ENVISIONING THE EMERGING FACADE OF CORPORATE GOVERNANCE IN INDIA IN THE LIGHT OF INSOLVENCY AND BANKRUPTCY CODE, 2016

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PROLOGUE

The existence of corporate governance is, in this fast pacing corporate eon, a requisite of assured success in maintaining financial stability in the business, amongst other imperative parameters. On the other hand, the use of credit mechanism is also extensive and pervasive in all the sectors of the economy. As of 2015, the insolvency resolution in India took 4.3 years on an average, which was higher when compared to United Kingdom (1 year), United States of America (1.5 years), and South Africa (2 years).[2] Ranking 136th out of 189 countries in the World Bank Index on the ease of resolving insolvency,[3] the alarmed Indian corporate system now seeks redemption with the enactment of the Insolvency and Bankruptcy Code of 2016. The coexistence of effectual corporate governance and an effectual code of insolvency and bankruptcy is, although, an ideal–case scenario, yet attainable. In an attempt to assess the same, it is crucial to have an overview of the following:

WHAT IS CORPORATE GOVERNANCE: MEANING, HISTORY AND IMPLICATION

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[2] The World Bank, 'Time to resolve Insolvency (years)' (2016) <https://data.worldbank.org/indicator/IC.ISV.DURS> accessed 13 September 2017.

[3] World Bank Group, *Doing Business 2016: Measuring Regulatory Quality and Efficiency* 208 (13th edn, World Bank 2016).

"*Corporate Governance is the blood that fills the veins of transparent corporate disclosure and high quality accounting practices. It is the muscle that moves a viable and accessible financial reporting structure.*"

- *Kumara Mangalam Birla Committee Report on Corporate Governance, 2000*

The indispensability of corporate governance in the contemporary corporate scenario is irrefutable. In common parlance, it refers to a system which is devised for effective management and control of the companies. Defied to be an end, corporate governance is referred to as a means for persistent maintenance of 'economic efficiency, sustainable growth, and financial stability',[4] defined as a system by which companies are directed and controlled, the report of the Cadbury Committee in 1992, further expounded that the underlying principles for the same are 'openness, integrity, and accountability'.[5] It was, however, only after the global financial crisis of 2007-2008 that the urge for corporate governance gained momentum. The Financial Crisis Inquiry Commission in its report averred that the crisis was avoidable and concluded, "dramatic failures of corporate governance and risk management at many systemically important financial institutions were the key cause of this crisis."[6]

In the context of the Indian corporate culture, the inadequacy of provisions relating to corporate governance under the Companies Act, 1956, triggered SEBI to constitute a series of committees namely, Kumar Mangalam Birla Committee in 2000, Narayana Murthy Committee in 2003 and Adi Godrej Committee in 2012.[7] The entailment of provisions for corporate governance in India under the Companies Act, 2013, SEBI listing regulations and clause 49 of listing agreement, are thus accredited to the deliberations by these committees and recommendations thereof. So much so, that SEBI has, at present, set up a committee under the Chairmanship of Uday Kotak, Executive Vice Chairman and Managing Director of Kotak Mahindra Bank, so as to heighten the level and standard of corporate governance of the listed companies in India.[8]

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[4] Organisation for Economic Co-operation and Development, *G20/OECD Principles of Corporate Governance* (OECD 2015).
[5] Adrian Cadbury, *Report of the Committee on the Financial Aspects of Corporate Governance* (1992).
[6] The Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report* (US Government Printing Office 2011) xviii.
[7] Aarati Krishnan, 'All you Wanted to know about corporate governance' *The Hindu Business Line* (21 August 2017) 1.
[8] KR Srivats, 'SEBI forms committee on corporate governance' *The Hindu Business Line* (New Delhi, 4 June 2017).

DELINEATING 'INSOLVENCY' AND 'BANKRUPTCY'

