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A Journey of Endless Hope

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A dialogue between two characters in a novel[1] goes like this: 'How did you go bankrupt?' Bill asked. 'Two ways,' Mike said, 'Gradually and then suddenly.' Most bankruptcies happen that way. The insolvency reforms in India also happened in the same way. While in the works for many years, the insolvency reforms suddenly took shape with the enactment of the Insolvency and Bankruptcy Code, 2016 (Code) on May 28, 2016. In no time, it became a reform by the stakeholders, of the stakeholders and for the stakeholders.

Prior to the enactment of the Code, India did not have any experience of a proactive, incentive-compliant, market-led, and time-bound insolvency law. Many institutions required for implementation of a state-of-the-art insolvency law, did not exist. The Code and the underlying reform, in many ways, was a journey into an uncharted territory- a leap into the unknown and a leap of faith. The entire regulatory framework in respect of corporate insolvency, both resolution and liquidation, and the entire ecosystem for corporate insolvency were put in place by the end of 2016, and provisions relating to corporate insolvency process came into force on December 1, 2016. The first corporate insolvency resolution process (CIRP) commenced on January 17, 2019. There is, perhaps, no parallel anywhere in the world to the swift enactment and implementation of the Code.

The Government led the reform from the front and demonstrated the highest commitment to the insolvency reform. It subordinated its dues to claims of all stakeholders except equity. It made the resolution plan binding on itself. It pushed very large corporates with high non-performing assets(NPAs) into the resolution process in the early days. It made changes in banking law, revenue law, company law, etc. to facilitate the processes under the Code. The regulators did their bits too: the Securities and Exchange Board of India (SEBI) exempted resolution plans from making public offers under the Takeover Code; the Reserve Bank of India (RBI) allowed external commercial borrowings for resolution applicants (RAs) to repay domestic term loans; and the Competition Commission of India devised a special route for swift approvals for combinations envisaged under resolution plans. There have been quite a few regulatory interventions from the Insolvency and Bankruptcy Board of India (IBBI) in the last three years. These years witnessed an unprecedented co-operation and partnership among authorities and stakeholders, to implement the Code in letter and spirit to fully realise its objectives.

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[1] Ernest Hemingway (1926), The Sun Also Rises. Scribner

A dynamic law is one which is crafted in the context of life. Given that life is ever evolving, the Code underwent prompt course corrections, to address deficiencies arising from implementation of the Code, in sync with the emerging market realities, to further its objectives. It has witnessed three major legislative interventions[2] in as many years and dozens of subordinate legislations. The Adjudicating Authority (AA), the National Company Law Appellate Tribunal (NCLAT) and the Supreme Court (SC) have been in the forefront of the implementation of the Code. They have delivered numerous landmark orders to explain several conceptual issues and settle contentious issues and resolve grey areas with alacrity. These orders have imparted clarity to the roles of various stakeholders in the resolution process and as to what is permissible and what is not, thereby streamlining the process for future. The insolvency regime now boasts of, probably, the single largest body of case laws. The Insolvency Law Committee continuously reviews the implementation of the Code to identify issues impacting the processes under the Code and make recommendations to address them, in true spirit of the adage' the road to success always remains under construction'.

The insolvency journey has weathered several storms on the way. Besides the usual challenges of building institutional capacity and developing the markets and practices to implement the reform, there was scepticism if the Code can be implemented at all and if it would meet the same fate as many such reforms had in the past. There was also reluctance to accept the reform and, at times, vigorous efforts, to cling[3] on to the old order. The resistance came in different forms from different quarters and continues even today. Some naysayers wanted implementation of the Code only after India had a world class ecosystem, including insolvency professionals (IPs) who can conduct the most complicated insolvency resolution processes. They essentially expected Olympic swimmers on the scene, without ever diving into a swimming pool! A few big fish preferred to watch from the sidelines till commoners tried their hands and emerged successful. Some condemned the reform as the first resolution plan[4] approved under the Code returned about 6 per cent of the claims of the creditors, disregarding the fact that the creditors got about 600 per cent of the liquidation value from the revival of the firm which had been sick for decades. Some promoters waited for the outcomes of the Code to pan out. As they saw many firms moving away from the hands of extant promoters through the process under the Code, they intensified their efforts to challenge the provisions of the Code.

