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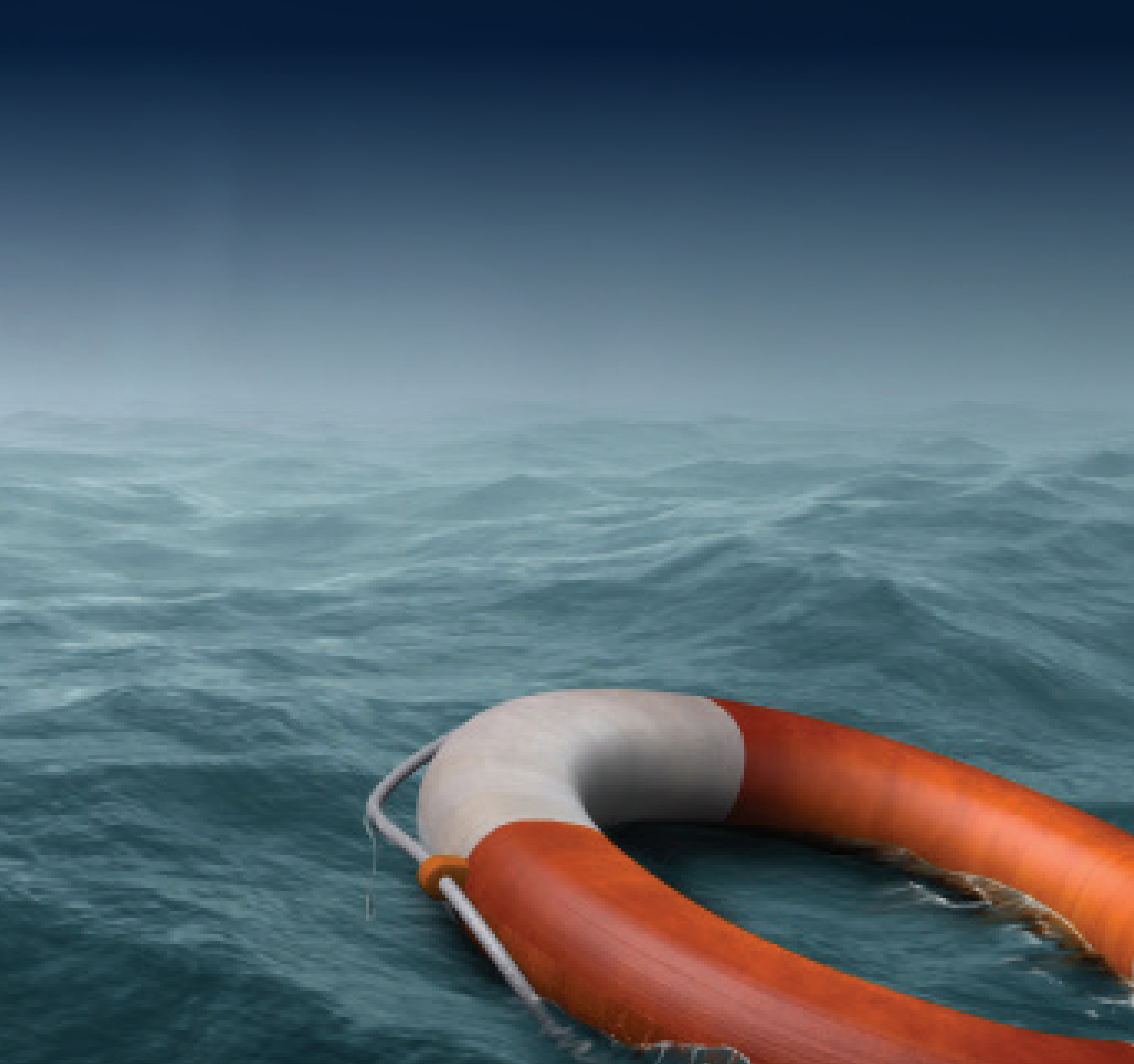
Shardul Amarchand Mangaldas
CENTURY of EXCELLENCE



Distressed Asset Opportunities in India

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Distressed Asset Opportunities in India