Insolvency, in simpler terms, is a state of financial difficulty where a company squarely fails to run its business at the current pace. With a two-fold test –'cash flow' test where it is unable to pay debts, and the 'balance sheet' test where the liabilities exceed the realizable assets, insolvency is dissimilar from bankruptcy.[9] Bankruptcy, having originated from the Latin term *bancus ruptus*,[10] is defined as a statutory procedure by which the insolvent debtor obtains financial relief and undergoes a judicial reorganization or liquidation of the debtor's assets for the benefit of creditors.[11] Deciphering the meek line of differentiation between 'insolvency' and 'bankruptcy', it can be indisputably averred that while insolvency is a state of business, bankruptcy is the declaration and adjudication of that state by the court of law, involving a legal process. Irrespective of the uncoordinated appearance of insolvency and bankruptcy, the fundamental relation between the two is significant as it defines a bankrupt and the point of initiation of solvency and bankruptcy legislative framework in India owes its genesis to English laws, as also reasoned by the absence of any indigenous laws prior to the British era.[12] Sections 23 and 24 of the Government of India Act, 1800 were the earliest insolvency related provisions in Indian legislative machinery through which insolvency jurisdiction was conferred on Bombay, Calcutta, and Madras.[13] However, the Presidency Towns Insolvency Act, 1909 and Provisional Insolvency Act, 1920 were two imperative enactments that dealt with personal insolvency and had analogous provisions, with the only difference in the extent of territorial jurisdiction. While the former was applicable to only the presidency towns, the latter applied to the whole of India.

The outright change in the facet of this branch of law post-independence is perceptible. It is a subject matter of Concurrent List of the Constitution of India in its 9th Entry, thus enabling both state and centre to enact laws on the same. Under the Companies Act, 1956/2013, Part VI A, VII & Section 391, embodied the insolvency and bankruptcy provisions.[14] This act, which left the

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[9] Robert J Stearn, Jr and Cory D Kandestin, 'Delaware's Solvency Test: What Is It and Does It Make Sense? A Comparison of Solvency Tests under The Bankruptcy Code and Delaware Law' (2011) 36 Delaware Journal of Corporate Law 165.
[10] Louis Edward Levinthal, 'The Early History of English Bankruptcy' (1919) 67 University of Pennsylvania Law Review 1, 2.
[11] Bryan A Garner, *Black's Law Dictionary* (9th edn, 2009) 867.
[12] Mulla, *The Law of Insolvency in India* (2nd edn, N M Tripathi 1958) 1-2.
[13] Law Commission of India, *Report on Insolvency Laws* (Law Com No 26, 1964) paras 2-3.

terms ‘insolvency’ and ‘bankruptcy’ undefined, squarely failed in dealing with cases pertinent to the same, consuming between 3 to 15 years for winding up the company.[15] In pursuance of the recommendations of the T. Tiwari Committee, set up by Reserve Bank of India (hereinafter RBI) in 1981, the Parliament enacted Sick Industrial Companies (Special Provisions) Act, 1985, (hereinafter SICA), which provided for creation of the Board of Industrial and Financial Reconstruction (hereinafter BIFR).[16] Out of the total 5800 cases reported to BIFR between 1987 and 2014, the rehabilitation plan was implemented in only 9% of them, thus highlighting the stark failure of the Act of 1983.[17] The same was followed by the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (hereinafter RDDBFI), enacted in furtherance of the recommendations of the High Level Committee on the Financial System (Narasimham Committee I, 1991). RDDBFI provided for the establishment of Debt Recovery Tribunal (hereinafter DRT) and Debt Recovery Appellate Tribunal (hereinafter DRAT). The disappointing performance of DRTs and DRATs and subsequent recommendations of the Narasimham Committee II, 1998 led to the enactment of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (hereinafter SARFAESI) Act in 2002. The declining recovery rates from 61% in 2008 to 21.9% in 2013 assert the worsening performance of the SARFAESI Act, 2002.[18]

After more than a decade of SARFAESI Act having come into force, the insolvency bankruptcy laws have now been consolidated as a separate comprehensive code in the form of IBC (as also recommended by the NL Mitra Committee, 2001).[19] It has amended 11 laws including Companies Act, 2013, DRT Act, 1993 and SARFAESI Act, 2002.[20]