Almost every provision in the Code in respect of corporate insolvency has been challenged on grounds of constitutional validity. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities, passed the constitutional muster.[5] The Code prevails over every other law in case of any inconsistency between the two.[6] Section 29A, which was introduced by the Insolvency and Bankruptcy Code (Amendment) Act, 2018 to prohibit persons with certain disabilities to submit resolution plans,

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[2] The Insolvency and Bankruptcy Code (Amendment) Act, 2018; the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018; and the Insolvency and Bankruptcy Code (Amendment) Act, 2019.

[3] One fails to notice changes in the environment and strives hard to cling on the old order, best illustrated quoted in Spenser Johnson, Who Moved My Cheese (1998).

[4] Resolution plan of Synergy Dooray Automotive Limited approved by AA on August 2, 2017.

[5] *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.,* (2019) 4 SCC 17 (hereinafter 'Swiss Ribbons').

[6] *M/s. Innoventive Industries Ltd. v. ICICI Bank & Anr.,* (2018) 1 SCC 407 (hereinafter 'Innoventive Industries Ltd.'); *Pioneer Urban Land and Infrastructure Limited and Anr. v. Union of India & Ors,* [Writ Petition (Civil) No. 43 of 2019].

was upheld.[7] Section 5(8), which was introduced by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 to treat home buyers as financial creditors (FCs), was upheld[8]. While upholding various provisions in the Code, the SC has accorded certain degree of deference to the legislative judgment in economic choices, apart from the presumption of constitutionality in economic legislations[9]. Section 30(2)(b), which was introduced by the Insolvency and Bankruptcy Code (Amendment) Act, 2019 to provide a waterfall for resolution plans, is under challenge. With every judgement delivered by the courts of law, the insolvency reforms have developed deeper and stronger roots.

The speed and challenges of implementation of the Code did not come on the way of innovation. One such innovation is the information utility (IU). India has the unique distinction of having an IU to cater to the informational needs of stakeholders under the insolvency and bankruptcy regime. Another innovation is the launch of a two-year Graduate Insolvency Programme, the first of its kind in the world, aimed at producing a cadre of top-quality IPs who can deliver world-class insolvency resolution services. The IBBI itself is also an innovation: there is no exact parallel organisation either inside or outside the country. It develops and regulates the insolvency profession and lays down the rules of the game for professionals and the market.

Matured over the last three years, the ecosystem now comprises 27 benches of NCLT, 2800 IPs, 3 insolvency professional agencies, 54 insolvency professional entities, one information utility, 2300 registered valuers and 11 registered valuer organisations. The professionals and market participants are learning on the job and are evolving best market practices. Debtors and creditors alike are undertaking corporate processes. About 2000 corporates, some of them having very large non-performing assets, have been admitted into corporate process. About 600 of them have completed the process either yielding resolution plans or ending up with liquidation. Details are presented in the Table below. Another 500 firms have commenced voluntary liquidation.

The resolution plans have yielded about 188 per cent of liquidation value for FCs.[10] They are realising on an average 43 per cent of their claims through resolutions plans under a process which takes on average 340 days and entails a cost on average of 0.5 per cent, a far cry from the previous regime which yielded a recovery of 25 per cent for creditors through a process which took about 5+ years and entailed a cost of 9 per cent. It is important to note that this realisation, not being an objective of the Code, is only a bi-product of revival of failing firms. Beyond revival of firms, the Code has ushered in significant behavioural changes resulting in substantial recoveries for creditors outside the Code and improving performance of firms. Therefore, it is important to consider what happens in the processes under the Code and what happens on account of the Code.