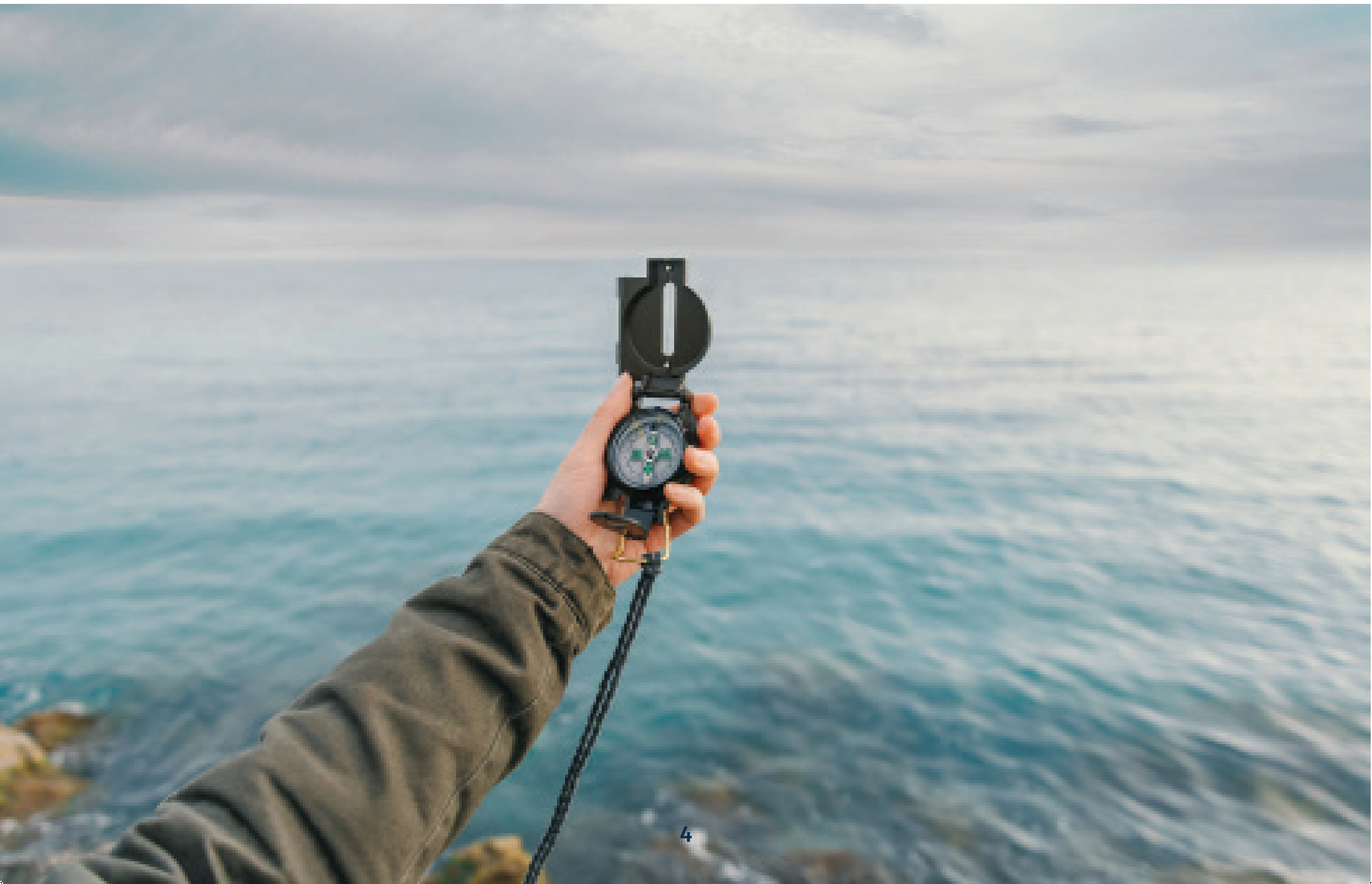
The law relating to Insolvency and Bankruptcy in India has recently become a hallmark of dynamism with the passage of the Insolvency and Bankruptcy Code, 2016 (Code) and is witnessing new horizons. The legal regime has undergone a paradigm shift to reach a position where the law is facilitating faster resolution of stressed assets, while also opening avenues for acquisition of businesses as going concerns.

The Code has received wide-spread acclaim at resolving the stress situation in the country's financial system. To keep pace, the legislature and the Insolvency and Bankruptcy Board of India, a dynamic institution, has been proactive in making amendments to the Code and the regulations to address the changing needs in insolvency resolution processes. This effort is being further supplemented by the judiciary by putting to rest various issues that have been creating a great deal of hurdles in giving effect to the provisions of the Code. Other stakeholders such as the Securities and Exchange Board of India (SEBI) have also notified various changes to further streamline the corporate insolvency resolution process towards the advancement of the objective of the Code.

Strengthening the Debt Market and Business Landscape

The Code is a path-breaking legislation, welcomed as a breath of fresh air. It is revitalising the staggering debt market in India that is reeling under the enormous pressure of non-performing assets, bad debts and banking frauds. In nearly two years of its operation, the Code has been a game-changer for all stakeholders in the country. The quarterly newsletter of Insolvency and Bankruptcy Board of India pegs the average at 69.7 per cent of total claims admitted in the 12 cases that had been resolved in the January-March quarter of 2018.

The Code consolidates the extant laws such as Sick Industrial Companies Act, Securitisation and Reconstruction of



Financial Assets and Enforcement of Security Interest Act, and Recovery of Debt Due to Banks and Financial Institutions Act, to one where the insolvency resolution process is streamlined and only two adjudicating authorities are involved – a departure from the old framework that involved multiple fora. The emphasis of the Code has always been on providing a time-bound resolution process, which transfers control of the stressed asset from the defaulting directors / promoters to the creditors. Like every other new legislation, the Code has also been subject to various interpretational challenges – however, the judiciary, including the National Company Law Tribunal (NCLT), the National Company Law Appellate Tribunal (NCLAT) and the Supreme Court, has been an active participant in providing a texture to the Code which is conducive for business and for the overall growth of the economy. It is also notable that the resolution plans selected by the committee of creditors is subject to further approval of the NCLT under Section 31 of the Code, which makes the plan binding on the corporate debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan. This provides a great degree of certainty to the process.

With the advent of the Code, India has made a leap in ranks in both; the World Bank's Ease of Doing Business and the World Economic Forum's Competitiveness Index by more than 30 places in the period between 2015 and 2017. It is providing a lease of life to stressed assets in India and an opportunity to potential acquirers to re-run these businesses with enhanced vigour. It can rightfully be called the hallmark of a reformed commercial-legal setup that welcomes investment and makes business profitable.

Opportunities for Investment

The Code has opened new avenues for foreign investors who seek to mark their presence in the opportunity-abounding Indian market, as well as for domestic acquirers, who are on the lookout for business expansion prospects. Enabling the successful resolution applicant to acquire extant businesses and run them free of liabilities – the new law presents a worthwhile platform for investors, especially foreign companies to expand in the South Asian economic behemoth. The Code has also shown sensitivity towards the continuous need for businesses to reform, design new strategies and structures for producing goods and services and reaching out to customers. Its in-built flexibility provides acquirers the space for creating innovative business plans that investors often desire in this dynamic business landscape. While the conventional principles of acquisition continue to apply, the investor is given the liberty to structure the acquisition in any manner which is commercially and legally feasible, and the Code has ensured that all these existing principles are now streamlined and moulded into a definitive and time-bound process which ultimately has the approval of the NCLT. The plan, with the blessings of the court, becomes binding on all parties which grants certitude to the situation, and a drastically reduced potential of protracted disputes. With the new timeline-driven regime, creditors are looking forward to an expedited resolution process, while new investors are keen to enter the market or expand for attractive prices in an expeditious process, which is a very welcome change in an otherwise slow legal framework.