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[14] Ernst & Young LLP, ‘The Insolvency and Bankruptcy Code, 2016: An Overview’ (Ernst & Young LLP, July 2016) <http://www.ey.com/Publication/vwLUAssets/ey-the-insolvency-and-bankruptcy-code-2016-an-overview/%24FILE/ey-the-insolvency-and-bankruptcy-code-2016-an-overview.pdf> accessed 12 October 2017.
[15] Rajeswari Sengupta, Anjali Sharma, Susan Thomas, ‘Evolution of the insolvency framework for non-financial firms in India’ (2016) Indira Gandhi Institute of Development Research Working Paper No. 2016-018, 12 <http://www.igidr.ac.in/pdf/publication/WP-2016-018.pdf> accessed 15 October 2017.
[16] Board of Industrial and Financial Reconstruction, ‘Genesis of SICA, 1985<http://bifr.nic.in/genisis.htm> accessed 12 October 2017.
[17] Rajeswari Sengupta, Anjali Sharma, Susan Thomas, ‘Evolution of the insolvency framework for non-financial firms in India’ (2016) Indira Gandhi Institute of Development Research Working Paper No 2016-018, 8 <http://www.igidr.ac.in/pdf/publication/WP-2016-018.pdf> accessed 15 October 2017.
[18] Reserve Bank of India*, Report on Trends and Progress of Banking in India* (2008-2013).
[19] Reserve Bank of India*, Report of Dr. N L Mitra Committee on Bankruptcy Laws* (2001) 8.
[20] ‘Legislative Brief on the Insolvency and Bankruptcy Code, 2016’ (*PRS Legislative Research*, 5 May 2016) <http://www.prsindia.org/administrator/uploads/media/Bankruptcy/Legislative%20Brief-%20Bankruptcy%20code.pdf> accessed 14 October 2017.

DECODING THE CODE: SALIENT FEATURES OF INSOLVENCY AND BANKRUPTCY CODE, 2016

In an attempt to consolidate the laws relating to insolvency and bankruptcy, the IBC was passed by the Parliament and eventually received Presidential assent on 28th May, 2016.[21] Developing an institutionally sound framework to assist corporates, limited liability partnerships, partnership firms, individuals and other body corporates to overcome the state of insolvency, this code seeks to reform the existing fragmented system. The hereinafter deliberates upon the salient features of IBC pertaining to corporate debtors:

TWO-FOLD INSOLVENCY PROCESS FOR CORPORATE DEBTORS

With a default worth Rs. 100,000 to initiate an insolvency process for corporate debtors, the code of 2016 envisages two stages under the same *viz.* Insolvency Resolution Process and Liquidation. Ordinarily, while the former involves the assessment of the viability of the debtor's business for continued existence and scope of revival, the latter is resorted to on failure of the Insolvency Resolution Process.[22]

The Insolvency Resolution Process can be initiated at the National Company Law Tribunal (hereinafter NCLT), by either a creditor, financial or operational or voluntarily by the defaulting corporate debtor.[23] The admission of application is followed by an order of moratorium, a public announcement of the initiation of corporate insolvency resolution process, calling for the submission of claims and appointment of an interim resolution professional in accordance with sections 14, 15 and 16 of the code.[24] During the moratorium period, the debtor is barred from disposing of its assets out of the ordinary course. In furtherance of the same, a creditors committee is constituted by the resolution professionals, endowed with sweeping decision

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[21] Samvad Partners, 'India: Insolvency and Bankruptcy Code' (*Mondaq,* 12 September 2017) <http://www.mondaq.com/india/x/627706/Insolvency+Bankruptcy/Insolvency+And+Bankruptcy+Code> accessed 15 October 2017.

[22] 'The Insolvency and Bankruptcy Code, 2016 - Key Highlights' (*Trilegal*, 16 May 2016) <http://www.trilegal.com/index.php/publications/update/the-insolvency-and-bankruptcy-code-2016-key-highlights> accessed 13 October 2017.

[23] The Insolvency and Bankruptcy Code 2016, s 6.

[24] The Insolvency and Bankruptcy Code 2016, s 13.

making powers for the purpose of submission of a cogent and effective revival, or to call it so, resolution plan.

In the event of non-receipt of a resolution plan within the requisite period of time or non-compliance of requirements entailed in section 31 of the code, the Adjudicating Authority is empowered to pass an order of liquidation.[25] The Insolvency Resolution Professional may act as the liquidator and shall discharge all the functions of Board of Directors, forming an estate of the assets, and consolidating, verifying, admitting and determining the value of creditors' claims.[26]

INSTITUTIONAL INFRASTRUCTURE FOR INSOLVENCY PROCESS FOR CORPORATE DEBTORS

INSOLVENCY RESOLUTION PROFESSIONALS (IRPS)

Appointed to perform the corporate insolvency resolution process, IRPs (including interim resolution professionals) are conferred with the powers of the board of directors or the partners for the effective management of the corporate debtor.[27] The going concern of the same, as provided for in the code, shall be the preservation of the value of the property of the corporate debtor in addition to management of its operations.[28] Not only do they run the business of the defaulting corporate debtor, but verify the claims of the creditors and constitute creditors committee. Also, they discharge the functions of the liquidator, unless replaced.[29] Mamta Binani, former president of Institute of Company Secretaries of India (hereinafter ICSI), was appointed as the first-ever IRP under the new regime for Synergies-Dooray.[30]

