CORPORATE BANKRUPTCY AND INSOLVENCY RESOLUTION IN INDIA: LACUNAE IN THE PRESENT AND REMEDY FOR THE FUTURE

ROHAN KOHLI*

The Background to the Bill

According to World-Bank estimate, it takes about 4.3 years on an average to resolve insolvency in India[1], nearly twice the time it takes to do so in its four neighbouring countries China, Nepal, Pakistan, and Sri Lanka[2]. This lengthy time period in resolving insolvency is further added to by a wide range of laws dealing on the topic, thus complicating the situation even further.

Collective Insolvency Legislations

At present, there are multiple contradictory elements in the legal scenario surrounding bankruptcy. To begin with, Chapter XIX of the Companies Act, 2013 serves as the nodal point, dealing with Revival and Rehabilitation of Sick Companies from sections 253 to 269. This act predominantly revolves around secured creditors, and recognises the presence of unsecured creditors in the revival of a company. The 2013 Act prescribes a period of one year for the finalisation of a rehabilitation plan for the company. Once a company is declared a sick company by the Tribunal under section 253, any secured creditor or the company may make an application to the Tribunal for rehabilitation and revival of the company. Along with this, the definition of "sick companies" has been changed from a previous "net worth erosion" to the inability to pay dues to creditors within 30 days of

* II year, BA.LLB. (HONS), National Law India University, Bhopal.

1 Time to resolve insolvency is the number of years from the filing for insolvency in court until the resolution of distressed assets.

2 It takes China 1.7 years, Nepal, 2 years, Pakistan, 2.7 years and Sri Lanka, 1.7 years on an average to resolve a bankruptcy case. The World Bank's Ease of Doing Business Index 2015 ranked India 137 out of 189 countries on the ease of resolving insolvencies based on various indicators such as time, costs, recovery rate for creditors, the management of a debtor's assets during the insolvency proceedings, creditor participation and the strength of the insolvency law framework. The World Bank, *World Development Indicators* (2015), data.worldbank.org/indicator/IC.ISV.DURS.

demand[3]. But this Chapter XIX has not been notified for commencement and the changes made in the Companies Act, 1956 have also not entered in force.

The law for rescue and rehabilitation exclusively for industrial companies remains the Sick Industrial Companies (Special Provisions) Act (SICA), 1985. Under SICA, a specialised Board of Industrial and Financial Reconstruction (BIFR) assesses the viability (industrial companies in distress make a reference to BIFR based on a test involving an erosion of their net worth by 100%) of the industrial company.[4] Once it has been assessed to be unviable, BIFR refers the company to the High Court for liquidation. The SICA was to be repealed in 2003, but the repealing act could not be notified as the National Company Law Tribunal proposed by a 2002 amendment to the Companies Act, 1956 got entangled in litigation.[5]

The Micro, Small and Medium Enterprise Development Act, 2006, is the nodal legislation for registering MSMEs but is absent on provisions for resolving insolvency and bankruptcy, which are dealt with in Companies Act itself.

Partnership firms are registered under the Indian Partnerships Act, 1932, administered by the Ministry of Corporate Affairs. Insolvency and bankruptcy resolution of partnership firms is treated the same as under individual insolvency and bankruptcy law.

---

[3]Companies Act § 253(1) (2013).

[4] See, Sengupta, Rajeswari & Anjali Sharma, *Corporate Insolvency Resolution In India: Lessons From A Cross-Country Comparison,* WORKING PAPER FRG IGIDR (2015). Sengupta and Sharma compare the number of new cases that file for corporate insolvency in the U.K., which has a robust insolvency law, to the status of cases registered at the BIFR under SICA, 1985, as well as those filed for liquidation under Companies Act, 1956. They compare this with the number of cases filed in the UK, and find a significantly higher turnover in the cases that are filed and cleared through the insolvency process in the UK.

[5] The changes made in the older Companies Act legislation, the CA 1956, have not entered into force as Chapter VIA of the CA 1956, which provided for the National Company Law Tribunal (NCLT) to exercise powers in relation to sick industrial companies could not be notified as the NCLT was subject to a long-drawn-out litigation. The Supreme Court, on 14 May 2015, delivered its judgment on the constitutionality of the NCLT. A few amendments to the operation of the NCLT are required before these provisions can be notified. See Madras Bar Association v. Union of India W.P.(C) No. 1072/2013

i. Debt Recovery Laws

The Recovery of Debt Due to Banks and Financial Institutions Act [6](RDDBFI Act) 1993 provides for the establishment of special Debt Recovery Tribunals (DRTs) to enforce debt recovery by these institutions only with Debt Recovery Appellate Tribunals (DRATs) as the appellate forum.[7]

Under certain specified conditions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI) 2002 enables secured creditors to take possession of collateral without requiring the involvement of a court[8] or tribunal. The DRT is the forum for appeals against such recovery.[9]

The validity of various provisions of the SARFAESI Act was initially challenged in *Mardia Chemicals Ltd. v. Union of India.*[10] However, as discussed in Part III, validating the Act has not put an end to the controversies over SARFAESI's interactions with other laws, particularly SICA and ongoing proceedings in the BIFR.

---

[6] The RDDBFI Act is available to both secured and unsecured creditors, but they need to be banks or notified financial institutions.

[7] Any cases pending before the civil courts that involved debt of over Rs 10 lakh were automatically transferred to the DRTs.

[8] § 13 of the SARFAESI Act, 2002 allows secured creditors to take steps to enforce their security interest in respect of any debt of a borrower that is classified as a non-performing asset without the intervention of a court or tribunal, if certain conditions specified in the act are met.

[9] SARFAESI Act, 2002 intended to protect secured creditors by ensuring that their enforcement under the act would take precedence over any reference by a debtor to the BIFR.