The Process under the Code

- When a corporate debtor defaults in repayment of dues, corporate insolvency resolution process can be initiated by a financial creditor under Section 7, by an operational creditor under Section 9 or by the corporate debtor itself under Section 10 of the Code, by making an application to the NCLT.

- Admission by NCLT results in imposition of a moratorium, freezing claims against the debtor for 6 months or maximum 9 months, under Section 14. Upon admission of the application, the NCLT appoints an interim Resolution Professional (RP) who takes the responsibility of the debtor's assets and functioning, within 14 days of admission of the application.

- The interim RP holds office for 30 days, during which he takes control of the debtor's assets and operations, and collects financial information of the debtor from information utilities. The NCLT also makes a public announcement about the commencement of corporate insolvency resolution process, inviting claims from creditors.

- The interim RP constitutes the Committee of Creditors (CoC) comprising of the financial creditors, but a financial creditor who is a related party of the debtor does not have a right to represent, participate or vote in the CoC. Operational creditors are to be part of the CoC, without voting rights, if their aggregate dues are not less than 10% of the debt.

- Within 7 days of its constitution, the CoC decides whether the interim RP should continue as the RP.

- As per Section 12, the corporate insolvency resolution process must be concluded within 180 days from the date of admission of the application by the NCLT.

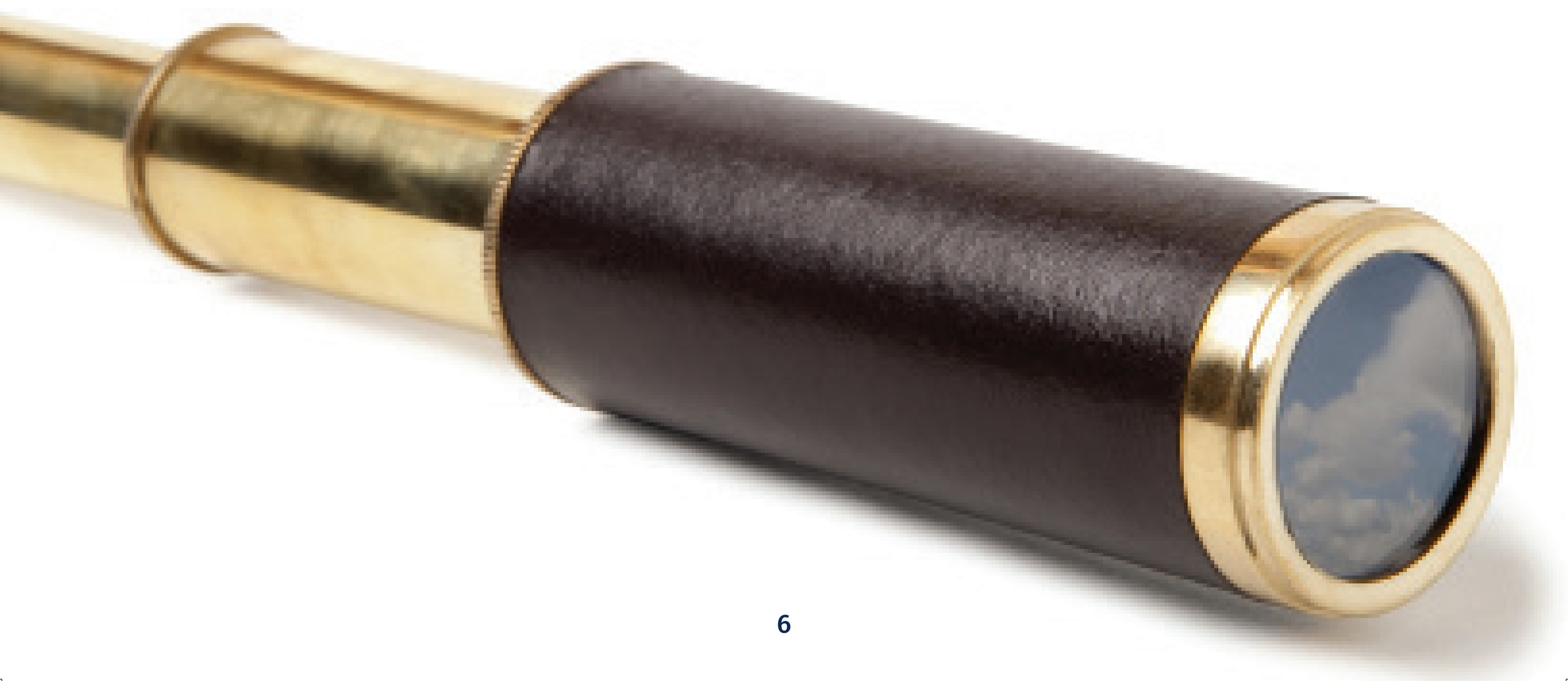
- If the CoC finds the case complex, the NCLT may grant a one-time extension of a maximum of 90 days.

- The CoC takes decisions regarding insolvency resolution, while the RP conducts the process and manages the corporate debtor during the period.

- The RP is required to prepare an information memorandum so as to enable resolution applicants (RAs) to prepare a resolution plan (plan).

