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The New Insolvency & Bankruptcy Code in India: Impact on the Distressed Debt Market

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Acknowledgement

INSOL International is very pleased to present a technical paper titled “The New Insolvency & Bankruptcy Code in India: Impact on the Distressed Debt Market” by Vikram Bajaj, Renaissance Capital Advisors, India.

The Insolvency and Bankruptcy Code, 2016 (IBC, 2016) was introduced in India on 1 December 2016. It is seen as one of the most significant economic reforms in the history of the country, with the objective of consolidating and amending the laws relating to re-organisation; ensuring insolvency resolution in a timely manner for the maximisation of the value of assets; promoting both entrepreneurship and the availability of credit; and balancing the interests of all stakeholders.

The initial resistance by the banks to opt for the new regime was addressed by the Indian government which empowered the Reserve Bank of India (RBI) to direct the banks to initiate proceedings by way of an amendment to the Banking Regulation Act, 1949 in May 2017. The RBI duly identified 12 large NPLs constituting approximately 25% of the banks’ total NPLs and compelled the banks to initiate insolvency resolution proceedings under the IBC in relation to these.

This interesting paper examines the key developments that have taken place since the implementation of the IBC 2016. It looks at the lessons learned from the resolution plans approved so far, the contentious issues raised before the tribunals and the progress in the 12 large distressed cases identified by the RBI. It also looks at what the IBC means for foreign creditors and examines the opportunities in the Indian distressed debt market for investors currently and looking forward to the next 2-3 years.

INSOL International sincerely thanks Vikram Bajaj for this detailed analysis and for writing this excellent technical paper.

April 2018



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The New Insolvency & Bankruptcy Code in India: Impact on the Distressed Debt Market

By

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Introduction

India is the fourth fastest growing economy in the world with a growth rate of 7.2% compared with a global average of 2.7%¹. The size of the Indian economy at \$2.30 trillion has surpassed the size of UK Economy² (its erstwhile colonial master), for the first time in 150 years.

The country, has, however, been facing headwinds with mounting non-performing loans (NPLs), the thin capital buffers of many scheduled commercial banks, muted credit growth, depressed investment demand and fixed capital formation. The banking system is saddled with NPLs of more than INR 9 trillion and the gross NPA ratio of scheduled commercial banks is 10.2% and is projected to reach 11.1% by September 2018³. This has crippled the capacity of the banking system to keep the growth engine pumping.

Against this backdrop and to address these challenges, a new insolvency and bankruptcy framework known as the Insolvency and Bankruptcy Code, 2016 (IBC, 2016), was introduced on 1 December 2016. It is seen as one of the most significant economic reforms in the history of the country, promulgated with the objective of consolidating and amending the laws relating to re-organisation; ensuring insolvency resolution in a timely manner for the maximisation of the value of assets; promoting both entrepreneurship and the availability of credit; and balancing the interests of all stakeholders³.

The implementation of the IBC during the course of the last year has contributed significantly to the evolution of jurisprudence in this area and has raised various contentious issues and highlighted certain gaps in the legislation. The legislature and the regulator have taken a number of steps to make the law as effective as possible. Certain amendments have been made to the Banking Regulation Act to empower the Reserve Bank of India to prompt banks to use the new legislation (see further below). The IBC, 2016 has been amended to exclude certain individuals from involvement in the resolution process (including individuals who have been declared a wilful defaulter; have been prosecuted for criminal offences; are ineligible to act as directors; and undischarged insolvents). Various points of law have been analysed and settled by the apex court. Further review and overhaul of the IBC, 2016 is in progress and a committee for the review of the same has been constituted.

The impact of the new insolvency and bankruptcy framework is clearly visible. In the World Bank Rankings for Resolving Insolvency, India's ranking improved from 133⁴ to 103. This was a key contributor to the overall 30 points jump in Ease of Doing Business ranking to 100 from 130. In line with this, Moody's has raised India's credit rating for the first time in 14 years, from the lowest investment grade of Baa3 to Baa2, and changed the outlook from stable to positive⁵.

