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Insolvency Reforms in India: Policy and Economic Implications

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Abstract

The Indian government introduced the Insolvency and Bankruptcy Code of India (IBC) in 2016 as reforms in insolvency and bankruptcy laws are crucial for improving the business environment and credit markets in India. The banking sector of India has been marred for long by the problem of Non-performing-Assets (NPAs), and many of its largest companies are struggling under massive debts. The main objective of the new law was to facilitate insolvency resolution and liquidation in a timely manner and to improve India's ranking in the 'ease of doing business' index. This paper highlights the importance of insolvency reform in the economic policy of any country, while it examines the insolvency regime in India under the IBC with respect to its prospects and challenges and implications of the Code for the Indian corporate sector. Thus, the paper contributes to the policy debate relating to this subject.

Keywords: *Insolvency and bankruptcy; debtors; creditors; NPAs; liquidation, India, insolvency law; economic reform; policy*

Introduction

The introduction of the Insolvency and Bankruptcy Code, 2016 (IBC or the Code) is the most significant economic reform in India since the New Economic Policy of 1991 which encompassed liberalisation, privatisation, and globalisation of the Indian economy (Pedersen, 2000). Post this policy, India witnessed tremendous economic growth because of the extensive policy reforms which included removal of trade barriers, incoming foreign direct investment, and initiation of divestment in government-owned public sector enterprises. This also led to the growth of the banking sector in India as the finance provider for the growing corporate sector.

But gradually, over the years, the performing assets of the banks started turning into NPAs. The banking sector of India has been marred for long by the problem of a large number of NPAs. Many of the country's largest companies are drawing their last breath under the enormous mountains of debts. There have been several attempts in the past to revive these companies by the Indian government and the central bank- the Reserve Bank of India. But the long-established legal framework did not support creditors in timely and effective recovery of the defaulted assets, thus putting an undue burden on the Indian credit system. Under the previous existing insolvency and bankruptcy laws, the banks got entangled in long years of tedious litigations when trying to recover their money from the defaulting debtors, which proved to be a failure in the majority of the cases. Therefore, recognising that reforms in the insolvency and bankruptcy laws are crucial for improving the business environment and credit markets in India, the Indian government introduced a comprehensive code for dealing with individual and corporate insolvency and bankruptcy- the Insolvency and Bankruptcy Code of India 2016, (IBC).

The introduction of the IBC was anticipated to be a turning point in this scenario. The IBC was expected to resolve and settle the issue of (NPAs by creating a robust mechanism for resolution of credit-related disputes between creditors and corporate debtors. It was also purported to improve the credit eco-system in India by reducing creditor distrust while ensuring that companies continue to function rather than being liquidated for non-payment of loans. The main objective of the Code was to facilitate the process of insolvency resolution and liquidation in a timely manner, which, in turn, was aimed at improving India's ranking in 'the ease of doing business' index. It has been three years since the Code) was implemented. This paper makes a critical appraisal of the provisions of the Code, highlighting the importance of insolvency reform in Indian economic policy in the second section. The third section presents the history of insolvency and bankruptcy laws in India, and the fourth section explains the major provisions of the Code. In the fifth section, a critical analysis of the Code has been undertaken, while the sixth section presents the status quo. The next section discusses the implications of the Code for the Indian corporate sector, and the last section contains the conclusion.

Insolvency Reform and Economic Policy

Insolvency refers to a situation where an entity (the debtor) is unable to raise sufficient cash to meet its obligations or is unable to pay debts as they become due for payment. Symptoms of insolvency may include poor cash management, increase in loans or decrease in liquidity or cash flows (Mackevičius and Sneidere, 2010). On the other hand, bankruptcy occurs when a court has determined insolvency and has issued legal orders for its resolution. Upon declaration of a person or entity as insolvent, the court is responsible for liquidating the personal property of the insolvent debtor and distributing the proceeds amongst the creditors of the insolvent debtor.