[10] Chemicals Ltd. v. Union of India (2004) 4 SCC 311 (Para 34): The petitioners challenged the Act on the grounds that it allowed banks to take drastic measures for the seizure and sale of assets of a borrower and to take over the management or possession of secured assets. The primary contention was that it was a draconian legislation as it allowed secured creditors to take measures to recover debt due without the involvement of an adjudicatory authority. The Supreme Court rejected these challenges quoting widely from the legislative history on the impetus for the SARFAESI Act's enactment. The Court stated that banks faced tremendous difficulties in recovering debts due and that this was a major impediment to financial liquidity for industry and, as a consequence, economic growth.

ii. Other Mechanisms

Non-judicial mechanisms set up for banks to restructure loan contracts with debtors include Corporate Debt Restructuring (CDR), the Joint Lending Forum and the Strategic Debt Restructuring Forum, prescribed by the Reserve Bank of India (RBI).

To bring out a solution to this scenario, the Bankruptcy Law Reform Committee ("BLRC" or the "Committee") was set up by the Department of Economic Affairs, Ministry of Finance, under the Chairmanship of Mr. T.K. Vishwanathan (former Secretary General, Lok Sabha and former Union Law Secretary) to study the "corporate bankruptcy legal framework in India" and submit a report to the Government for reforming the system[11]. Out of the discussions of the committee, Interim Report of the Committee that was put out for public comments at the end of February, 2015. On 4 November, 2015 BLRC came out with the final report.

The Committee has chosen the strategy of repealing many existing laws on bankruptcy and insolvency, and writing a clean modern law which is a simple, coherent, and effective answer to the problems under Indian conditions.

The Report of the BLRC is in two parts:

i. Rationale and Design/Recommendations;
ii. A comprehensive draft Insolvency and Bankruptcy Bill covering all entities.

The draft Bill has consolidated the existing laws relating to insolvency of companies, limited liability entities (including limited liability partnerships and other entities with limited liability), unlimited liability partnerships and individuals which are presently scattered in a number of legislations, into a single legislation.[12]

[11] Bankruptcy Law Reform Committee, *Interim Report* (Feb. 2015).

[12] Press Information Bureau, Ministry of Finance, Government of India, *Summary of the Recommendations of the Bankruptcy Law Reforms Committee (BLRC)* (Nov. 4, 2015).

Litigation Problems in the Present Scenario

While studying about the present system in the country, the multiplicity of legislations on corporate bankruptcy becomes evident whenever litigation is initiated by companies. The myriad forums for insolvency resolution and several challenges to the existing legislations have created a situation which is extremely confusing and contradicting for any corporate entity to follow. Typically high courts in India receive cases which can be broadly classified under four heads:

i. Liquidation references from BIFR (refer to page 1 for conditions for a BIFR reference)
ii. Winding up petitions in High Courts under Companies Act, 1956
iii. Appeals from BIFR (typically in cases involving interpretations and challenges to specific provisions of SICA)
iv. Appeals from DRT and DRAT (typically involve the interpretation of the RDDBFI Act or the SARFAESI Act, and sometimes their conflict with each other or with Companies Act)

If we begin to evaluate such cases from 2002 onwards i.e. after the SARFAESI Act came into existence, we find a certain themes emerging which point out the reasons why the existing regime has not been able to succeed, firstly the existence of multiple forums and multiplicity of legislations, and secondly weak institutions that lead to inordinate delays, especially in liquidation of companies.

i. Parallel Proceeding Cases

BHEL v. Arunachalam Sugar Mills[13] illustrates a very important point that the majority of cases faced by High Courts are where proceedings were initiated by various parties and the court is left with to decide which proceeding and which legislation to be given predominance over the other. There were situations where the debtor company had made a reference to the BIFR under SICA while a secured creditor had filed a winding up petition in the high court[14] or initiated enforcement

[13] BHEL v. Arunachalam Sugar Mills Ltd. (High Court of Madras), OSA Nos 58, 59, 63, 64 and 81 of 2011, decided on 12 April 2011.

[14] See, for example, In re: Oswal Foods Limited (2008) 145 CompCas 259 (All), decided on 16 November 2006 involved a situation where the debtor company had made two references to the

action under the SARFAESI Act[15] and other cases where creditors had each initiated proceedings in different forum or under different statutes.[16]

i. Conflicts between SICA and Debt Enforcement Laws

Many of the cases that involved conflicts between the SARFAESI Act and SICA were relatively straightforward as they often involved a factual question of whether 75% of creditors had indeed sought enforcement action under the SARFAESI Act in which case the BIFR proceedings would need to abate.[17] In *BST and PSP Workers Union v. Union of India*[18] the BIFR had made a reference for liquidation in the high court while secured creditors had sought enforcement action under the SARFAESI Act, whereby the Kerala High Court held that as the secured creditors had not notified the BIFR of the SARFAESI enforcement action, the BIFR retained jurisdiction and the winding up order passed by the high court was valid.

BIFR, while a creditor filed a winding up petition in the High Court; In Re: Consolidated Steel and Alloys, CA Nos. 165, 385, 706 and 992/07 and 1031/08 in CP No 428 of 2002, decided on 7 November 2008, where the Delhi High Court actually failed to issue a winding up order following the BIFR's reference and creditors subsequently had to file a separate winding up petition in the court.

[15] Asset Reconstruction Co India P Ltd v. Shamken Spinners Ltd, AIR 2011 Del 17, decided on 22 November 2010; M/S Digivision Electronics Ltd v. Indian Bank and Ors. WP 13056/2005, decided on 7 July 2005.

