Experiencing the Code: Corporate Insolvency in India

Contents
About the Code

- Status check: the journey this far
- Implementation journey of the Code
- Select judgments
- Regulations issued by the IBBI

The Code on the ground

- Practical challenges faced by IP
- Liability of directors under IBC – Considering the scope of “wrongful trading”
- How does cross-border insolvency get impacted?
- Key milestones in the journey ahead...

Practical Considerations

- Nitin Jain, Edelweiss Capital
- Sumant Batra, Kesar Dass B. & Associates
- Kalpesh Kikani, AION

Perspectives
We must compliment the Ministry of Finance for a speedy development and implementation of Insolvency and Bankruptcy Code (Code). Since December 2016, when the Code became effective, an entire ecosystem has evolved to resolve the problem of corporate distress. In a short span of less than nine months:

- 900+ insolvency professionals (IPs) have registered with the Insolvency and Bankruptcy Board of India (IBBI).
- The IBBI, with tremendous zeal, has issued multiple additional regulations in 2017 to further strengthen the Code.
- Over 200 insolvency proceedings are on-going or in-progress across various National Company Law Tribunal (NCLT) benches.
- Knowledge sharing events are being conducted every day across the country, further strengthening awareness and thereby implementation of the code.

However, insecurity/inhibitions among various stakeholders is creating practical issues for implementation:

- The financiers, while taking a decisions of getting a resolution plan under distress (and sometimes hostile) situations.
- The IPs, who tend to get over cautious as the level of consequences may be unprecedented.
- The promoters, who find it difficult to deal with the 180/270-day period where the IP “takes over” their business, which in most cases has been managed for decades without question.
- The creditors, employees and now consumers, who do not trust the system and see the change in guard for companies under IBC an opportunity to vent out their long overdue frustration of operating in a sub-optimal environment, with the lack of knowledge of the law further adding to their detrimental actions.

To help overcome the above fears, the legal system has been active mainly because there is lack of precedent for the code. Additionally, it is open to interpretation as it is based more on spirit rather than on rules.

However, over time, we expect to see these insecurities diminishing with increasing confidence between all stakeholders and judicial precedent while working together towards a solution. It may be naïve to expect a perfect world, but there is already a sense of coordinated turnaround, which will strengthen over time. The Code will surely be revisited to sort out the legal and practical issues that have come to the fore over the last nine months. The IP industry needs to build on their strength from a business acumen perceptive, that I believe will go a long way in achieving ‘coordinated turnaround’.
The New Insolvency law is creating a lot of excitement and anxiety in the industry, as it throws both opportunity as well as challenges. The Code establishes an Insolvency Regulator, The Insolvency and Bankruptcy Board of India (IBBI) to exercise regulatory oversight over Insolvency Professional agencies and the Adjudicator, the National Company Law Tribunal with designated Insolvency benches; and information utilities-the repositories and depositors of information to facilities quick access to information and timely resolution.

In this backdrop, recognizing the importance of insolvency and Bankruptcy Code in the financial architecture of the country, ASSOCHAM with support of industry leaders is organizing National Conference on Insolvency and Bankruptcy Code- 2016 in main corporate hubs (Bangalore, Kolkata, Hyderabad, New Delhi, Ahmadabad and Mumbai) in association with Insolvency and Bankruptcy Board of India (IBBI).

ASSOCHAM-EY have brought out the knowledge paper with the objective to highlight the issues and challenges being faced by various stakeholders on the ground.

We hope that this study would help and be relevant to the regulators, markets participants, Government departments and other research scholars.
About the Code
What are the highlights of the Code?

**Key existing legislation, regulations and non-statutory guidance amended**
- Companies Act, 1956/2013
- Recovery of debts due to banks and financial institutions act, 1993 RDDBFI Act, 1993
- SICA Act, 1985
- Other enactments for partnerships and individual insolvencies
- Non-statutory guidelines/out of court mechanism

**Objective section of the Code**
- Consolidate and amend laws relating to insolvency and bankruptcy
- Maximisation of value
- Time-bound resolution
- Promote entrepreneurship and availability of credit
- Alteration of priority of payment of government dues
- Establish an insolvency and bankruptcy board in India

**The Insolvency and Bankruptcy ecosystem**
- Insolvency and Bankruptcy Board of India (IBBI)
  - Insolvency and Bankruptcy Board of India (IBBI) - apex body for promoting transparency & governance in the administration of the Code; will be involved in setting up the infrastructure and accrediting IPs & IUs
  - Insolvency and Bankruptcy Board of India (IBBI) - Insolvency Professional Agencies (IPAs) - Information Utilities (IUs)
  - Insolvency and Bankruptcy Board of India (IBBI) - Insolvency Professionals (IPs)
  - Insolvency and Bankruptcy Board of India (IBBI) - Committee of Creditors (CoC)
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## Corporate Insolvency Resolution Process (CIRP)

### Default

Failure to pay whole or any part or instalment of the amount of debt or interest due (min INR1 lakh)

### Who can file the application?

- Financial creditors
- Operational creditors (including Government & employees/workmen)
- Corporate debtor

No new application for CIRP can be made

### Interim Resolution Professional/Resolution Professional (IRP/RP)

- Financial creditor and/or corporate applicant shall propose the name of an IRP in the application;
- It is optional for the operational creditor to propose the name of an interim IP

- All powers of the suspended Board of directors shall vest with the IRP/RP
- RP is responsible to run the company as a going concern during CIRP

- IRP/RP to get immunity from legal proceedings for actions taken in good faith

### Moratorium

- The NCLT to declare moratorium from insolvency commencement date until completion of insolvency

Moratorium shall prohibit:
- Institution of suits
- Transfer of assets
- Foreclosure, recovery or enforcement under SARFAESI
- Recovery of assets

### Committee of Creditors

- Consists of financial creditors only, excluding related parties
- Include secured and unsecured financial creditor
- Will confirm or replace IRP as RP
- To approve several actions of RP

### Resolution process

1. Default
2. Appointment of a resolution professional
3. Moratorium period (180/270 days)
4. Formation of Committee of Creditors
5. 75% of the creditors to approve
   - Yes: Implement the resolution plan
   - No: Go to liquidation

### Resolution plan

The resolution plan must provide for:
- Payment of insolvency resolution process costs
- Repayment of the debts of operational creditors
- Management of the affairs of the borrower after the plan is approved
- Implementation and supervision of the approved plan

### Voting power

- Only financial creditors have voting power in the committee in the ratio of debt owed
- All decision of the committee shall be approved by 75% of financial creditors
- Directors and operational creditors can attend the meeting; but would not have any voting rights

### Fast track insolvency

For debtors with:
- Assets and income below a level
- Such class of creditors
- Other categories as notified by the central Government to be completed in 90 days, with a one time extension of 45 days
Liquidation Process

**Liquidation order**
- Liquidation order will be passed if:
  - CIRP ends
  - Plan not submitted to the NCLT
  - Plan not approved
  - Decided by CoC
  - Plan not properly implemented

**Liquidation steps**
- Appointment of liquidator
- Formation of liquidation estate
- No legal proceeding by or against the debtor
- Consolidation of claims
- Distribution of assets (refer Waterfall chart alongside)
- Dissolution of debtors (to be completed within 2 years)

**Operations under liquidation**
- Liquidation order shall be deemed to be a notice of discharge to the officers, employees and workmen of the debtor
- Unless, the liquidator continues the business for limited period during the liquidation process

**Liquidator**
- The RP shall act as the liquidator unless replaced by the NCLT. Powers of BoD to vest with the RP
- Liquidator shall:
  - Form liquidation estate
  - Take into custody & control all assets
  - Consolidate, verify, admit and determine value of creditors’ claims.
  - Carry on the business for its beneficial liquidation

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### Priority waterfall of claims

**Insolvency resolution process and liquidation costs**

**Secured creditor and Workmen dues (upto 24 months and secured creditors)**

**Other employee dues (upto 12 months)**

**Financial debts of unsecured creditors**

**Government dues (upto 2 years); and unpaid secured creditors**

**Any remaining debt and dues**

**Preference shareholders, if any**

**Equity shareholders or partners, as the case may be**

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**Remuneration of liquidator**
- To be based on a scale of value realized and distributed by the liquidator.
- Scale is highest for first six months and reduces for 6 to 12 months and further reduces for 12 to 24 months.