INFORMATION UTILITIES (IUS)

The creation of multiple IUs to collect and store financial information related to a debtor, as contained and contemplated in the code, the same can be instrumental in activating the resolution process and be also produced as evidence at various stages of the process.[31] Chapter V of Part IV

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[25] The Insolvency and Bankruptcy Code 2016, s 33(1).
[26] The Insolvency and Bankruptcy Code 2016, s 36.
[27] The Insolvency and Bankruptcy Code 2016, s 17(1).
[28] The Insolvency and Bankruptcy Code 2016, s 20(1).
[29] The Insolvency and Bankruptcy Code 2016, s 34(1).
[30] *Synergies Dooray Automative Limited v Edelweiss Asset Reconstruction Company Limited and Others* [2017] CP No 1/IBC/HDB/2017 (NCLT Hyderabad Bench).

of the code contains provisions with respect to registration, governing body, core services and obligations of IUs, besides providing for the procedure for submission of financial information. Very recently, National e-Governance Services Ltd., a government entity, has received the in-principle approval for establishing an IU in India- the first under IBC.[32]

THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (IBBI)

Supervising the insolvency proceeding and maintaining a check on other actors under the code *viz.* IRPs, IAs and IUs, IBBI is often addressed as the regulator of the system created by the code. While Chapter I of Part IV of the code entitled 'The Insolvency and Bankruptcy Board of India' encompasses the provisions relating to the establishment, constitution and meetings of IBBI, including the powers of the chairman, removal of members etc.; Chapter II is a meticulous draft on the powers of the same.

ADJUDICATING AUTHORITIES

- NCLT
- National Company Law Administrative Tribunal (hereinafter NCLAT)**,** to be approached within 30 days from the date of receipt of order of NCLT
- Supreme Court of India, to be approached within 45 days from the date of receipt of the order of NCLAT.

The first insolvency resolution order under this code was pronounced by NCLT in the matter of Synergies-Dooray Automotive Ltd on 14.08.2017. With an aggregate claim amount against Dooray from financial creditors standing at Rs. 972 crores and the cost of the proposed scheme at Rs. 54 crores, the resolution plan was approved by NCLT on 02.08.2017.[33]

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[31] 'Legislative Brief on the Insolvency and Bankruptcy Code, 2016' (*PRS Legislative Research*, 5 May 2016) <http://www.prsindia.org/administrator/uploads/media/Bankruptcy/Legislative%20Brief-%20Bankruptcy%20code.pdf> accessed 14 October 2017.

[32] Ashish Rukhaiyar, 'NeSL becomes India's first Information Utility under Insolvency & Bankruptcy Code' *The Hindu* (New Delhi, 16 June 2017) <http://www.thehindu.com/business/markets/neslbecomesindias-first-information-utility-underinsolvency-bankruptcy-code/article19089468.ece> accessed 15 October 2017.

[33] *Synergies Dooray Automative Limited v Edelweiss Asset Reconstruction Company Limited and Others* [2017] CP No 1/IBC/HDB/2017 (NCLT Hyderabad Bench).

TIME BOUND AND 'FAST TRACK' CORPORATE INSOLVENCY RESOLUTION PROCESS

An incompetent, onerous, and time-consuming procedure may eventually constrain a firm to liquidate on account of mounting financial distress, also tying the resources for a longer time.[34]A fast-paced process, on the contrary, may protect the value of the assets of the firm and improve its chance for an eventually successful turnaround.[35] Time-bound insolvency resolution is perhaps the quintessence of IBC. From ascertainment of the existence of a default by the corporate debtor within fourteen days of the receipt of the application[36] to completion of the process within a period of one hundred and eighty days (extendable to 90 days for only one time with the consent of 75% of creditors) from the date of admission of the application,[37] IBC ensures expeditious execution of every requirement at every step. The appointment of an IRP, for instance, shall be made within fourteen days from the insolvency commencement date.[38] The code has also embraced the concept of Fast Track Insolvency Resolution Process under Chapter IV. It provides for completion of the entire process within 90 days, with only a single extension of 45 days.[39]

