CHAPTER-9

SUGGESTION AND CONCLUSION
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The chapter shall deal with:

- The deficiencies in the present insolvency regime.
- Suggestion and conclusion.
DEFICIENCY IN THE PRESENT INSOLVENCY REGIME

DEFICIENCY IN NCLT

It is observed that the average time taken in completing winding-up process of a company under courts winding up is more than ten years. The high court judge dealing with company cases is not able to sit on a day-to-day basis and is not in a position to devote the time and energy required for early disposal of winding-up cases. The suggestion that the jurisdiction of the courts be statutorily conferred on the Company Law Board (CLB) did not find favour at this stage when the CLB does not have adequate members, benches at all the seats of the high courts, and infrastructure to deal with multiplicity of proceedings involved in matters relating to winding up. The problem of endemic delays inherent in SICA (Sick Industrial Companies Act) procedures of revival and reconstruction is to a great extent exacerbated by the large-scale abuse of the provisions relating to suspension of legal proceedings, suits and enforcement of contracts. It was way back in 2000 that the Eradi Committee responded to the paucity of time at High Courts, gloomy condition of infrastructure at CLBs and endemic delays at the Board for Industrial and Financial Reconstruction (BIFR) that it proposed a National Tribunal for dealing with corporate disputes.

The Committee’s recommendation became a reality in 2016 in the form of the National Company Law Tribunal (NCLT). The NCLT will hear all matters pertaining to the Companies Act, 2013. It will also hear cases under the Insolvency and Bankruptcy Code. So with the establishment of NCLT, all the pending proceedings from the High courts, the CLB, the Debt Recovery Tribunal (DRT) and the BIFR will be transferred to the new formed tribunal.

The NCLT is the CLB, BIFR, DRT all rolled into one. But will it deliver? Lawyers and experts did not sound very optimistic. 4000 cases from the CLB. 700 cases from the BIFR. 5,200 cases from high courts. 15,000 cases from DRTs. This is the heavy burden that the NCLT (11 benches including the principal bench in New Delhi) will have to deal with.\footnote{644}{according to an NCLT Readiness report by consulting firm Alvarez & Marsal.}

The start of NCLT itself has been ominous. Unfortunately, the NCLT suffers from all the complications and issues that Company Law Board (CLB) had. The Companies Act, 2013 and the notification issued thereafter inviting applications for members are unusual. There is a minimum age in order to be appointed as the member of NCLT – you have to be at least 50 years old. But why this condition of age has been imposed? If a judge of a High Court can be
appointed at 43, then why there is this requirement of you an NCLT member to be 50 years old?

According to Section 413(2), Companies Act 2013, a person shall not be eligible for appointment as Judicial Member unless he/she has completed the age of 50 years as on the date of receipt of application. Further Section 409(2) (c), of the Companies Act 2013, states that a person shall not be qualified for appointment as a Judicial Member unless he has, for at least ten years been an advocate of a court. If you want someone to be at least 50 years old, they will have at least 25 years of practice. So why do say you need only 10 years of practice? Now who are these people who will have 10 years of practice at age 50? They are likely to be public sector employees who’ve passed law without even attending classes. It is unlikely that anyone from the National Law Schools will have only 10 years of experience at age 50. This was exactly the problem at CLB - you would get officers from sales tax department, excise department, commercial tax officer, and some public-sector unit officer - and these people are now expected to know company law. There are very meagre chances of these people to have even read the Companies Act.

Judges at the NCLT are expected to have both commercial know-how and judicial wisdom. It is expected from the judges who are functioning at the NCLT ought to have the required domain knowledge for dealing with cases under the Companies Act. But, some experts say, reality belies expectations.

Lawyers are struggling to explain the fundamentals of Companies Act, 2013 to the NCLT members. Murali Neelakantan, a Corporate Lawyer, cited the instance of a case at the NCLT that involved a demerger - in which, as is practice, the shares of the new (demerged) company are not issued to the transferor company itself but to the shareholders of the transferor company. This, as he explained, is a common thing in a demerger.

