No. of cases referred | Amount involved | Amount recovered* | Amount recovered as % of amount involved | No. of cases referred | Amount involved | Amount recovered* | Amount recovered as % of amount involved |
| **Lok Adalats** | 59,86,790 | 67,801 | 4,211 | 6.2 | 19,49,249 | 28,084 | 1,119 | 4.0 |
| **DRTs** | 33,139 | 2,05,032 | 9,986 | 4.9 | 28,182 | 2,25,361 | 8,113 | 3.6 |
| **SARFAESI Act** | 1,05,523 | 1,96,582 | 34,283 | 17.4 | 57,331 | 67,510 | 27,686 | 41 |
| **IBC@** | 1,986 | 2,24,935 | 1,04,117 | 46.3 | 537 | 1,35,139 | 27,311 | 20.2 |
| **Total** | **61,27,438** | **6,94,350** | **1,52,597** | **22** | **20,35,299** | **4,56,094** | **64,228** | **14.1** |

*Source: Off-site returns, Reserve Bank of India (RBI) and Insolvency and Bankruptcy Board of India (IBBI)*

Notes: * Refers to the amount recovered during the given year, which could be with reference to the cases referred during the given year as well as during the earlier years; DRTs: Debt Recovery Tribunals; @: Cases admitted by National Company Law Tribunals under IBC; The resolution plan of Essar Steel India Ltd. was approved in 2018-19. However, as apportionment among creditors was settled in 2019-20, the recovery is reflected in the latter year data.

Adding IBC to the existing arsenal of creditors has provided more than just a recovery route. It has triggered a systemic response to the underlying attitudinal problems in the creditor-debtor relationship by bringing about a positive behavioural change. The credible threat of a resolution process that may shift the control and management of the firm away from existing promoters and managers, deters the management and promoters of the firm from operating below the optimum level of efficiency and motivates them to make the best efforts to avoid default. Further, it encourages the debtor to settle default with the creditor(s) at the earliest. There have been instances where debtors have settled their debts voluntarily or settled immediately on filing of an application for corporate insolvency resolution process (CIRP) with the Adjudicating Authority (AA) before the application is admitted. As on December 2021, 19,803 applications for initiation of CIRPs of corporate debtors (CDs) were resolved even before their admission.

## JOURNEY SO FAR

Since the provisions of CIRP came into force in 2016, a total of 4946 CIRPs have commenced by the end of December 2021. 2527 CIRPs were initiated by operational creditors (OCs), 2111 by financial creditors (FCs) and 304 by CDs.

Out of the total cases that have been closed, around 47% (1514 cases) have been ordered for liquidation. In more than 60% of such cases, the committee of creditors (CoC) decided to liquidate the CD, in another 35%, the AA did not receive any resolution plan. In the rest three percent of cases, the AA rejected the resolution plan.

It is often argued that the outcome of the IBC process has been more titled towards liquidation than resolution. However, approximately 77% of the 1514 CIRPs which were ordered for resolution were earlier with BIFR or were defunct/non-functional. So, the value in these cases had already been eroded and these CDs had assets which on average were valued at less than eight percent of the outstanding debt amount.[3] Going forward, the situation may improve as these legacy cases are resolved.

It is sometimes argued that the value recovered by creditors has been low. It is mentioned various times that in various cases, the haircuts on borrowings were at times upwards of 90%. However, coming to this conclusion misses a crucial point, which is how much is the remaining value of assets when the resolution process starts. For instance, as of December, 2021, in the 457 CIRPs which were resolved, ₹ 8.34 lakh crore was owed to creditors whereas resolution plans realised ₹ 2.59 lakh crore. However, the correct comparison should be with the value of assets of debtors, which was ₹ 1.51 lakh crore. Therefore, realisation by FCs under resolution was 165.8% as compared to liquidation value and 33.1% as compared to their claims (until December 31, 2021). Similarly, the 292 CDs which have been completely liquidated had outstanding claims of ₹ 49,500 crore, but the assets were valued at ₹ 2293.42 crore and out of this, ₹ 2177.6 crore was realised during the liquidation of these companies.