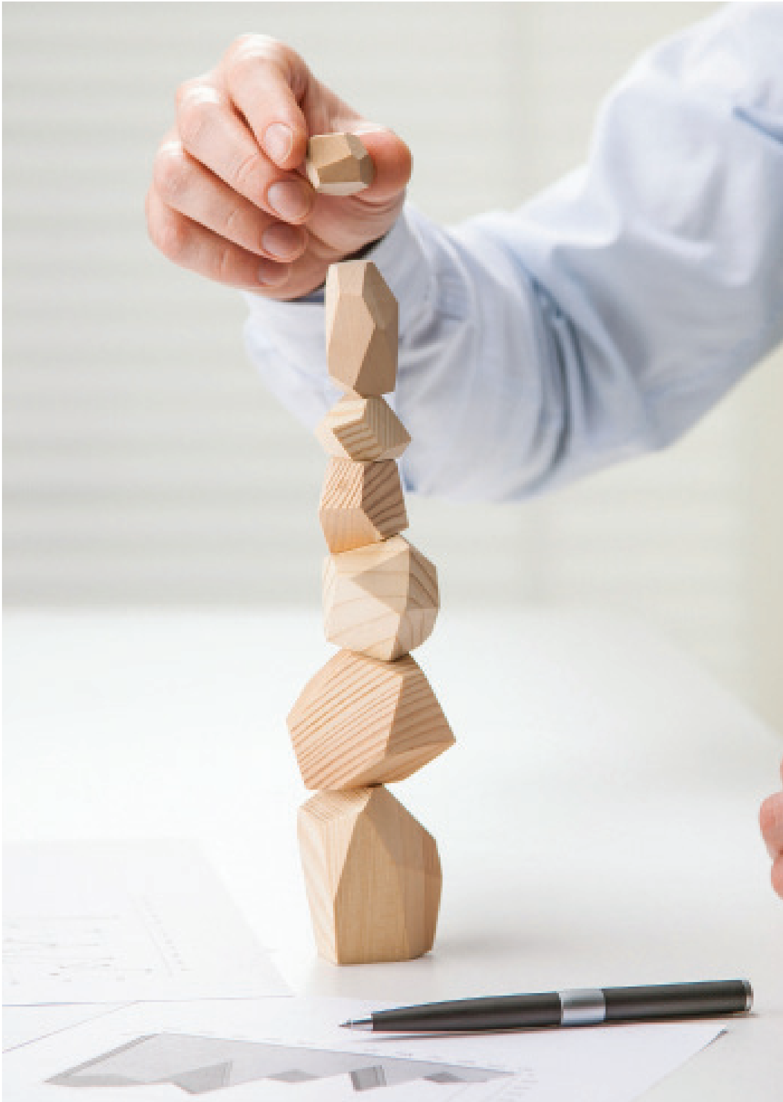
- Upon receipt of the plans from RAs, the CoC deliberates and approves one of the plans. The plan is then sent to NCLT for approval and implementation.

- In case the CoC does not approve of any of the plans submitted, the corporate debtor goes into liquidation.



The Balancing Act between the Legislation and Interpretation

Both the legislature and the judiciary have been proactive in their engagement with insolvency laws. While the Code is possibly the one legislation which has received maximum scrutiny within its first two years, the Parliament has been quick to take note of impediments, and the concerned courts have continuously been pivotal in settling disputes and developing jurisprudence around the Code which provides guidance to every subsequent process being carried out. The Courts have also been mindful of not stepping into the territory moulded by the Code and economic policies and have time and again upheld the basic principles which govern the Code and its application. Here are some key developments in Insolvency law framework:



Constitutional Validity of the Code

In a landmark judgment in January 2019, the apex court upheld the constitutional validity of the Insolvency and Bankruptcy Code. The judgment touches upon a multitude of aspects of the Code, and is an authority on various questions that have come up in respect of its interpretation. In the said judgment, Hon'ble Justice Nariman has extensively dealt with the objective of the Code which is reorganization / revival / continuation and insolvency resolution of corporate debtors, in a time-bound manner so as to prevent the value of the assets of such persons from depleting, while maximizing value of the assets of such persons so that they are efficiently run as going concerns, promoting entrepreneurship as the persons in management of the corporate debtor are removed and replaced by new entrepreneurs, and enhancing viability of credit in the hands of banks and financial institutions.

One of the key observations of the court was that the resolution process is not adversarial to the corporate debtor but protective of its interests.

It is critical to note that that the Supreme Court found that the classification of creditors as financial and operational creditors is not in violation of Article 14 of the Constitution of India. It noted that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money, whereas an operational debt would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority. Outlining the difference between the two classes of creditors, the Court indicated that for preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code. This is also the reason why giving voting rights to only financial creditors is also not unconstitutional. NCLAT has while looking into viability and feasibility of resolution plans that are approved by the committee of creditors, always considered whether operational creditors are given roughly the same treatment as financial creditors, and if they are not, such plans are either rejected or modified so that the operational creditors' rights are safeguarded.

There is a paradigm shift in legislative policy, which has shifted from the concept of inability to pay debts to determination of default. The Supreme Court was sensitive to the fact that the legislature and the government ought to be permitted to experiment in order to foster change in the economy. A denial of the same by adoption of rigid methodologies by the courts, would not only hinder growth, but will also result in adverse and grave consequences to the nation.

Once the Code gets triggered by admission of a creditor's application under Sections 7 to 9, the proceeding, being a collective proceeding, is a proceeding *in rem*. Being a proceeding *in rem*, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. If the committee of creditors is not yet constituted, the NCLT, in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. Further, Section 12A requires ninety per cent of the committee of creditors to allow withdrawal, and this high threshold has been explained in the Insolvency Law Committee Report as all financial creditors have to put their heads together to allow such withdrawal as, ordinarily, an omnibus settlement involving all creditors ought, ideally, to be entered into. Under Section 60 of the Code, the committee of creditors do not have the last word on the subject. If the committee of creditors arbitrarily rejects a just settlement and/or withdrawal claim, the NCLT, and thereafter, the NCLAT can always set aside such decision under Section 60 of the Code. Hence, Section 12A of the Code was also declared as constitutionally valid.

One of the most contentious issues under the Code, Section 29A, was also brought to the Court's attention. A resolution applicant has no vested right for consideration or approval of its resolution plan and thus, no vested right is taken away by application of Section 29A. It was also held that proviso to Section 35(1) (f) is not arbitrary and violative of Article 14 of the Constitution, as there is no vested right in an erstwhile promoter of a corporate debtor to bid for the immovable and movable properties of the corporate debtor in liquidation. The legislative purpose which pervades Section 29A continues to do so even when it applies to liquidation.

The policy as well as the period of giving one year to a defaulter to pay off the debts in terms of Section 29A(c) was found valid as it is a policy matter decided by the RBI and which emerges from its Master Circular, as during this period, an NPA is classified as a substandard asset. The ineligibility under Section 29A attaches only after lapse of the one year period as the NPA gets classified as a doubtful asset.