**Reporting**
- Preliminary report – within 30 days from the date of the order
- Progress report – within 15 days after end of every period of 3 months from the date of order

**Insolvency and liquidation cost**
- Insolvency cost include interim funding, cost of running the debtor as going concern (e.g., rent or salary of employees), cost of IP etc
- Liquidation cost include any cost incurred by liquidator during liquidation period

**Secured creditor in liquidation**
- Secured creditor has the option to:
  - Enforce and realise the security outside the Code or
  - Relinquish its security interest and receive proceeds as defined in the priority of claim

Distinctation between rights of different class of secured creditors (first vs second charge, fixed vs floating charge) is not clarified in the Code or regulations
Key aspects of the CIRP regulations

1 | Public announcement
- It has to be made within 3 days of the appointment of the IRP.
- It should be published in one English and one regional language newspaper.
- It should invite creditors for submission of proof of claims (PoC) and give them 14 days from the date the IRP is appointed.

2 | Moratorium
- Supply of specified essential goods or services will not be terminated or suspended during the moratorium period. The Board has specified electricity, water, telecommunication and IT services as essential supplies.
- It will not apply to such transactions as may be specified by CG.

3 | Appointment of valuers
- The IRP should, within 7 days, appoint two registered valuers (in accordance with the Companies Act) to determine the liquidation value.
- The IRP/RP may appoint a third valuer if two estimates are significantly different.
- Liquidation value is part of the final information memorandum, which is to be prepared within 14 days of the first Committee of Creditors (CoC) meeting.

4 | Submission of PoC
- Separate forms have been specified for submission by operational creditors, financial creditors and workmen employees.
- Financial creditors should submit the PoC electronically, while other creditors can submit it by post or electronically.
- A creditor can file the PoC till approval of the plan by the CoC if the creditor failed to submit it within the date stipulated in the public announcement.

5 | If there are no financial creditors, the CoC may consist of only operational creditors
- 18 largest such creditors by value
- One representative elected by all workmen other than workmen included in top 18 operational creditors
- One representative elected by all employees other than employees included in the top 18 operational creditors

6 | Meeting of the CoC
First meeting of the CoC
- The IRP has to convene the first meeting within 7 days of filing the report to the NCLT certifying constitution of the committee.
Any other meeting of the CoC
- The RP can convene a meeting of the CoC as and when necessary or on a request made by members of the CoC representing 33% of the voting rights.
Quorum
- It should have members of the committee representing at least 33% of the voting rights.

7 | Voting by the CoC
- The resolution professional will take a vote of the members of the CoC when all the members are present in the meeting. If all members are not present at a meeting, the resolution professionals will circulate the minutes of the meeting and seek vote by electronic means within 24 hours, after submitting minutes of meeting.
- All matters listed in section 28 (1) of the Code would need a positive vote of 75% of the creditors by voting share.

8 | Approval of the resolution plan
- The resolution applicant should submit a resolution plan 30 days before the expiry of the maximum period for insolvency resolution – i.e., 180 + 90 days, as the case may be.
- The resolution plan should mandatorily identify specific source of funds to pay the insolvency resolution process cost, and the liquidation value of operational creditors and dissenting financial creditors.
- Liquidation value is the estimated realizable value of the assets of the corporate debtor if the corporate debtor were to be liquidated on the insolvency commencement date.
- The resolution plan should provide for the implementation and supervision of the plan.
The Code on the ground
Since the Code became effective on 1 December 2016, rapid progress has been made with more than 900 Insolvency Professionals (IPs) having registered and over 200 cases admitted by the NCLT. The data indicates that the majority of the action has been in the main cities of Mumbai and Delhi, and the number of IPs significantly increased in the last couple of months. It is also interesting to note that Operational creditors account for nearly 50% of the cases filed till date.

**Note:** Information is updated till 24 August 2017

**Source:** www.ibbi.gov.in
Cases admitted by NCLT

Number of IPs registered

Cases by industry classification

IPs registered with IPA

Experiencing the Code: Corporate Insolvency in India
Implementation journey of the Code
Since its announcement on 1 December 2016

IBC was approved by both Houses of the Parliament and received the presidential assent in May 2016. It was made operational from 1 December 2016. Everyone involved has been surprised with the speed and commitment with which it has moved forward in the last 12-18 months.

IBC is often touted as the second most important legislative reform (after GST) that the incumbent Government has undertaken, as it is expected to resolve the NPA problem, make the exit process easier for investors, attract fresh capital and foreign investors, channelize capital to more productive assets and give a fillip to India’s ease of doing business ranking.

While the new Code elicited praises and excitement from market participants, it also led to concerns regarding the readiness of the infrastructure for proper implementation.

The following is a point-of-view on the top 10 concerns raised at the beginning of the journey and also how the market seems to be developing. These are our views and understanding of the on-ground situation and are purely based on our experience in the last few months and interactions with other IPs, lawyers, bankers, creditors, promoters and various other stakeholders involved.

### Concern

#### Constitutional validity of the Code
Stay orders will halt the IBC proceedings

IBC is a transformational reform in many ways and looks to make some very important structural changes. Many concerns were raised initially around the constitutional validity of some of the provisions of the Code.

Essar Steel filed a petition in Gujarat High Court challenging Reserve Bank of India’s decision to refer it to the NCLT to start CIRP.

Similarly, multiple cases/appeals are filed against the applications filed for CIRP; however, no appeal has significantly impacted the CIRP process, once initiated.

In the first case admitted under IBC, Innovative vs. ICICI Bank, a writ petition was filed challenging the constitutional validity of section 4 to section 32 of the Code. However, NCLAT decided that the provisions of the Code shall have effect notwithstanding the provisions of any other law for the time being in force. The Innovative matter is currently being debated in the supreme court.

#### The NCLT may not be able to handle plethora of proceedings under IBC

The NCLT was constituted on 1 June 2016 with 10 benches and one principal bench. A major challenge foreseen for the Code was the tidal flow of cases to the NCLT.

In addition to new cases filed for resolution under IBC, there was a significant backlog of cases that were transferred from CLB. Also, winding up cases with high courts, corporate recovery cases with the debt recovery tribunals (DRTs) and rehabilitation cases with the BIFR were transferred to the NCLT.

We understand that as of now ~ 1,000 cases are filed with the NCLT under IBC, of which ~ 220 are admitted, and we understand that the NCLT has coped well with the workload.

The NCLT would continue to play a very critical role in the IBC ecosystem as more complex filings happen over the next few months.

We also understand that, discussions are already onto increase the number of benches and change single-member benches to double-member benches.
Since its announcement on 1 December 2016, IBBI has a critical role in holding the entire ecosystem of IBC together and making sure the Code is moving forward in the right direction. It was established on 1 October 2016 and has already made significant progress in setting up the IPA, conducting exams to registers IPs and issuing multiple regulations to support the smooth implementation of the Code. IBBI has been at the forefront in building capacity, educating the market and proactively supporting the implementation of the Code. However, the job has not been easy and the expectations are high. Looking at the role played by the regulator in matured markets, we believe IBBI has to continue to provide a lead role in a smooth implementation of the Code over the next few years.

One of the hallmark of IBC is the strict time-bound resolution process it proposes. Erstwhile insolvency laws and regulations were not very effective in terms of standing by the timelines specified.

The specified time limits for resolution under IBC is a breath of fresh air to the creditors but at the same time, is considered an uphill task to achieve. There have been deviations in a few cases from the 14-day timeline for the NCLT to admit or reject a case. NCLAT in the case of J K Jute Mills Company Limited. stated that the 14-day timeline for the NCLT was not mandatory. However, other procedural timelines, for example, for public announcement, have been broadly adhered to.

The real test for IBC timelines would be to get cases resolved within a period of 180/270 days with all necessary approvals.

IBBI notified Information Utilities Regulations, effective from 1 April 2017. The regulations provide for a framework and technical standards for registration and regulation of IUs.