Usually, the assets under cases that come to resolution have low value or are in distress. Each asset has its life cycle and if the distress in the assets is not resolved, the value of the assets diminishes. The extent of haircut taken by creditors is not the apt measure to judge the success of IBC as in many cases the value of assets when companies go into resolution has already become low.

Six years since its commencement, the IBC has seen a paradigm shift *vis-à-vis* its nascent stage – on-field challenges, as and when faced, have been attempted to be tackled by way of amendments.

Keeping in line with the dynamic nature of the Code which led to making changes along the way when needed, the Code was amended again in 2021 to include a pre-packaged insolvency resolution process (PPIRP) for micro, small, medium enterprises (MSMEs) to an alternative insolvency resolution process to ensure quicker outcomes. This is a combination of a debtor-in-possession and a creditor-in control approach. As nomenclature suggests, pre-pack is a restructuring plan which is agreed to by the debtor and its creditors prior to the insolvency filing and then sanctioned by the court on an expedited basis. PPIRP is introduced which will help MSMEs to negotiate with the FCs and revive the enterprise by the management/promoters/partners while continuing to remain in the management. In the case of PPIRP, it's only the CD[4] and not the creditors who can file application and submit the base resolution plan.[5] The entire process of PPIRP is to be completed in a maximum of 120 days. Simply put, PPIRP is nothing but consensual restructuring where there is mutual agreement between CD and creditors (informal) and then judicial approval of AA (formal).

## INTERNATIONAL COMPARISON OF IBC WITH US AND UK

Chapter 11 of the Bankruptcy Code in the US can be said to be the origin of the corporate resolution and reorganisation process. It is considered an extremely company-friendly system and, in fact, are said to help companies continue to the furthest extent possible during the process.

In the US, in most cases, the debtor company files a petition in bankruptcy court with a list of creditors and a summary of assets & liabilities. Moreover, the management of the company continues, and the debtor remains in possession during insolvency proceedings. The debtor has a period of four months (extendable upto 18 months) to propose and seek approval from impaired creditors & shareholders within two months. The plan should be approved by a majority of each class of creditors whose rights have been impaired and two-third in amount. In the US, the debtor is allowed to sell substantially all its assets free of lien, to avoid further erosion of value due to losses. Once the resolution plan is confirmed, it discharges debtor's pre obligation other than what is proposed in the plan. If the plan is not confirmed, then it is converted to bankruptcy proceedings.

The UK's insolvency law 'Insolvency Act, 1986', on the other hand, is for the most part considered to be more creditor friendly. In UK, the creditors or CDs can start the insolvency process. Management control passes to an Insolvency Practitioner or Administrator during insolvency proceedings. The assets of the debtor may be sold by the Administrator. The resolution plan must be submitted within eight weeks of the appointment of an Administrator (or extended period as allowed by the court) and the approval requires a simple majority in value of those creditors present and voting. After one year (or whatever extended time was provided), the Administrator applies if no purpose has been achieved for resolution, then a liquidation proceeding can be initiated.

One of the major differences of IBC as compared to the US insolvency regime is that a 'debtor-in-possession' approach (management remains in control of running the company) is followed in the US, whereas IBC (as well as UK insolvency law) is more of a 'creditor-in-control' regime. Both approaches have their own merits. For example, the debtor in possession approach believes that the management of the company is best suited for running the company for a quick reorganisation plan rather than a new person who will have own learning curve as well cost. The argument in favour of the debtor in possession approach is that the removal of the debtor's incumbent management in all cases could undermine the possibility of rehabilitation, since management will, in some cases, have the best understanding of the business's operation. However, there are various arguments against this approach as well.

The first consideration relates to the type of incentives such an approach may create. First, if a debtor perceives that it has everything to gain (the stay on creditors) but nothing to lose (no loss of control in the business), it may be tempted to utilise the rehabilitation procedures when rehabilitation is clearly not possible. Specifically, a debtor that is no longer viable may attempt to use rehabilitation proceedings solely to delay the inevitable, with the consequence that the assets of the debtor continue to be dissipated. Accordingly, instead of promoting rehabilitation, such a system may merely encourage debtors to delay liquidation to the prejudice of creditors. Another issue is that even when the enterprise can be rehabilitated, there is the possibility that the debtor's management may act irresponsibly and, in some cases, even fraudulently during this period.