[16] In Kritika Rubber Industries v. Canara Bank (Karnataka High Court), CA No 190/2008 in Co P No 167/1999, decided on 13 June 2013, one group of secured creditors had initiated an action in the DRT, while another group subsequently filed a winding up petition in the Karnataka High Court. The DRT decided in favour of the creditors and a recovery officer at the DRT ordered the attachment of the property securing the debt, which was subsequently sold in an auction. In the meantime, the high court had ordered the winding up of the debtor and appointed an official liquidator (OL) to oversee its liquidation. The OL, upon learning of the DRT's actions, sought an order to set aside the sale by auction, which the High Court allowed. An interesting fact in this case is that it appears that the parties to the DRT proceedings were unaware of the winding up petition in the high court. Indeed, one of the secured creditors claimed to have had no knowledge of the winding up petition (that was filed in 1999) until it received notice of the OLs action to set aside the sale authorised by the DRT (which occurred in 2008) (Para 3.3 and 32).

[17] See, for example, Triveni Alloys Ltd v. Board for Industrial and Financial Reconstruction and Ors, WP No 4481 of 2005 and 32594 of 2003, decided on 19 July 2005.

[18] CP 23 of 2006, decided on 03 August 2009.

The most recent decision of the Supreme Court that dealt with the conflict between rescue and rehabilitation and debt enforcement laws was in *KSL Industries v. Arihant Threads Ltd.*[19]

ii. Conflicts between Winding up Proceedings and the SARFAESI Act

The SARFAESI Act has also often clashed with winding up proceedings, wherein the primary question in most of these cases was whether enforcement action could proceed under SARFAESI in situations where a winding up petition had been filed in the high court. Here also there has been many contradictory judgments, on one hand where one high court held that the debtor's assets could be sold in an auction pursuant to a SARFAESI Act enforcement action without the leave of the Company Court where a petition had been filed for winding up[20], and on other hand high courts ruled that the consent of the official liquidator was required for such a sale *(BHEL v. Arunachalam Sugar Mills Ltd, Kritika Rubber Industries v. Canara Bank).* The Supreme Court came to quite a different conclusion in *Official Liquidator, UP and Uttarakhand v. Allahabad Bank.*[21]

iii. Conflicts between SARFAESI and RDDBFI Act

Proceedings under SARFAESI does not require the intervention of a court or tribunal, while under the RDDBFI Act, it is compulsory. Can parallel proceedings under these two laws be instituted by creditors is a moot question. In *Bank of India v. Ajay Finsec Pvt Ltd and Ors*[22], the DRT ruled that banks and financial institutions

[19] Supreme Court, Civil Appeal No 5225 of 2008, decided on 27 October 2014. In this case, the conflict was between SICA Act, 1985 and the RDDBFI Act, 1993. The provisions in conflict were § 22 of SICA Act that provides for a stay of all proceedings against the debtor and § 34 of the RDDBFI Act that provides that the Act has overriding effect. The Supreme Court considered the objects of both laws in detail and decided that SICA Act took precedence over the RDDBFI Act.

[20] Indian Bank v. Sub-Registrar, Writ Appeal Nos. 1420 and 1424 of 2013 and OSA Nos. 34 and 35 of 2013, decided on 11 November 2014.

[21] Official Liquidator, UP and Uttarakhand v. Allahabad Bank, AIR 2013 SC 1823: This case involved the role of the Company Court and the official liquidator where the company subject to the winding up proceedings was also subject to recovery proceedings under the RDDBFI Act, 1993. The Supreme Court upheld the precedence of the RDDBFI Act and held that the Company Court did not have jurisdiction over matters that were pending before the DRT.

[22] Original Application No. 167 of 2001, decided on 28 November 2003.

may simultaneously pursue proceedings under the SARFAESI Act and RDDBFI Act. This view was also upheld by the Supreme Court in *M/S Transcore v. Union of India*[23], 24 where the Court stated that the two acts were complementary to each other. However, despite both these rulings, nearly two years after *Bank of India v. Ajay Finsec Pvt Ltd*, the Patna High Court held that the proceedings under the RDDBFI Act could not be initiated if SARFAESI Act enforcement action had begun.[24]

iv. Instances of Delay

The high courts and Supreme Court have typically adopted a pro-rehabilitation stance and been reluctant to order winding up proceedings.[25] In many of the liquidation cases reviewed, the issuance of a winding up order did not necessarily signal the close of the insolvency process. There were numerous instances of liquidators struggling over the priority of claims and payments many years after the winding up order had been passed.[26]

At a glance all these cases depict the significant problems of India's bankruptcy laws which have ended up creating insecurity and uncertainty for the creditors. The mere enactment of new consolidated bankruptcy legislation does not mean that all such problems will go away at once. The insolvency regime has to date been characterised by weak institutions, whether it is the high courts, the BIFR or

[23] M/S Transcore v. Union of India AIR 2007 SC 712.

[24] M/S Punea Cold Storage v. State Bank of India AIR 2013 Pat 1.

[25] In Rishabh Agro Industries Ltd. (2000) 5 SCC 515, a Division Bench of the Supreme Court held that it was open to the directors of the company to explore the possibility of rehabilitation even after the winding up order had been passed. This judgment has since been cited in several later cases when former management of a debtor attempt to revive a company in the final stages of being wound up, for example In re: Oswal Foods Limited.

[26] For example, in Mining & Allied Machinery Corpn v. The Official Liquidator (CA Nos 115, 426, 797/2012 and 1126/2011 and BIFR 510/1992, decided on 2 December 2014), nearly 10 years after the winding up order was passed, the Calcutta High Court was asked to consider whether contract labourers could be treated as workmen and, therefore, be entitled to proceeds from liquidation as secured creditors. In Official Liquidator, Suganti Alloys Castings Ltd v. Edupuganti Subba Rao (CA 160 of 1995, decided on 19 April 2006), while the Andhra Pradesh High Court passed the winding up order in 1990, the OL was struggling to complete the liquidation process as late as 2006.

the official liquidators, and a new law alone cannot fix these issues.[27] The new law will work effectively only when it interacts with the present legislations in a harmonious manner, without much room for discrepancies and controversies to emerge from.