In terms of the overall legal and institutional framework supporting economic activity in a market economy, there is no component more important than that of an effective insolvency system (Hagan, 2001). As a necessary counterbalance to encouraging private firms to succeed, a market economy must also devise a system for dealing with the firms that fail. For this purpose, a set of insolvency laws is required that provides a predictable mechanism for liquidation or reorganisation of the failing businesses (Flaschen and DeSieno, 1992). For many emerging economies, reform in the area of insolvency has acquired centre stage in their economic reform programs because the development of an effective credit enforcement system that is supported by a predictable insolvency framework provides a necessary stimulus for foreign investment. An effective insolvency system is of particular relevance to an economic policymaker as it serves two critical purposes- *first*, it supports the credit system, and *second,* it strengthens the business sector of the economy. For supporting the credit system, it provides a mechanism that enables financial institutions and banks to maximise the value of their claims on a distressed debtor, and hence protect their financial stability. An insolvency system empowers the creditor to initiate either liquidation or reorganisation proceedings against a debtor in financial distress, which brings a discipline to the debtor-creditor relationship that is essential for sustainable relations. This discipline is of significant importance to emerging economies like India, where the enforcement of creditor claims is subject to considerable delay and uncertainty. An insolvency system establishes the rules that allocate the risk of failure in a predictable manner. Thus, it can make a crucial contribution to the health of the credit system of an economy by fostering the availability of credit (Hagan, 2001).

Efficient regulation of corporate insolvency can also promote the efficiency and competitiveness of the corporate sector by establishing a precise exit mechanism and specifying a maximum reorganisation period that imposes considerable discipline in the business sector. It is also related to increased access to credit for business and on better terms (Cirmizi, Klapper and Uttamchandani, 2010). In an efficient insolvency regime, creditors are more willing to lend to companies because they are assured of recovering their loans. Besides, the failure rate of businesses may reduce in such economies, thereby helping to maintain a higher overall level of entrepreneurship in the economy and preserving employment (Klapper and Love, 2011). An insolvency framework leads to the efficient reallocation of resources across the economy by being a facilitator for business exit and liquidation of non-viable firms (Djankov, 2009). Liquidation is a means to transfer the NPA into the hands where they fulfil the purpose of productivity better than when they were in the hands of the debtor (Paulus et al. 2015). When a debtor is unable to pay its debts or liabilities, the insolvency systems of the country provide a legal mechanism for addressing the collective satisfaction of the outstanding claims of the various parties affected by the insolvency. These parties include the owners and management of the debtor company, the creditors (secured or unsecured), government creditors, tax agencies, employees, suppliers of goods, and services. An insolvency system must contain measures that ensure equitable treatment of all these stakeholders. The legal mechanism shall also accommodate the legal, commercial, and social institutions and practices that are relevant to the design of the insolvency law and required for its operation. An effective and efficient insolvency system must strike a balance between the interests of all these stakeholders, along with taking care of the relevant social, political and other policy considerations that have an impact on the economic and legal objectives of the insolvency proceedings (United Nations Commission on International Trade Law, 2005).

Two significant policies in insolvency law include providing the debtor with a fresh start and treating all the creditors of the debtor equitably under law. Insolvency laws are required to determine the circumstances under which a company can enter into bankruptcy and lay down provisions relating to issues like protection of stakeholders' interests, the priority of creditors' claims, and control of the company during the insolvency process (Deakin et al., 2010). An efficient bankruptcy system shall ensure that the companies whose going-concern value is less than liquidation value are liquidated, while those whose going-concern value is higher than liquidation value are restructured. Bankruptcy law provides for a common legal procedure by which all claims against the defaulting company are settled. In the absence of such a procedure, individual creditors would engage in a competition to be the first to sue the company for recovery of their debts or claims. Even in the case of companies that decide to reorganise instead of liquidating, the law shall set up the framework for negotiating the reorganisation or reconstruction of the distressed assets (White, 1989).

As per the United Nations Commission on International Trade Law (UNCITRAL), 2005, effective and efficient insolvency regimes should aim to achieve the following objectives in a balanced manner:

- Providing certainty in the market to promote economic stability and growth
- Maximising the value of assets
- Striking a balance between liquidation and reorganisation
- Ensuring equitable treatment of creditors who have similar rights
- Providing timely, efficient and impartial insolvency resolution
- Ensuring a transparent and predictable insolvency law that contains incentives for gathering and disseminating information
- Establishing rules for ranking of priority claims
- Developing a framework for cross-border insolvency.

UNCITRAL had laid down these key objectives in its 'Legislative guide on insolvency Law' (2005) as part of its mission to progressively harmonise and modernise international trade law (Block-Lieb and Fordham, 2006). Although the country-specific approach to insolvency resolution may vary, generally it should aim to achieve the aforementioned key objectives. Governments are expected to make conscious policy decisions in this direction. But all this diligent exercise of designing insolvency law is put to the ultimate test at the time of actual practice when the laws are put to action (Halliday, 2006). As an insolvency regime cannot completely protect the interests of all the parties, governments have to make certain policy choices while designing a law on insolvency. These choices depend upon the economic, social and political goals the law is designed to achieve, such as rescuing businesses in distress, protecting employment, protecting creditors, encouraging entrepreneurship while balancing the other objectives specified above. Thus, insolvency law can have far-reaching effects on any economy.