On the other hand, the alternative approach, i.e., 'creditor-in-control' has certain merits as well as disadvantages. This approach envisages that the company can best be run by an Insolvency Professional over the previous management. Given that creditors are a key player in the insolvency process, this approach allows them to take key decisions, like approving the resolution plans. Giving creditors control over the initiation of insolvency proceedings binds them to take effective action to recover their dues. This helps in a more efficient and timely process (as compared to the lengthy court proceedings under the previous regimes in India). The appointment of a Resolution Professional (RP) who has expertise in the insolvency process is likely to lead to better outcomes for both the debtor company and the creditors, with reduced scope for appeals. Though there are certain arguments against the creditor-in-control regime as well.

The success of the creditor-in-control method relies heavily on the attitude of the creditors in question. Creditors may focus solely on their own interests, in terms of debt repayment, and therefore take decisions which are not in the best interests of the debtor company as a going concern or its shareholders/employees. This removes any potential for growth or renewal and may lead to poor resolution outcomes. Moreover, the process of creditors taking decisions regarding the debtor company and ultimately agreeing on a resolution plan may be a cumbersome process when creditors are not in agreement. This may lead to delays in the process. Though in both approaches, the laws look for a resolution plan on a going concern basis over liquidation.

India's previous insolvency regime saw the promoters and management of the debtor company retaining some control of the company during the insolvency process. This resulted in long-drawn court battles, with lenders either waiting for years or even failing to recover their dues. The increasing number of bad assets and debts put significant pressure on the economy. Further, to protect any malfeasance, IBC prohibits the initial owners from offering resolution plans for their own firms (section 29A). In fact, this was added later on within a year after the Code was passed, once it was realised that the debtor companies were using this mechanism to take over the company back after restructuring with a significant haircut to creditors. For instance, the first resolution under the Code, *Synergies Dooray Automotive Limited* (August 2017) was an eye-opener. A related party of the defaulter's company walked away with the company with a 94% haircut to the creditors. The Supreme Court in *Chitra Sharma v. Union of India*,[6] held that the purpose behind the bar against certain individuals is to ensure that persons responsible for the insolvency of the CD do not participate in the CIRP by means of a backdoor entry. Similarly, in *Phoenix ARC v. Spade Financial Services*,[7] it was observed that the IBC provides that any related party of a CD does not have the right to be part of the CoC. The object of such a provision is to prevent the decisions of the CoC from being sabotaged by related parties of the CD. Though a drawback of the Code is that some people argue that this has led to more focus on liquidation under IBC than resolution and restructuring.

Both in the UK and US, the Bankruptcy Code allows any stakeholders of the debtor to initiate the pre-pack process and the debtor is responsible for negotiating the plan of reorganisation with all the creditor classes. The US Bankruptcy Code facilitates three forms of pre-packs, namely, pre-plan sales under section 363, pre-packaged bankruptcy proceedings and pre-arranged bankruptcy proceedings under Chapter 11. Even Indian IBC has now included the provisions for PPIRP, though it is available for MSMEs only. Though the design of the pre-pack is not exactly same as in US and UK.[8]

The origins of the two different approaches to insolvency and resolution may be cultural. Nathalie Martin of Boston College wrote comprehensively on the cultural origins of bankruptcy law in 2005.[9] In the US, business failures are considered rather normal and hence there is no stigma attached to it. There is no presumption either that the debtor has deliberately failed to repay creditors. Hence, the bankruptcy process does not seek to dispossess the debtor.

Professor William J. Woodward Jr., of the Temple University Beasley School of Law, in an article[10] written in 2008, outlines the rationale for the way that bankruptcy law evolved in the US, particularly after 1978 when 'debtor-in-possession' was firmly enshrined. He contrasts the situation with China's bankruptcy law, which more closely resembles that of India.