Proposed Institutional Infrastructure

For any robust insolvency resolution process, proper institutional infrastructure is an absolute essential. Any such infrastructure includes regulators, adjudicators and tribunals which work in concert to provide a coherent solution for any aggrieved party.

i. Tribunals

Under Companies Act, 2013, and the Limited Liability Partnership (LLP) Act, 2008 the National Company Law Tribunal (NCLT) has jurisdiction over the winding up and liquidation of companies and LLPs respectively. Appeals from the order of NCLT shall lie to the National Company Law Appellate Tribunal ("NCLAT"). The Committee has chosen to continue with this existing institutional arrangement. NCLT has jurisdiction over adjudications arising out of firm insolvency and liquidation, while NCLAT will have appellate jurisdiction on

[27] For a more detailed analysis, see Aparna Ravi, *The Indian Insolvency Regime in Practice – An Analysis of Insolvency and Debt Recovery Proceedings*, WORKING PAPER, FRG IGIDR (2015). Her analysis is based on a detailed review of 45 judgments of the High Courts and 15 judgments from the DRTs and DRATs, as well as a review of important judgments of the Supreme Court that have had a significant impact on the interpretation of existing insolvency legislation. All of the judgments she reviewed are from the period after June 2002, the year when the SARFAESI Act came into effect, and are intended to provide a picture of how a debtor in distress or a creditor seeking recovery goes through the legal system as it exists today. The judgments selected for the detailed review were chosen from a much larger group of high court and tribunal judgments with the goal of obtaining judgments that covered the various types of insolvency-related matters that were heard by the courts and tribunals.

the same.[28] Furthermore, the limitation period of 45 days has been prescribed for filing appeal to the NCLAT.[29]

The Supreme Court is the forum for appeal only on a question of law from NCLAT, with the limitation period extendable by 30 days.[30] Furthermore the NCLT has been given exclusive jurisdiction in the Bill, which includes freedom from any injunction granted over its matters.[31]

Furthermore an insolvency resolution process or bankruptcy proceeding of a personal guarantor of such corporate debtor can be filed at any point of time during the pendency of a corporate insolvency resolution process or liquidation proceeding of a corporate debtor before the NCLT.[32]

ii. The Insolvency and Bankruptcy Board[33]

One of the basic problems with regard to the existing bankruptcy framework is the lack of a regulator in the sector. This lacuna leads to an inordinate amount of work falling on the shoulders of the courts, which are already overburdened with the existing litigation. Thus the setting up of a regulator was one of the most important requirements of a unified law on bankruptcy, and the establishment of the Board will prove to be one of the biggest highlight of the Bill.

The Bill has given quite a free hand to the Board in respect to its powers and functions. This is evident by enacting provisions for constitution of various

[28] The Insolvency and Bankruptcy Bill § 60(1) (2015): The NCLT shall have territorial jurisdiction over the place where the registered office of a company is located and can entertain an application under this Act regarding such corporate debtor or corporate person.

[29] *Id.* § 61(1): An appeal against a liquidation order passed under § 33 may only be admitted on grounds of material irregularity or fraud committed in relation to such a liquidation order. § 61(2): This period could be further extended for a period not exceeding 15 days.

[30] *Id* § 61(3): An appeal lies to the Supreme Court within a period of 90 days. § 62: The limitation period may be extended by 30 days.

[31] *Id* § 63: Civil Court not to have jurisdiction. § 60(5): No injunction shall be granted by any court, tribunal or authority in respect of any action taken, or to be taken, in pursuance of any power conferred on the NCLT or the NCLAT.

[32] *Id* § 60(2)(a).

[33] Hereinafter referred to as "Board".

Committees by the Board for efficient discharge of its functions.[34] The Board has been given the powers of a civil court while trying a suit which extends to summoning witnesses, examining them on oath, examination of evidence. Section 196(1) gives a comprehensive list of all the powers and functions that the Bill has vested in the Board.[35]

The requirement of a performance bond by insolvency professional or an agency as a security is one such measure by which the Board efficiently exercises control over them.[36]

iii. Insolvency Professionals

Insolvency Professionals (IP) are vital to any efficient mechanism to resolve insolvency and bankruptcy. Under the Bill, an IP may assume any of the following roles:

1. Resolution professional (RP) to resolve insolvency for a firm or an individual[37];

2. Bankruptcy Trustee in an individual bankruptcy process[38];

---

[34] These committees include and are not limited to Standards Advisory Committee, Financial Advisory Committee, Insolvency Professional Advisory Committee and Information Utilities Advisory Committee.

[35] Including and not limited to registering agencies and professionals, fixing eligibility criteria, levying fees, specifying professional standards, monitoring performance, inspections and investigations, curriculum and examination of such professionals, maintaining and disseminating literature and records on bankruptcy, issuing guidelines, and grievance redressal. For a more comprehensive list, see § 196(1) and the analysis of Insolvency Professionals and agencies dealt with in the forthcoming headings.

[36] As per § 206(2)(a), the concerned insolvency professional agency acts as a surety for the obligations of the insolvency professional and is to be jointly and severally liable for losses in relation to any person whose interests are prejudicially affected by any act of fraud or gross misconduct of the insolvency professional. Also the payment of claims in respect of losses shall be equal in amount, to at least the value of the assets of the corporate debtor or the debtor as on the insolvency commencement date or the insolvency commencement date of the debtor, as the case may be.

[37] The IP may order a fresh start order process under Chapter II of Part III or the individual insolvency resolution process under Chapter III of Part III of the Bill.

[38] The IP may participate in the individual bankruptcy process under Chapter IV of Part III of the Bill.