A question is being asked- you’re looting the company? Selling a valuable asset and not getting any consideration? How do you explain this? The Act says that is how it should be done and that is how it has been done for at least 50 years. Now, the lawyers have to explain to the judge, how a demerger happens. Other side gets to say - look, how oppressive this is - company is selling off valuable assets and not getting any consideration and the (judicial) Member is saying yes, yes. Similarly, nuances of standing, allotment of shares, holding of

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645 Murali Neelakantan, Corporate Lawyer
meetings – all have to be explained to them. This lack of knowledge and experience is leading to indecision as well. A corporate lawyer, who is based at Bangalore, spoke on the condition of anonymity, that the Bengaluru NCLT bench is just trying to follow the practices of the Delhi NCLT bench and is not applying its own mind in taking decisions independently, as a result of which further delay in the process is taking place. He explained that no order on mergers, transferred from the high court, have been passed till date, though more than two months have elapsed since the transfers began. The lawyer further said that a government notification drafted to clarify the applicability of Companies Act, 1956 to matters pending with a High court - has somehow given various NCLT benches the impression that all the order should now be passed under the Companies Act, 2013. As a result of this the Bangalore bench is now insisting that for transferred cases, fresh notices be issued to all concerned stakeholders. This has led to the duplication of effort and delays.

It’s not just the quality of members that the NCLT is struggling with; quantity is a problem too. At present there are twenty six adjudicating members in the 11 National Company Law Tribunal (NCLT) benches. But the supporting staffs are highly insufficient in number. U.S. bankruptcy courts have around 4000-5000 assistant personnel that perform judicial, legal and administrative functions. In the U.K., Her Majesty’s Courts and Tribunal Service employs 16,000 full-time staff which includes legal advisers, courtroom staff, administrative staff and court enforcement officers. Assuming 25,000 cases move to the NCLT and judicial strength ramps up to 50 in three years and a judge can handle 60 cases at any given point in time, it will take more than seven years to clear the current backlog. Currently the work load in the NCLT is gargantuan as all the disputes have been centralised in NCLT. There aren’t enough judges at the NCLT currently. A creditor initiating the insolvency resolution proceedings would need to establish that there is a debt, a default has occurred and that it has corresponded with the debtor to attempt to recover that debt. In order for the proceeding to be initiated, a person from the NCLT has to review these points within 14 days as per the Insolvency Code. It is a strenuous task to meet this target, as in the present time there aren’t enough judges or administrative representatives of the NCLT who can perform this demanding task.

646 NCLT Readiness Report, Alvarez & Marsal
The limited liability company is a contract between equity and debt. As long as debt obligations are met, equity owners have complete control, and creditors have no say in how the business is run. When default takes place, control is supposed to transfer to the creditors; equity owners have no say. When creditors know that they have weak rights resulting in a low recovery rate, they are averse to lend. The crashing of some business strategies is fundamental to the process of the market economy. At a point when business collapses, the best outcome for society is to have a fast renegotiation between the financiers, to finance the going concern using a new arrangement of liabilities and with a new management team. In the event if this is not possible, the best outcome for society is a quick liquidation.

At the point when such courses of action can be instituted, the market procedure of creative demolition will work easily, with more noteworthy focused power and more prominent competition. India is in the process of establishing the framework of a mature market economy. This includes well drafted current laws, that supplant the laws of the preceding 100 years, and high performance organisations which implement these new laws. The Government has endeavoured to provide one critical building block of this process, with a modern insolvency and bankruptcy code, and the design of associated institutional infrastructure which reduces delays and transaction costs. It is hoped that the implementation of this Code will increase GDP growth in India by fostering the emergence of a modern credit market, and particularly the corporate bond market. GDP growth will accelerate when more credit is available to new firms including firms which lack tangible capital. While many other things need to be done in achieving a sound system of finance and firms, this is one critical building block of that edifice.