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<td><strong>Stringent timelines provided in the Code</strong></td>
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<td><strong>No information utilities (IUs) in place, making the establishment of dispute a challenge</strong></td>
<td>In the IBC design, the IU enables quicker initiation of cases by providing access to irrefutable and transparent evidence of default. In the absence of IUs, initiating a case as well as forming the CoC will take longer and be more challenging than envisaged. This in turn will make it difficult to meet the 180-day timeline. IBBI notified Information Utilities Regulations, effective from 1 April 2017. The regulations provide for a framework and technical standards for registration and regulation of IUs.</td>
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## Implementation journey of the Code

Since its announcement on **1 December 2016**

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<td><strong>Speed of decision making by CoC</strong></td>
<td>The CoC is a key decision making body in every CIRP. The speed of decision making at the CoC should match the pace at which the Code has progressed. Banks are in the process of developing internal guidelines &amp; decision matrices to enable the attendees of CoC to have efficient decisions in time. The speed of CoC would also depend upon the expertise of the IP. The IP should provide relevant information before time to CoC members, to help them take internal approvals and come better prepared for CoC voting.</td>
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<td><strong>OCs misusing the intent of the Code</strong></td>
<td>Since the trigger of the Code is a default of only INR1 lakh, there were concerns regarding frivolous filings by OCs. Out of the ~220 cases admitted by the NCLT, ~50% have been initiated by OCs. Also, most of the cases withdrawn from the total of ~1,000 filed, are related to cases where the corporate debtor and OC make an out-of-court settlement. This has resulted in the use of IBC as a mechanism for recovery instead of resolution. However, this is also driven by lack of other remedies available to OCs following the introduction of the Code. Better understanding of the position of OCs under liquidation waterfall and the costs involved as an applicant such as filing fee &amp; lawyer fee and IRP fee might reduce the number of frivolous filing by OCs in the future. Also, with effective implementation, IBC will become a real threat to CDs and the cash culture would slowly improve, where CDs would look to pay OCs on time to avoid IBC filing.</td>
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<td><strong>Availability of IPs</strong></td>
<td>IPs form the backbone of the Code. However, with limited guidance and significant liabilities, there were initially many apprehensions around professionals coming forward to take up the role of IP. Their role requires a fine balancing act, given that they are in charge of managing the debtor company and are accountable to the CoC and the adjudicating authority for their actions. Equally important are personal qualities, such as integrity and independence. Fortunately, professionals have reacted very positively toward the opportunity and there are already ~900 IPs registered with more than 10 years of professional experience. Only ~220 cases have been admitted until now and the outcome of most of them would only be tested in the next few months, hence most of the registered IPs still do not have practical experience of successfully running and closing CIRP. Therefore, while the supply side concern has been addressed, the jury is still out on the quality and performance of IPs.</td>
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Most of the companies admitted under IBC have a working capital deficit, hence raising interim finance quickly was seen as critical to a successful resolution.
Due to multiple issues, raising interim finance continues to be a challenge.
To make effective use of the interim finance, more alignment among CoC members and guidance from IBBI on some of the technical points are immediately required.
Also, most of the cases getting admitted are highly stressed and hence difficult to get interim finance, investors have limited confidence on the security of their funds.

Taking control of the corporate debtor and suspending the powers of the BoD (promoters) was seen as a major challenge in the implementation of the Code.
Based on our experience and discussion with other IPs, if the communication is kept clear and transparent with the promoters and other stakeholders, promoters are largely co-operating with the process. Promoters genuinely interested in the revival of enterprises would not see their displacement as a threat but as an opportunity to focus on putting together a resolution plan.
At the same time, there have been sporadic instances of physical threats to IPs from promoters and promoters threatening to sue IPs for loss of a contract.
CIRP has to be seen and communicated by IP as a resolution process for the benefit of all stakeholders.
The experience and knowledge of the BoD (promoters) should be actively leveraged by IP, to maintain a going concern and cause minimal disruption to operations while a resolution is being worked out to maximize return for all stakeholders.

While there is still a long way to go in terms of filling all the gaps, IBC is by far the best insolvency law India could have enacted in the current circumstances. It will develop as it gains maturity and its users gain experience in unique situations that cannot be generalized.
The approach and mindset adopted by banks would continue to play a significant role in the success of this initiative, as the tight resolution timelines envisaged under IBC cannot be met if bankers do not have the commercial flexibility and the autonomy to sell distressed assets.
The law looks near perfect on papers, but implementation challenges abound and it may take a few years before it delivers the desired results. However steadfastness by the Government, increasing interest of IPs and active participation by the lenders are paving the way for a healthy insolvency market very soon.

A good start with the right intent and a developing infrastructure is half the battle won and to the credit of all stakeholders involved, the first nine months of implementation have been a definite success.
Select judgments
Setting precedents!

NCLAT concluded that prior notice should be given to CD in case of application by a financial creditor (FC).

Provisions of Maharashtra Relief Undertaking (Special Provisions) Act (MRU Act) will not prevail over IBC.

Consent of JLF members is not required by FC before filing an application under Section 7 of the Code.

Innoventive Industries Limited vs. ICICI Bank Limited

Time limit prescribed in the Code for admitting or rejecting a petition by the NCLT to initiate CIRP.

The time limit of 180 days + 90 days (extension) for completion of the insolvency resolution process under section 12 is mandatory.

The period of 7 days granted to an applicant to remove defects is mandatory and on failure to observe this, the application is fitted to be rejected.

J K Jute Mills. vs. M/S Surendra Trading

Committed return plan in a real estate transaction should be considered as financial debt and the applicant should be considered as FC.

Nikhil Mehta and Sons vs. AMR Infrastructure Limited

Personal properties of promoters pledged with FC will not be covered in the moratorium provided to CD under the Code.

Sree Metaliks Limited vs. Union of India

The NCLT rejected the withdrawal of the insolvency petition after it had been admitted for CIRP based on a settlement between the parties.

Schweitzer Systemtek India vs. Phoenix ARC

The NCLT rejected the withdrawal of the insolvency petition after it had been admitted for CIRP based on a settlement between the parties.

Parker Hannifin India Private Limited

The NCLT does not have the power to amend the order of BIFR or to extend the sanctioned BIFR scheme period under the Code.

Industrial & Commercial Bank of China vs Alok Industries

Financial debt is money borrowed to repay on a future date along with interest. The money is lent for value addition to the money as agreed between parties.

Bills of exchange along with interest would become “financial debt” not “operational debt.”

M/s. Hada Textiles Industries Limited

M/s Uttam Galva Steel Limited

High Court of Kolkata decided that reasonable opportunity of being heard should be given to the CD to substantiate that there exists a default against the CD.

The NCLT is under no obligation to give notice to other FCs before admitting a case.

Pendency of winding up proceedings before the High Court (before its admission) is no bar for initiation of proceedings under section 7 of the Code or for continuation.
IBC does not in any manner empower an IRP to interfere with the affairs of the subsidiaries of the corporate debtor.

Financial creditor misrepresented material facts to the NCLT in order to obtain order of admission of the application. NCLAT declared all actions illegal, including orders of admitting the case, appointment of IRP, declaration of moratorium and freezing of account. A fine was imposed on the financial creditor and CIRP was dismissed.

Lokhandwala Kataria Construction vs. Nisus Finance and Investment Manager LLP

Supreme Court (under Article 142 of the Indian Constitution) ruled that a settlement can be considered and a case can be withdrawn even after insolvency proceedings have started against a company. Since this order was under Article 142, it should be treated on the facts of that particular case and not as a precedent of general applicability.

Starlog Enterprises Limited vs. ICICI Bank

Himachal Pradesh State Electricity Board was directed by the NCLT to restore the electricity supply to the CD. As per IBC, supply of essential goods or services to the CD should not be terminated, suspended or interrupted during the moratorium period.

Industrial & Commercial Bank of China vs. Alok Industries

M/s Super Multicolor Printers (p) Limited

If an amount has been admitted in recent financial statements, the debt is not time barred because such admission gives a fresh limitation period as per section 18 of the Limitation Act 1963.

Starlog Enterprises Limited vs. ICICI Bank

Financial debt is money borrowed to repay on a future date along with interest. The money is lent for value addition to the money as agreed between parties.