Whereas India's bankruptcy laws modelled after the UK assume that debtors have failed to repay creditors deliberately and hence must be stripped of possession and control. In other words, the former can evolve in a society based on high levels of trust. The latter reflects low levels of trust. It might be understandable, due to the history of debtor frauds and defaults, caused not by 'hard-to-control' business failures but due to diversion of funds for purposes other than for which the loans were drawn. Indeed, the reasons why the implementation of IBC in India was hailed was that it handed creditors back control against borrowers.

In a way, a partial explanation for the inordinate delay in the settlement of bankruptcy proceedings in India well above the norm of 270 days is the 'low trust' culture in the country. That even RPs have, sometimes, attempted to game the process in favour of debtors is proof of that 'low trust' reality that will fade away only over time.

As an aside, it is worth pointing out that low-trust reality manifests itself in many situations. Therefore, there is a cat-and-mouse game between fraudsters and lawmakers. The outcome is an elaborate, complex and hard-to-comprehend set of laws, rules, regulations and enforcements. These extract an economic cost in terms of lost growth and productivity that is hard to measure.

Corporate governance improvement, not in law, but in practice, will be a key requirement for countries to move towards 'debtor-in-possession'.

Writing in September 2020, Sumant Batra makes the case for India's IBC process to provide for 'debtor in possession' provisions, alongside the existing 'credit in control' provisions.[11] Apparently, Singapore adopted this approach in recent reforms and some other countries are also examining it. The author suggests that India should consider providing for both approaches if it were to attract investments from American firms who are used to a 'debtor-in-possession' approach.

In an affirmation of our earlier argument that low-trust societies opt for a 'creditor-in-control' approach, he suggests that in situations where there was no trust deficit between creditors and debtors, creditors should be free to opt for a 'debtor-in-possession' regime.

## CONCERNS IN INSOLVENCY PROCESS

### Delays in admission of insolvency applications

The Code prescribes a period of 14 days for admission of insolvency applications. However, in reality, the admission usually takes a much longer time than that. A consultation paper released by the IBBI on April 13, 2022, notes that the average time taken for admission of an insolvency application by an OC has increased from 468 days in 2020-21 to 650 days in 2021-22. This is longer than even the stipulated deadline for completion of a CIRP under the Code. A lot of petitions filed with the National Company Law Tribunal (NCLT) have been stalled at the admission stage for up to two years. The primary cause for this delay is insufficient human resources, as the NCLT often functions at less than 50% of its sanctioned strength. These kinds of delays affect the efficiency of the process.

### Delays in resolution process

One important concern that remains is that the timelines set by the law for various actions have not been met. For instance, it took on an average 391 days for the CIRPs to end up for orders for liquidation. Further, for 20% of cases for which final reports have been submitted, it is a further 431 days on average. And the rest 80% cases for which order for liquidation has been passed, 46% of cases are still ongoing for more than two years, 23% for more than one and less than two years, 13% for more than 270 days and less than one year.

The delays are prevalent even in the case of voluntary liquidations. Out of the total ongoing cases for voluntary liquidation under IBC, 34% of cases are ongoing for more than two years, 18% each for more than one and less than two years, and more than 270 days and less than one year as of December 2021.

One reason for the delays is that there are few NCLT benches and there is not adequate manpower to handle the cases. The IBC cases are not the only mandate of NCLT, they also consider various cases under the Companies Act, 2013 such as mergers etc. For instance, of the sanctioned strength of 64 judges for NCLTs, only 45 positions were occupied as of November, 2021. This leads to delays in the commencement of the resolution process.

The Standing Committee on Finance 2020-21 also noted that there are huge pendencies with NCLT.[12] As per the Report of the Committee, as on May 31, 2021, more than 70% of cases are pending with NCLT for more than 180 days. The Standing Committee's Report has commented that the NCLT takes a long time to admit cases. The Committee noted that as of August 2021, about 13,740 bankruptcy cases were pending with NCLTs. Further, 71% of such cases have been under process for more than 180 days.