1. Insolvency and Bankruptcy Code, 2016 – Insolvency resolution framework for corporates

IBC, 2016 was promulgated in May 2016, and the provisions relating to the Corporate Insolvency Resolution Process (CIRP) were notified in December 2016. The law also deals with the bankruptcy of partnerships and individuals, however, the provisions in relation to this are yet to be notified.

The National Company Law Tribunal (NCLT) with several benches across India is the Adjudicating Authority in respect of corporate entities. The Insolvency and Bankruptcy Board of India (IBBI) is

* The views expressed in this paper are the views of the author and not of INSOL International, London.

¹ Global Economic Prospects Report – June 2017 – World Bank Group

² <https://www.forbes.com/sites/realspin/2016/12/16/indias-economy-surpasses-that-of-great-britain/#72fa43b93bc0>

³ Financial Stability Report – December 2017, Reserve Bank of India

⁴ Preamble – Insolvency and Bankruptcy Code, 2016

⁵ Ease of Doing Business Rankings, 2017 - World Bank Group

⁶ https://www.moody.com/research/Moodys-upgrades-Indias-government-bond-rating-to-Baa2-from-Baa3--PR_374998

the regulator, which issues rules and regulations for implementation of the law, regulates insolvency professionals and information utilities. Insolvency professionals, licensed by IBBI are appointed by the adjudicating authority for taking over the reins of insolvent entities during the period of the corporate insolvency resolution process and liquidation.

Information utilities have been conceived as repositories of financial information in relation to the credit transactions of corporate entities. This financial information is available to establish defaults and verify claims expeditiously in order to initiate the insolvency process.

IBC, 2016 seeks early identification of insolvency and allows an application for CIRP to be made by the following:

- a corporate applicant (the company, its promoters and directors)⁶;
- financial creditors (providers of finance); and
- operational creditors (providers of goods and services).

An application may be admitted if it is determined that there has been a “default” in payment of undisputed amounts which are due and payable to a creditor or creditors.

The Adjudicating Authority upon admission of a case for CIRP appoints an insolvency professional as an Interim Resolution Professional (IRP) to take over the management and control of the insolvent company. The CIRP period allowed is 180 days and commences upon the admission by the Adjudicating Authority; the period may be extended only once by a maximum of 90 days, thus the overall CIRP period cannot exceed 270 days.

The IRP on appointment invites claims against the insolvent company and constitutes a Committee of Creditors (COC) comprising of all financial creditors⁷, based on claims received and admitted by the IRP. The COC appoints the IRP or some other insolvency professional as the Resolution Professional to manage the further insolvency resolution process. As the process runs under the overall supervision of a COC, the law is described as the ‘Creditors in Control’ regime. The Resolution Professional has to establish and evaluate Resolution Plans for the resolution of the insolvency, and ensure compliance with the safeguards provided in the law for the protection of the interests of various stakeholders. Once the Resolution Professional is satisfied that the Resolution Plan is compliant it is placed before the COC for approval. The Resolution Plan approved by the COC is then placed before the Adjudicating Authority for approval and upon approval by the Adjudicating Authority the Resolution Plan becomes binding on all stakeholders. The decision on the commercial aspects of the Resolution Plan is the prerogative of the COC, while the Adjudicating Authority has been entrusted to review the process and its compliance with the law. In the event that, no Resolution Plan is approved by the COC during the CIRP period of 270 days, the insolvent company is put in to liquidation.

2. Key developments

In its maiden year of operation, more than 4,300 applications have been made under the IBC, 2016 before the various benches of the NCLT of which 462 cases have since been admitted to the CIRP. Resolution Plans have been approved in 9 cases and 23 companies have been put in to liquidation as they could not find resolution, while 93 companies opted for a voluntary liquidation process. While most of the resolution plans came from promoters, two resolution plans involved a change of management (including a buyout by a private equity fund).

The IBBI website now lists more than 1,366 Insolvency Professionals and the first Information Utility has also been licenced and will soon become operational.