The objectives of insolvency laws in different countries also differ. For example, in French law, the intention is to preserve employment and enterprises while in Germany the main purpose is to satisfy creditors. The British approach encourages the entrepreneur, and the US Bankruptcy Code aims to provide a fresh start. In recent years, many countries have introduced reforms in their insolvency laws.

Chile implemented a new insolvency law in 2014 for adopting a new and modern bankruptcy system. New amendments were introduced to the legal insolvency framework in Georgia in 2017. Pakistan adopted the Corporate Rehabilitation Act in March 2018 for implementing reorganisation proceedings. Morocco and Kenya also introduced reforms in the insolvency laws in 2018.

History of Insolvency laws in India

In India, the Ministry of Company Affairs, the Ministry of Law and Justice and the Ministry of Finance are entrusted with making legislation in the domains relating to companies, insolvency and banking law. The insolvency and bankruptcy issues in India were dealt with by many overlapping laws, namely the Sick Industrial Companies Act (Special Provisions; 1985), Recovery of Debt Due to Banks and Financial Institutions Act (1993), Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (2002), and Companies Act (2013). These Acts stipulate norms for the restructuring, seizure, and sale of debtors' assets in the case of insolvency issues of companies and financial firms. But the insolvency resolution of individuals and partnerships was also dealt with through two archaic Acts, the Presidency Town Insolvency Act (1909) and the Provincial Insolvency Act (1920). However, creditors were also able to approach civil courts, already suffering from an overload of pending issues and low-resolution rate. Insolvency resolution was delayed owing to overlapping applicability of laws and lack of qualified insolvency professionals. These Acts also created multiple forums for the resolution of insolvency with fragmented jurisdiction creating infinite uncertainty regarding shareholders' wealth. The Bankruptcy Law Reforms Committee (2015) s also observed that processing time of insolvency cases in India was 4.3 years, almost 3-4 times higher than that of USA (1.5 years) and UK (1 year). This committee report was tabled in the Indian parliament and passed on May 2016 by both houses of the Parliament in India.

There was no unified regulatory authority to regulate the rights of the various stakeholders, that is secured or unsecured creditors, employees, etc. or to settle the priority of their claims. There was a lack of an enabling environment for the enforcement of creditors' rights and thus, a large number of distressed assets and NPAs. NPAs are an essential indicator of the health of the banking sector of a country (Jain and Sheikh, 2012). Moreover, the multiplicity of legislation and non-statutory guidelines made the process of debt-recovery very cumbersome and time-consuming. Overall the insolvency laws in India were weak and ineffective. Inadequate laws, coupled with typical delays in the Indian courts regarding insolvency matters, made the recovery of debts and enforcement of security interests a Sisyphean exercise. In this scenario, the winding-up process could take more than ten years to complete (Goswami, 2003; Batra, 2003; Batra, 2007).

"The civil courts are burdened with diverse types of cases. Recovery of dues to banks and financial institutions is not given any priority by the civil courts. The banks and financial institutions like any other litigants have to go through a process of pursuing the cases for recovery through civil courts for unduly long periods." (Justice Eradi Committee Report, 2000). In India, the reforms relating to the rights of creditors, insolvency, and the debt markets have either been significantly delayed or have been ineffective (Armour and Lele, 2009). As per the World Bank measures, the Indian insolvency law was amongst the least effective in the world (World Bank, 2007).

Various legislations relating to insolvency and debt-recovery of companies and financial firms are set out in Table 1 below:

Table 1: Insolvency legislation in India

Year of enactment	Name of law
1985	The Sick Industrial Companies Act
1993	The Recovery of Debts due to Banks and Financial Institutions Act
2002	The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act
2003	The Sick Industrial Companies (Special Provisions) Repeal Act
2013	The Companies Act

Source: Compiled by the author

The Sick Industrial Companies Act was enacted in 1985 for detection of sick and potentially sick companies. The objective was the restructure and rehabilitation of distressed or sick companies. The Act provided for the creation of a quasi-judicial body, the Board for Industrial and Financial Reconstruction (BIFR), which was tasked with taking appropriate measures for revival and rehabilitation of the potentially sick entities and liquidation of non-viable undertakings. Though BIFR fared better than the courts, the Board itself generated significant delays and expenses and effected very few successful recoveries.