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[7] *Chitra Sharma and Ors. v. Union of India and Ors,* [WP (C) Nos. 744, 782, 783, 803, 860 & 950-2017; 511-2018 & SLP (C) Nos. 24001, 24002, 36396 & 33267-2017].; *Arcelor Mittal India Private Limited v. Satish Kumar Gupta and Ors.*, (2019) 2 SCC 1 (hereinafter "Arcelor Mittal"); *Swiss Ribbons*

[8] *Pioneer Urban Land and Infrastructure Limited and Anr. v. Union of India & Ors.*,[Writ Petition (Civil) No. 43 of 2019].

[9] *Ibid.*

[10] Quarterly Newsletter of the IBBI-, April-June, 2019, Vol. 11.

Table : Corporate Insolvency Resolution Processes **(Number)**

Quarter	CIRPs at the beginning of the Quarter	Admitted	Closure by				CIRPs at the end of the Quarter
			Appeal/ Review/ Settled	Withdrawal under Section 12A	Approval of Resolution Plan*	Commencement of Liquidation	
Jan- Mar, 2017	0	37	1	0	0	0	36
Apr-Jun, 2017	36	129	8	0	0	0	157
July-Sept, 2017	157	233	18	0	2	8	362
Oct-Dec, 2017	362	147	38	0	7	24	440
Jan-Mar, 2018	440	195	20	0	11	59	545
Apr-Jun, 2018	545	247	20	1	14	52	705
Jul-Sept, 2018	705	241	29	27	31	86	773
Oct-Dec, 2018	773	275	8	36	16	78	910
Jan-Mar, 2019	910	372	20	19	17	81	1145
Apr-Jun, 2019	1145	286	12	18	22	87	1292
Total	**NA**	**2162**	**174**	**101**	**120**	**475**	**1292**

* These exclude 3 resolutions which have since yielded into liquidation

FREEDOM TO EXIT

Mainstream economic thought believes that at any point of time, human wants are unlimited while the resources to satisfy them are limited .The central economic problem, therefore, is inadequacy of resources vis-à-vis ever-increasing, unlimited wants. Mainstream legal thought believes that as a person moves from natural state to economic state, it loses some degree of freedom .The central legal problem, therefore, is inadequacy of freedom to pursue economic interests meaningfully. Thus, there are twin inadequacies of resources and freedom: resources are limited, so also is freedom. There are twin adequacies too: resources have alternative uses, and firms pursue self-interests. An economy thrives when the self-interested firms have maximum possible freedom to shift resources to more efficient uses continuously and seamlessly.

Freedom unleashes and realises the full potential of every firm and every resource in the economy. It is well established that economic freedom and economic performance have a very high positive correlation. Countries having a high level of economic freedom generally outperform the countries with not-so-high level of economic freedom. It has, therefore, been the endeavour of countries all over the world to provide the right institutional milieu that (a) provides, promotes and protects economic freedom, and (b) regulates such freedom only to the extent it is necessary for addressing market failure(s). In other words, the endeavour is to have better business regulations that make it easier for firms to do business in the economy.

A firm needs freedom broadly at three stages of a business - to start a business (free entry), to continue the business (free competition) and to discontinue the business (free exit).This enables new firms to emerge continuously; and they do business while they are efficient and vacate the space when they are no longer efficient. The first stage ensures

allocation of resources to the most efficient use, the second stage ensures efficient use of resources allocated, and the third stage ensures release of resources from inefficient uses. This ensures the most efficient use of resources and consequently optimum economic well-being. The economic reform typically endeavours to provide economic freedom at these three stages.

The reforms in India in the 1990s focused on freedom of entry. It ushered in liberalisation, privatisation and globalisation. It dismantled the *license-permit-quota Raj,*[11] when discretionary license gave way to an entitlement of registration. It allowed firms meeting the eligibility requirements to raise resources, without requiring any specific approval from the State, to facilitate freedom of entry.

The reforms in the 2000s focused on creating a free and fair market competition. It moved away from control of monopoly of firms to promote competition among firms at marketplace. Size or dominance, *per se,* was no longer considered bad, its abuse was. The reforms provided a level playing field and competitive neutrality and prohibited firms from restricting the freedom of other firms to do business.