3. Liquidator in a firm liquidation process[39];

Entry barriers have been put up for a more efficient and centralised workflow. No person shall render his services as insolvency professional under the Bill without being enrolled as a member of an insolvency professional agency.[40] Every insolvency professional shall, after obtaining the membership of any insolvency professional agency, register themselves with the Board.[41] Any insolvency professional under the act is expected to take reasonable care and diligence, adhering to procedure of the law, as well as accounting and finance related functions.

iv. Insolvency Professional Agencies

The BLRC envisioned a network of IP agencies for optimal bankruptcy resolution environment in the nation, and for that purpose, a necessary regulatory governance process has to be followed by the professional IP agencies in carrying out the following functions:

i. Regulatory functions - drafting detailed standards and codes of conduct through bye-laws, that are made public and are binding on all members;[42]
ii. Executive functions - monitoring, inspecting and investigating members on a regular basis, and gathering information on their performance, with the over arching objective of preventing frivolous behaviour and malfeasance in the conduct of IP duties;[43]

---

[39] An IP may take part in corporate insolvency resolution process under Chapter II of Part II, or in the liquidation of a corporate debtor firm under Chapter III of Part II of the Bill.

[40] *Id* § 207(1).

[41] *Id* § 207(2).

[42] *Id* § 205(1) provides a detailed list of bye-laws to be drafted by IP agencies, which includes setting up various professional standards, enrolment of its members, membership laws, examination and curriculum for IPs as well as initiating disciplinary proceedings against member IPs. IP agencies must exercise minimal discretion in framing bye-laws, especially in the process of granting licenses to IPs.

[43] This includes inspections, investigations, enforcement of orders and processing of complaints. Such functions include, and shall not be limited to all functions listed in § 204(1) of the Bill. The BLRC Report envisions the heads under this section to be a comprehensive list, but not an exhaustive one.

iii. Quasi-judicial functions - addressing grievances of aggrieved parties, hearing complaints against members and taking suitable actions.[44]

These three types of functions are envisioned to prove as a framework for efficient working of the system. But at the same time, the IP agencies are also required to follow all rules and regulations laid down by the Board from time to time. There is a presumption of the IP agencies working under good faith and in a professional manner with ethical conduct, for which the Board may have in regard these principles for the working of IP agencies. Furthermore, the Board shall have power, albeit not absolute, to grant certificate of registration to these IP agencies, which also extends to rejecting any application for the same, or renewing and cancelling an existing registration for any such reasons as have been listed out in Section 201(5).[45] Any insolvency professional agency which is aggrieved by any order of the Board may prefer an appeal to the NCLAT.[46]

v. Insolvency Information Utilities

The draft Bill lists out the establishment of information utilities which would collect, collate, authenticate and disseminate financial information from listed companies and financial and operational creditors of companies, along with an individual insolvency database with the goal of providing information on insolvency status of individuals.[47] The information utility shall be registered with the Board which reserves the power to grant registration, or renew or cancel an existing registration. Any appeal against the order of the Board lies to the NCLAT.

[44] Anybody who is aggrieved by an action of an IP may address their grievance to the agency of which the IP is a member as per § 204(1)(f).

[45] The reasons for such include making any false statement or misrepresentation, contravening any provisions of this Bill or any bye-laws, following the established principles of Administrative Law.

[46] *Id* § 202 of the Bill.

[47] Press Information Bureau, Ministry of Finance, Government of India, *Summary of the Recommendations of the Bankruptcy Law Reforms Committee (BLRC)* (Nov. 4, 2015).

vi. Insolvency Resolution Process

For any corporate entity facing insolvency, a definite insolvency resolution process is essential for establishing clarity and permanence.[48] A defined process not only lets the parties themselves prepare for bankruptcy and its future ramifications, but in doing so it also eases the burden off the courts as a large amount of their work gets already done by the aggrieved parties. To the extent this can be implemented, the costs involved decreases and the time involved also comes down drastically.

vii. The Present Process in India

Currently, the Companies Act 2013 permits the following parties to file an application before NCLT for a declaration that company is sick- (a) the company, (b) any secured creditor, (c) the Central Government, (d) the Reserve Bank of India, (e) State Government, (f) public financial institution, (g) a State level institution, (h) a scheduled bank.[49] Under the SARFAESI, 2002 also, debt enforcement rights are available for secured creditors only. To determine a company as sick or not, a period of 60 days has been prescribed for the NCLT under Section 253(7).

The existing process for insolvency resolution is found in Chapter XIX of Companies Act, 2013. Under this, the secured creditors of a company representing at least fifty percent of its outstanding debt may serve a notice, and on non-payment of dues, may apply to the Tribunal for declaring a company as sick. The Act also empowers NCLT to pass any order which shall be in power till 120 days. Furthermore a period of sixty days is prescribed to apply to NCLT for insolvency resolution after declaration of a company as sick.[50] The Tribunal has also been empowered to set up an interim administrator within 7 days of such application,

[48] When a company defaults on a debt payment, there are three kinds of legal procedures available to creditors and debtors that are common to all jurisdictions: (i) foreclosure or enforcement of the debt by a creditor or group of creditors, (ii) liquidation of the debtor and a distribution of its remaining assets to creditors, and (iii) a reorganisation or revival of the business, which results in a continuation of the business in some form or in the sale of the business as a going concern. For a more comprehensive analysis, see Djankov et al, *Debt Enforcement Around the World*, 116(6) JPE, 1105–49 (Dec.).

[49] Companies Act § 253(5) (2013).

[50] Companies Act § 254(3) (2013).

who must aid the court to examine every possible avenue for insolvency resolution, which includes convening meetings and appointing committee of creditors and taking over the management,[51] of the company if need arises. Furthermore the Act also provides for setting up a company administrator in a later stage, who may take over all assets, inventory, books, and all documents of the company; draft a scheme of revival and rehabilitation of the company which may include amalgamation with another company,[52] takeover of the company,[53] and other such measures[54], though they will have to be approved by the creditors of the sick company.