The Sick Industrial Companies Act, 1985 was repealed and replaced by the Sick Industrial Companies (Special Provisions) Repeal Act, 2003. The new Act was aimed at plugging some loopholes in the earlier Act. Its objective was to combat industrial sickness and also to reduce it. It was realised that some companies used the declaration of sickness as an escape route upon failure of a project or other similar reasons, for gaining access to various benefits and concessions from financial institutions. Under the new Act, BIFR was dissolved and replaced by the National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal. However, NCLT was constituted in the year 2016.

The Recovery of Debts due to Banks and Financial Institutions Act, 1993 was introduced to provide an alternative process for recovery of debts by the banks through the creation of Debt-Recovery Tribunals. Before that banks and financial institutions were required to seek remedial action through the civil courts which were time-consuming. The objective of the Act was that debt-recovery could be adjudicated expeditiously, as banks being the backbone of any economy need a robust legal framework to function smoothly.

Another major legal reform relating to creditor rights was the enactment of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act 2002 (SARFAESI). To avoid the delays associated with enforcement through the Indian courts, SARFAESI empowered banks and financial institutions to enforce security interests extra-judicially. In particular, such creditors were permitted to seize and sell collateral without recourse to courts if a default was not remedied within 60 days. SARFAESI also established a regime regulating the securitisation and restructure of financial assets. It gave lenders an alternative exit route from distressed loans—a sale to an investment entity specialising in distressed debt, as opposed to enforcement. In July 2005, the Reserve Bank of India (RBI) authorised the sale or purchase of NPA by banks and other financial institutions in return for cash consideration.

With respect to the enforcement of bank debt and security interests, the RDDB Act and SARFAESI represented limited but positive steps forward. However, these statutory provisions apply only to debts due to banks and financial institutions and are not available to ordinary creditors. Thus, an ordinary creditor wishing to enforce a debt has no option but to pursue the debtor before ordinary civil courts, with the associated long delays (Kang and Nayar, 2004)

Though all these laws provided for the rehabilitation of distressed companies and the recovery of debt claims by banks and financial institutions, none was successful. This was evident from the number of pending cases and the growing volume of NPAs (Jain, 2007). These laws instead created obstacles so that creditors were unable to recover their debts, and long delays favoured debtors. There was no fear amongst corporate debtors of losing their assets or their companies. Thus, it was necessary to remove these statutes so as not to burden the economy any further.

Insolvency and Bankruptcy Code, 2016

The Indian government, led by Prime Minister Narendra Modi, has introduced several initiatives and positive reform measures to enhance investor confidence (Sahoo, 2014). India has recently witnessed various critical legal reforms in the areas of taxation, labour laws, company law and insolvency, and bankruptcy-related laws. The introduction of the Insolvency and Bankruptcy Code in 2016 has been the most significant contribution of this government, as India lacked a law for the resolution of distressed assets and debt-laden companies, which form a large part of NPAs in the banking sector. The Code has consolidated the various insolvency laws (like the SARFAESI Act, 2002 and the Companies Act, 2013) and brought them under a single umbrella (Budhiraja, 2016). This legislative reform attempts to unify the existing laws and increase the breadth and depth of debt financing in India (Kumar et al., 2017). One of the fundamental features of the Code is that it allows creditors to assess the viability of a debtor as a business decision and agree upon a plan for its rehabilitation or speedy liquidation. The Code creates a new institutional framework, consisting of a regulator, insolvency professionals, information utilities and adjudicatory mechanisms that will facilitate the formal insolvency resolution process and liquidation within a defined time-frame.

The IBC institutional framework comprises of four main pillars- the regulator, the adjudicatory body, the insolvency professionals and the information utilities, which are described below:

1. Regulator: Insolvency and Bankruptcy Board of India (IBBI)

   The IBC has created a regulatory and supervisory body, the IBBI which has been charged with educating the sector, and implementing, and operationalizing the Code effectively. The Board will regulate all matters related to insolvency and bankruptcy, set out eligibility requirements for insolvency intermediaries (insolvency professionals, professional insolvency agencies and information utilities), regulate entry, registration and exit of insolvency intermediaries, make model by-laws for professional insolvency agencies, set out regulatory standards for insolvency professionals, specify the manners in which information utilities can collect and store data, and oversee the functioning of insolvency intermediaries and the resolution process.

2. Adjudicatory Authority- National Company Law Appellate Tribunal (NCLT) and NCLAT

   All proceedings under the Code in respect of corporate insolvency are to be adjudicated by the NCLT. NCLT will serve as a single-window forum for handling all aspects of insolvency resolution of corporate entities. No other court or tribunal is authorised to grant a stay against an action initiated before the NCLT. Appeals against an order of the NCLT must be made to the NCLAT. All appeals against the order of NCLAT must be made to the Supreme Court of India. In case the resolution or restructuring of debts is not viable, the NCLT may direct for dissolution of the corporate entity.