⁶ "corporate applicant" means—(a) corporate debtor; or (b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional documents of the corporate debtor; or (c) an individual who is in charge of managing the operations and resources of the corporate debtor; or (d) a person who has the control and supervision over the financial affairs of the corporate debtor (section 5 IBC, 2016);

⁷ An operational creditor having not less than 10% of the debt has the right to attend the COC meeting – but no voting rights (section 24 IBC, 2016)

2.1 The lessons learned from the resolution plans approved so far under the IBC

Resolution Plans take many forms and shape and provide the measures required for implementing the plan, including but not limited to the following:

- (a) transfer of all or part of the assets of the corporate debtor to one or more persons;
- (b) sale of all or part of the assets whether subject to any security interest or not;
- (c) the substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;
- (d) satisfaction or modification of any security interest;
- (e) curing or waiving of any breach of the terms of any debt due from the corporate debtor; and
- (f) reduction in the amount payable to the creditors.

The Resolution Plan must be compliant with the provisions of Section 30(2) of IBC, 2016 which provides safeguards for non-participating and dissenting classes of creditors, compliance with other laws and adequate monitoring of its implementation.

The Resolution Plan is required to be approved by the COC by a vote of not less than 75 per cent of the voting share of the financial creditors. The Ministry of Corporate Affairs has through a circular clarified and confirmed that no approval of shareholders of the corporate debtor is required either at the stage of consideration or for implementation of the Resolution Plan⁸.

The Resolution Plan approved by COC is submitted to the Adjudicating Authority for its approval and upon approval by the Adjudicating Authority under section 31 IBC, 2016 it becomes binding on the corporate debtor, its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

A summary of the Resolution Plans approved so far is set out below.

No.	CASE NAME	DATE OF ORDER	NCLT BENCH	RESOLUTION PROFESSIONAL
1	Synergies Dooray Automotive Ltd.	2-8-2017	NCLT - Hyderabad	Mamta Binani
2	Chhaparia Industries Pvt. Ltd.	29-9-2017	NCLT - Mumbai	Vikram Bajaj
3	Prowess International Pvt Ltd.	17-10-2017	NCLT - Kolkata	Arun Kumar Gupta
4.	Sree Metaliks Ltd.	7-11-2017	NCLT - Kolkata	Sri Kuldeep Verma
5.	West Bengal Essential Commodities Supply Corporation Ltd.	20-11-2017	NCLT - Kolkata	Anil Goel
6.	Kamineni Steels & Power India Pvt. Ltd.	27-11-2017	NCLT - Hyderabad	Shree C.B Mouli
7.	Shirdi Industries Ltd.	12-12-2017	NCLT - Mumbai	Devendra Jain
8.	JEKPL Pvt Ltd.	15-12-2017	NCLT - Allahabad	Mukesh Mohan Gupta

⁸ General Circular No. IBC/1/2017 Dated 25-10-2017 Ministry of Corporate Affairs, Government of India

9	Hotel Gaudavan Pvt. Ltd.	31-12-2017	NCLT - Delhi	Mr. Arunava Sikdar
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The following points are noteworthy in respect of the resolution plans approved so far:

- The Resolution Plans have incorporated varied resolution strategies including the following:
 - the merger of an insolvent corporate entity with a solvent entity;
 - the buyout by a private equity fund;
 - change of management;
 - sale of assets and payment of operational debt in priority to financial creditors;
 - settlement of dues of financial and operational creditors including government dues such as income tax and value added tax; and
 - the restructuring of liabilities.
- The first Resolution Plan sanctioned in the August 2017 in the case of *Synergies Dooray Automotive Ltd* raised questions on the efficacy of the resolution process and vulnerability of the process to circumvention by the transfer of debt from 'related parties' to 'unrelated parties'. The constitution of the COC and the voting power of financial creditors was affected by the assignment of debt by a financial creditor related to the corporate debtor to an unrelated entity. The role and extent of responsibility of Resolution Professional in probing the ingenuity of the transactions also came to be questioned. The Resolution Plan has since been challenged and is sub-judice. The CIRP carried out by the Resolution Professional was upheld and the Resolution Plan was approved. This decision is now subject to an appeal.
- The Resolution Plan in case of *Sree Metaliks Ltd* provided for different treatment of the various classes of secured creditors, based on the difference in their security profile and distribution in the event of liquidation. The Resolution Plan was approved by the Adjudicating Authority, however, the Appellate Authority has put a stay on its implementation, pending the final disposal of the appeal against the approval order by the Appellate Tribunal.
- The Resolution Plan in case of *Kamineni Steels & Power India Pvt. Ltd* was approved by the Adjudicating Authority even though it did not meet the statutory minimum of 75% vote shares. The statutory requirement was held to be directory and the Resolution Plan was approved by the Adjudicating Authority, however the Appellate Authority has put a stay on its implementation pending the outcome of an appeal.
- The Resolution Plan in the case of *Hotel Gaudavan Pvt. Ltd* was approved against a backdrop of a non-cooperative and hostile CIRP wherein the promoters brought both civil and criminal proceedings against the Resolution Professional and the financial creditors. The litigation proceedings were quashed by the orders of the Supreme Court of India. The Resolution Plan incorporates a change of management / board of directors and a mechanism for the cancellation of the equity of erstwhile promoters and the issuance of new equity.