The index of economic freedom, which measures the degree to which the policies and institutions of an economy are supportive of economic freedom, has substantially improved for India since the 1990s. The outcome has been astounding. The average growth rate in the post reforms period since 1992 has been more than double of that in the pre-reforms period. Today, India is the fastest-growing, trillion-dollar economy and the sixth largest in the world.

The Indian economy moved from socialism with limited entry to *'marketism'* without exit, leading to substantial cost of impended exit[12] After having commenced business, a firm in a market economy fails to deliver, as planned, mostly on account of competition and innovation:
(a) The firm belongs to an industry where business is no more viable for exogenous reasons such as innovation. Most such firms have economic distress and are generally unviable. The only option available is to release the resources of the firm for other competing uses and the entrepreneur to pursue emerging opportunities. A few of these firms may, however, have resources to change the business and become viable.
(b) The firm belongs to an industry where other firms in the industry are doing well, but the firm in question is not doing well for endogenous reasons such as inability to compete at marketplace. Most such firms have only financial distress, not being able to meet financing costs and are generally viable. It is necessary to rescue the firm well in time from the clutches of current management and put it in the hands of a credible and capable management to avoid liquidation. A few of these firms may have significantly depleted resources and become unviable.

The World Economic Forum identifies three broad sources of growth, namely, (a) factor endowments and institutions, (b) competition, and (c) innovation, while classifying economies into five classes according to their stages of development[13] Where the reliance on competition and innovation is relatively less, say less than 40 per cent, the economy is in the first stage of development, typically yielding a per capita GNP of less than USD 2000 and where the reliance on competition and innovation is significant, say more than 80 per cent, the economy is in the fifth stage of development, typically yielding a per capita GNP of at least USD 17000. The level of

[11] A term coined by C. Rajagopalachari for bureaucratic system of granting licences and permits for new commercial ventures.
[12] Economic Survey, Ministry of Finance, Government of India, 2015-16.
[13] The Global Competitiveness Report, World Economic Forum, 2017–18.

competition and innovation explains much of the distance in per capita GNP from USD2000 to USD 17000. Competition helps efficient firms to drive out inefficient firms; innovation helps new order to drive out old order. Thus, competition and innovation both carry the germs of firm failure. The higher the intensity of competition and innovation, the higher is the incidence of firm failure. Since competition and innovation are two main sources of growth in a market economy, it is necessary to have a mechanism to smartly deal with the failures.

In case of failures arising from either competition or innovation, the resources at the disposal of the firm are underutilised and the management / entrepreneur has failed. Where a firm remains in such a state for long, its balance sheet gets stretched. Such failure by many firms, particularly large ones, impacts the balance sheets of creditors, particularly banks. This reduces the availability of funds with the creditors, limiting their ability to lend for even genuinely viable projects, thus restricting credit growth . The impact is pronounced where some firms deliberately fail to repay loans. Thus, what emerged in the middle of this decade, popularly referred to as the *Twin Balance Sheet* problem[14], where both the banks and firms were reeling under the stress of bad loans, thereby, hindering overall economic growth.

Given that the resources are scarce, and failures are routine in a dynamic market economy, India needed a codified and structured market mechanism to put the underutilised resources to more efficient uses continuously and free entrepreneurs from failure. The Code provides such a market mechanism for (a) rescuing a failing, but viable firm; and (b) liquidating an unviable one and releasing its resources, including entrepreneur(s), for competing uses, and thereby provides the freedom to exit, the ultimate freedom.

THE INSOLVENCY AND BANKRUPTCY CODE, 2016

The objective of the Code is time-bound reorganisation and insolvency resolution of firms for maximisation of value of assets of the firm concerned, to promote entrepreneurship and availability of credit and balance the interests of all its stakeholders. The first order objective is resolution. The second order objective is maximisation of value of assets of the firm and the third order objective is promoting entrepreneurship, availability of credit and balancing the interests. This order of objectives is sacrosanct[15] The Code bifurcates and separates the interests of the firm from that of its promoters / management with a primary focus to ensure revival and continuation of the firm by protecting it from its own management and from a death by liquidation. [16] It is the mandate of the nation[17] It is a paradigm shift in the law[18]