Further, there are several minor procedural and uncontested matters requiring NCLT approval, such as - (a) replacement of Interim Resolution Professional (IRP) with RP; (b) extension of CIRP from 180 days to 270 days; (c) exclusion of time period; (d) admission of CD into liquidation and appointment of a Liquidator etc. Given the issues with sanctioned strength of the NCLT, these approvals often take very long, causing unnecessary delays in the process of admission and/or liquidation.

## Need to put more focus on restructuring

Under the Code, over time, the process has become overly focused on the overall price of resolution bids as compared to the actual plans for restructuring those firms' business models and capital structure or the distribution of proceeds among creditors. There is a general understanding among bank creditors that they should accept the highest bid rather than assess operational or management plans for firms. FCs, for example, bank employees, face perceived legal risks in the judgments they make about restructuring loans and hence, in such a situation, it is easier to mechanically choose among the bids rather than going through complex negotiations. Further, in the resolution process there are always chances that the promoters of the CD will hesitate to co-operate with the RP in running the affairs of the debtor, due to which the RP will not be able to take complete control of the CD.

It was recognised that the Code has been more successful in liquidation than restructuring. Hence, the Code was amended in 2018[13] with a view to encouraging resolution as opposed to liquidation. The voting threshold was brought down to 66% from 75% for all major decisions such as approval of the resolution plan, extension of CIRP period, etc. Further, to facilitate the CD to continue as a going concern during the CIRP, the voting threshold for routine decisions was reduced to 51%. Further, the Code also amended the criteria to be able to bid as a resolution applicant to be able to allow more entities to become eligible.

As of December 2021, out of the 3247 CIRPs that have been closed, 1514 have ended in orders for liquidation. However, approximately 77% of the 1514 CIRPs which were ordered for resolution were earlier with BIFR or were defunct/non-functional. For resolution to happen, the resolution value should be higher than the liquidation value and in cases where the value of assets has depleted, this may not happen. So, this needs to be kept in mind while assessing whether the Code favours liquidation more than resolution. Though, more efforts need to be made to bring more focus on restructuring.

Even the Standing Committee on Finance (2020-21) noted that there is a need to allow for more flexible resolution plans. The committee noted that:

> Section 5(26) of the IBC defines a resolution plan as a plan proposed by a resolution applicant for insolvency resolution of corporate defaulters as a going concern. Resolution Professionals, CoC and certain judgements by NCLT indicate that the term 'going concern' must imply that the resolution plan must result in disposal of the entire business and operations of the Corporate Debtor under one plan. Though the actual experience shows that bidders may be interested in selected business units or assets rather than the entire business.[14]

The committee recommended amendment in the Code to clarify that the resolution plan can be achieved through any means prescribed under regulation 37 (which allows RP much more flexibility in developing a resolution plan across multiple bidders each taking different pieces of corporate defaulters) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

### Insufficient provisions on cross-border bankruptcy and insolvency

The IBC at present has no standard instrument to restructure firms involving cross-border jurisdictions. Cross-border insolvency is regulated by sections 234 and 235 of IBC. Section 234 empowers the Central Government to enter into bilateral agreements with other countries to resolve situations about cross-border insolvency. Further, the AA can issue a letter of request to a Court or an Authority (under section 235) competent to deal with a request for evidence or action in connection with insolvency proceedings under the Code in countries with the agreement (under section 234).

The problem of not having a cross-border framework problem was also expressed by the NCLT, Mumbai in a cross-border insolvency case involving an Indian entity.[15] NCLT stated that while insolvency proceedings against the CD have already been initiated before a District Court in the Netherlands, '*there is no provision and mechanism in the IBC, at this moment, to recognize the judgment of an insolvency court of any foreign nation. Thus, even if the judgment of the Foreign Court is verified and found to be true, still, sans the relevant provision in the IBC, we cannot take this order on record*'.

Growing international trade is increasing the integration of businesses. As the world has become more financially interconnected, the need for a comprehensive provision for cross-border matters has become imperative.