M/s. Hada Textiles Industries Limited

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Urban Infrastructure Limited vs. Neelkanth Township

Deem Roll Tech Limited vs. R. L. Steel and Energy

NCLAT held that once a CIRP is initiated, the NCLT has no jurisdiction to initiate another CIRP against the same CD. FC/OC can file claims to IRP pursuant to the public announcement.

Meyer Apparel Limited

If a debt is time barred as per the provision of the Limitation Act 1963, the application will be rejected.
Regulations issued by the IBBI

The Code was notified in May 2016, and implemented from 1 December 2016. IBBI has issued multiple regulations since then (noted below) to help in the implementation of the Code. The Code sets out the main principles and procedures to be followed. However, the details has been left to subsidiary legislation, which is issued by IBBI in the form of regulations.

<table>
<thead>
<tr>
<th>Regulations</th>
<th>Date of Issue</th>
<th>Key Contents</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Model Bye-Laws and Governing Board of Insolvency Professional Agencies</td>
<td>21-Nov-16</td>
<td>It mandates IP agencies to have bye-laws, which provide for all matters specified in the model bye-laws in the regulation</td>
</tr>
<tr>
<td>2 Insolvency Professional Agencies</td>
<td>21-Nov-16</td>
<td>It contains the eligibility criteria and procedure and forms for application of registration and conditions for its cancellation</td>
</tr>
<tr>
<td>3 Insolvency Professionals</td>
<td>23-Nov-16</td>
<td>It contains the types and procedure for insolvency examinations, eligibility criteria for IPs, registration of IPs, IPES and Code of conduct for IPs</td>
</tr>
<tr>
<td>4 Insolvency Resolution Process For Corporate Persons.</td>
<td>30-Nov-16</td>
<td>It contains regulations for CIRP as well as regulations around the eligibility of IPs, public announcement, CoC meetings, IRP cost, resolution plan, creditors' claims, and various forms for submission of proof of claims</td>
</tr>
<tr>
<td>5 Liquidation Process</td>
<td>15-Dec-16</td>
<td>It contains regulations for the liquidation process, including appointment, remuneration, powers and functions of liquidators; proof of claims; distribution of proceeds of liquidation; various forms for submission of proof of claims</td>
</tr>
<tr>
<td>6 Information Utilities</td>
<td>31-Mar-17</td>
<td>It contains regulations for information utilities, and their registration, shareholding and governance, technical standards and bye laws, duties and core services</td>
</tr>
<tr>
<td>Regulations</td>
<td>Date of Issue</td>
<td>Key Contents</td>
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<td>7 Voluntary Liquidation process</td>
<td>31-Mar-17</td>
<td>It contains regulations similar to those for the liquidation process but applicable for the voluntary liquidation of corporate persons under Chapter V of Part II of the Code</td>
</tr>
<tr>
<td>8 Fast Track Insolvency Resolution Process for Corporate Persons</td>
<td>15-Jun-17</td>
<td>It contains regulations similar to those for insolvency resolution of corporate persons but applicable to the fast track process under Chapter IV of Part II of the Code</td>
</tr>
<tr>
<td>9 Insolvency Resolution Process for Corporate Persons (Amendment)</td>
<td>16-Aug-17</td>
<td>It includes the form for submission of proof of claims by creditors other than those covered in regulations 7, 8 and 9 of the CIRP regulation</td>
</tr>
<tr>
<td>10 Advisory Committee</td>
<td>31-Jan-17</td>
<td>It contains regulations for constitution and meetings of advisory committee of boards</td>
</tr>
<tr>
<td>11 Engagement Of Research Associates And Consultants</td>
<td>31-Jan-17</td>
<td>It contains the eligibility and functions of research associates and consultants appointed by the board</td>
</tr>
<tr>
<td>12 Procedure For Governing Boards Meetings</td>
<td>31-Jan-17</td>
<td>It contains regulations for conduct of meetings in governing boards, business to be conducted, charter of conduct for members and manner of execution of contracts</td>
</tr>
<tr>
<td>13 Inspection and Investigation</td>
<td>14-Jun-17</td>
<td>It contains regulations on inspection and investigation of service providers by boards, and related processes and reporting, including actions for restitution of the amount of unlawful gain</td>
</tr>
</tbody>
</table>
Practical considerations
It would not be an overstatement to say that IPs are the backbone of the IBC framework. Their role requires a fine balancing act, given that they are in charge of managing the corporate debtor as a going concern and are accountable to the CoC and the adjudicating authority for their actions.

While the law is still new and developing, IPs are bound to face challenges in unexpected forms and degrees of complexity.

Never is a new piece of legislation absolutely prescriptive, and so is the case with IBC. Therefore, it will evolve with new case laws, regulatory clarifications and supportive rules and regulations, paving the way for a clearer framework for the next wave of cases. Conservatively, this process may take two to three years to stabilize, and this is not unique to India. In the UK and some other jurisdictions around the world, it took two to four years for the newly enacted insolvency law to stabilize. Hence, IPs can expect a bumpy ride, at least for the next few years. The following are some of the challenges IPs might face along the way:

1. **Lack of awareness of the law amongst stakeholders**

   **“Day 1”**

   The Code, rules and regulations refer to the time of “commencement of insolvency” for multiple timelines. It is the time at which the NCLT admits the application and the clock starts ticking for the resolution process. In some cases, the application is accepted by the NCLT on a particular date, order is delivered on a different date and a different date is affixed to the order copy. Therefore, there remains some ambiguity about the date that should be considered as “day 1” for public announcement, valuer appointment, valuation of claims etc.

2. **Preparedness of CoC constituents to support the process**

   **Empowerment of CoC attendees**

   Decision making by the attendees to the CoC have to be commercially sound, while they should be timely and effective as well. Appointment of RP, appointment of various advisors to the RP, raising interim finance and evaluation & approval of resolution plans are some of the key decisions to be made by the CoC.

   While some banks have set up detailed internal decision making matrices and standard processes, many are still in the process of developing the same. As every decision of the CoC needs an approval of 75% of the CoC, indecision can be fatal to the corporate debtor.

   **Appointment of RP in the first CoC**

   As per section 22 of the Code, the CoC in its first meeting can either appoint the IRP as the RP or appoint a new RP. In case a new RP is appointed, the CoC needs to file an application to the NCLT for such appointment and the NCLT would send the name of the new RP to IBBI for confirmation. This process of sending an application by the CoC to the NCLT and then to IBBI and then from IBBI to the NCLT can take a few weeks. Although the NCLT has clarified in one of its judgments that till the time a new RP is confirmed, the IRP can continue in the role of the RP, it may lead to confusion and uncertainty and the business would undergo a change of administrative hands all over again in a span of just 30 days!
The transition of IRP to RP should happen seamlessly to avoid any disruption, especially considering the fact that no confirmation is required by the NCLT from IBBI at the time of appointment of the IRP.

**Hiring of technical support/experts and approval from CoC**

Lack of support from the existing management, vacancy in some critical positions in the organization structure or lack of skill in specific functions may hinder a speedy resolution. Hence, there might be an urgent and important need to hire experts, either on the payroll or as temporary consultants, to maintain the going concern of the CD. However, the CoC might insist on L1 selection criteria, which might not completely serve the purpose.

Attracting the right set of professionals at a competitive price is a challenge for the RP, which may be addressed only by active support of the CoC and shared conviction of the RP and members of the CoC.

**Sale of non-core assets**

One way to generate liquidity during CIRP is to sell off some of the non-core assets. Regulation 29 of CIRP regulations states that assets that are not secured and do not make up more than 10% of the total assets of the company can be sold by the RP without CoC approval. However, practically, there would be very few assets in a CD that are not secured. Hence, prior CoC approval is required to sell the assets, which can be a long and time-consuming process. Also, this would entail release of security by banks before the sale of non-core assets.

**Interim finance**

Most of the companies admitted under IBC would have a working capital deficit, hence raising interim finance quickly is very critical for continuation of smooth business operations. Despite the priority given to interim finance by the Code, the existing lenders have been extremely reluctant in releasing interim finance.