The CIRP under the Code endeavours to achieve its stated objectives. A threshold amount of default entitles a stakeholder to trigger CIRP of the firm and if triggered, the firm moves away from 'debtor-in-possession' to 'creditor-in-control'; management of firm and its assets vest in an IP, who runs the firm as a going concern, and a committee of creditors (CoC) is constituted to evaluate options for the firm. The IP invites feasible and viable resolution plans from eligible and credible resolution applicants for resolution of insolvency of the firm. If the CoC approves a resolution plan within the stipulated time with 66 per cent majority, the firm

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[14] *Supra* note 12
[15] *Binani Industries Limited v. Bank of Baroda & Anr.,* [CA (AT) No. 82,123,188,216 & 234 -2018] (hereinafter "Binani Industries").
[16] Swiss Ribbons, *supra* note 5.
[17] *DF Deutsche Forfait AG and Anr v. Uttam GalvaSteel Ltd.*, [C. P. No. 45/I&BP/NCLT/MAH/2017]
[18] Innoventive Industries Ltd. *supra* note 6.

continues as a going concern. If the CoC does not approve a resolution plan with the required majority within this period, the firm mandatorily undergoes liquidation. The Code tries, by divesting the erstwhile management of its powers and vesting it in a professional, to continue the business of the firm as a going concern until a resolution plan is drawn up. Then the management is handed over under the plan so that the firm can pay back its debts and get back on its feet. All this is done within a period of six months with a one-time extension of up to 90 days or else the chopper comes down and the liquidation process begins.[19]

Strategy of the Code

The strategy under the Code includes the following elements:

A. The Code has strong focus on prevention. It requires that only credible and capable persons can submit resolution plans. This means that persons having any of the specified ineligibilities cannot submit resolution plans. India has a unique concept of promoter who also controls management. Some of them may have specified in eligibilities and hence may not be eligible to submit resolution plans. Even if one is eligible, it may not submit the most competitive plan or the CoC may opt for liquidation. In such cases, the existing promoter and management may lose the firm for ever. With the Code in place, ownership of firms is not a divine right.

The credible threat of a resolution process that may shift the control and management of the firm away from existing promoters and managers, most probably, for ever, deters the management and promoters of the firm from operating below the optimum level of efficiency and motivates them to make the best efforts to avoid default. Further, it encourages the debtor to settle default with the creditor(s) at the earliest, preferably outside the Code. There have been thousands of instances where debtors have settled their debts voluntarily or settled immediately on filing of an application for CIRP with the AA before the application is admitted. There are also settlements after an application is admitted.[20] The Code has thus brought in significant behavioural changes and thereby redefined the debtor-creditor relationship. With the Code in place, the defaulter's paradise is lost.[21] Repayment of loan is no more an option; it is an obligation.

On the other hand, the creditor knows the consequences of default by a debtor, if insolvency proceeding is not initiated or the insolvency is not resolved. It is motivated to resort to more responsible (meritocratic) lending to reduce incidence of default. Further, although a creditor has the right to initiate a proceeding under the Code as soon as there is a default of the threshold amount, it is not obliged to do so at the first available opportunity, if it has reasons for the same. It cannot, however, defer the initiation of proceeding indefinitely, allowing ballooning of default. It needs to explain to itself and its stakeholders why it initiated an insolvency proceeding or why it did not, in case of a default, and suffer consequences of its actions of omission or commission. Consequently, there would never be a high value default if this law exists on the statute book. This is another dimension of prevention. The scheme of

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[19] Ibid.
[20] *Lokhandwala Kataria Construction Private Limited v. Nisus Finance and Investment Managers LLP.,* (Civil Appeal No. 9279/2017)
[21] Swiss Ribbons, *supra* note 5.

incentives and disincentives under the Code has brought in behavioural changes which would minimise the incidence of default in the days to come and most defaults would be resolved outside the Code. Going forward, the use of the Code would be minimal.