3. Insolvency Professionals

The Code makes provision for the creation of a cadre of professional insolvency practitioners, known as insolvency professionals, who are tasked with overseeing various aspects of the resolution of insolvency. The Code also sets up Insolvency Professional Agencies (IPAs), which are professional bodies that regulate the practice of IPs. Individual practitioners are required to be enrolled with the IPAs empowered to regulate and develop the profession of IPs. There are at present three IPAs registered under the provisions of IPA regulations. The following table presents the data relating to the number of IPs registered with these three IPAs:

Table 2: Number of IPs registered

Name of IPA	Number of IPs registered as on 31 March 2019
Indian Institute of Insolvency Professional of ICAI	1520
ICSI Institute of Insolvency Professional	733
Insolvency Professional Agency of the Institute of Cost Accountants of India	203
Total	2456

Source: Data released by IBBI

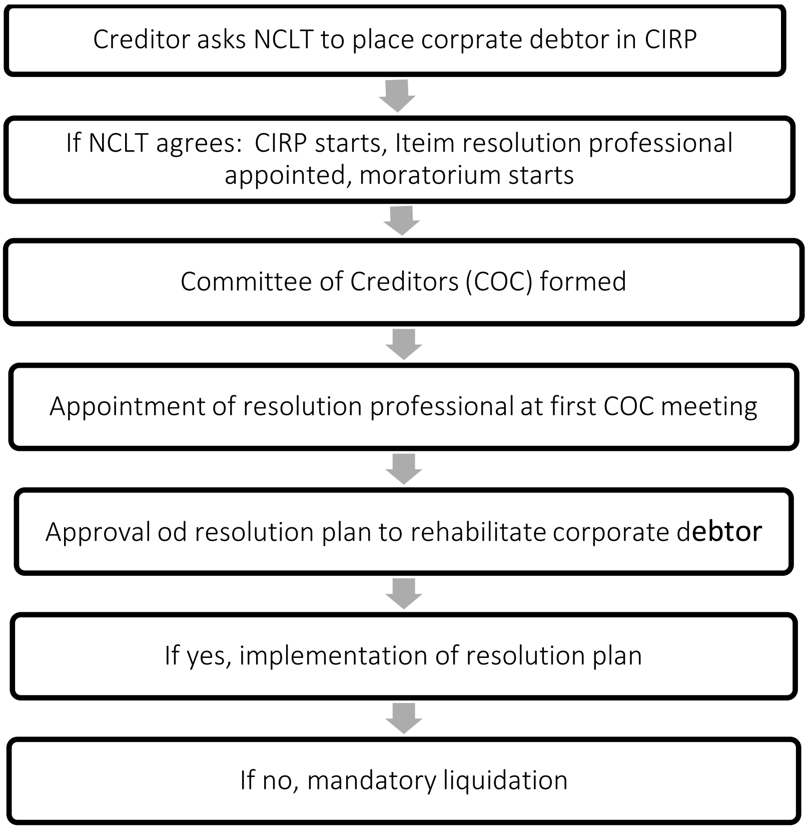
4. Information Utilities (IUs)

The IBC envisaged the creation of IUs whose task will be to collect, collate, and disseminate information from companies and creditors. Under the current scenario, financial information about non-corporate borrowers is available only from the income-tax department and is not publicly accessible even under the Right to Information Act, 2005. The 'IUs' contemplated under the Insolvency and Bankruptcy Code will help to overcome this deficiency (Eshwar, 2016). In Chapter V of the Code, Sections 209 to 216, the broad framework for formation, governance, and core services of IUs, accepting information submission, storing and publishing such information, is legislated. These are enabling provisions to facilitate the development of the IUs as an industry that will develop over time. The power to license an IU is vested with the IBBI, which will also exercise powers to regulate them, including the manner of collecting and storing of information, and for providing access to such data. At present, there is one Information Utility, known as National E-Governance Services Limited.

The Corporate Insolvency Resolution Process (CIRP) under the IBC can be explained with the help of the flowchart shown in figure 1.