The Resolution Plans approved during the first year of implementation of IBC, 2016 bode well for the efficacy of the new framework for restructuring and resolution which has allowed for the implementation of a wide range of commercial decisions to resolve insolvency. The core structure of IBC 2016 has been effectively put in to practice whereby the operational processes and day to day management is vested in the Resolution Professional, the commercial decisions on insolvency resolution are made collectively with the financial creditors through the COC and legal confirmation is obtained through the Adjudicating Authority.

The Resolution Plans incorporating change of management at an early stage point towards a potent distressed M&A market facilitated by the legal framework of the IBC, 2016. A change of

management under a Resolution Plan is likely to be increasingly common going forward as Section 29A⁹ (brought in by an amendment in November 2017) places substantive restrictions on existing management's ability to participate in the resolution process.

2.2 Evolving Jurisprudence: Contentious issues raised before the tribunals

The devil is in the detail and for a long time a slow legal system has been the greatest impediment to the pursuit of investment and the ease of doing business in the Indian sub-continent. With the IBC, 2016 a similar fate was apprehended by most, however the swiftness with which jurisprudence is evolving has allayed such fears. The largest number of cases have been filed by operational creditors, using the code as a strong-arm tactic for the recovery of their dues.

The apex court has over the course of last year settled several contentious issues, promoting efficacy in the implementation of the IBC, 2016. Some of the key issues settled by the apex court are as follows:

- *Overriding effect of IBC, 2016 over state laws*

It was held in the case of *Innoventive Industries vs. ICICI Bank*¹⁰ that there is no repugnancy between Maharashtra Relief Undertaking Act (a state law) and IBC, 2016 as the non-obstante clause in Section 238 of IBC, 2016 gives it an overriding effect on all laws for the time being in force.

- *Time limit of seven days for making corrections to the application to Adjudicating Authority is directory not mandatory*

It was held in the case of *Surendra Trading Company vs Juggilal Kamlapat Jutemills Co. Ltd.*¹¹ that the seven day time limit for making corrections to the application is directory and the Adjudicating Authority has inherent powers to condone any reasonable delay

- *Existence of a dispute is sufficient to reject the application of operational creditor*

In the case of *Mobilox Innovations Pvt. Ltd. vs Kirusa Software Pvt. Ltd.*¹² the apex court held that the Adjudicating Authority will dismiss an application by the operational creditor if a dispute is brought to its notice without going into the merits of such a dispute. It is sufficient to see that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. The Adjudicating Authority does not need to examine the merits of the dispute except to the extent indicated.

- *Moratorium shall apply to initiation or continuation of arbitration proceedings in respect of debt recoverable from the corporate debtor*

In the case of *Alchemist Asset Reconstruction Co. Ltd. vs. Hotel Gaudavan Pvt. Ltd.*¹³ it was held that the moratorium applies to arbitration proceedings for a debt due from the corporate debtor. Further criminal proceedings initiated against the Resolution Professional by the promoters of the corporate debtor were also quashed.

The rulings from the Supreme Court of India, the second and the final appellate forum under IBC, 2016 on a large number of issues indicates the pace at which jurisprudence for the new law is evolving.