The current provisions for IBC are ad-hoc and are susceptible to delays. The need for a cross- border insolvency framework under the Code was highlighted by the Insolvency Law Committee report (October 2018) as well.[16] The committee recommended the adoption of the United Nations Commission on International Trade Law (UNCITRAL) with certain modifications to make it suitable to the Indian context. In fact, UNCITRAL Model Law on Cross-Border Insolvency, 1997 has emerged as the most widely accepted legal framework to deal with cross-border insolvency issues. This law helps address the main four issues in a cross- border case: (a) Access to foreign courts (b) Recognition of foreign proceedings; (c) Cooperation between courts; (d) Coordination of more than one insolvency proceedings. Further, it provides for flexibility to tweak it to suit the requirements of domestic jurisdictions.

### Group resolutions

Another important dimension that needs to be incorporated into the Code is the concept of group resolution – one in which the resolution of borrowers belonging to the same corporate group is undertaken together. An example of this was seen during the resolution process of the *Videocon Group*; however, the same was put in place through discretionary powers available to the AA rather than through a feature of the Code. Such a process is especially vital in an economy like India where traditionally credit contracts have been embedded with cross obligations and credit mitigating cover provided by parent and group companies of the borrower. In such a system, default by a borrower is likely to spur cross defaults by group companies, thereby increasing the overall credit risk to the financial system. A comprehensive process for collective resolution of such interlinked corporate groups is thus necessary to further improve the efficacy of the Code.

## CONCLUSION AND WAY FORWARD

The Code marked a radical departure from the prevalent approaches in that it embraced the 'creditor-in-control' model as against the 'debtor-in-possession' model that had failed to produce any tangible improvements in the credit discipline in the country. Thus, the Code fundamentally reset the power balance between debtors and creditors in the face of a default by the debtors. The Code has been successful in bringing about marked changes in resolving contracts and the way insolvency is handled in the country. In a single stroke, the Code removed 'the divine right of promoters to continue in the saddle', as had been observed by the Hon'ble Supreme Court, restoring the interests of other stakeholders, especially the creditors. The insertion of section 29A provided further fillip to the notion that an insolvent debtor has to be protected from its own management, if required, for the maximisation of value from the debtor to society as a whole. Thus, for the first time, the promoters are faced with the possibility of losing control of their respective companies if financial stress is not addressed in a timely and comprehensive manner. The Code also enhanced the negotiating power of OCs by allowing them also to make applications for initiating CIRP in respect of the debtors who are in default. Of the total CIRP cases as on December 31, 2021, over 51% of the cases had been filed by OCs. Such cases had a higher proportion of withdrawals as well – at over 50%, constituting 71% of the total withdrawal cases – indicating that filing of insolvency proceedings as a negotiating tactic appears to be working for OCs. It helped to increase the recovery rates and binging about behaviour changes in debtors as well.

As pointed out by Shri M. Rajeswar Rao, the Deputy Governor of the Reserve Bank of India, in a recent speech,[17] another often ignored aspect relating to the impact of the Code is the credible 'threat of insolvency'. A key metric for assessing this impact is the number of CIRP applications that are withdrawn before admission. Till December 2021, 19,803 applications for initiation of CIRPs having total underlying default of ₹ 6.1 lakh crore were resolved before admission.

Of course, some challenges remain. For instance, the actual time being taken for the resolution is much longer than what is prescribed in the Code. To speed up resolution of bankruptcies, the number of NCLT benches and sanctioned strength of judges should be increased. There is also a case for reserving some benches for cases with very large amounts. Setting aside a specified number of NCLTs to hear cases of large defaults would be consistent with the recommendations of the Parliamentary Standing Committee as well. There is also a case for removing some decisions to require an NCLT mandate, such as replacement of IRP with RP, extension of CIRP time etc. Another issue is to put in place features so that the process puts more emphasis on resolution rather than liquidation. Moreover, there are not yet enough provisions for cross-border insolvency and group insolvencies in the Code which should be introduced. Furthermore, there is a need to radically simplify the voluntary liquidation process under IBC, though the effort has already begun with the announcement of Centre for Processing Accelerated Corporate Exit (C-PACE) in the Union Budget 2022-23.