B. The Code envisages a market mechanism to rescue a failing, viable firm as it may not always be possible to prevent genuine failures in the face of competition and innovation, despite the best efforts and the most desirable behavioural changes. If there is a resolution applicant who can continue to run the firm as a going concern, every effort must be made to try and see that this is made possible. [22] The Code is a beneficial legislation which puts the Corporate Debtor (CD) back on its feet, not being a mere recovery legislation for creditors.[23] It envisages resolution of insolvency and not a recovery proceeding to recover the dues of the creditors.[24] It does not envisage sale or liquidation of the firm for recovery of loan.[25] In fact, it attracts penalty if the process under the Code is abused for purposes other than the purposes of the Code.[26]

(i) The Code endeavours resolution of insolvency at the earliest, preferably at the very first default, to prevent it from ballooning to un-resolvable proportions. In early days of default, enterprise value is typically higher than the liquidation value and hence the stakeholders would be motivated to resolve insolvency of the firm rather than liquidate it. Therefore, it entitles the stakeholders to initiate CIRP as soon as there is threshold amount of default. It also requires the AA to commence a CIRP within 14 days of receipt of an application for the same.

(ii) The Code mandates resolution in a time-bound manner, as undue delay is likely to reduce the enterprise value of the firm. When the firm is not in sound financial health, prolonged uncertainty about its ownership and control may make the possibility of resolution remote. Time is the essence of the Code. It is mandatory to complete a CIRP within 180 days, extendable by a one-time extension of up to 90 days.[27] The regulations provide a model time line for each task in the process, which needs to be followed as close as possible.[28] The Code requires that a CIRP shall mandatorily be completed within 330 days, including any extension of time as well as any exclusion of time on account of legal proceedings.

(iii) The Code envisages resolution of the firm as a going concern, as closure of the firm destroys organisational capital and renders resources idle till reallocation to alternate uses and makes the possibility of resolution remote. It, therefore, facilitates continued operation of the firm as a going concern during CIRP. It makes available a cadre of competent and empowered IPs to manage the affairs of the firm under resolution as a going concern, to protect and preserve the value of its property, help in retrieval of value lost through fraudulent and preferential transactions and assist the CoC to arrive at the best resolution plan. It mandates the firm, its promoters and any other person associated with its management to extend all assistance and cooperation to the IP. It envisages information utilities to make available authentic information required for completing the process expeditiously. It enables raising interim finances and includes the cost of interim finance in insolvency resolution process cost,

[22] Arcelor Mittal, *supra* note 7.
[23] Swiss Ribbons, *supra*note 5.
[24] *Prowess International Pvt. Ltd. v. Parker Hannifin India Pvt. Ltd.*, [CA (AT) No. 89-2017].
[25] Binani Industries, *supra* note15.
[26] *Unigreen Global Private Limited.,* [CP No. IB- 39 (PB)-2017].
[27] *M/s. Surendra Trading* Company*v. M/s. Juggilal Kamlapat Jute Mills Company Limited & Ors.,* [CA No. 8400-2017].
[28] Arcelor Mittal, *supra* note 7.

which has super priority. It envisages moratorium on institution or continuation of suits or proceedings against the firm during the resolution period. It prohibits suspension or termination of supply of essential services to the firm to keep it going. It prohibits any action to foreclose, recover or enforce any security interest during CIRP and thereby prevents a creditor(s) from maximising its individual interest.

(iv) The Code envisages a collective mechanism for resolution of insolvency. It enables any FC to initiate CIRP even when the firm has defaulted to another FC. This prevents the debtor from granting preferential treatment to a more vocal creditor, while ignoring the less vocal ones. It does not envisage termination of the process even if claims of the creditor concerned are satisfied. Once admitted into CIRP, other creditors have a right to file their claims. Thereby, the nature of insolvency proceeding changes to a representative suit and it is no more a *lis* between a creditor and the firm.[29] Therefore, they alone do not have the right to withdraw the insolvency petition even if the dues of the creditor concerned have been settled. The law, however, allows withdrawal with the approval of the CoC by 90 per cent of voting power.