A very convoluted question was put to rest when the Court held that in terms of the usage of 'related party', the persons who act jointly or in concert with others are connected with the business activity of the resolution applicant. Such persons must be connected with the resolution applicant within the meaning of Section 29A (j). In the absence of showing that such person is "connected" with the business activity of the resolution applicant, such person cannot be disqualified. Further, in order to enable resolution applicants to come forward for MSMEs, it was necessitated that an exception for application of Section 29A be carved out for them.

Lastly, when it was argued that in the event of liquidation, the Operational Creditors will never get anything as they rank below all other creditors including other unsecured creditors which is arbitrary and discriminatory, the Court noted that the reason for differentiating between financial debts and operational debts is in the relative importance of the two types of debts when it comes to the object sought to be achieved by the Code.

Repayment of financial debts infuses capital into the economy inasmuch as banks and financial institutions are able, with the money that has been paid back, to further lend such money to other entrepreneurs. This rationale creates an intelligible differentia between the two types of debts. Thus, it was noted that unsecured debts are of various kinds, and so long as there is some legitimate interest sought to be protected, having relation to the object sought to be achieved by the statute in question, Article 14 does not get infracted.

Commercial Wisdom of the Committee of Creditors

A crucial development was the decision of the Supreme Court where it upheld the supremacy and the commercial wisdom of the decisions taken by the members of a committee of creditors, comprising of financial creditors. The Court held that neither the adjudicating authority nor the appellate authority has been endowed with the jurisdiction to reverse the commercial wisdom of dissenting financial creditors. The Court dismissed an argument that the dissenting financial creditors were only a minority in the committee of creditors. It went to elucidate that the fact that a substantial or majority percent of financial creditors have accorded approval to the resolution plan would be of no avail unless the approval is by a vote of not less than 75% (although this threshold has been changed to 66% after the amendment of 2018) voting share of the financial creditors.

The Court rejected the argument that the financial creditors' power to cast their vote under section 30(4) of the Code is coupled with a duty to exercise that power with care and reason, keeping in mind the legislative intent and spirit of the Code i.e.to revive the corporate debtor and not to mechanically move it to the brink of liquidation. It was reasoned that accepting such an argument would require the Court to re-write the provisions of the Code which would result in doing violence to the legislative intent of having consciously not stipulated that as a ground to challenge the commercial wisdom of the minority (dissenting) financial creditors. The commercial decision of the committee of creditors of not approving the resolution plan or rejecting it is not justiciable. The adjudicating authority is required to reckon only the factors specified under section 30(2) or 61(3) of the Code, as the case may be.

This judgement is one of the landmark decisions taken by the apex court as it is reflective of the judiciary handing over the reins of the corporate insolvency resolution process to the financial creditors and their judgement. The Court has, by virtue of this decision ensured that no external authority or party shall be allowed to interfere in the insolvency resolution process or substitute its wisdom or knowledge for that held by the financial creditors.

Resolution Plans Should not be Discriminatory and Should Seek to Maximise Assets

The NCLAT has addressed various questions relating to fairness of resolution plan in its judgment in the case of *Binani Industries*

Limited Vs. Bank of Baroda. It held that the resolution plan submitted by Rajputana Properties Private Limited for Binani Cement was discriminatory and contrary to the scheme of the IBC as it prescribed differential treatment for similarly situated operational creditors or the financial creditors on one or other grounds, offered only liquidation value to dissenting creditors and the Committee of Creditors did not give due consideration to the revised plan submitted by Ultratech Cement Limited.

The appellate tribunal emphasised that the first order objective of the Code is "resolution"; the second order objective is "maximisation of value of assets of the Corporate Debtor" and thereby for all creditors, and not maximization of value for a stakeholder or a set of stakeholders; and the third order objective is "promoting entrepreneurship, availability of credit and balancing the interests". This order of objectives is sacrosanct.

It said that while only financial creditors are members of the committee of creditors, the liabilities of all creditors who are not part of the negotiation process must also be met in any negotiated solution.

Both Financial Creditors and Operational Creditors are critical for businesses to run. It is possible to balance interests of all stakeholders if the resolution maximises the value of assets of the Corporate Debtor, and not when the resolution maximises the value for a stakeholder or a set of stakeholders such as Financial Creditors.

It further held that any resolution plan which provides liquidation value to the operational creditors or liquidation value to the dissenting financial creditors in view of clause (b) and (c) of Regulation 38(1), without any other reason to discriminate between two set of creditors similarly situated such as financial creditors or the operational creditors cannot be approved being illegal. Dissenting financial creditors cannot be discriminated on the basis of Regulation 38. Section 53, including explanation given therein cannot be relied upon while approving the resolution plan.

Company can be an "undischarged insolvent" for Section 29A

Section 29A of the Code provides that a person shall not be eligible to submit a resolution plan if such person, or any other person acting jointly or in concert with such person is an "undischarged insolvent". The NCLT stated the definition of person in the Code included a company and therefore the usage of the term 'person' in Section 29A has to be read in harmony with the statutory meaning given to the word. Therefore, a company or a body corporate can be declared as an undischarged insolvent by any competent forum under any statute. The NCLT, while approving the resolution plan for Bhushan Energy Limited, appreciated that although the expression, "undischarged insolvent" had not been defined in the Code or the Companies Act, 2013, it has to be seen if the person cannot pay its debts as they become due and payable. The NCLT held that an initiation of corporate insolvency resolution process under the Code may not lead to the conclusion that a person is an undischarged insolvent. This is due to the fact that resolution process is an attempt to rescue a fund starving body corporate and restore it to a sustainable financial ease. Moreover, a declaration of a body corporate as an undischarged insolvent should be made by a court of competent jurisdiction and the NCLT was not of the opinion that the Adjudicating Authority under the Code was vested with such jurisdiction.

Regulatory Developments

The Insolvency and Bankruptcy Board of India along with the Reserve Bank of India (RBI) and SEBI have also taken strides in ensuring that the Code and its implementation are streamlined and simplified. At every juncture, efforts have been taken to ensure that potential problems faced by all stakeholders are identified and corrected.