⁹ The Insolvency and Bankruptcy Code (Amendment) Ordinance 2017 notified on November 23, 2017

¹⁰ *Innoventive Industries Vs. ICICI Bank* – Supreme Court of India - Civil Appeals No. 8337 – 8338 of 2017

¹¹ *Surendra Trading Company vs Juggilal Kamlapat Jutemills Co. Ltd.* – Supreme Court of India - Civil Appeal No. 8400 of 2017

¹² *Mobilox Innovations Pvt. Ltd. vs Kirusa Software Pvt. Ltd.* - Supreme Court of India - Civil Appeal No.9405 of 2017

¹³ *Alchemist Asset Reconstruction Co. Ltd. vs. Hotel Gaudavan Pvt. Ltd.* – Supreme Court of India – Civil Appeal no. 16929 of 2017

2.3 Reserve Bank of India's direction to banks to initiate insolvency proceedings

Although the IBC 2016 enshrined a new 'creditors in control' regime, financial creditors were slow to seek recourse to the IBC, 2016 in the early days of its implementation. This initial resistance by the banks to opt for the new regime was addressed by the Central Government when it empowered the Banking Regulator, the Reserve Bank of India (RBI) to direct banks to initiate proceedings under the IBC, 2016, by way of an amendment to the Banking Regulation Act, 1949 in May 2017.

As the infrastructure for implementation of the new law was still developing and lacked depth, it was expected that RBI would use its whip sparingly and gradually. However, the RBI within the first month of the amendments, issued directions to certain banks to initiate insolvency proceedings under IBC, 2016, in respect of 12 large NPLs comprising about 25% of NPL book of the banking sector. The aforementioned banks duly filed applications for initiation of CIRP in these cases which have subsequently been admitted in 11 of these large NPLs. As the nascent system was front loaded with bulge bracket cases, it soon threw open a plethora of litigation and highlighted a number of gaps in the new law, which has, however, helped in the establishing the law more firmly.

The power of the RBI to issue directions to the banks to initiate insolvency proceedings was considered in the case of *Essar Steel India Ltd.*¹⁴. It was held that the RBI was empowered to issue such directions.

In August 2017 the RBI issued a second list of 28 cases, comprising another 15% of the banks' NPL book, with instructions to the banks to find a resolution by 13 December 2017, failing which the cases should be referred to NCLT under IBC, 2016. The banks were able to resolve just 3 cases within the stated deadline and sought an extension of time from the RBI in relation to the remaining cases. The RBI has since firmly declined any extension and directed for initiation of insolvency proceedings in relation to the remaining 25 cases by 31 December 2017. The majority of these cases are now at the filing stage or consideration for admission.

2.4 Progress in the 12 cases which constitute approximately 25% of the banks' NPLs

The IBC, 2016 was implemented on 1 December 2016, without any substantive supporting infrastructure in terms of judicial band width, experienced resolution professionals to take over the reins and information utilities to bridge information asymmetry. The nascent law encountered a big challenge when, as stated above, the RBI issued instructions to the banks in June 2017 to file applications for initiating insolvency resolution process for 12 large NPLs comprising about 25% of NPL book of Indian Banks.

Notwithstanding the odds and legal challenges posed, 11 of these cases were admitted by the Adjudicating Authority and CIRP has since been initiated. All of these cases involved substantial assets and have received significant interest from financial as well as significant investors. Most of these cases are now nearing the initial 180 days timeline and the Resolution Professionals are seeking extensions of time to 270 days to allow wider participation and allow the banks time to evaluate the proposals.

A brief summary of the 12 large NPLs on RBI's First List of June 2017, where recourse to IBC, 2016 has been taken by the banks is stated in the chart below.