(v) The Code calls for a team effort to resolve insolvency. There are many players having defined, complementary roles for completion of the process. It is a team responsibility to complete the process in time, though one has the prime responsibility for a task in the process. The insolvency proceeding is not an adversarial proceeding. There is no pleading or defending party, and the terminologies like petitioner, respondent, plaintiff, and defendant are not present under the Code.[30]

(vi) The Code provides for the best sustainable resolution. It requires the IP to provide complete, correct and timely information about the firm to resolution applicants for design of resolution plans and to detect avoidance transactions. It envisages only credible and capable persons to propose competing, viable and feasible resolution plans and empowers the CoC to choose the best of them. It envisages limitless possibilities of resolution through a resolution plan, including restructuring by way of merger, amalgamation or demerger. A resolution plan may entail a change of management, technology, or product portfolio; acquisition or disposal of assets, businesses or undertakings; restructuring of organisation, business model, ownership, balance sheet; strategy of turn-around, buy-out, acquisition, takeover; and so on.

(vii) The Code segregates commercial aspects of insolvency resolution from judicial aspects and empowers the stakeholders of the firm and the AA to decide matters within their respective domain expeditiously. It puts the entire process at the disposal of the stakeholders and motivates them with incentives and disincentives to complete the process at the earliest. The consideration of resolution plans and approval of the best of them requires two abilities, namely, the ability to restructure the liabilities and the ability to take commercial decisions. In contrast with the operational creditors (OCs), the FCs generally have the resilience to wait for realisation of their dues post reorganisation and the ability to determine if a resolution plan will achieve the objectives of the Code. In view of their abilities, the CoC comprises FCs. The commercial decisions of the CoC are not generally open to any analysis, evaluation or judicial review by the AA or the appellate authority.[31] The commercial aspects include the manner of

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[29] *Parker Hannifin India Private Limited.,* [CP (IB) No. 150-KB-2017].
[30] *Supra note* 17.
[31] *K. Sashidhar v. Indian Overseas Bank & Ors.,* 2019(3) SCALE 6.

distribution of realisations under the resolution plan.[32]

(viii) The Code balances the interests of stakeholders in the resolution process. It assumes significance as the firm undergoing CIRP may not have enough at the commencement of CIRP to satisfy the claims of all stakeholders fully. It provides specific balances, such as minimum payment to OCs in priority over FCs and for dissenting FCs. It aims to balance the interests of all stakeholders and does not maximise value for FCs.[33] It incorporates the principle of fair and equitable dealing of OCs' rights.[34]

(ix) The Code requires the resolution plan to be in compliance with all applicable laws of the land and it must be implementable**.** The IP needs to certify this, and the AA needs to be satisfied. Otherwise, the plan may not be implementable, and the purpose of resolution is defeated**.** The Code provides severe penal consequences if an approved resolution plan is not implemented.[35]

(x) A resolution approved by the AA is binding on all stakeholders, including central government, state governments and any local authority to whom the CD owes debt under any law.

C. The Code facilitates creative destruction. For a market economy to function efficiently, the process of creative destruction should drive out failing, unviable firms continuously. It was not happening hitherto in the absence of an effective mechanism. Quite a few firms got stuck up in *'chakravyuaha'*[36] of unsustainable business or with idle assets and no business. The Code provides a mechanism whereby a failing, unviable firm exits with the least disruption and cost and releases idle resources in an orderly manner for fresh allocation to efficient uses.

Although a default of a threshold amount enables initiation of resolution process, it does not imply that the firm has failed, or that it is unviable. There is no precise mathematical formula to identify a firm as an unviable one. The market may wrongly punish a viable firm, by mistaking it as unviable and vice versa, because of market imperfections. Accordingly, it may push a viable firm to closure and conversely, allow an unviable firm to survive. Rescuing an unviable firm may not be of great concern as it would be a matter of time before it is closed. Closing a viable firm, on the other hand, is of grave concern as it impacts the daily bread of its stakeholders and it cannot be revived later. Similarly, there is no mathematical formula to identify a resolution applicant as credible and capable and a resolution plan as viable and feasible. Based on this premise, the Code has adopted a very cautious approach and provides an opportunity to the market to rectify a mistake where it has made a wrong assessment or decision.