PRIORITY OF CLAIMS

Section 53 of the Code enlists an order in which the proceeds from the sale of liquidation assets of the body corporate shall be distributed. Paid ahead of all dues, first-hand priority is assigned to the costs of Insolvency resolution process and that of liquidation, thus also, incentivizing the profession. The same is followed by the claims of secured creditors and workmen dues up to 24 months. Immediately below are the salaries/dues of other employees' up to 12 months, followed by, financial debts of unsecured creditors; ranking fourth in the order of priority. Succeeding the same and ranking on the same pedestal are Government dues (up to 2 years) and payments to secured creditors for any unpaid amounts following enforcement of their security interest. Sixth,

[34] Lee, Seung-Hyun, Mike Peng, and Jay Barney, 'Bankruptcy Law and Entrepreneurship Development: A Real Options Perspective' (2007) 32(1) Academy of Management Review 257, 264.
[35] ibid.
[36] The Insolvency and Bankruptcy Code 2016, s 7(4).
[37] The Insolvency and Bankruptcy Code 2016, ss 12(1) and 12(3).
[38] The Insolvency and Bankruptcy Code 2016, s 16(1).
[39] The Insolvency and Bankruptcy Code 2016, s 56.

in order of priority are generalized as remaining debts and dues, and the rest cater to the claims of Preference shareholders, followed by Equity shareholders or partners in the end.

ANALYZING THE AFTERMATH OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016 ON STAKEHOLDERS OF CORPORATE GOVERNANCE

"*Effective debt monitoring and collection play a crucial role in corporate governance in market economies and require adequate information, creditor incentives, and an appropriate legal framework.*"

\- *Cheryl W. Gray*

Unreasonable, as it is, to expect all the businesses to succeed in their venture, it is typically usual for some businesses to collapse, vitalizing the need to focus on corrective measures to be taken in such tumultuous times. Such measures are accounted to unswervingly affect the stakeholders of corporate governance. Including not just shareholders and directors or the management, but also the creditors, suppliers, customers, employees and various other groups,[40] the code is a portrayal of the emerging façade of corporate governance, involving these stakeholders. Recapitulating that the tenacity of bankruptcy laws lies in resolving conflicts among a firm's stakeholders,[41] the hereinafter elucidation is a detailed account of the same, individually assessing the impact of the Code on the stakeholders of corporate governance in India:

CREDITOR-DRIVEN APPROACH

Without any whit of doubt, creditors assume an indispensable role in the corporate governance and in view of the same, the present code is undeniably creditor oriented. The indispensability of cooperation of the creditors is universally accredited, since in exclusion of the same, the distressed firms would be dismantled through an anarchic creditors' run, which eventually would

[40] Tarek Roshdy Gebba, 'Corporate Governance Mechanisms Adopted by UAE National Commercial Banks' (2015) 5 Journal of Applied Finance and Banking 23, 27.
[41] T H Jackson, *The logic and Limits of Bankruptcy Law* (Harvard University Press 1986).

undermine the debtor's recovery value.[42] OCED, too, acknowledges the indispensability of insolvency laws in enforcing creditor's rights in its Principles of Corporate Governance.[43]

Expunging the meek line of difference between secured and unsecured creditors, this code confers upon all the creditors, whether secured or unsecured, an opportunity of time bound resolution process, thus attempting to exalt the position of unsecured financial creditors (such as bond holders) in respect of secured financial creditors. Ensuring that the resolution process is initiated as early as possible, the same under the code commences immediately after first signs of financial stress become visible.

Since the interpretation of the consequences of creditor control depends crucially on the subsequent impact of creditor intervention on borrower performance,[44] the code incorporates 'Creditor in Possession Approach', whereby the board of directors are suspended and replaced by creditor approved resolution professional so as to manage the Company. Astonishingly expeditious, the insolvency resolution process period has been limited to one hundred and eighty days, however, it can further be extended but not beyond a period of ninety days.[45] So much so, that a liquidation mechanism has been laid down, which is to be supervised by the insolvency professional acting in the capacity of liquidators, excluding even an iota of the likelihood of procrastination in the procedure by the company management.[46]

BACK-SEATED BOARD OF DIRECTORS AND SHARE-HOLDERS

The classic-corporate-scenario entails the coexistence of a manager-shareholder and a dominant creditor, effectually functioning with the expertise of the manager and the permission of the creditor.[47] Accountable for the verification of financial reliability, of compliance with laws and regulations and the reduction of information asymmetry between shareholders and managers,[48]