¹⁴ *Essar Steel India Ltd. vs. Reserve Bank of India* – High Court of Gujarat at Ahmedabad



No.	Company Name	Promoters	Industry	Operations	Issues leading to Insolvency	Debt Size (INR Crore)	Proceedings	Potential Suitors**
1	Essar Steel India Ltd	Shashi Ruia, Prashant Ruia Ravi Ruia Promoters Stake - 97.54%	Steel	10 million tonne facility in Hazira Gujarat for Flat Steel Products Beneficiation and pellet making capacity of 20 MTPA spread across Vizag and Paradeep	Aggressive expansion from 4.6 million tonne to 10 million tonne Aggressive acquisition of Canadian steel maker Algoma Steel and the iron ore mines in Minnesota Reduction in supply of natural gas from Krishna-Godavari basin	40,000	Admitted	Essar Group along with Russia's VTB Capital Arcelor Mittal Tata Steels Steel Authority of India Ltd. Vedantta Group POSCO - South Korean Steel Manufacturer
2	Lanco Infratech Ltd (LIL)	L. Madhusudan Rao Lagdapati Rajgopal - Ex Congress MLA Promoters Stake - 58.52%	Infrastructure / Power / Property Development	LIL is holding company for a group of companies with business interests comprising - power (4500MW - thermal and hydro), infrastructure (roads), natural resources (coal), solar (EPC and generation) and property development	Delay in signing Power Purchase Agreements Delay in payments by power distribution companies 2 power project of 660 MW each in Chhatisgarh require financial closure	43,502	Admitted	JSW Group Tata Power
3	Bhushan Steel Ltd.	Brij Bhushan Singal Neeraj Singal Promoters Stake - 57.82%	Steel	5.6 million tonne steel plants in Maharashtra, Odisha and Uttar Pradesh - 3rd largest secondary steel producer in India Iron ore mine in Odisha	Cancellation of coal mines by Supreme Court Slump in steel prices Dumping of steel from China Bribery allegations against promoters	42,356	Admitted	SAIL JSW Steel with JFE of Japan Arcelor Mittal Liberty House - UK

** Based on news relating to expressions of interest made in the companies



No.	Company Name	Promoters	Industry	Operations	Issues leading to Insolvency	Debt Size (INR Crore)	Proceedings	Potential Suitors**
4	Bhushan Power and Steel Ltd	Brij Bhushan Singal Sanjay Singal Promoters Stake - 94.46%	Steel & Power	2.3 Million Tonne Steel Plant 503 MW Captive Power Plant	Slump in steel prices Rise in input costs for steel and power Government investigations	37,248	Admitted	SAIL JSW Steel with Piramal-Bain Capital Tata Steel Vedanta Arcelor Mittal Liberty House - UK Mesco Steel
5	Alok Industries Ltd	Ashok Jiwrajka Promoters Stake - 29.03%	Textile	Manufacture and Export of Yarn and Speciality Fabrics	Debt lead diversification into non-core areas like acquisition of Mileta in Czech Republic, Store Twenty One in the UK, and real estate investments under Alok Infrastructure	23,433	Admitted	Reliance Industries Ltd. Employees of Alok Industries Ltd.
6	Monnet Ispat and Energy Ltd.	Sandeep Jajodia Promoters Stake - 25.27%	Steel and Power	Diversified steel producer, power and mines	Deallocation of coal mines	10,333	Admitted	JSW Steel with AION Capital Edelweiss Blackstone TPG Capital
7	Era Infra Engineering Ltd.	Hem Singh Bharana Promoters Stake - 66.35%	Infrastructure / Real Estate Development	EPC Contracts	Slump in construction and infrastructure sectors Claims against projects stuck in litigation	10,129	Not Admitted - Due to prior admission of Winding up proceedings before High Court	Not Applicable
8	ABG Shipyard Ltd.	Rishi Agarwal Promoters Stake - 9.74%	Ship building	Ship building	Global slowdown in industry	8,742	Admitted	Liberty House - UK Shapoorji Pallonji Group
9	Jaypee Infratech Ltd.	Jayprakash Gaur Promoters Stake - 71.64%	Infrastructure and Real Estate Development	EPC Contracts, Cement, Power and Real Estate	National Green Tribunal's 2013 ruling staying construction within 10 km of the Okhla Bird Sanctuary	8,606	Admitted	More than 21 Companies including Hinduja Group, Adani Group, Vedanta Group, Essel Highways, IDFC, Lodha Group, Puravankara, SARE Homes, L&T Infra, Cube