RBI's Revised Framework on Resolution of Stressed Assets

The RBI's Revised Framework on Resolution of Stressed Assets was issued vide its circular dated February 12, 2018. It seeks to harmonise existing guidelines with norms specified in the IBC for resolution of stressed assets. The Circular has repealed all earlier restructuring schemes (CDR, JLF, SDR, S4A, flexible restructuring) and the lenders are required to develop board-approved policies for resolution of stressed assets under this framework.

For existing defaults, where resolution plan aggregate exposure is greater than Rs. 20 billion, a resolution plan has to be finalized within 180 days from March 1, 2018. All cases where earlier schemes of RBI were invoked but not implemented are to fall under the revised framework. If the implementation of the resolution plan fails during specified period, lenders are to take the borrower to the IBC process.

The Circular created great unrest in certain sectors, especially the power sector. Writ petitions were filed in various courts, but the case from Allahabad High Court is noteworthy (*Independent Power Producers Association of India Vs. Union of India*). The court held that the February 12 circular is valid under Section 35 AB of the Banking Regulation Act.

On appeal, the Supreme Court, in the matter of *Reserve Bank of India Vs. Dharani Sugars and Chemicals Ltd* struck down the circular while upholding the constitutionality of Section 35AA and 35AB of the Banking Regulation Act. It was stated that the aforesaid provisions are not excessive in any manner, nor do they suffer from the lack of guiding principles. The Statement of Objects and Reasons and the Preamble of the Banking Regulation Act were seen as providing sufficient guidance in this regard.

It was observed that prior to the enactment of section 35AA, the RBI could have issued directions to banking companies to initiate insolvency resolution process under the Code, in furtherance of section 21 and 35A (section 35A conferred general powers on the RBI to issue directions to banking companies, in public interest, or in the interest of banking policy, or to prevent the affairs of the company being conducted in a prejudicial manner or to secure its proper management). However, after the introduction of section 35AA, it was observed that such directions could only be issued within the strict contours of this provision, which require:

- the Central Government's prior authorization, and
- occurrence of a default with regard to specific assets.

Therefore, by necessary implication, it meant that this provision prohibits the power to issue directions with regard to insolvency resolution of stressed assets from being exercised in any other manner apart from the mode prescribed under section 35AA.

Therefore, section 35AA only referred to specific cases of default for specific stressed assets and not to the issuance of directions to banking companies generally, as had been done in the impugned circular. As a result of the aforesaid, the impugned circular was declared to be ultra vires as a whole and without any effect in law. While declaring the impugned circular as ultra vires, the Supreme Court recognised and upheld the powers of the RBI to issue directions in respect of specific "default" under the Code. Therefore, all directions where the RBI has identified specific cases of defaults for reference under the Code are good in law.

However, the RBI has been prompt and issued a press release the very next day acknowledging the decision of the Supreme Court with an assurance that it was in the process of reworking the specifics of a new circular to govern stressed assets. It is hoped that this circular shall be released very soon and there shall not be a major shift in the status quo.

Implementation of Resolution Plans

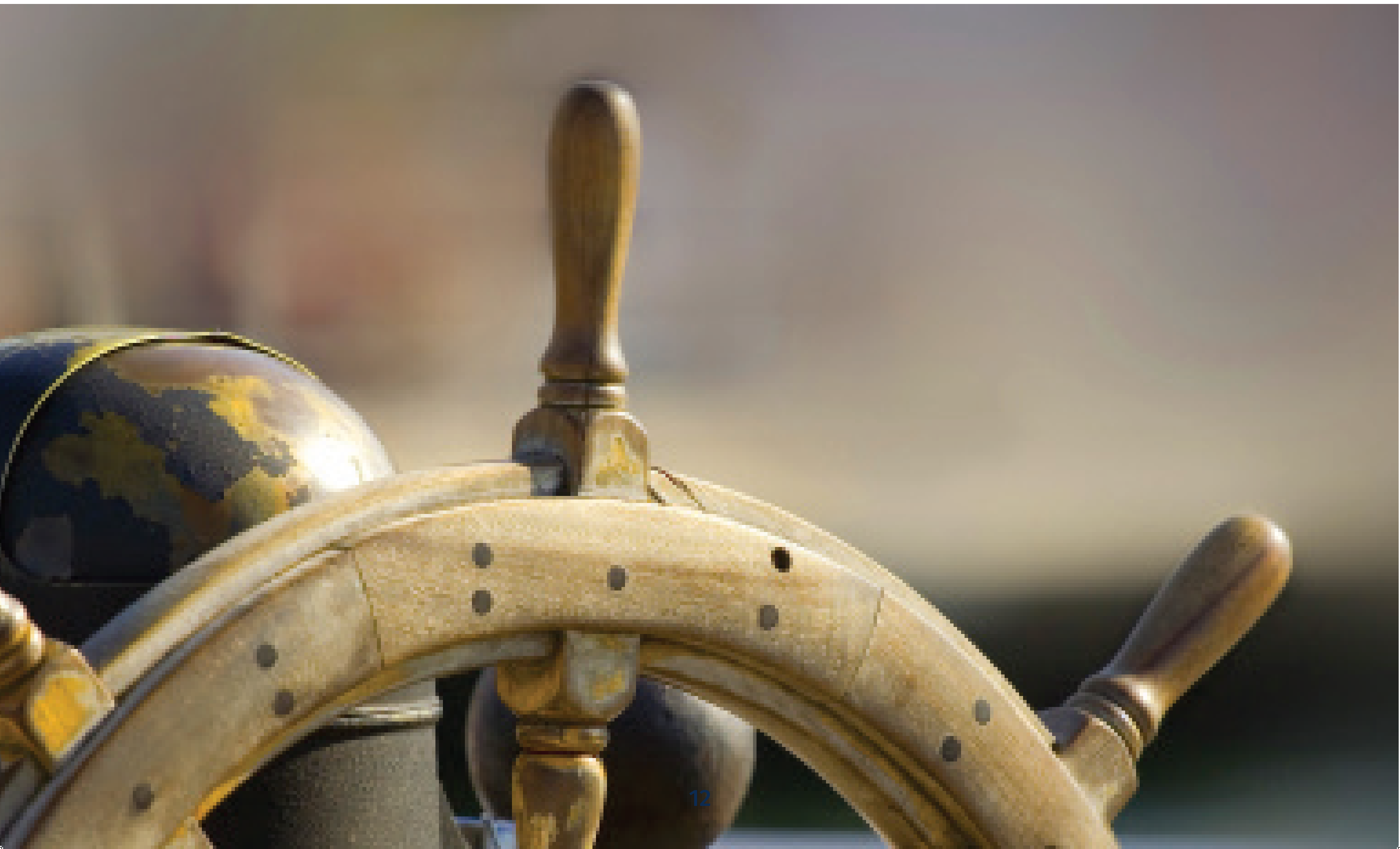
The objective of the Code is resolution of insolvency faced by the Corporate Debtor by inviting and implementing resolution plans. Upon receipt of resolution plans from resolution applicants, the committee of creditors deliberates and approves one of the plans. The plan is then sent to NCLT for approval and implementation. There are a number of incentives that are afforded to the resolution applicant (i.e. the investors) at this stage.