The IBC has been amended twice since its enactment- the first time in November 2017 and the second time on June 2018. The important change brought in the amendment of November 2017 was the introduction of Section 29A, which bars promoters from bidding for their own companies. Also, it introduced the rule that the approval of the resolution plan required the consent of 75% of the creditors. In the amendment of June 2018, this threshold was reduced to 66%. Also, Section 12A was introduced, which deals with the withdrawal of insolvency proceedings against a company. It provides an option to the promoters to offer a settlement to the creditors before bankruptcy proceedings start and to regain control of the company provided 90% of the creditors agree. Also, in some cases decided by the Supreme Court of India, the Court has explained and interpreted various provisions of the IBC, for example-Brilliant Alloys v/s S Rajagopal and Others (Dec 2018) and Swiss Ribbons v/s Union of India (Jan 2019).

Figure 1: Process of CIRP



The insolvency resolution process gets triggered on different grounds in different jurisdictions. In India, according to Section 4 of the Code, a creditor can invoke the provisions of the Code and apply for the commencement of the CIRP against any company which has defaulted in making payment of rupees one lakh.

Critical Appraisal

It has been three years since the Code (IBC) was implemented, but in terms of the number of cases resolved its success has been limited. Moreover, in this short period, the Code has been revised/amended several times, which points out to the fact that the Code was drafted in a hurry by the government. Also, there are some shortcomings in the Code discussed below:

1. The limited infrastructure of the NCLT and delays in the resolution process: The NCLT only has 14 benches in different parts of the country. This comprises of a Principal bench at New Delhi and newly added benches at Jaipur, Kochi, and Cuttack. Additionally, in March 2019, the government has approved two additional benches at Amravati and Indore. The NCLT has to decide thousands of cases relating to company law. Of these 1,858 cases are related to insolvency, and only 94 cases have seen the approval of resolution plan (IBBI data as at31 March 2019). A large number of cases

and a limited number of benches and judges makes it impossible to meet the 270-day deadline prescribed by the IBC. Moreover, another reason for the delay is that large and powerful companies hold up the cases by continually keeping them in motion between the NCLT, NCLAT and the Supreme Court, while the creditors wait for a resolution. Another point of contention is whether the period of litigation be counted in the 270 days prescribed for the resolution process. Nevertheless, the value of assets is certainly lost due to the delays.

2. Rights of the lenders: As per the Code, creditors are divided into two categories- financial creditors and operational creditors. Operational creditors are not part of the Committee of Creditors unless they represent ten per cent or more of the aggregate debt. Thus, they are not allowed to vote on the resolution plan. As a result, they have to take a higher haircut on their claims compared to financial creditors. This is a serious issue for the Indian economy as most of the time, operational creditors are the small and medium enterprises.

3. Role of Resolution Professionals: As per the IBC, the resolution professional is appointed by the consortium of lenders. Their role is to recommend a viable resolution plan that has the approval of 66% of the creditors. This exercise is to be completed within the threshold of 270 days. However, the IBC has placed too many expectations on the resolution professionals, as they have to understand the business of the corporate debtor, calculate the claims of the various creditors, and also devise a resolution plan in only 270 days, which is almost impossible. Moreover, certified resolution professionals in India are in the majority chartered accountants and company secretaries who are not very well versed in the operations of the other side of the business. Also, creditors, both- financial and operational creditors, have a right to approach the court on the ground that a resolution professional has not kept the creditors' interests in mind while devising the resolution plan, which results in frequent litigation and further delay in the process.

4. Forbidding multiple rounds of bidding: The IBC forbids multiple rounds of bidding by companies who are interested in buying the distressed assets of insolvent companies. The objective of this provision was to put a restraint on the never-ending negotiations and to keep the bids competitive. But it has resulted in out-of-court settlements. Sometimes high-value bids are submitted after the deadline. There is no clarity in the Code whether these late bids should be evaluated and considered or not. In some cases, the rejection of a bid on the ground of lapse of the timeline may be unfair to creditors as it may hamper real price discovery of the distressed assets. The case of Bhushan Power and Steel Ltd can serve as an example: Liberty House submitted a bid after the submission deadline. This was followed by litigation by Tata Steel who were the early bidders.

5. Promoters barred from bidding for their companies: Section 29A of the IBC which was introduced after the first amendment in November 2017, prohibits promoters from bidding for their own companies. However, an exception was allowed for the MSMEs. The objective of this provision was to prevent defaulting promoters from regaining control of their companies at a cheaper value. Section 29A fails to recognise that not all promoters are defaulters as in some cases the default in payment of debt is not intentional or deliberate and may be caused due to business failure. There should be a distinction between such cases and fraud or deliberate default. Promoters of such companies should be allowed to bid for their own companies as they are the ones who make the highest bids and would be genuinely interested in ensuring the company continues to run. Also, there may be difficulty in finding buyers for some companies.