In case there is an external financier who is ready to provide interim finance, it still has to be approved by the CoC, which has not been an easy process. Lenders would need to consider the larger implications of the benefits to be derived via interim finance in the interest of the business – rather than being only concerned about dilution of the security available to them.

**Regulatory & legislative challenges**

**Alignment with other laws**

It is mandatory for a resolution plan to comply with all provisions of the law. For instance, approval of shareholders under Companies Act and SEBI for changes in capital structure envisaged under the resolution plan.

Currently, as per regulations, approvals under shareholder agreements and incorporation documents are exempt. The shareholders may block any part of the resolution plan, especially matters such as capital reduction. Similar alignment is required between SEBI regulations regarding requirements of audit committees and remuneration committees, timelines for submitting results and many other such compliances. An exemption may have to be made in the Income Tax Act for payment of tax on book profit due to write-off of liabilities under the resolution plan.

**Dealing with contingent liabilities**

Most companies have varied pending litigations – tax, statutory dues, Government dues, labor litigation and other commercial disputes (contingent liabilities). Investors need clarity on whether, and to what extent, such dues would be discharged as part of CIRP on the basis of the resolution plan. Contingent liabilities by nature cannot be reliably estimated, hence valuation would differ from person to person depending upon their risk assessment of such liabilities.

**Greater clarity in case of charges on an asset**

A typical corporate debtor has multiple lenders with multiple charges spread across various assets. IBC disregards differential rights across the same asset class that investors have priced differentially. This would curtail the freedom of parties to structure debt with different levels of risk and hamper liquidity in debt markets.

**Dissenting financial creditors**

The Code allows dissenting financial creditors to be paid out at liquidation value in order to allow a resolution plan to proceed. This may be a disadvantage to the agreeing creditors whose dues get restructured for repayment over a longer period, say, over 8–10 years. Therefore, recovery to dissenting creditors should be proportionate instead of a onetime payment.
Plan not approved by the NCLT in 270 days

The Code provides for approval of a plan by CoC and submission to the NCLT for approval in maximum 270 days. However, there is no time limit for the NCLT to approve the plan. It is not clear who would be in control of the operations and responsible for the going concern in case the NCLT approval happens beyond 270 days. The erstwhile BoD might be reinstated during such interim period or the RP’s appointment and CoC might be extended beyond 270 days.

Protection available to the RP

Legal cases against the RP

Since there is a moratorium against the CD, some creditors and statutory authorities are filling legal cases against IPs. Some of these filings are even for recovery of dues pertaining to pre-NCLT order dates, for which RPs owe no responsibility. RPs should be provided immunity from such filings. While section 233 provides for immunity for actions taken under good faith, RPs will have to put in a lot of time and energy to shield themselves from such attacks from all corners and come out clean. Unless some kind of moratorium is provided to RPs, any aggrieved stakeholders might target them as the reason for their loss.

No insurance product available

Even after the Code has been operational for nearly 9 months, no professional indemnity insurance product is available in India for IPs. While we understand that many service providers are in the process of getting a product in place, the lack of insurance is a significant deterrent for IPs to take up appointments.

In view of the reluctance of the banks to provide indemnity to the IP, this matter is paramount.

Information challenge/record keeping by CD

For CDs who have been stressed for a long time, record keeping and availability of staff are definite challenges. The absence of complete and proper information makes it tedious to verify and admit claims on time. Similarly, in the absence of sanitized and accurate source data, the liquidation valuation for all the assets of the corporate debtor by the appointed valuers may be far from the truth.

Quality of information memorandum (IM)

IM and its requirement are defined in section 28 of IBC and illustrated in regulation 36 of the CIRP regulations. The list provided in the regulations is only indicative and additional information as considered appropriate by the IRP/RP can also be provided. The objective of making the IM is to share it with CoC members and any other potential resolution applicant. However, as highlighted above, the IM, which forms the initial basis of resolution decisions, is as good as the integrity of the bookkeeping records, which itself may be corrupt in many distressed cases. Also, submitting an IM with relevant operational and trading information in the first CoC can be very challenging for the IRP.

Identification of preferential and undervalued transactions

Directors and officers have to be mindful of the liabilities arising from wrongful, fraudulent and preferential transactions in the pre-insolvency period. It is upon the RP to unearth such transactions within the CIRP timelines, which may be an arduous task. In most cases, identifying such transactions would need special investigation skills, for which the RP might have to rely on external experts.

Conclusion

The challenges faced by IPs are manifold – some awaiting legal clarity, some stemming from tight timelines, some pertaining to practical issues of managing multiple stakeholders, some due to unskilled bandwidth and some due to the sheer complexity of responsibilities IPs are entrusted with.

While the legal issues are expected to be ironed out over a period of time as the insolvency landscape matures, the other practical issues highlighted above can only be handled by a concerted team effort, where each stakeholder works in unison in the interest of collective resolution instead of serving individual interests. IBC is a test of the collective resilience and maturity of the creditors, debtors, professionals and regulators combined.
The notification of the corporate insolvency provisions of IBC has been a landmark financial sector reform. Experts have analyzed and critiqued several important features of IBC. However, an aspect that has received little attention is the new liability regime introduced for directors of companies that enter into a CIRP under IBC.

Directors’ liability under IBC may be classified into two broad categories: disgorgement-based liability and punitive liability. The punitive liability to a large extent codifies the regime against directors for actions such as defrauding creditors, asset stripping and falsification of books of accounts of the company. Though the imposition of fines and imprisonment raises concerns, it is the interpretation of the new disgorgement-based liability that could cause greater risk to directors.

A | Disgorgement-based liability — Wrongful trading — Section 66(2) of IBC

Section 66(2) of IBC introduces the concept of “wrongful trading.” Under this provision, a director is liable to make contributions to the assets of the company and the NCLT may disgorge such amounts from the director’s personal assets if two conditions are satisfied:

- The director knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a CIRP against the company.
- The director did not exercise due diligence in minimizing the potential loss to the creditors of the company.

A director is said to have exercised sufficient due diligence if such diligence was reasonably expected of a person carrying out the same functions as the director.

B | Brief background to section 66(2) of IBC

IBC adopts the legislative best practices from advanced insolvency jurisdictions the world over. The wrongful trading provision has been borrowed from the UK Insolvency Act, 1986 (the UK Act). Criminal liability for directors for defrauding creditors existed in the UK even prior to the UK Act. However, it was felt that a new standard should be introduced to afford compensation-based remedy to those creditors who suffered a loss due to the mismanagement of the company in the zone of insolvency — even if such mismanagement by the directors of the company fell short of the level of criminality.

The wrongful trading provision enabled contribution orders against a culpable director to be made without proof of actual dishonesty and without a criminal standard of proof. For instance, a company would be trading wrongfully if it incurred liabilities with no reasonable prospect of meeting them or when a company continued trading even when it was heavily undercapitalized.

C | Scope for liability of directors

Introducing wrongful trading under IBC will afford significant protection to creditors dealing with a distressed company. However, directors must be aware of the surrounding liability issues.

The threshold for incurring directors’ liability

The wrongful trading section of the UK Act applies only when the directors should have known that there was no reasonable prospect of avoiding an insolvent liquidation of the company, whereas section 66(2) of IBC applies when there was no reasonable prospect of avoiding the commencement of a CIRP against the company. It is worth noting that under IBC, a CIRP may be commenced on a mere payment default of INR100, 000 and an insolvent liquidation is only the last resort of a CIRP.

There is sound logic for diluting the trigger point from an insolvent liquidation (i.e., the UK standard) to the commencement of CIRP (i.e., the IBC standard). It is to incentivize directors to take mitigating action at the first onset of any financial distress rather than waiting till such time where saving the company as a going concern is no longer commercially tenable. At the same time, advancing the threshold at which directors need to take corrective action increases the prospect of personal liability.

Avoidance of liability: The NCLT’s subjective satisfaction

Given this onerous standard, the question is what steps directors can take to mitigate potential losses to creditors. Section 66(2) creates a safe harbor for directors’ actions taken to mitigate losses with sufficient due diligence. The NCLT will decide if the mitigating actions taken by the director meet the standard expected of a person carrying out the same functions as are carried out by such director.
There is a broad spectrum of actions a director may take to mitigate creditors' losses. However, the directors' liability will depend on the subjective assessment of the NCLT as to whether their actions meet the “due diligence” standard. As a result, directors may not know a priori if their actions will meet the scrutiny of the judiciary.