These provisions no-doubt are fraught with numerous questionable sections, which provide a very complicated approach to a much needed simple procedure. On one hand these and other provisions like creating a Rehabilitation and Insolvency Fund (Section 269), and stricter punishments and penalties (Section 267) show that the intent of the government is aligned towards creating a coherent law for bankruptcy; but at the same a great focus on court involvement in the process is counterproductive for any fast and easy process.

viii. Establishing a New Process[55]

Over time, insolvency law has evolved to incorporate a broader set of considerations such as asset preservation, a means to revive a debtor's business if it is viable and to consider the interests of other stakeholders in addition to financial creditors, including trade creditors and employees.[56] The UNCITRAL Legislative Guide on Insolvency, states nine broad objectives of an insolvency law

[51] *Id.* § 256(1).
[52] *Id.* § 261(2)(c).
[53] *Id.* § 261(2)(d).
[54] For the complete list, see Companies Act § 261 (2013).
[55] For the three goals that a bankruptcy procedure should have (delivering an ex post efficient outcome, preserving the bonding role of debt by penalizing managers and shareholders adequately in bankruptcy states, preserving the absolute priority of claims), see Oliver Hart, *Different Approaches to Bankruptcy,* ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS (June. 1999).
[56] S. Paterson, *Rethinking the Role of the Law of Corporate Distress in the Twenty-First Century*, LSE LAW, SOCIETY AND ECONOMY WORKING PAPERS (2014).

regime all of which rest on having a collective mechanism for insolvency resolution:[57]

i. Provision of certainty in the market to promote efficiency and growth;
ii. Maximisation of value of assets;
iii. Striking a balance between liquidation and reorganisation;
iv. Ensuring equitable treatment of similarly situated creditors;
v. Provision of timely, efficient and impartial resolution of insolvency;
vi. Preservation of the insolvency estate to allow equitable distribution to creditors;
vii. Ensuring a transparent and predictable insolvency law that contains incentives for gathering and dispensing information;
viii. Recognition of existing creditor rights and establishment of clear rules for ranking priority of claims; and
ix. Establishment of a framework for cross-border insolvency.

The objectives outlined above are inter-related and rest on three fundamental characteristics that are shared by most well developed insolvency law regimes (either through statutory provisions or their implementation in practice): (a) a linear step-by-process for a debtor and creditors to follow when insolvency is triggered, which allows for predictability and certainty in terms of process and outcomes;[58] (b) a collective mechanism for resolving insolvency that helps preserve value and also serves to advance principles of equity and fairness by involving all stakeholders in the process; and (c) a time bound process for resolving insolvency that either ends in a rescue and restructuring of the debtor's business or a liquidation and distribution of the debtor's assets to various stakeholders.[59] It is worthwhile to note that the BLRC has taken these UNCITRAL objectives as a base point while formulating the new bankruptcy legislation.

[57] *Legislative Guide to Insolvency Law*, *Part I*, UNCITRAL, 10–14 (2015).
[58] Supra note 5.
[59] See Debanshu Mukherjee, Priyadarshini Thyagarajan and Anjali Anchayil, *The Place of a Collective Liquidation Processin an Effective Bankruptcy Regime: A Comparative Analysis*, WORKING PAPER, IGIDR.

ix. Insolvency Resolution under the 2015 Bill

The biggest highlight of the 2015 Bill is the Insolvency Resolution process ("process") that has been enunciated under Chapter II, along with a fast track process listed in Chapter IV under Part II of the Bill. For any robust process, a fair degree of certainty is required, which is quite evident in numerous ways under this Chapter. The category of people who are designed as corporate applicants have been listed in Section 5(3), namely shareholders and partners of corporate entity, managers, any financial supervisor of the corporate entity and any other person who has been employed by the corporate person. The Section 5 which contains definitions of all terms used in the Chapter is a highly resourceful section, which lists various definitions covering several heads exhaustively, for example financial debt, fraudulently, insolvency process period costs, related party, voting share etc.

The Bill lists out various instances where the process can be initiated by various different people under different circumstances. Where any corporate debtor commits a default, a financial creditor[60] (any person to whom a financial debt is owed), an operational creditor[61] (a person to whom an operational debt is owed) or the corporate debtor itself may initiate the process. Each of these may also propose a resolution professional to be appointed to act as the interim resolution professional. Though at the same time, certain situations bar these persons from initiating the process. For example a corporate debtor who is undergoing or completed 12 months previously a corporate insolvency resolution process, or a financial creditor whose resolution plan was approved 12 months before the date of making an application under this Chapter and who has violated any of the terms of such plan cannot initiate the process.

The point that stands out from all these provisions is the time period prescribed for the process to be completed. The time period prescribed is 180 days, extendible

[60] A financial creditor either by itself or jointly with other financial creditors may file an application along with proof of the default for initiating corporate insolvency resolution process against a corporate debtor before the adjudicating authority when a default has occurred.

[61] An operational creditor shall, on the occurrence of a default, deliver a demand notice or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor, who shall respond within 10 days, failing which the operational creditor may file an application with the adjudicating authority.

to a maximum one-time period of 90 days, with a suitable safeguard of requirement of 75% of committee of creditors as a pre-requisite to any such extension. This is a paradigm shift from the present situation where creditors can seek for an extension indefinitely. This period is seen as a "calm period", where the creditors can hold-off their claims.

To streamline the process further and decrease vexatious litigation, the Adjudicating Authority has been given very wide powers, to appoint an IP (who shall exercise the management of the company for the process duration, including all powers exercised by the partners and board of directors, entering into any such contracts with other companies, control of all assets and securities of the company) under section 16 and to declare a moratorium under section 13. Such a declaration will prohibit the institution or continuation of suits or proceedings against the corporate debtor in any court, tribunal, arbitration panel or other authority; prohibit any transfer of assets or rights, prohibits any debt recovery action by the application of SARFAESI Act, and enforces the status quo of any property in question. Furthermore such a moratorium may continue till the process period ends.