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[42] Régis Blazy, Joël Petey and Laurent Weill, 'Can Bankruptcy Codes Create Value? Evidence from Creditors' Recoveries in France, Germany, and the UK' (Annual Meeting, Chicago, March 2013).
[43] Organization for Economic Co-operation and Development, *OECD Principles of Corporate Governance* (2004) 11.
[44] Greg Nini, Amir Sufi and David C Smith, 'Creditor Control Rights, Corporate Governance, and Firm Value' (*Social Science Research Network*, 11 December 2011) <http://dx.doi.org/10.2139/ssrn.1344302> accessed 12 October 2017.
[45] The Insolvency and Bankruptcy Code 2016, ss 12(1) and 12(3).
[46] The Insolvency and Bankruptcy Code 2016, s 5(18).
[47] B Adler, 'A Theory of Corporate Insolvency' [1997] New York University Law Review 343, 375.
[48] C Hill and G Jones, *Strategic Management Essentials* (3rd edn, South-Western College Pub 2011).

the board of directors is in all certainty, an imperative entity of corporate governance. A vehement piece of argument, thus dictates, that portion of the company or firm must be protected and greater protection shall be accorded to shareholders, or else they may undertake absurd steps to protect their company or firm.[49]

Although the Code embodies a reorganization process, so as to preserve the value of shareholder's and managerial interest in the company's assets, yet the underlying inclination towards creditors is predominantly overriding. Section 7 of the Code, for instance, empowers the financial creditor to file an application for initiation of the insolvency process and by virtue of Rule 4(4), the same has to be forwarded to the debtor as well, with the object of giving the corporate debtor an adequate notice. However, no provision exists whereby the debtor can make his representation in pursuance of the notice received by him under such situation.

Another technical glitch prevalent is pertaining to section 7(4), wherein the yardstick to be qualified for admission or rejection of an application is extremely feeble, as all that has to be ascertained by the adjudicating authority is the existence of any default on the part of the debtor. In such situation, a possibility crops up where the creditor's right to file an application under the code would straight away arise, even if there had been a delay of a single day on the side of the debtor. Furthermore, the IRP is to be appointed by none other than the committee of creditors, which but naturally raises a presumption of biasness. Consider a situation, where there is a viable revival plan formulated, but the creditor is adamant on being reimbursed expeditiously, the creditor's committee might reject the plan which indisputably would work against the object of the Code, i.e., to maximize the value of assets. Astoundingly, as regards the distribution of the proceeds arising out of the liquidation of the company or individual or partnership firm is concerned, the preference shareholder & equity shareholders occupy the bottom two positions respectively, after everyone else's claim has been settled.[50]

PARTLY HEEDED EMPLOYEES AND WORKMEN

A necessitated recipient of the protection accorded by insolvency laws, particularly in businesses deriving their value from the goodwill created by the skills and services of employees,[51] they are

[49] Cirmizi, Klapper and Uttamchandani, 'The Challenges of Bankruptcy Reforms' (2012) 27(2) World Bank Research Observer 185, 190.
[50] The Insolvency and Bankruptcy Code 2016, s 54.

one of the focal stakeholders of corporate governance. The same stands reaffirmed by Principle C 12.4 of the World Bank's Principles and Guidelines for Effective Insolvency and Creditor/Debtor Regime, stating, 'Workers are a vital part of an enterprise, and careful consideration should be given to balancing the rights of employees with those of other creditors'.[52] Unfortunately, the repercussions of the collapse of mega-corporations are shattering for their employees, owing to legislative dearth. Depriving them of two square meals a day, the catastrophic collapse of Enron, for instance, left over 4500 staff unemployed, and with uncertain ability to access entitlements owed to them under their work contracts.[53]

Speaking of the Code of 2016, provisions have been carved out by the same which are favourable for the workmen of the company under the process of insolvency, wherein Workmen's dues & debts due to secured creditors have been placed on the same footing in respect of order of priority of payment of debts, immediately followed by wages and outstanding dues to the employees (besides workmen). While the former is in the order of priority graded at second, the latter is at the third number.[54] Nevertheless, the code omitted to deal with the post-insolvency harm, immediately connected with the hitherto employees of the organization, such as job losses in consequence to insolvency. Though the primary objective is to protect the interest of the creditor, but at the same time, the state is under an obligation to safeguard the interest of the employees as well.