The present structure of the bankruptcy and insolvency process in India is elaborate and multi-layered. The legislative process is covered over multiple laws, and adjudication takes
place in multiple forums. The Insolvency and Bankruptcy Code, 2016 (IBC), which is a dynamic piece of legislation of contemporary times, has replaced this arrangement dealing with insolvency in India. Financial sector reforms have given a transformation of the equity, currency and commodity markets. The present bankruptcy and insolvency framework is knit together from debt recovery laws as well as collective action laws to resolve insolvency and bankruptcy.

However, despite considerable policy efforts, the credit markets continue to malfunction. One key factor that holds back the credit market is the mechanism for resolving insolvency, or the failure of a borrower (debtor) to make good on repayment promises to the lender (creditor). The existing laws have several problems and are enforced poorly. The IBC offers a time-bound resolution process aimed at maximising the recovery of debts. This will benefit not just the creditor and debtor companies, but will give a major boost to the Indian economy. It is a single unified Code to resolve insolvency for all companies, limited liability partnerships, partnership firms and individuals. In order to ensure legal clarity, the provisions in all existing law that deals with insolvency of registered entities be removed and replaced by this Code. This has two distinct advantages in improving the insolvency and bankruptcy framework in India. The first is that all the provisions in one Code will allow for higher legal clarity when there arises any question of insolvency or bankruptcy. The second is that a common insolvency and bankruptcy framework for individual and enterprise will enable more coherent policies when the two interact. For example, it is common practice that Indian banks take a personal guarantee from the firm’s promoter when they enter into a loan with the firm. Before the coming into existence of the Insolvency and Bankruptcy Code, 2016, there were separate set of provisions that guided recovery on the loan to the firm and

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653 The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design(November 2015); Available at: <http://ibbi.gov.in/BLRCReportVol1_04112015.pdf> accessed on 11th August 2017

654 Ibid.
on the personal guarantee to the promoter. Under a common Code, the resolution can be synchronous, less costly and help more efficient recovery.655

Steps are now in process to set up this institutional infrastructure. The National Company Law Tribunal (NCLT) has been notified as the adjudicating authority for the ‘corporate insolvency’ and ‘bankruptcy cases’. The IBBI has been constituted and has begun building capacity. The regulating frame for ‘IPs’ and ‘IPAs’ has been set up and some IPs and IPAs have already been registered by the ‘IBBI’. It may take some time for new IUs to get registered but even without the IUs in place, the provisions of the IBC related to the Corporate Insolvency Resolution Process (CIRP) and liquidation have been notified. While the former has been operational from December 1, 2016, liquidation provisions will come into force from December 15, 2016. Clearly, the speed of implementation has been prioritised leaving the institutional set-up to develop in parallel to the functioning of the law. Following are some of the challenges in its implementation:

➢ The NCLT will face the biggest challenge in the process of transitioning existing cases to the IBC. Presently, there are only 11 NCLT benches which are functioning in India with 16 judicial members and seven technical members among them. With CLB getting dissolved, NCLT mandate includes hearing cases earlier dealt with by the Company Law Board (CLB) under the Companies Act 2013, in addition to cases under the IBC. As of March 2015, there were around 4,200 pending CLB cases. All of these will now be transferred to the NCLT. In addition, the CLB receives around 4,000 new cases every year. Now these will have to be dealt with by NCLT. With the IBC becoming operational, all the 4,500 winding-up cases pending at the various High Courts as of March 2015 are also likely to get transferred to the NCLT. There are very high chances that corporate recovery cases at the debt recovery tribunals (DRTs) and the rehabilitation cases at the Board for Industrial and Financial Reconstruction (BIFR) are eligible to be initiated as new IBC cases.