A very detailed procedure for setting up of committee of creditors, its composition, its functions and their approval of insolvency professionals has been provided for[62], which provides the much needed certainty in the legislation. Furthermore to prevent any discrepancies that may arise from any interpretation of the legislation, very definite provisions have also been listed for IPs – their conduct in the insolvency resolution process, their duties[63], and their replacement by the committee (by a 75% vote of the creditors, with subsequent conformation by the Board) or a financial creditor or corporate debtor.[64] Along with all such powers, the committee of creditors also reserves the right of approving or rejecting

[62] For the full text, see §§ 21, 22, 24 of the 2015 Bill.

[63] For example, taking immediate custody of assets and records of the company, becoming the company's representative, auditing, submitting the final plan, etc. For a full list, see § 25 of the 2015 Bill, though some of the actions of the IPs need approval of committee of creditors under the conditions mentioned in § 28(1).

[64] In the event of any irregularities, failure of standard of care exercised, conflict of interest, misinformation, contravention of any law: § 27(1).

the final plan submitted by the IP (by a vote of 75% of the creditors the plan can be approved). The Bill has also provided for an added layer of security so that no undue haste by the creditors can happen as the approved plan again needs to be approved by the Adjudicating Authority. While this may seem as a cumbersome step, this is much needed, to prevent instances in future arising where creditors may exploit the autonomy granted to them, or prevent instances of collusion between IPs and the creditors. This provision under Section 31 provides just an added layer of security.

x. Fast Track Process

Under Chapter IV, a separate fast track process has also been provided (which may be initiated by a creditor or corporate debtor), which shall be completed within 90 days, extendable by a one time period of 45 days on a majority vote of no-less than 75% of the committee of creditors. Such a process has been made for those companies with assets and income below a certain level or a corporate debtor with such class of creditors or such amount of debt as may be notified by the Central Government, with the rest of the procedure same as the normal resolution process.

Liquidation Process

For many people bankruptcy and insolvency are one and the same. True to this they are almost used interchangeably in most times. But actually they are fundamentally different terms, two stages of a process. The first phase of the insolvency and bankruptcy process is the period of insolvency resolution during which insolvency is assessed and a solution is reached within a stipulated time period and when a solution is not reached within the specified time limit, the second phase of the process begins wherein the entity is declared bankrupt.[65] One possibility is to negotiate a debt restructuring, where the creditors accept a reduction of debt on a net payment value basis, and hope that the negotiated value exceeds the liquidation value. Thus liquidation happens after all other options have been explored, after a company has been declared as bankrupt. Such a sequence

[65] 1 The Report of the Bankruptcy Law Reforms Committee, 12, 63 (Nov. 2015).

with liquidation at the last is necessary because it involves destruction of capital of a company.

This textbook definition of liquidation is precisely what has been taken by the BLRC while formulating the Bill. An entire detailed Chapter III has been devoted to Liquidation Process. In the event that the Adjudicating Authority does not approve of the resolution plan submitted, or where the maximum period of 180 days passes by without any plan being submitted, or where the committee of creditors by a majority of not less than 75% pass a resolution in this aspect anytime during the duration of the process before submission of the plan, the Adjudicating Authority may initiate liquidation for the company. The last provision is especially important because many times the value of a company begins deteriorating with time and where circumstances show that no resolution can occur delay proves to be counterproductive.

When the Adjudicating Authority passes the order for liquidation, the IP who was earlier appointed to present a resolution plan, now steps into the shoes of a liquidator, until replaced (on a Board recommendation, or rejection of the IP's resolution plan). The powers of a liquidator extend to verifying creditor claims, seeking information from any information utility or any such system; control of assets and securities including their sale and transfer; drawing, accepting and making any negotiable instruments; settling claims; investigating financial affairs; reporting progress to the Authority; representing the company in any suit or proceedings; amongst others (for the full list, refer to Section 35: Powers and duties of liquidator, of the 2015 Bill). As a further safeguard, a liquidator trust is envisioned to be created by the liquidator as the fiduciary, for the assets of the company[66] as an immediate measure. Furthermore a short 21 day period has been

[66] Such assets which shall include any assets over which the corporate debtor has ownership rights, assets that may or may not be in possession of the corporate debtor, movable and immovable tangible assets, intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights, and shall not include assets owned by a third party which are in possession of the corporate debtor (such as assets held in trust, bailment contracts, assets in security collateral held by financial services providers, personal assets of any shareholder or partner of a corporate debtor, assets of any Indian or foreign subsidiary of the corporate debtor). For the full list of assets and their specific nature, see § 36 of the 2015 Bill.

prescribed for the liquidator to accept creditor claims. The powers of the liquidator extend to accepting/rejecting (with reasons) the claims of the creditor along with a duty to avoid preferential transactions (here again the Bill provides appropriate safeguards by listing the characteristics of a preferential transfer in Section 43, and the relevant order that may be made by the Adjudicating Authority in Section 44) in one or more creditor's favour.

The Bill also has safeguards against any mistakes made by the liquidator by way of undervalued transactions by which the liquidator may apply to the Adjudicating Authority to have any such transaction made by him declared as void [67]extending to a period of 2 years for a related party and 1 year for anyone other than a related party, preceding the insolvency commencement date. Furthermore such an application may also be made by an aggrieved creditor, shareholder or a partner of a corporate debtor to establish status quo. Furthermore the Bill also prevents any such undervalued transaction arising due to fraud by a corporate debtor (Section 49), without prejudicing any interest in property which was acquired from a person other than the corporate debtor, and also prevents any extortionate credit transactions made to a corporate debtor (Section 50), to prevent misuse of law.