FORECASTING THE RESULT OF INSOLVENCY AND BANKRUPTCY CODE, 2016 ON THE YARDSTICK OF 'EASE OF DOING BUSINESS'

In order to strengthen the economic partnership and magnetize investments, the business environment of any country assumes a pivotal role which is highly dependent upon the legislation and policies of the incumbent government. In this context, the 'ease of doing business index' requires special mention as the instant index has been developed and is published by the World Bank, which primarily seeks to accord ranking to countries by taking into account certain parameters, out of which, resolving insolvency is one. The direct outcome of a higher rank in the

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[51] Department of Economic Affairs, *Interim Report of the Bankruptcy Law Reform Committee* (2015) 36.
[52] The World Bank, *Principles for Effective Insolvency and Creditor/Debtor Regimes* 25 (The Wold Bank 2016).
[53] Gordon W Johnson, *Insolvency and Social Protection: Employee Entitlements in The Event of Employer Insolvency* 1 (OECD 2006).
[54] The Insolvency and Bankruptcy Code 2016, s 54.

'ease of doing business index' is indicative of the fact that the regulatory environment is more favourable and conducive to the initiation and operation of the local businesses in comparison to the countries under-ranked. For determination of ranking, an extensive survey is conducted by the 'Doing Business' team and the drafted questionnaire principally focuses on measuring the regulations having a direct impact on the businesses, while due importance is also granted to other general conditions, such as, nation's immediacy to large-sized markets, rate of inflation or tax payment mechanism etc.[55] Presently, in respect of afore-mentioned index, India ranks miserably low at 130 among 189 economies of the World, and to add to its woes, in terms of resolving insolvency it holds the 136th position.[56]

Of late, incessant efforts have been put by the Indian govt. to escalate their ranking and improve business environment via introduction of certain economic reforms such as, The Central Goods & Services Act, 2017,[57] Start-up Plan, Insolvency & Bankruptcy Code, 2016 etc.[58] M. S. Sahoo, Chairman of the Insolvency and Bankruptcy Board of India, at a National Seminar asserted that the new law in the coming future is intended to place the debt markets in an equally vibrant position as that of the equity markets with ample liquidity and enhanced risk management. Besides improving the 'ease of doing business' ranking, it is bound to promote entrepreneurship and discharge more money for developmental projects, he said. At the National Conference organized by ASSOCHAM, the Karnataka Law Minister T. B. Jayachandra specifically stated that the code would act as a strong assisting tool in the insolvency of the corporate houses in a judicious manner to capitalize on the value of their assets.

Moreover, the time bound resolution for insolvency will lead to a steep decline in the number of defaulters, ensure improved recovery and work for better availability of finance for projects involving momentous risks besides offering the efficient and advanced quality of services. Therefore, the Act principally aims at providing an environment that augments smoother time bound-settlement scheme of insolvency, permits quicker turnaround of businesses and help

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[55] 'Definition of 'Ease of Doing Business'' (*The Economic Times)* <http://economictimes.indiatimes.com/definition/ease-of-doing-business> accessed 12 October 2017.
[56] World Bank Group, *Doing Business 2016: Measuring Regulatory Quality and Efficiency* 208 (13th edn, World Bank 2016).
[57] 'GST to facilitate ease of doing business: EU' *The Economic Times* (New Delhi, 6 October 2017) <http://economictimes.indiatimes.com/news/economy/policy/gst-to-facilitate-ease-of-doing-business-eu/articleshow/60974576.cms> accessed 14 October 2017.
[58] 'Insolvency Code to improve ease of doing business' *The Hindu Business Line* (Mumbai, 19 December 2016) 1.

maintain a proper database of successional defaulters. Mamta Binani, former president of ICSI stated that within a period of five years, IBC has the potentiality to unlock Rs. 25,000 crore of capital blocked in dispute at multi-fold levels. It is being expected that IBC will at least take two years in order to showcase an improvement in the rankings in respect of ease of doing business index.[59] The code will help generate developer confidence, eliminate the confusions created by the prevalent judicial framework, assist in developing credit and bond market and help in addressing the Non-performing asset situation.[60] Also, given the fact that there is clarity on the insolvency framework to be resorted to, the probability of investors investing in stressed/distressed situations will increase in a multi-fold manner.