The Code provides for initiation of a process for resolution; it does not enable initiation of liquidation process directly. It promotes resolution over liquidation.[37] After CIRP is initiated, if the market discovers that the process should not have been initiated, the Code allows termination of process with the approval of the CoC by 90 per cent of voting power before constitution of CoC, after constitution of CoC but before invitation of Expression of Interest, or

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[32] Section 30(2)(b), as amended by the Insolvency and Bankruptcy Code (Amendment) Act, 2019.
[33] Binani Industries, *supra* note 15.
[34] Swiss Ribbons, *supra* note 5.
[35] *Corporation Bank v. Amtek Auto Ltd. & Ors.*, [CP (IB) No. 42-Chd-Hry-2017].
[36] It is a mythological multi-layer formation from which it is difficult to get out., Economic Survey, Ministry of Finance, Government of India, 2015-16.
[37] Preamble to the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

after invitation of Expression of Interest in exceptional cases, on an application made by the applicant.[38] During the process, the stakeholders endeavour to rescue the firm through a resolution plan. The CoC may at any time decide to liquidate a CD, even before preparation of information memorandum, where running the entire CIRP is an empty formality and liquidation maximises the value. Liquidation process commences only on failure of resolution process to revive the firm.

Even after an order for liquidation is issued, the law enables compromise or arrangement based on an application of a member, a creditor or the liquidator. In several matters, the NCLAT has directed to attempt a compromise or arrangement.[39] Many recent orders of the NCLAT have directed the liquidators to make efforts to sell the firm as a going concern or the business of the firm as a going concern to protect the interests of stake holders. [40]On failure of compromise or going concern sale, the liquidator may proceed to sell the assets in bits and pieces.

CONCLUSION

The Code is still at its nascent stage. The work relating to individual insolvency, cross border insolvency, group insolvency, and valuation profession has begun in right earnest. As the process matures in the days to come, the insolvency regime is expected to impact not only 'ease of doing business', but also overall economic growth. The Code would boost economic growth through three main routes.

Firstly, the failure of business dampens entrepreneurship if it is onerous for an entrepreneur to exit a business. By rescuing viable businesses through CIRP and closing non-viable ones through liquidation, the Code releases the entrepreneurs from failure. It enables them to get in and get out of business with ease, undeterred by genuine business failures. As more and more potential entrepreneurs recognise this, the Code would promote entrepreneurship.

Secondly, when a firm fails, it typically defaults in service of debt obligations. As many firms default, the availability of funds with the creditor declines, limiting thereby its ability to lend for even genuinely viable projects. On the other hand, low and delayed recovery pushes up the cost of lending, and consequently, credit becomes available at a higher cost at which many projects may become unviable. Through provision for resolution and liquidation, the Code reduces incidence of default, and enables creditors to recover funds either through revival of the firm or sale of liquidation assets. It incentivises creditors - secured and unsecured, bank and non-bank, financial and operational - to extend credit for projects and thereby enhances availability of credit.

Thirdly, default typically reflects relative under-utilisation of resources at the disposal of the firm as compared to other firms in the industry. The Code ensures optimum utilisation of resources at all times by preventing use of resources below the optimum potential, ensuring efficient use of resources within the firm through a resolution plan; or releasing unutilised or under-utilised resources through closure of the firm and thereby maximising the value of the firm and in turn. The resources, that are currently unutilised or underutilised or rusting for

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[38] Swiss Ribbons, *supra* note 5.
[39] *Y. Shivram Prasad v. S. Dhanapal & Ors.*, [CA (AT) (Insolvency) No. 224 & 286-2018].
[40] *Edelweiss Asset Reconstruction Company Ltd. v. Bharati Defence and Infrastructure Ltd.*,[CP-292-I&B-NCLT-MAH-2017]

whatever reason, can be put to more efficient uses, enabling the growth rate to move up by a few percentage points.

By liberating the entrepreneur from failure and releasing resources from *chakravyuha* of inefficient or defunct firms, for continuous recycling, coupled with improved availability of credit, the Code has changed the narrative from 'Hopeless End' to 'Endless Hope'.

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