6. Alignment with other laws: The companies (buyers) who apply to buy the distressed assets with a resolution plan have to abide by the other laws like SEBI regulations and the Competition Act. Thus, there is a need to align these laws with the IBC to avoid confusion on the part of resolution applicants.

7. Lack of provisions relating to cross-border insolvency and group insolvency: The IBC does not provide any clarity on the matters of cross-border insolvency and group insolvency. Group insolvency refers to multiple entities of the same corporate group. The existing legal framework under the IBC does not facilitate insolvency resolution and liquidation of corporate debtors of the same group. For example, Videocon Industries, Videocon Telecom and several others of its group companies are facing insolvency proceedings. Creditors can save time and cost if allowed an option of joint proceedings against the debtor group companies.

Status quo

This section of the paper discusses the current state of affairs under the IBC based on the data published by the IBBI. As reported, there are very few cases where the resolution plans have been approved.

As presented in Table 3, 1858 corporate debtors (CDs) have been admitted into CIRP by the end of March 2019. Of these 152 have been closed on appeal or review or settled; 91 have been withdrawn; 378 have ended in liquidation, and 94 have ended in approval of resolution plans. It can also be observed that 1143 CIRPs are pending as at31 Mach 2019.

Out of the total of 1858 CIRPs admitted, only 715 could be closed. It can be observed that about 52.87% of the CIRPs which were closed-ended in liquidation, as compared to 13.14% ending with a resolution plan. Withdrawal under Section 12A accounted for 12.72% of cases.

Table 3: CIRP

Status	Number
Admitted	1858
Appeal/Review/Settled	152
Withdrawal under Section 12A	91
Approval of the resolution plan	94
Commencement of liquidation	378
Total CIRPs at the end of March 2019	1143

Source: Compilation from the website of the NCLT

Table 4 shows that the highest number of CIRPs is in the manufacturing sector, comprising around 42% of the total CIRPs. In this sector, the number of CIRPs is highest in the basic metals sector with large steel companies in India such as Bhushan Steels Ltd., Monnet Ispat and Energy Ltd, and Essar Steel India Ltd. having faced insolvency proceedings.

As per the IBC, the time limit for resolution is 270 days. But as can be seen in Table 5, most of the CIRPs i.e., 362 out of 1143 have already been pending for more than 270 days.

In 2017, the RBI had identified 12 big accounts, which constituted almost 25% of the total NPAs in the country, to be immediately resolved under IBC. Together these companies had outstanding claims of Rs.3.45 lakh crores as against a liquidation value of Rs. 73,220.23 crores. Out of these, resolution plans in respect of six CDs were approved as on 31 March 2019, as presented in Table 6. The data shows that realisation in Bhushan Steels Ltd. is highest at 63.50 % while it is the lowest at 17.11% in the case of Alok Industries Ltd.

Table 4: Sectoral distribution of CDs under CIRP as at31 March 2019

Sector	No. of CIRPs
Manufacturing	*772*
Food, beverages and tobacco products	93
Chemicals	75
Electrical machinery and apparatus	70
Fabricated metal products	50
Machinery and equipment	83
Textile, leather and apparel products	127
Wood, rubber, plastic and paper products	80
Basic metals	140
Others	54
Real estate	*359*
Construction	*202*
Wholesale and retail trade	*180*
Hotels and restaurants	*52*
Electricity	*47*
Transport, storage, and communications	*50*
Others	*96*
Total	1858

Source: Data released by IBBI

Table 5: Status of pending CIRPs as at 31 March 2019

Number of days	Number of CIRPs
More than 270 days	362
180 – 270 days	186
90 – 180 days	247
Less than 90 days	348
Total	1143

Note: The number of days pending is from the date of admission. It includes time excluded by the Tribunals

Source: Data released by IBBI

The effectiveness of an insolvency regime cannot be measured or assessed by the number of proceedings, nor is the number of successful reorganisations as compared to the number of liquidations in bankruptcy an appropriate measure of a successful regime. There is no accurate indicator for ascertaining the optimal number of reorganisations. Moreover, bankruptcy liquidation is not an economic evil; instead it is beneficial to the economy because it leads to reallocation of the idle factors of production (Balz, 1997). The ultimate objective of an insolvency and bankruptcy regime in any economy is to establish a structure that provides for efficient decision making in individual cases and thus minimises losses to stakeholders and the economic environment.