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655 Ibid.
INSOLVENCY PROFESSIONALS FEAR MALTREATMENT AS LAW FAILS TO PROTECT THEM - Even as the Insolvency and Bankruptcy Board of India (IBBI) taken up a few cases, insolvency professionals (IP) still fear the law (Insolvency and Bankruptcy Code) does not provide fool-proof protection to them. Although there is a provision in the section 233 of the Code that no suit, prosecution or other legal proceeding shall lie against the insolvency professional, liquidator and other officials of IBBI for anything which is done in good faith under the Code, professionals feel that it is too hard to prove that a particular act was done in a good faith. Once allegations in this regard are made against IP, proving that a particular act was done in good faith will not be an easy task and at the same time the IP will have to bear the heavy litigation cost in this regard. This is a strong reason for professionals to show reluctance in taking the job of an IP. Further, it is believed that the original promoter of the company may have several allegations against an IP. This may include accusing IP of selling assets to siphon off part of them as well as professional negligence on the part of IP.656

Generally people across disciplines such as chartered accountancy, cost accountancy and company secretary ship do not show any inclination to come together to work in any firm, but the job of IP requires these professionals to work jointly. Mamta Benani, president of ICSI, insists that these professionals should come together as the process of insolvency does not lie on one person.657 Binani said India needs many more IPs than the current 900, especially with the bankruptcy code notified by the government. Various new entities will have to be established in order to archive time-bound insolvency resolution. In addition to this, with the dismal situation of pendency and disposal rate of DRTs, 658 their present potential may be inadequate to handle this additional role. A major overhaul of DRT infrastructure both in terms of physical facilities and manpower will be needed to achieve what the Code seeks.659


657 Mamta Binani, president of ICSI

658 Debt Recovery Tribunal

659 The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design(November 2015); Available at:<http://ibbi.gov.in/BLRCReportVol1_04112015.pdf> accessed on 11th August 2017
IPAs, controlled and maintained by the Board, will be formed for regulating the functioning of IPs. Instead of making the IPs and/or IPAs self-regulated, the Board has been assigned with the responsibility of regulating their performance and laying down the standards of performance. In most insolvency/liquidation proceedings, government will be an interested party for recovery of the unpaid statutory dues of its several departments. This will make the impartial operation of insolvency professionals (whose entry and exit in the insolvency profession is regulated by the government through the Board) difficult.

A large number of trained and skilled insolvency professionals will be required for successful execution of the Code. A strong anchor, clear-cut plan will be needed to develop a large pool of insolvency professionals and an institutional structure which will produce, certify and regulate them. Such insolvency professionals will not only be needed to comprehend the subtle distinctions and differences of various aspects of restructuring/liquidation but must also be capable of carrying out the affairs of the company during the process. This exercise will definitely take a considerable amount of time, resources and expertise. Moreover, effort will be needed to ensure that such professionals are available all over the length and breadth of India and not just for high profile cases in economic and commercial hubs.

Even though the Code suggests 2 mechanisms concerning the cross border element of insolvency/liquidation, a comprehensive framework needs to be imbibed to effectively deal with this issue. A number of Indian companies have assets and creditors situated all over the world and at the same time various foreign companies have subsidiaries in India. Issues relating to Insolvency/liquidation of Indian companies with assets located in several jurisdictions outside India and vice-versa cannot be achieved without having a mechanism like adoption of the UNCITRAL Model Law on Cross Border Insolvency. In case of bilateral agreements suggested by the Code presently, it will not only be difficult but will also take a very long time to negotiate an agreement with each country. Upon the receipt of a letter contemplated under the Code several countries may refuse to share any information about the assets located in their country. As such, while the Code recognizes cross border issues, it

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660 Insolvency professionals
661 Ibid.
does not specifically deal with them other than providing the legal basis for dealing with the issue down the line.
SUGGESTION AND CONCLUSION

India has brought in a new regime of corporate and individual insolvency by legislating the Insolvency and Bankruptcy Code (IBC) in 2016. The winding-up of companies under the Companies Act 2013 has been substantially revised and consolidated under IBC. The process of insolvency resolution has been mandatorily brought under the IBC prior to making the companies enter the path of liquidation.