**Safe choice vs. the correct choice: Dilemma for directors**

UK case law considers several actions on the part of the directors as being reasonable and prudent so as to meet the due diligence test under the safe harbor. The takeaway seems to be that generally speaking, voluntarily filing for an administration procedure under the UK Act is certainly a safe and legally tenable course of action. Drawing an analogy, in the absence of judicial precedents or any further guidance from IBC, the safest option for directors facing an imminent payment default by a company also seems to be to voluntarily file for CIRP. Consequently, section 66(2) will put directors in the position of making a difficult choice between:

- Applying for the commencement of CIRP against the company and thereby avoiding personal liability
- Making a genuine and good faith attempt to remedy the default and continue trading

Directors fearing wrongful trading liability may act in a risk-averse manner and may be tempted to file for a CIRP prematurely instead of endeavoring to weather the temporary financial difficulty and preserve long-term value.

This causes a real threat of unnecessary CIRPs against fundamentally sound businesses, causing disruption to consumers, suppliers and employees.

**D Means of mitigating liability of directors**

Directors need to maintain a fine balance in preserving value in a sound business on the one hand and avoiding personal liability on the other. It is not an easy choice, especially for companies that are clearly solvent but could potentially be dragged into a CIRP owing to temporary liquidity issues.

In the absence of any clarity on how the concept of wrongful trading will play out in Indian courts, directors should consider the following steps to be able to maintain this balance:

- Negotiate all debt contracts and material supply contracts such that any payment default entitles the counterparty to initiate an IRP only after affording the company an adequately long notice period to consider all viable options, to help directors buy time to consider their options carefully
- Put in place processes in consultation with the company’s auditors to ensure availability of adequate and timely financial information about the company
- Regularly discuss and review the cash flows of the company and closely monitor all actual and contingent claims against the company
- Review the director and officer (D&O) insurance policies to ensure that they cover any liability arising as a result of wrongful trading
- Obtain a legal opinion from a reputed law firm to ensure that the mitigating steps taken at the onset of a potential CIRP meet the test of “due diligence” under section 66(2) of IBC.

**Conclusion**

IBC has radically altered the insolvency law landscape in India. The clear shift in power toward FCs will go a long way in resolving distressed situations, enhancing recoveries for all stakeholders and reducing the scope for misfeasance by directors and promoters. However, mandating directors to take creditor-focused action at the early stages of a financial difficulty could create pitfalls for professional managers and directors who may not have any fraudulent or criminal intent. Till such time as the dust settles on the law around wrongful trading, directors will be well advised to take all possible steps to eliminate personal liability without compromising the prospects of commercially viable businesses.

*Suharsh Sinha has been a senior associate with AZB & Partners since 2016. He was a consultant to the Bankruptcy Law Reform Committee. He specialises in restructuring & insolvency matters and practiced as a solicitor with a leading UK law firm from 2009 to 2014. He is a member of the Indian, English and New York State Bar.*
Why has cross-border insolvency not been covered in the Code?

The Code has been widely acknowledged as a blend of some of the best practices across the world, but it falls just short of being truly global. Cross-border insolvency has not been adequately covered in the Code. While it accords the power to the Central Government to enter into an agreement with foreign countries for enforcing the provisions of the Code, the international community would have expected more.

Most of the previous law-reform committees had recommended that the UNCITRAL Model Law on Cross-Border Insolvency, which has already been adopted by over 41 countries, should be adopted in India. The Corporate Bankruptcy and Winding up Code, 2001 proposed by the NL Mitra Committee laid out detailed provisions relating to the subject of cross-border insolvency, but it did not see the light of day. The BLRC, in its interim report, stated “Further thought and consideration is required before implementing the UNCITRAL Model Law. Such adoption should ideally take place only after the adoption of the Insolvency Code.” It also noted that some other international approaches may also need to be considered while framing the cross-border insolvency laws, including EC Regulation on Insolvency Proceedings, American Law Institute's NAFTA Transnational Insolvency Project and the International Bar Association Cross-Border Insolvency Concordat.

Considering the complexities involved in the cross-border cases and the absence of an effective domestic insolvency framework, it is probably prudent to take one step at a time. Even while focusing on domestic insolvency, the BLRC acknowledged the need for cross-border insolvency in its inal report.

Limited cross-border provisions in the Code

Cross-border insolvency has not been defined in the Code, but in general it may be understood as insolvency of borrowers who have assets or creditors in different jurisdictions or are subject to insolvency proceedings in multiple jurisdictions.

The Joint Parliamentary Committee on the Code, while deliberating on the Code, conceded that not incorporating provisions relating to cross-border provisions will lead to an “incomplete Code,” and accordingly added two new enabling sections: “Agreements with foreign countries” (section 234) and “Letter of request to a country outside India in certain cases” (section 235).

Agreements with foreign countries: The Central Government is empowered to enter into bilateral agreements with foreign Governments. It may also apply the Code in relation to assets or property of a corporate debtor (including a personal guarantor of a CD) situated at any place in a country outside India with which reciprocal arrangements have been made.

It is yet to be seen how effective bilateral agreements turn out to be, as they would be contingent on long-drawn negotiations with each country, and agreements with each country would vary, which might lead to chaos and litigation.
Letter of request to a country outside India in certain cases: The NCLT may, on receipt of an application from an RP, request a competent authority of a foreign country to seek evidence or action in relation to the foreign assets of the CD.

There are no specific provisions in the Code on how Indian authorities would give or seek assistance to or from foreign authorities or how Indian authorities would recognize and deal with debtors that are undergoing insolvency proceedings in multiple proceedings.

The two sections pertaining to cross-border insolvency were notified on 30 March 17. However, they do not have any immediate impact on the resolution of insolvent companies with cross-border interest, except that the NCLT can now issue a letter of request as envisaged in section 235.

The IBBI needs to quickly provide for a cross-border insolvency framework. Given that many of the existing insolvency cases have foreign creditors, including significant debt raised in foreign currency, the existing provisions of the Code may not be adequate. Courts in foreign jurisdictions may not recognize the restructuring plan approved by the NCLT in India. Further, the moratorium clause in IBC would not stop foreign creditors from filing suits in foreign courts. It will be cumbersome and costly for RPs to manage such litigation.

Similarly, any court decree/order by foreign courts may not be recognized by the NCLT in India, leading to a logjam in the execution of judgement. Foreign parent companies that get their restructuring plans approved in a foreign country having a bearing on their Indian enterprise will face similar non-acceptance by the courts in India.

The Code does not make any distinction between domestic and foreign creditors, and therefore both categories of creditors would have equivalent rights. However, it is not explicitly mentioned whether the representatives of foreign insolvency proceedings and creditors would have a right of access to the courts, as envisaged in the UNCITRAL Model Law.

“`The next frontier lies in addressing cross-border issues. This includes Indian financial firms having claims upon defaulting firms which are global, or global financial persons having claims upon Indian defaulting firms. Some important elements of internationalization - foreign holders of corporate bonds issued in India, or borrowing abroad by an Indian firm - are dealt with by the present report. However, there are many other elements of cross-border insolvency which are not addressed by this report.”`

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Final report of BLRC: Volume I
Key milestones in the journey ahead...

1. Resolution of the ‘Big 12’ cases in the next 6-9 months, would help in setting precedents and a strong base for future implementation.

2. Increase in the NCLT bandwidth by adding judges and benches to deal with the expected rise in the number of cases.

3. Establishment of Information Utilities would make information readily available to IPs and the NCLT, for expeditious clearance of cases.

4. Set up ‘National Insolvency Examination’ for IPs by IBBI.

5. Improve alignment of IBC with other related laws and regulations like Companies Act, Income Tax Act, SEBI, RBI etc. to speed up resolution plan approval.