Implications for the Indian Corporate Sector

The IBC can have a major impact on the Indian corporate and banking sector, as the primary aim of the law is to address the NPAs in the Indian banking system which amount to around 10 trillion rupees. If these NPAs are resolved successfully and the asset quality of the banks improves, it will give impetus to new investments and promote economic growth. The Code can also become a significant driver in the growing merger and acquisition deals in Indian corporate sector as bidders are interested in acquiring stressed assets that are now available at quite lucrative prices and several of such entities are close to the conclusion of their resolution process under the IBC. In June 2018 in one of the major developments under the IBC, homebuyers and allottees through an ordinance under the Real Estate (Regulation and Development) Act, 2016, were accorded the status of financial creditors, which gives them due representation in the Committee of Creditors and also enables them to invoke section 7 of the Code if developers default on their obligations. Section 7 allows the financial creditors either individually or jointly to file an application in the NCLT for initiating resolution proceedings against the defaulting company. It has put homebuyers on the same footing as other stakeholders in any real estate project. This will undoubtedly have an implication for the real estate sector in India, which has witnessed exponential growth in the last two decades and has drawn massive investments. Given the defaults by the large infrastructure companies like Jaypee Infratech and Amrapali Group (private sector infrastructure companies in India), this ordinance is a welcome relief for homebuyers. Apart from the real estate sector, other key industries that could drive deal activity pertaining to stressed assets include steel, power, and the telecom sector in India.

Table 6: Resolution of Six large NPAs

Name of CD	Claims of Financial Creditors dealt under resolution			Successful Resolution Applicant
	Amount admitted	Amount realised	The realisation as a percentage of claims	
Electrosteel Steels Ltd	13175	5320	40.38	Vedanta Ltd
Bhushan Steels Ltd	56022	35571	63.50	Bamnipal Steel Ltd.
Monnet Ispat and Energy Ltd.	11015	2892	26.26	Consortium of JSW and AION Inv. Pvt. Ltd.
Essar Steel India Ltd.	49473	*	*	Arcelor Mittal India Pvt. Ltd.
Alok Industries Ltd.	29523	5052	17.11	Reliance Ind. Ltd., JM Financial ARC Ltd.
Jyoti Structures Ltd.	7365	3684	50.02	Group of HNIs led by Mr. Sharad Sanghi

*Apportionment between FCs and OCs is under consideration by NCLAT.

Source: Data released by IBBI

Conclusion

Drafting new legislation in relation to insolvency is only a start, and it will take time for the IBC to settle down. Prior to the legislation, the credit culture in India was such that there was no fear of losing the company as insolvency cases before the courts dragged on for many years. After the enactment of the Code, there will be a gradual but definite movement towards a different and better credit culture in India. But policymakers have to keep in mind that promoters whose self-interest is affected will try to devise manipulative measures, which will have to be avoided through careful and effective implementation of the Code. Effective implementation, in turn, requires a robust institutional infrastructure, which obviously cannot be developed in a short period. Thus, it is necessary that the economic policymakers lay greater emphasis on the institutional aspect of insolvency reform before the advent of any crisis. Another pertinent challenge lies in ensuring that the law is implemented in its true spirit. Additionally, there are challenges such as the differential treatment of different creditor categories, the Committee of Creditors being empowered to decide the fate of debtor companies, the role of insolvency professionals without much accountability, and the need to coordinate insolvency reform with other elements of the legal and regulatory framework. The above issues have led to a large number of legal disputes. Hence, the government reconstituted the Insolvency Law Committee in March this year to analyse the functioning and implementation of the Insolvency and Bankruptcy Code, and make recommendations for addressing the issues. The Ministry of Corporate Affairs has also invited stakeholder comments on the proposed legal reforms relating to group insolvency and pre-packaged insolvency. Serious efforts are required to reduce the difficulties faced by creditors as well as by debtor companies. Any misstep in the process will discourage foreign companies, international investors, and bidders and lead to unnecessary liquidation of the companies. Thus, it remains to be seen how the insolvency regime in India will shape up after the proposed changes and whether the government will address the challenges in the Code as discussed.

However, the success of the Insolvency and Bankruptcy Code, though limited, should not be ignored merely because of some challenges. Its success has become evident in cases like Bhushan Steels Ltd. which was taken over by steel giant Tata Steel Ltd. Insolvent Bhushan Steel Ltd. was amongst the largest NPA identified by the RBI. This case has been a breakthrough in the rescuing of bankrupt firms and their creditors. The IBC will encourage financial discipline amongst businesses as companies can no longer abuse bankruptcy proceedings to stall recovery action by the creditors. Recovery of loans will boost the financial health of lenders and improve the asset quality of banks enabling them to make further investments.

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