The biggest incentive is Section 31 of the Code, which provides comfort to the resolution applicant that once the resolution plan submitted to the committee of creditors and consequently, the NCLT has approved, the plan becomes binding on the corporate debtor and its employees, members, creditors and other stakeholders involved in the plan. The approval of the terms of the resolution plan, including concessions sought by the resolution applicant go a long way in providing a smooth and seamless transition for the resolution applicant to take over the corporate debtor without having to be held answerable for the prior mistakes of the earlier promoters. Therefore, an approval of the plan by the adjudicating authority effectively gives the resolution applicant a clean slate in respect of the corporate debtor and its operations.

Exemptions provided under various SEBI Regulations

This is also supported by the SEBI who have provided concessions for resolution applicants taking steps to implement the resolution plan. In this regard, the SEBI published a discussion paper on compliance with SEBI Regulations by listed entities undergoing corporate insolvency resolution process under the Code. A number of recommendations made under the discussion paper were also implemented expeditiously.

Regulation 3 and 4 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Takeover Regulations) exempts acquisitions made pursuant to a resolution plan approved under Section 31 of the Code from the obligation to make an open offer. The acquisition of Bhushan Steel by Tata Steel, acquisition of Electrosteel by



Vedanta and the acquisition of Monnet Ispat by JSW Steel under the Code were exempted from making an open offer under the Takeover Regulations.

Similar concessions exist under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR). Regulation 23 of the LODR earlier required that the approval of shareholders be sought for all material related party transactions. However, a proviso has been added to the effect that the approval of shareholders shall not be required for listed companies whose resolution plan has been approved under the Code, subject to disclosure to recognised stock exchange within one day of the resolution plan being approved.

The provisions for a listed entity disposing shares in its material subsidiary only after passing a special resolution in its general meeting under Regulation 23 of LODR was relaxed in cases where such a disposal was effected under a resolution plan duly approved under the Code. Further, Regulation 31A of the LODR provides an exemption from the procedure to be followed by listed entities for re-classification of persons as promoter or the public if such re-classification takes place pursuant to a resolution plan. A listed entity under the Code is also not required to obtain prior approval of the SEBI and stock exchanges for the scheme of arrangement it is entering in.

The SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 also exempts listed entities whose resolution plan had been approved under the Code from complying with the requirements of preferential issue of equity shares. The said relaxation extends to preferential issue of convertible securities as well.

These amendments in the extant regulatory regime carve out exceptions to ensure that the implementation of the resolution plan doesn't face undue delay on account of permissions and approvals which are sought from the SEBI.

Approval of the Competition Commission

A concern that has been faced for some time was the lack of any provision in the Code on the approvals of the concerned regulators or authorities, if required, on the resolution plan prior to the resolution plan being approved by the NCLT. This was resulting in several conditional resolution plans being approved by the NCLT, which would also create a doubt over quick implementation of the resolution plan. One such regulator whose approval is invariably prescribed as a condition to the effectiveness of resolution plans was the Competition Commission of India (CCI). Under the Competition Act, 2002, an acquirer's obligation to notify the CCI is triggered upon execution of a binding document conveying an agreement or even a decision taken by the acquirer to acquire control, shares, voting rights or assets.

In this context, one of the earliest uncertainties was as to what would constitute a binding document for a prospective buyer to notify the CCI i.e. whether the submission of the resolution plan or the approval of such resolution plan by the committee of creditors. In many cases, the CCI approval was being sought after the approval of the resolution plan by the NCLT. This would result in delays in implementation of the resolution plan. Another potential concern would be that in the event CCI approval was not granted, the corporate debtor would face liquidation for non-implementation of the plan.

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 has sought to address this issue by specifically providing that the approval of the CCI shall be required to be obtained prior to approval of a resolution plan by the committee of creditors. This ensures that the resolution plan will be in a position to be implemented after approval by the NCLT and there are no delays on implementation of the resolution plans or uncertainty regarding the CCI approval. The CCI has also been supporting the processes and there have been cases where CCI has granted approval within 15-20 days, which is noteworthy.

Upsides Available to Investors

Acquisition of companies under the Code provides the resolution applicants with a multitude of advantages which are unique to the insolvency resolution process carried out pursuant to an application initiated under the Code.

Capital Intensive Projects

The cases which have been referred for resolution under the Code mostly include companies that are major players in the power and infrastructure sectors. The initial capital investment required to even enter the market in the aforesaid sectors is huge, combined with the time taken for procurement of fixed assets and all authorisations and clearances appended to such fixed assets. However, the opportunity to acquire a company with existing assets and authorisations comes as an offer on a silver platter. Moreover, the approval of the resolution plan obtained under Section 31 of the Code, eases the process of ensuring compliance with all required consents and guarantees a free and clear title to all assets acquired in the process.