6. Implement Cross border insolvency and adopt the UNCITRAL Model Law.

7. IBBI to amend regulations based on market feedbacks from the participants and stakeholders.

8. Effectively implement ‘Registered Valuers and Valuation rules’, introduced by IBBI.


10. Active role by IPAs in the training of IPs and knowledge sharing among market participants.
In conversation with

Nitin Jain
President & CEO Global Asset and Wealth Management, Edelweiss Capital

Q. What are your views on the 12 cases in which IBC proceedings have been initiated?

It is a strong step in the right direction and has got the entire system into motion. It has created the kind of energy that is required to tackle the NPA issue in the banking system. I am quite optimistic that some of these assets are of reasonably high quality, and can be resolved if all the stakeholders come together.

Q. What do you expect in the next list of such cases by the RBI?

It is difficult to say, but if the RBI comes out with another list, it will be a framework-led approach led by the size of the debt. This action of the RBI has given a jumpstart to the process of addressing the NPA issue. However, at some point, the banks would gear up and take this on their own to make it a sustainable process.

Q. What are the top three practical challenges you see in the next 12 months?

A-I feel that it is one of the biggest reforms set in motion and is quite relevant to the current context. It has the ability to transform the way business is done in India. Having said that, the Code is still in its infancy and is likely to be challenged in courts over the next 12-18 months, before stabilizing. This is also something that people have not experienced. A lot of the stakeholders – IRPs, promoters, lenders and judiciary – are new and will evolve through the process. There is no rulebook available and thus people will have to learn on the fly, thereby creating a lot of stress on the system.

Q. The IBC has been operational for 8 months. What are your thoughts on it so far?

I am surprised with the speed with which it has been executed and the way the infrastructure has been set up. The first case was filed on 7 December, which was within 6 days of the law being passed, and over 200 cases have
been filed since then. Things seem very positive, and it is definitely a giant step toward strengthening our legal system and reinforcing the ease of conducting business in the country. With most new regulations, the first 12–18 months are very challenging, both from an acceptability and an implementation point of view. However, in this case, we have witnessed huge traction so far.

Q. Do you think it will be different compared to some of the old options such as the CDR or SDR, which beyond a point were not really successful in resolving a distress situation?

My view on this is slightly different. I do not know why people believe that the SARFEASI was not successful because I do not think there is any tool or instrument that resolves these problems in a jiffy! We can take the example of the great financial crisis of 2008 where the existing legal infrastructure of the US was unable to address the situation. Even a country as evolved as the US had to find new ways and mechanisms to resolve that particular crisis. Every crisis is different and whenever it is structural, new answers have to be sought out. Consequently, the existing infrastructure and law will take care of any potential eventuality. The SARFEASI definitely helped a lot but it was not a finisher. Similarly, for IBC, new infrastructure has to be set up, other laws have to be in sync and the entire law has to mature and stabilize. All in all, I think it is a huge step forward.

Q. What are some of the critical aspects of IBC from an ARC standpoint?

There are certain things that are important to reflect upon. First, with IBC being a time bound process, there is a necessity to take action; in other words, it provides a huge dis-incentive not to take any action. Ergo, all parties have to come to the table and find a viable way forward, which is positive on a going concern basis.

Clarity on the waterfall is a big step up since historically it was hard to determine where parties lie in the chain. Finally, the fact that the board gets dissolved immediately and the CoC practically take control of the company is a huge deterrent for erring promoters to use dubious means.

Q. Do you think any disputes will arise between lenders and the other stakeholders on deciding the liquidation value?

It is possible, but given the fact that liquidation value will be much lower than the value after successful resolution, I doubt that the challenge will hold too much water.

Q. Do you think it is a practical challenge to garner the working capital and interim funding required to run the business during the resolution process?

I think there will be easy availability of funds and this is a very good platform for priority funding. This will not happen immediately, although the law will eventually stabilize in the next two years and become one of the best avenues for funding distressed companies.

Q. Any closing comments on IBC?

I am quite optimistic about this legislation and its huge potential for growth. It will be a strong deterrent for promoters to use dubious means and also a disincentive for lenders for not taking decisions. This will go a long way in solving the NPA situation that we are grappling with.

Q. Lenders face problems making critical decisions in 180 days and there is a growing concern that IBC is a one-way ticket to liquidation? Do you feel the same?

I am not so sure. Given that it is a time-bound process, now every lender knows the consequence of delaying it. Up until now, lenders were not able to act because there was no dis-incentive for them for not taking any action. This will help expedite the process.

Q. Do you feel that it is one of the biggest reforms set in motion and is quite relevant to the current context.

I feel that it is one of the biggest reforms set in motion and is quite relevant to the current context.
In conversation with

Sumant Batra
Chief Mentor, INSOL India and Managing Partner, Kesar Dass B. & Associates

Q. Do you think IBC will be a game changer?

India is in the process of laying the foundations of a mature market economy. IBC is an endeavor to provide one critical building block of this process. IBC is largely a sound piece of legislation. It has its flaws. History has shown that reforms rarely contain all the solutions needed to resolve all the problems of a legal system. The success of IBC will depend on how effectively it is implemented. IBC will have to sail through rough currents that may be created by implementation issues. We will need to patiently wait to find out if IBC will lead to the development of a robust corporate debt market and unlock the flow of capital. But then, as Joyce Meyer wrote, “Patience is not the ability to wait but how you act while you are waiting!” All the stakeholders must act with this spirit. The baggage of the past must be shunned. Undoubtedly, the enactment of IBC is a big leap forward and there is every reason to smile as of now!

Q. Do you think it will be different compared to some of the old options such as the CDR or SDR, which, beyond a point, were not really successful in resolving a distress situation?

IBC introduces significant legal and structural changes in the insolvency framework, bringing enormous relief to stakeholders that had no room for participation in the earlier insolvency regime. While Indian banks have various options under CDR and SDR, and also have legal right to enforce their security interest without intervention of court, some of the most important lenders operating in the economy are not banks. They are the dispersed mass of households and financial firms that buy corporate bonds. The lack of power in the hands of these lenders, including bondholders, has been one (though not the only) reason why restructuring had not worked in the past. The unsecured creditors, including the distress asset and
special situation funds, did not have any effective participation in the insolvency process and were wary of investing in the market. There was no committee of creditors through which unsecured creditors such as bondholders could participate in the process. Nor was there a cadre of insolvency practitioners to drive the process. There had been a pressing need for a very long time to introduce an efficient insolvency framework in the country that would help in the resolution of non-performing loans and benefit creditors besides banks and financial institutions. IBC has created a level playing field. The resolution plan sanctioned under IBC is binding on all parties. A CDR or SDR was only contractually binding and its enforcement was always a problem. This is certainly an improvement from the out-of-court process.

**Q. What are your views on the 12 cases against which the IBC proceedings have been initiated?**

These cases have helped provide a jump-start to IBC. Whether these big cases should have been brought under IBC so early in the life span of IBC is debated by some. I, however, feel that it offers an opportunity to the stakeholders to set the bar really high in terms of implementation of IBC and stakeholder behavior. These cases also offer an opportunity to set standards, benchmarks and good precedents in various areas of IBC implementation. The most encouraging part, from whatever I know, is that the advisors involved in these cases have handled the cases with great maturity.

**Q. What are your thoughts on the NCLT bandwidth issue?**

The NCLT has been a quick learner. The only concerns are inconsistency in the views of various benches and a very literal interpretation of IBC provisions. IBC should be interpreted keeping in view the philosophy behind it and the fundamental principles of insolvency law.

**Q. What is your view on IBBI’s role in the journey till now?**

It has been fairly satisfactory except for some aberrations now and then. The most positive part of the journey thus far is the positive attitude demonstrated by the stakeholder in the implementation of the law.

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“Patience is not the ability to wait but how you act while you are waiting.”

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**Q. From a short to medium term perspective, what are the challenges that might impact the successful implementation of IBC?**

The total time frame of 180 days provided for corporate rescue sets high expectation for the market. It would be challenging to meet this time frame due to numerous processes and participating stakeholders being involved unless adequate infrastructure and capacity is created in the involved institutions. The discipline of insolvency professionals is a new phenomenon and the market does not have a sufficient number of qualified and experienced insolvency professionals. Completing the process in such a short time will be immensely challenging for resolution professionals, who will have to manage the affairs and assets of the company while gathering information, settle claims and invite resolution plans from potential investors and other interested persons. The Government, the NCLT and the private sector must work in close coordination to ensure that the timelines are observed and IBC is successful.