The IBC is still a new law and newer issues keep appearing. Though the Government has been very proactive in bringing about changes in the Code whenever required. For instance, in the first year of the Code, it was found that the promoters were trying to hold on to their companies through their related parties bidding for resolution plans along with significant haircuts to the creditors. For instance, in the first resolution under the Code, *Synergies Dooray Automotive Limited* (August, 2017), a related party of the defaulter company walked away with the company with a 94% haircut to the creditors. Post this, the Code was amended to include section 29A to prohibit related party transactions. The next issue that has come to light recently is in respect of the treatment of secured vs unsecured creditors. In India, all the FCs (both secured and unsecured) of a debtor form a part of the CoC, which goes on to take significant decisions regarding the future of the debtor company, including the appointment of a RP and the final resolution plan. In recent times, the case of *KG Corp* came to light where some unsecured creditors came together, took control of CoC and came up with a resolution plan with a very small resolution value.[18] These kinds of examples are attempts of gaming the system by insolvent debtors. Banks have brought this to the attention of NCLT, which has ordered the RP to provide inspection and copies of the documents sought by the banks.

To sum up, the IBC has been a very crucial reform which has brought very important changes in the insolvency landscape in India. It is evolving in the right direction and, surely, over time, it will result in substantial improvement in economic efficiency and higher economic growth by enhancing the willingness and ability of creditors to lend.

1 As per data available from RBI databases.
2 Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 providing insertion of section 10A in the Code to temporarily suspend initiation of CIRP under sections 7, 9 and 10 of the Code for a period of six months or such further period, not exceeding one year, w.e.f. March 25, 2020.
3 IBBI Quarterly newsletter, October – December, 2021.
4 The CD has to be eligible under section 29A to submit a resolution plan.
5 A base resolution plan is the resolution plan prepared by the CD in conformity with section 30 of the Code and presented in the first instance to its CoC for consideration after the PPIRP application is admitted.
6 Writ Petition (Civil) No. 744 of 2017 with Writ Petition (Civil) No. 782 of 2017, Writ Petition (Civil) No. 783 of 2017, Special Leave Petition (Civil) No. 24001 of 2017, Writ Petition (Civil) No. 803 of 2017, Writ Petition (Civil) No. 805 of 2017, Special Leave Petition (Civil) No. 24002 of 2017, Writ Petition (Civil) No. 950 of 2017, Writ Petition (Civil) No. 860 of 2017, Special Leave Petition (Civil) No. 36396 of 2017, Special Leave Petition (Civil) D No. 33267 of 2017 and with Writ Petition (Civil) No. 511 of 2018.
7 Civil Appeal No. 2842 of 2020 with Civil Appeal No. 3063 of 2020.
8 Himani S. (2020), "Pre-packaged Insolvency in India: Lessons from USA and UK", SSRN, 13 January.
9 Martin N. (2005), "The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation", Boston College International and Comparative Law Review, Vol. 28, Issue 1.
10 Woodward Jr W.J. (2008): ""Control" in Reorganization Law and Practice in China and the United States: An Essay on the Study of Contrast", Santa Clara Law Digital Commons, 1 January.
11 Batra S. (2020), "Insolvency & Bankruptcy Code: Moving beyond 'credit in control'", *Financial Express*, 29 September.
12 Report of the Standing Committee on Finance 2020-21 "Implementation of Insolvency and Bankruptcy Code: Pitfalls and solutions", August, 2021.
13 Press Information Bureau, Government of India, Ministry of Corporate Affairs (2018), "President Approves Promulgation of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018", 6 June.
14 Supra Note 12.
15 *State Bank of India v. Jet Airways (India) Ltd.*, 2019, CP 2205 (IB)/MB/2019, CP 1968(IB)/MB/2019, CP 1938(IB)/MB/2019.
16 Report of the Sub-Committee of the Insolvency Law Committee on Pre-packaged Insolvency Resolution Process, October, 2020.
17 Address delivered by Shri M. Rajeshwar Rao, Deputy Governor, Reserve Bank of India, in the International Research Conference on Insolvency and Bankruptcy held at IIM Ahmedabad (2022), "Resolution of Stressed Assets and IBC", 30 April.
18 2022, "How a web of 'related parties' gamed the IBC process of a Tayal group firm to con PNB, BoI, UCO Bank", *Economic Times*, 4 April.