In such cases, the resolution applicant only requires to infuse working capital in such companies to have the projects up and running. Once taken over, the company can be nursed back to health with proper governance and sound financial policies supplanted by the resolution applicant. The resolution applicant can even increase the existing capacity of such projects on the basis that the foundation already exists. Such a capacity building exercise was undertaken by Tata Steel in its acquisition of Bhushan Steel successfully.

Reliability of Information Supplied

During the corporate insolvency resolution process, the resolution professional is in control of the corporate debtor. Therefore, dissemination of information regarding the corporate debtor and its assets and liabilities is done through an impartial arbiter with no vested interest in the corporate debtor. Therefore, the quality of information which is provided is highly reliable. A disclosure made by the resolution professional in such cases may be safely relied upon for due diligence by the resolution applicant, thereby increasing the ease of conducting business and implementation of the resolution plans.

Success of the code

Given the prime objective of the Code is "resolution of stressed assets and maximization of their value", the measure of success of the Code can only be seen through the actual resolution of stressed assets. The implementation of the resolution plan may result in immediate payment of outstanding dues of the creditors of the corporate debtor, but the resolution of stress in any company, and its multiplier effect in the economy will only be felt over a longer period of time.

The Code is a recent enactment and while there are a large number of resolved cases, the effects of the turnaround have been demonstrated only in a few early cases.

However, one key attribute of a law of this nature is that it acts as a deterrent for corporates and creditors to delay resolution of stress situations. To this end, the Code has been a significant success especially with the regulatory push towards timely resolution, along with the prevention of defaulting promoters from participating in the resolution process under Section 29A of the Code. The affected promoters have approached the judiciary on multiple occasions, but the judiciary has been cognizant of the spirit of the Code and has upheld the exclusion of such defaulting promoters from the resolution process. This has prompted multiple instances of corporates avoiding insolvency proceedings through settlements with the creditors.

As a summary, of the total 1,484 cases admitted for corporate insolvency resolution process till December 31, 2018, 142 cases were either settled or released on appeal / review – while 63 cases were withdrawn from corporate insolvency resolution process with the consent of creditors under section 12A of the Code. A further 79 cases were successfully resolved, while 302 cases have been sent for liquidation.[1]

It may be noted that cases being sent for liquidation are not a failure of the Code. They are, in fact, a success, as they result in the system being able to focus its energies and efforts in other cases where there is a possibility of resolution, instead of flogging a quintessential dead horse. It enforces the idea of a timely resolution – instead of continuing to pursue efforts to save the corporate where there is no scope of recovery. This is another means of achieving the objective of resolution of stress in the economy – by focusing resources on resolvable cases. Liquidation proceedings also provide an avenue of realizing as much value as possible from a corporate debtor – that has not been successful in generating value as a going concern – through sale of its available assets.

Conclusion

The three arms of the government as well as other stakeholders are relentlessly striving to make the Code functional and ensure speedy resolution of stressed assets despite some bottlenecks which need to be resolved. Section 31 of the Code makes the resolution plan binding on all stakeholders. With the recent amendments, homebuyers have been identified as financial creditors. The Code needs to bring some clarity on status of the home buyers as secured or unsecured creditors, and a generic clarity on how differential charges held over assets are to be dealt with, which becomes significant in the waterfall mechanism under Section 53.

The Code is a hallmark of the economy trying to rejuvenate itself. The level of activity by the three arms of the government is unprecedented. India's improvement in global rankings and credit ratings is a testimony to the changing landscape of economy. The Code is expected to further strengthen the process of resolution of stressed assets, and with the pace of developments discussed in this piece, the process can be expected to be nothing short of promising.

1 IBBI News Letter for the period October – December 2018 (https://www.ibbi.gov.in/uploads/publication/QUARTERLY_NEWSLETTER_FOR_OCT_DEC_2019.pdf)

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About FICCI

Established in 1927, FICCI is the largest and oldest apex business organisation in India. Its history is closely interwoven with India's struggle for independence, its industrialisation, and its emergence as one of the most rapidly growing global economies.

A non-government, not-for-profit organisation, FICCI is the voice of India's business and industry. From influencing policy to encouraging debate, engaging with policymakers and civil society, FICCI articulates the views and concerns of the industry. It serves its members from the Indian private and public corporate sectors and multinational companies, drawing its strength from diverse regional chambers of commerce and industry across the states, reaching out to over 2,50,000 companies.

FICCI provides a platform for networking and consensus building within and across sectors and is the first port of call for the Indian industry, policymakers and the international business community.

About SAM & Co

Shardul Amarchand Mangaldas, founded on a century of legal achievement, is one of India's leading full service law firms. Our mission is to enable business by providing solutions as trusted advisors through excellence, responsiveness, innovation, and collaboration.

We are one of India's most well recognised firms, and are known globally for our integrated approach. With more than 550 lawyers including over 110 partners, we provide exceptional services across practice areas which include General Corporate, Merger & Acquisition, Private Equity, Banking & Finance, Insolvency & Bankruptcy, Competition Law, Dispute Resolution, Projects & Project Finance, Capital Markets, Tax, Intellectual Property and Venture Capital. We are at the forefront of global and Indian M&A and private equity transactions, cutting edge high risk litigation and advice on strategically important matters across a spectrum of practices and industries for our multi-jurisdictional clients.

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The LEGAL 500

'Tier 1' in 2019 for Banking & Finance, Capital Markets, M&A, Private Equity, Project Finance, Project Development: Infrastructure, Oil & Gas and Transport

IFLR 1000

'Band 1' in 2019 for
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Corporate/M&A
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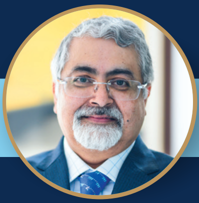

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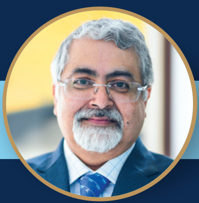

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