** Based on news relating to Expression of Interest made in the Companies



No.	Company Name	Promoters	Industry	Operations	Issues leading to Insolvency	Debt Size (INR Crore)	Proceedings	Potential Suitors**
								Highways from Singapore, Kotak Infra, SARE Group, Deutsche Bank, Asset Reconstruction Company (India) Limited, Suraksha Realty, Tata Realty, National Infrastructure Investment Fund (NIIF) and JSW Group
10	Electrosteel Steels	Umank Kejriwal Mayank Kejriwal Promoters Stake - 45.2%	Steel	2.5 million tonne integrated steel plant in Jharkhand for manufacturing billets, wires and steel rods	Delay in project completion 1.5 Million Tonne Capacity is complete, while further capex of Rs1200 crore required to complete the project	7,505	Admitted	Srei Infrastructure Finance Tata Steel Mesco Steel Edelweiss Vedanta Group Renaissance Group
11	Amtek Auto Ltd.	Arvind Dham Promoters Stake - 52.4%	Automobile	Manufacturer of auto components with manufacturing plants across geographies	Aggressive global expansion including acquisition of 19 plants across the US, UK, Mexico, Brazil, Germany, Italy and Hungary Global slowdown in automotive industry	3,928	Admitted	Deccan Value Investors (US-based hedge fund) AION Capital SSG Capital Liberty House – UK
12	Jyoti Structures Ltd.	Thankur, Valecha and Mirchandani family Promoters Stake - 45.2%	Power Equipment	Power Transmission Towers EPC in Power Sector	Aggressive expansion in overseas markets	3,387	Admitted	Manish Kejriwal founder of PE firm Kedarra Capital with consortium of Investors

** Based on news relating to expressions of interest made in the companies

3. What the IBC means for foreign creditors

The IBC 2016, does not distinguish the origin of the debt, thus a foreign financial or operational creditor can initiate proceedings under the law in pursuit of their debt. Initially, the applications of some foreign operational creditors were dismissed for non-compliance with procedural requirements including the furnishing of bank certificates from an Indian Bank to establish default. However, the apex court in the case of *Macquire Bank Ltd. vs. Shilpi Cable Technologies Ltd.*¹⁵ has done away with such requirements and held that default may be proved on the basis of other documents and the non-provision of such certificates does not render the application incomplete.

Insolvency proceedings brought by foreign creditors under the IBC, 2016 have been admitted in the following cases:

- *Muskaan Power Infrastructure Ltd*¹⁶ based on the application of a foreign financial creditor namely Sunrise 14 A/S, a company incorporated in Denmark.
- *Varun Corporation Ltd*¹⁷ based on the application of a foreign financial creditor namely the Mauritius Commercial Bank, a company incorporated in Mauritius.

The largest insolvency proceeding filed by a foreign creditor was that filed by China Development Bank against Reliance Communications Ltd for its debt of USD 1.78 million. However, the rigour of the new law proved effective and the dues were settled and the proceedings have since been withdrawn.

Similarly, foreign financial creditors are entitled to a seat in the COC based on the claims filed by them with the Interim Resolution Professional. The members of the COC have the option to represent themselves or may appoint an insolvency professional to represent their interests in the COC meetings.

4. Acquiring distressed debts in India

Fund raising activity around distressed debt opportunities in India has gained significant momentum as a result of the new time restricted resolution process. Preqin, a London-based alternative assets research firm has reported that India and China will be the next focus of distressed debt investors.

The process of acquiring distressed assets from Indian banks is expressed to have become more efficient, in the wake of the 270 days resolution timeline set by IBC, 2016. The six funds in the market are looking to raise \$4.8 billion in contrast to \$ 4.4 billion raised by 10 funds over last 10 years. The distress M&A opportunity has grown manifold, at an estimated 50 per cent haircut taken by the banks it could be an Rs 1 trillion or \$15 billion opportunity in the 12 large cases alone. Further with large business conglomerates focusing on deleveraging, the opportunity is expected to get bigger. This is aided by the new section 29A added to IBC, 2016 by amendment in November 2017, which imposes a legal bar on those existing promoters and / or management that contributed to the distress situation, from presenting or being part of a resolution plan under the CIRP.