A secured creditor in the liquidation proceedings may relinquish its security interest to the liquidation trust and receive proceeds from the sale of assets by the liquidation.[68]

The detailed order of priority for division of proceeds from sale of trust assets has also been provided in Section 54, which provided a great deal of certainty to the Bill. The Committee has recommended keeping the right of the Central and State Government in the distribution waterfall in liquidation at a priority below the unsecured financial creditors in addition to all kinds of secured creditors for

[67] By such an order or decree, the Authority may compel any property transferred as part of the transaction, to be vested in the corporate debtor, or release or discharge (in whole or in part) any security interest granted by the corporate debtor, require any person to pay such sums, in respect of benefits received by such person, to the liquidator.

[68] § 53. The detailed manner has been described in § 54.

promoting the availability of credit and developing a market for unsecured financing (including the development of bond markets).[69]

i. Voluntary Liquidation

Another very novel innovation of the act has been recognition of voluntary liquidation as a necessary feature that had until now been absent in the Indian financial sector. This provision is probably the most ambitious one, firmly positioning a bill on par with the other legislations around the world. Under voluntary liquidation, any corporate person who intends to liquidate voluntarily may do so, provided that the corporate person follows the requirements laid down by the Board and certain additional requirements in Section 59(3).[70] The Bill provides for an affirmation by the shareholders of the company, and a further affirmation required by two-thirds of the creditors in case the company is indebted to any persons. Within two-days of such affirmation, the Board and the Registrar of Companies must be taken in confidence, and the rest of the process shall happen in the same way as the liquidation process enshrined in Chapter III. The final result must be affirmed by the order from the Adjudicating Authority.

Voluntary Liquidation is an existing phenomenon, which was until now not recognised by Indian law. The 2015 Bill has done well to give recognition to the process and lead the way for more such legislations to follow suit.

Conclusion

While drafting a new consolidated law on bankruptcy, there are two directions that can be taken. One path is laying a heavier emphasis on courts, forums and judicial processes as the go-to redressal system. The other is laying a heavier emphasis on an insolvency framework, which might have a nodal body, and a number of professionals providing personalised service, thereby isolating the resolution process rather than having it centralized. When India was faced with this twin dilemma, the BLRC chose to take a balanced approach of the two, leaning towards

[69] Supra note 66, at 14, made manifest in § 54(1).

[70] Some of the additional requirements are affidavit by the directors of the company declaring non-insolvent status of the company and non-fraudulent intentions and disclosure of assets of the company.

the second option as its choice. While studying the present systems in UK[71] and Singapore[72] they finalised upon the 2015 Bill as favouring the second option, though that has to be ratified by courts, thus providing an amalgam of both options as the solution. Hence instead of initiating large scale judicial reforms, the BLRC has chosen to form a set of institutions to aid a weaker-judiciary, to form an overall robust process.

In line with easing up the burden on the courts, the BLRC recommended forming a creditor's committee, where all creditors have voting rights in proportion to the outstanding debts owed to them, thus making insolvency what is should truly be, a business decision. This has been a positive departure from the previous situation where the laws brought some or other arms of the government into the equation. We can be optimistic in forecasting a future where insolvency professionals[73] will assume a leadership role in dealing with insolvency and bankruptcy in India.

As a departure from the normally conceived view of policy changes requiring a great deal of institutional overhaul, the bankruptcy framework does not require major institutional investments. The insolvency professionals can be nominated from the existing crop of financial consultants in the country, and there are a number of governmental and non-governmental agencies [74]which can serve as information utilities.

---

[71] The UK law has devolved large portion of the responsibilities to the insolvency practitioners thereby minimizing the role of the judiciary, which is now involved primarily in dispute resolution and for setting guidelines for the parties involved.

[72] In Singapore, on the other hand, the court plays a more active role in the judicial management process and the IP is, in a way, subservient to the court system. However, Singapore has also taken considerable effort in significantly improving the capacity and capability of its court system. For further analysis between laws of India, Singapore and UK, see Rajeswari Sengupta & Anjali Sharma, *Corporate Insolvency Resolution In India: Lessons From A Cross-Country Comparison*, IGIDR WORKING PAPER (Dec. 2015).

[73] For the study that was relied upon by the BLRC while formulating the provisions for setting up IPs, see Anirudh Burman and Shubho Roy, *Building the institution of Insolvency Practitioners in India*, IGIDR WORKING PAPER (Dec. 2015).

[74] FSLRC has recommended a statutory database, the Financial Data Management Centre (FDMC), which is a shared data facility for all financial agencies. The proposal here is somewhat different in having an industry of multiple competing information utilities. B. N. Srikrishna, *Report of the*

The BLRC report recognised several aspects of globalisation, namely foreign holders of corporate bonds issued in India, or borrowing abroad by an Indian firm, yet it missed out on many other aspects, like Indian firms which have become multinationals, and Indian financial investors that lend to overseas persons.

Different functions of a company give rise to different stakeholders, and this in-turn gives rise to different set of rights to people. Dealing with all of them in a single consolidated legislation provides the touchstone to balance the rights of all of them, while at the same time minimizing the possibility of conflicts. This Bill is a revolutionary step forward in recognising previously unknown facets of the industry, and improving upon the existing processes at the same time. Commenting on the efficacy of the Bill is not possible at this stage, though a great deal of optimism can be expected of it. To effectively set the pace for the future, the onus is now on the Parliament to pass the Bill, and launch a new age in insolvency and bankruptcy resolution in India.

Financial Sector Legislative Reforms Commission, Volume 1 and 2, COMMISSION REPORT, DEPARTMENT OF ECONOMIC AFFAIRS, MINISTRY OF FINANCE (2013).