

## ABOUT THIS BOOK



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**Editor**

*The Insolvency and Bankruptcy Code, 2016 (“Code”/ “IBC”), was introduced amidst various other reforms introduced by the Government, with focused emphasis on the “Ease of Doing Business in India.” Ease of Doing Business not only means speedy and easy entry, and ease of carrying out operation of businesses; it also covers in its ambit, the **ease of exit**. Of the 10 indices based upon rankings are given, “Resolving Insolvency” is one such index.*

*The Indian scenario of Insolvency, prior to implementation of the Code was a mosaic of pieces that did not fit with each other. A long list of statutes governed insolvency, and hence, there was confusion, and lack of policy direction. In many cases, the provisions of law were running counter to a centralised theme; in many cases, there was a need for a complete rethinking as well. While insolvency and business failure are inevitable outcome of running any business, the existing regime did not provide incentive for easy resolution of insolvency. Therefore, continuation of a stalemate was often in combined interest of both the creditors and the debtor. As for the creditors, mostly banks, there were huge losses due to such failed businesses, but bankers could afford to not call a spade a spade, and carry on the deadwood still, under various judicial and non-judicial structures such as the SICA, corporate debt restructuring (CDR) schemes, and so on.*

*The foundation of any developing country is a well-functioning credit system, and resolution of distress is an integral part of the ecosystem of credit extension and recovery. If the resolution of distress in lending is inefficient, lenders face prolonged defaults. This would mean, lenders add risk premiums to their lending, thereby resulting into the cost of risk affecting the entire credit space. Economically, the very essence of secured lending is for lenders to place value on the collateral backing the loan, and thereby minimise the risk of default, and hence, the risk premium. However, if secured lenders are unable to realise the value of their assets due to inefficiency of the resolution mechanism, secured lending becomes as costly as unsecured lending.*

*Simultaneously, the log-jammed assets in defaulted entities, under the aegis of Board for Industrial and Financial Reconstruction under the SICA, was a huge running cost for the country. These sick entities had failed years ago, and yet were kept alive under the SICA with potentially no prospects for resolution.*

*The situation also promoted defaults, as a defaulter less disincentive against defaulting. Having defaulted, one could still take succour under SICA, and continue to own and run a business. The benefit of limited liability would mean there was very little downside for the equity shareholders, while lenders’ losses would continue to deepen.*

### Why IBC?

- **Expeditious insolvency resolution**
- **Quick reorganization**
- **Maximization of value of assets**

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*While the situation was sufficiently grave, political strong will required for such a major economic reform was missing. Several committees in the past had recommended various reforms of the insolvency law. The agenda was on the backburner for over 50 years, considering that the 26<sup>th</sup> Law Commission in 1964 had recommended rewriting of insolvency laws.*

*The Interim Report submitted by the Bankruptcy Law Reforms Committee in February, 2015 set the stage for IBC, followed by its final report. Finally, IBC was given the Hon'ble President's assent on 28.05.2016, and hence, was ready to take the centre stage in the Indian economic scenario. Consequentially, the age-old and highly discredited SICA was given a farewell.*

*Regarded as one of the biggest economic reforms in the country, IBC claims to have provided a robust roadmap for dealing with insolvency in India. At the point of writing this, only the provisions about corporate insolvency have been enforced; there are indications that the rule-making and infrastructure development for personal insolvency are also in rapid progress.*

*On 28<sup>th</sup> May, 2019, IBC turned 3, at least on the statute book. Its performance in numbers may not be very satisfactory, given the high percentage of liquidations that it has resulted into. The Quarterly newsletter of IBBI for Jan-March, 2019 shows that while the total number of successful resolutions upto March 2019 was 94, the commencement of liquidations is 378. However, the over-4:1 ratio of liquidations-to-resolutions must be viewed in light of the fact that a large number of early insolvency cases are matters that were long under SICA, and were, therefore, only waiting for a formal initiation of liquidation.*

*The biggest impact of IBC is that provisions like section 29A have contributed in developing a well-behaved "credit-culture" in the corporate arena. It must have been a serious cultural shock to defaulters who, over the years, had framed the firm belief that it is possible to run a sick business, but pink-healthy promoters. Section 29A, uniquely so in the world, disqualifies defaulters from either submitting resolution plans or even buying the assets of the company in liquidation. So, every defaulter knows that if one does not pay what one has committed to pay, one will lose the reins of control over business forever. This has resulted into a new cult of healthy borrowing – where borrowers shun over-leveraging, over-capitalisation, and borrow only what they may service with reasonable certainty.*

*The three years of IBC have also seen several potential challenges – from challenges to Constitutionality of the law, to infrastructural issues (inadequate Benches, even more inadequate Appellate Benches, etc), bulging number of pending cases before NCLTs, even in the midst of stringent hard timelines of the law. However, the infrastructural machinery of the Code currently has all elements needed – IBBI, IPAs, IPs, IU, AA, and the appellate authority.*

*.Thus, the law has evolved a lot over a short time span of 3 years with active contribution from professionals, corporate participants, and of course, the judiciary – the adjudicating authorities, the appellate authority and the Apex Court. As would be apparent, the law was/is sketchy at places and was/is open to multiple interpretations – the judiciary in an array of legal cases has delved into the intent and provisions of IBC to enable smoother implementation.*

*At Vinod Kothari & Company, we have been witness to the development of the Code right since its embryonic stage. We had opportunity of interacting while the law was being enacted, and consistently thereafter. Since academic writing has been as much a part of our daily agenda as any other engagements, we have been continuously writing and commenting on IBC developments, right from the time of the Interim Report of the BLRC.*

*With 3 years behind us, it was thought apt to cherry-pick some of our writings on IBC that remain relevant and useful in understanding the law.*

*Some of views and analyses were later either modified by subsequent statutory changes, or there were rulings of courts that either supported or obverted our views. While the anthology has picked up our writings spanning over more than 3 years, we have put relevant updates wherever required. There are, of course, several issues where the law is yet to develop.*

*For ease of reading, the topics have been categorised into 8 sections:*

- Section I covers the background and emergence of IBC.*
- Section II provides clarity on certain basic definitional concepts.*
- Section III covers aspects of corporate insolvency resolution process (including moratorium, resolution plan, etc).*
- Section IV deals with liquidation process.*
- Section V provides perspectives on vulnerable transactions, relevant for both resolution and liquidation processes.*
- Section VI deals with non-corporate insolvency – the relevant provisions though have not been enforced yet.*
- Section VII covers certain recent and major judicial developments.*
- Lastly, section VIII covers our views on the much awaited group insolvency regime.*

*Hope you find the Book relevant and useful. Happy reading!*

*10<sup>th</sup> June, 2019  
Kolkata*