AN ANALYTICAL INTERNATIONAL APPRAISAL

On the ease of doing business index, in context of resolving insolvency, while UK & China are ranked at 13 & 28 respectively, USA is deservingly positioned at 5th rank. Owing its legal genesis to English Legal System, Singapore ranks at 29th position in the aforementioned Index. The indispensability of insolvency laws in almost every country is thus unquestionable, as the vacuum of the same would make it practically inconceivable for any stakeholder to successfully engage in a business in any capacity. In light of the same, the tabular representation attached herewith is a comparative analysis of the insolvency and bankruptcy law in other jurisdictions:

SR. NO.	PARTICULARS	INDIA	CHINA	BRAZIL	USA	UK	SINGAPORE
	Legislation	Insolvency and Bankruptcy Code, 2016	Enterprise Bankruptcy Law, 2006	The Brazilian Business Insolvency	Bankruptcy Reform Act, 1978	The Insolvency Act, 1986	Companies (Amendment) Act, 2017

[59] 'Insolvency Code to Improve Ease of Doing Business' *The Hindu Business Line* (Mumbai, 19 December 2016) 1.
[60] Ernst & Young Global Limited, 'Interpreting the Code: Corporate Insolvency in India' (2017) <www.ey.com/Publication/vwLUAssets/ey-interpreting-the-insolvency-and-bankruptcy-code/$FILE/ey-interpreting-the-insolvency-and-bankruptcy-code.pdf> accessed on 1 September 2017.

				(Amendment) Act, 2014			
	Requisite default amount to initiate the process	Rs. 1 Lakh	Bankruptcy petition must satisfy both the cash flow test and the balance sheet test.	-	Court petition by debtor or three creditors holding non-contingent, undisputed claims aggregating at least $12,300 more than the value of any collateral.	GBP 750	S$ 10000
3.	Creditor or debtor driven approach?	Creditor	Creditor	Debtor	Creditor	Creditor	Creditor
4.	Is IP entitled to protection under the law?	Yes	-	-	Yes	Yes	Yes
5.	What is the time-span of the moratorium	180 days	Limited but not definite.	Entire period until the	Applies unless leave of court is	Entire period until the	Entire period until the

	period?			plan is ratified	given.	plan is ratified	plan is ratified
6.	Is formulation of the committee of creditor's obligatory?	Yes	No		Yes	No	No
7.	Have any specialized courts been constituted to deal with insolvency?	Yes	Special divisions have been set up in lower-level courts.	Yes	Yes	No	No

PROPOSALS AND CONCLUDING REMARKS

The IBC code has been retrofitted to overcome the contemporary challenges ensuing from the insolvency and bankruptcy proceedings under preceding laws, nevertheless, certain significant rules & changes have been overlooked which assume momentous magnitude in refining the existing code & the same have been elucidated upon hereunder as suggestions:

1. DRTs are already overtaxed with voluminous work and are reeling under a backlog of cases. Keeping the same in view, vesting in DRTs the jurisdiction to handle the personal insolvency resolutions is expected to adversely affect the speedy disposal of cases in this respect. Therefore, this responsibility should be entrusted to the NCLT bench dealing with the pertinent case.

2. The need of the hour is to regulate the regulator. In a nutshell, IPs shall be trained personnel, timely monitored by IBBC. Furthermore, the existing lacuna of the inadequacy of NCLT benches (which are eleven in no.), judges and technical staff shall be effectively fixed.

3. As afore-depicted as well, the Code is profoundly in the interest of creditors, thereby depriving the debtors of a level playing field. In respect of the revival of the company, the committee of creditors solely has been entrusted with the responsibility of accepting or rejecting a revival plan of the debtor company. For the revitalization of the company participation of all the stakeholders suitably is imperative in order to make it conducive to the business environment of the economy.

4. An extremely high threshold limit has been fixed, i.e., 75% of creditor's committee must approve the plan for the sale of a business under Bankruptcy Code, especially, in comparison to the SARFAESI Act which requires endorsement of only 60 % of secured creditors; and the instant code in addition to it makes no distinction between a secured creditor and an unsecured creditor inasmuch as voting rights in the committee is concerned.

5. Reticent on 'cross-border insolvency', IBC, has failed to lay down a mechanism for resolving the case of a debtor with assets located, or creditors residing overseas.

6. Besides payment of workmen dues, IBC shall also inculcate provisions aiming at restoration of employees of collapsed corporate debtors, so as to check mass unemployment and ensure effective utilization of human resources.

In conclusion, on the basis of post-detailed analysis it can unequivocally be asserted that active participation and involvement of all the key stakeholders is tremendously vital - and in what manner they engage and play their role in ensuring the efficacious and intended functioning of the code would be a fundamental question for the success of IBC.