**Q. Any closing comments?**

We need a cross-border insolvency law on an urgent basis. In the absence of a cross-border insolvency framework, every day is a struggle for us professionals and the NCLT.
Q. What are your views on the readiness of banks to participate under IBC? What is the best way to change the mind-set to get them ready?

I am very enthused by the rapidity with which the banking system has taken to the usage of IBC. There has been no “dipping of toes”; they have wholeheartedly embraced the new regime, obviously in co-ordination with the Government and the RBI.

The best way to establish that this system works is through a successful illustration. On the 12 cases filed in the NCLT, if we see a few successfully come out within the prescribed 180 days with a cleaned-up balance sheet, with new investors having brought in significant capital to recapitalize these balance sheet and appropriate controls being put to avoid future mishaps, then we will have more believers in the new system. As we all know, nothing succeeds like success.

Q. The private sector banks seem to be more keen on filing cases under this new law without overanalyzing the consequences. They have a “let’s see how it goes” attitude. What is your view on this?

The basic starting point is learning about the process, and we suggest the stakeholders should look at it from the example of the UK pre-pack format. You can finally get it “blessed” by a legal process but at the core it is a commercial deal that has been agreed upon in advance among the various constituencies and now you have a fast-track way of getting it through so that stragglers, if any, do not hold back the process. I am keen to see participants approach it in this fashion.

Commercially, the deal has to work for all stakeholders, especially the promoters, the banks and the new investors. There is a prevalent fear of the unknown as we go through the initial deals, but after a couple of successful cases, the floodgates will open and we will see much more active participation.

Q. What are your views about the infrastructure readiness for the implementation of IBC such as IPs, the availability of IPAs and the response time of the IBBI?

I feel that the current infrastructure is growing as we speak, and if there is a high degree of acceptance from the banks, then it needs to grow even faster.
Q. From the looking-glass of an investor, what are some of the things to look at from an IBC perspective in the next 6–12 months that could make us more comfortable with such deals?

We are fully committed to supporting companies wishing to go through this process. It will create value discovery and bring in much needed validation of credible, third party, institutional “new money,” which will help de-risk the entire twin balance sheet problem.

Q. Are you worried as an investor about what comes back to you after a deal, even if the deal is unsuccessful and the NCLT approval is binding on all past liabilities getting settled?

We think of all the things that are available to us as a new shareholder, a new control investor in today’s India, and we believe that this is a good route forward for us. This does not mean that we are sanguine and not worried about the post-risk transactions. We are well aware that these situations will erupt from time to time and going in, we need to be prepared. We have learned a lot over the many years of experience across many countries that this is not the full and final settlement, that there will be some surprises we may not have factored in. But of all the things available on the table, this is the cleanest way forward.

Q. What are your views on the 12 cases against which IBC proceedings have been initiated?

These 12 contain some of the largest and high-quality assets from the distressed bucket. That does not mean all of them are actionable but many are. Based on the global expertise that each firm possesses and the partnerships they are able to put together because of the depth of their relationships on the ground, I would expect a lot of interest in the 12 cases.

Q. What do you expect in the next list of such cases by the RBI?

I see this as a series of continuous steps that got kicked off with these 12. I do not know if there is going to be a next 32 or 40 or 50 case list. A lot will depend on how the first 12 get actioned.

Q. What are the top 3 practical challenges you see in the next 12 months?

First, this is not going to be easy. All players who have done this both in India and globally know that this business is not easy. Globally, Apollo manages NPLs equal to the total NPLs in our entire banking system, so we surely do not expect this to be easy. Challenges will be on the legal front and how smoothly IBC is allowed to function. There will be challenges as regulators will need to constantly be in touch with market leaders to react quickly to solve issues as they crop up in the implementation of IBC. The biggest challenge I see is to demonstrate to the markets, both in India and globally, that this is not a ‘band-aid’ we are applying on a deep wound and that as a country we truly mean business. As part of our continued efforts at improving ease of doing business in India, we need to ensure that we truly clean up a lot of these companies with genuine risk capital being brought into these companies along with all appropriate control mechanisms. It will be a shame if we as a country waste all this effort that has been taken to get us to this stage.

Q. Any closing comments on IBC?

As a global investor, we think that this is the right way forward. I am optimistic about the law panning out in the medium to long term as this is not a one-year play and I am sure we will attempt to identify and resolve the problems along the way in the future. We have spoken to key stakeholders in banks, regulators and the Government at the highest levels and believe everyone is in sync on this. Overall I would want to congratulate all who have been involved in bringing IBC to this level and would urge them to remain every vigilant to make sure we make use of this opportunity to clean up the NPL problem in a substantive manner.

I was also involved when the SARFEASI Act and the CDR came out and there was a high level of optimism at that time too, but as we know they met with limited success. In this instance, though, I see much better coordination between the various arms of the Government and I think the optimism is well founded.
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ASSOCHAM

About ASSOCHAM

Evolution Of Value Creator

ASSOCHAM initiated its endeavour of value creation for Indian industry in 1920. Having in its fold more than 400 Chambers and Trade Associations, and serving more than 4,50,000 members from all over India. It has witnessed upswings as well as upheavals of Indian Economy, and contributed significantly by playing a catalytic role in shaping up the Trade, Commerce and Industrial environment of the country. Today, ASSOCHAM has emerged as the fountainhead of Knowledge for Indian industry, which is all set to redefine the dynamics of growth and development in the technology driven cyber age of ‘Knowledge Based Economy’.

ASSOCHAM is seen as a forceful, proactive, forward looking institution equipping itself to meet the aspirations of corporate India in the new world of business.

ASSOCHAM is working towards creating a conducive environment of India business to compete globally. ASSOCHAM derives its strength from its Promoter Chambers and other Industry/Regional Chambers/Associations spread all over the country.

Vision

Empower Indian enterprise by inculcating knowledge that will be the catalyst of growth in the barrierless technology driven global market and help them upscale, align and emerge as formidable player in respective business segments.

Mission

As a representative organ of Corporate India, ASSOCHAM articulates the genuine, legitimate needs and interests of its members. Its mission is to impact the policy and legislative environment so as to foster balanced economic, industrial and social development. We believe education, IT, BT, Health, Corporate Social responsibility and environment to be the critical success factors.

Members - Our Strength

ASSOCHAM represents the interests of more than 4,50,000 direct and indirect members across the country. Through its heterogenous membership, ASSOCHAM combines the entrepreneurial spirit and business acumen of owners with management skills and expertise of professionals to set itself apart as a Chamber with a difference.

Currently, ASSOCHAM has more than 100 National Councils covering the entire gamut of economic activities in India. It has been especially acknowledged as a significant voice of Indian industry in the field of Biotechnology, Banking & Finance, Corporate Social Responsibility, Civil Aviation, Company Law, Corporate Finance, Competency Building & Skill Development, Corporate Governance, Defence, Environment & Safety, Energy & Power, Education, Economic and International Affairs, HR & Labour Affairs, Information Technology, Infrastructure, Luxury, Legal Reforms, Mergers & Acquisitions, Real Estate and Rural Development, Sports, Telecom, Tourism to mention a few.

Insight Into ‘New Business Models’

ASSOCHAM has been a significant contributory force in the emergence of new-age Indian Corporates, characterized by a new mindset and global ambition for dominating the international business. The Chamber has addressed itself to the key areas like India as Investment Destination, Achieving International Competitiveness, Promoting International Trade, Corporate Strategies for Enhancing Stakeholders Value, Government Policies in sustaining India’s Development, Infrastructure Development for enhancing India’s Competitiveness, Building Indian MNCS, Role of Financial Sector the Catalyst for India’s Transformation.

ASSOCHAM derives its strengths from the following Promoter Chambers: Bombay Chamber of Commerce & Industry, Mumbai; Cochin Chambers of Commerce & Industry, Cochin; Indian Merchant’s Chamber, Mumbai; The Madras Chamber of Commerce and Industry, Chennai; PhD Chamber of Commerce and Industry, New Delhi.

Together, we can make a significant difference to the burden that our nation carries and bring in a bright, new tomorrow for our nation.

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