

# Insolvency and Bankruptcy Code: Two Sides of the Same Coin



Insolvency  
Professionals  
INTEGRITY | RESOLUTION | RECOVERY

**T**he Insolvency and Bankruptcy Code, 2016 (IBC), is a watershed in the history of India's banking credit culture. Replacing a plethora of legislation, it provides for a single-window, time-bound process designed to revive a company or failing which to liquidate it. Based on equity, asset maximization and promotion of entrepreneurship, the IBC aims to balance the interests of all stakeholders. The government on its part demonstrated empathy by putting its dues at the bottom of the waterfall list.

A major reason for introducing the IBC was the ballooning of non-performing assets (NPAs) in the balance sheets of the top public sector banks. Total NPAs of the banking system stands at over ₹8 trillion (US\$125 billion) of which ₹6 trillion is with public sector banks. The Reserve Bank of India (RBI) earlier this year identified 12 corporate accounts that accounted for about 25% of the gross NPAs of the banking system, and reports suggest that the second list of 35-40 defaulters has been drawn up. Directives have been issued to the banks to seek remedies under any of the existing schemes or to resort to the IBC.

By offering a time-bound resolution process aimed at maximizing the value of a distressed business, the IBC has benefited not just the creditor and debtor companies but has helped revive the overall economic sentiment in the country. There is a renewed effort to have the productive resources redeployed quickly. The involvement of an experienced resolution professional and monitoring of the corporate insolvency resolution process (CIRP) by the National Company Law Tribunal (NCLT) benefit all stakeholders.

A major challenge foreseen for the IBC was the tidal flow of cases to the NCLT. The NCLT currently has 11 benches (with a total of 16 judicial members and nine technical members). The Ministry of Corporate Affairs is seeking to augment this vital resource but engaging trained talent is bound to take time.

Another concern relates to case law/jurisprudence. Arguments presented to the NCLT are presently based on cases decided under legislation that the IBC has replaced. This will change gradually as the IBC gets perfected as a law and the insolvency professionals (IPs), information utilities (IUs), NCLT and Insolvency and Bankruptcy Board of India (IBBI) are properly set up and functioning in a manner envisaged by the IBC.

IPs form the backbone of the IBC. Ensuring that the IPs perform their role without any fear or favour will require well-defined entry barriers to the profession, effective practical training and close regulation by the IBBI.

### **Some of the legal issues causing concern are:**

- The overriding effect of the provisions of an approved resolution plan. There is no specific provision under the IBC stating that the scheme can dilute or reduce the claim of various stakeholders. Section 31 of the IBC provides that the scheme shall not be contrary to any other provisions of law.
- Approval of a resolution plan by the committee of creditors/NCLT does not imply that it will have the required approval of the shareholders of the company. What happens if the shareholders of the corporate debtor do not approve the final scheme?
- Applicability of the Limitation Act for the purpose of determining the existence of a debt. The National Company Law Appellate Tribunal recently stated (in Neelkanth Township and Construction) that the Limitation Act is not applicable to IBC proceedings.
- The meaning of the term "dispute", which is material for admission of a petition of an operational creditor, is pending adjudication by the Supreme Court.
- The power which can be exercised by the adjudicating authority under the IBC appears to be too wide and thus is likely to be interpreted by courts on a case-to-case basis.

The lack of IU infrastructure is another challenge. Under the IBC, a CIRP can be triggered only when a default by the debtor company has taken place. In the IBC design, the IU enables a quicker initiation of cases by providing access to irrefutable and transparent evidence of the default. In the absence of IUs, the IBBI is required to specify the evidence of default that can be used to trigger an IBC case. This can cause inordinate delays especially if the NCLT gets involved in evaluating whether a default has indeed taken place. This is already happening in the case of operational creditors.

Under the IBC design, IUs also facilitate the formation of the creditors' committee within 14 days from the date of registration of a case. All information regarding the creditors' claims needed by an IP to form the committee can be easily collected from the IUs. IBBI is currently promoting the setting up of these IUs.