The prominent fundraising deals / announcements by financial investors focussed on distressed debt during the period are noteworthy to sense the momentum:

- Caisse de Dépôt et Placement du Québec (CDPQ), the second-largest pension fund in Canada, inked a long-term partnership with Edelweiss Financial Service Ltd to invest approximately INR 5,000 crore (nearly \$750 million) in stressed assets and specialised corporate credit in India, over the next four years. CDPQ also picked up a 20% equity stake in Edelweiss Asset Reconstruction Co. Ltd.
- Piramal Enterprises and private equity firm Bain Capital jointly floated a stressed asset fund in August this year to invest about USD 1 billion (Rs 6,500 crore) into stressed

¹⁵ *Macquire Bank Ltd. vs. Shilpi Cable Technologies Ltd.* – Supreme Court of India – Civil Appeal no. 15135 of 2017

¹⁶ CP IB No. 39/CHD/PB/2017 – NCLT Chandigarh

¹⁷ CP No. 725/ I&BP/2017 – NCLT Mumbai

assets. Piramal Enterprises has also given Bain Capital a 50% stake in Piramal Assets Reconstruction Pvt. Ltd., which shall file for a licence from the RBI for perusing asset reconstruction business.

- Ambit Flowers ARC, an asset reconstruction company jointly promoted by Ambit Holdings Pvt. Ltd and New York-headquartered private equity firm JC Flowers, is looking to raise up to \$1 billion from global investors to invest in distressed assets held by banks.
- Global private equity firm Apollo Global Management and the World Bank's investment arm IFC launched a US\$1 billion debt vehicle to invest in distressed debt in emerging markets.
- Dallas-based Lone Star partnered with IL&FS is to jointly explore the distressed assets opportunity in India.
- Kotak Mahindra Bank reached an understanding with Brookfield, Abudhabi Investment Authority and Qatar Investment Authority to co-invest in distressed debt on a case by case basis.
- KKR has set up a 100% owned Asset Reconstruction Company to acquired distressed debt from banks.
- Canada's Brookfield Asset Management Inc announced it is to put approximately INR 7,000 crore (\$1.04 billion) into a planned joint venture with the State Bank of India that will invest in distressed assets.
- AION (Joint Venture of Apollo Global and ICICI Venture), TPG Capital, Everstone, Oak Tree are taking keen interest in evaluating the opportunities and keen to deploy their dry powder and if need be raise more funds.

5. Conclusion – (the opportunities in the Indian distressed debt market for investors currently and looking forward to the next 2-3 years)

The Associated Chambers of Commerce and Industry of India (ASSOCHAM) in its year ahead outlook projects USD 50 billion worth of M&A transactions in 2018 on the back of the large amounts of stressed assets coming to the market and active deleveraging by corporates by the sale of business and assets. The traction built by 11 of the large 12 cases not only signifies the size of the opportunity but the market appetite as well.

The activity in the distressed debt market is only likely to gain momentum from here as the RBI has already issued directions for the filing of insolvency proceedings in relation to 25 out of 28 companies on its second list. Besides the RBI directives the banks are slowly becoming savvy of the process and its benefits for early resolution and value preservation and voluntarily initiating insolvency proceedings against erring corporate debtors. The not so savvy banks are, on the other hand, putting up their NPLs for sale to asset reconstruction companies, which is likely to lead to a steep surge in sale of NPLs. While the IBC, 2016 is going to unfold large scale changes in credit underwriting, the huge INR 10 trillion clean-up of NPLs will provide a sizeable opportunity for next 2-3 years.



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Allen & Overy LLP
Alvarez & Marsal
Baker McKenzie
BDO
Brown Rudnick LLP
BTG Global Advisory
Clayton Utz
Cleary Gottlieb Steen & Hamilton LLP
Clifford Chance LLP
Conyers Dill & Pearman
Davis Polk & Wardwell LLP
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Goodmans LLP
Grant Thornton
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Kirkland & Ellis LLP
KPMG LLP
Linklaters LLP
Morgan, Lewis & Bockius LLP
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PPB Advisory
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RSM
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