The timescales have been shortened in order to curtail the process, with an aim to cut down the pain suffered by stakeholders and promoters. The decision-making process has been relegated to an expert tribunal with the expectation of faster turnaround. In theory, it looks great. But the efforts to implement the new regime do not match the intent behind it. In reality, they fall short substantially. Corporate insolvency in India has gone up over the years. As of March 2015, the number of closed companies stood at 268,142. Of this, the number of liquidations and dissolutions was dismally low, at 3.8% of the companies closed. The break-up of company closures is given in this table:

<table>
<thead>
<tr>
<th>S.No.</th>
<th>Description</th>
<th>Number of companies</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Liquidated/Dissolved</td>
<td>10,264</td>
<td>3.8</td>
</tr>
<tr>
<td>2.</td>
<td>Defunct/Struck off</td>
<td>238,417</td>
<td>88.9</td>
</tr>
<tr>
<td>3.</td>
<td>Amalgamated/Merged</td>
<td>15,365</td>
<td>5.8</td>
</tr>
<tr>
<td>4.</td>
<td>Converted to LLP</td>
<td>4,096</td>
<td>1.5</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>268,142</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

Source: Ministry of Corporate Affairs, Government of India.

The data also indicates that there were 5,079 companies in liquidation as of March 2015. The high tally of the companies under liquidation demonstrates that the winding up process in
India is a protracted affair, lagging behind the growth of the country’s corporate sector. Over the years, the liquidation process has not been able to keep pace with the changes in the business environment. This has resulted in the blocking of valuable national assets without any use: a national waste.

The data published by the Ministry of Corporate Affairs does not indicate how long the companies have been under the liquidation process. World Bank data on insolvency resolution indicates that in India, it takes 4.3 years on average to liquidate or dissolve a company. This does not compare well with any region, much less South Asia where the average time is 2.6 years.

The proposed reforms which I have mentioned in my earlier chapters will go a long way in protecting the interest of creditors in an insolvent company; nonetheless a few more steps are desirable. **Here are my few suggestions as to what the Indian Government should do to improve its insolvency system.**

A few of them may be mentioned as under.

- The only hope to recover the credited amount from an insolvent company is from the proceeds of the sale of the properties of insolvent companies. So the sale and disbursement of properties of companies under liquidation should be made more transparent. Procedures such as e-auction and e-tender should be introduced to fetch fair market value of the properties of the companies, so that the maximum amount of dues owed to the creditors may be repaid.

- Mismanagement of the financial affairs of the company by the board members is the substantial cause for companies’ finances going bust. Affixation of accountability will act as a deterrent against mismanagement of companies that jeopardize the interest of the creditors. So mechanism or laws to affix accountability for mismanagement of companies, that pushes it towards insolvency is called for.

- We have seen that genuine efforts have been made to formulate laws through recommendations, enactment etc. Yet, like any other branches of law, companies’ insolvency and restructuring laws in India lacks teeth. Authorities concerned need courage of conviction with clear mindset and will at heart in order to make the current laws more efficient and effective which ensures time bound adjudication and thus make the whole process of liquidation predictable in terms of time. And the judicial
process should rather take practical and business oriented approach towards revival of the sick companies. All supporting pillars i.e. accounting and auditing; statutory & legal framework; monitoring & enforcement; education & training; need to be strengthened and disciplined.

Crippling pendency, weak judicial capability, lack of administrative staff, inconsistent procedures, and manual filing- these are some of the challenges that companies and lenders have faced at the CLB, DRT and BIFR. So, what should the NCLT do differently to avoid falling into the same trap?

➤ I would like to suggest fixing the ‘procedures mindset’.

Tribunals were created to get over procedures but they don’t seem to be able to do it as there are more and more applications being filed and it takes far too long to reach the main matter. They have a beautiful chance to start with a clean slate - they can say that may be high courts had a procedure, I don’t care; CLB may have had a procedure, I don’t care. I will give you only so much time to argue, finish your arguments and go home. No reason why they can’t do it. If you really want to run a tribunal without the legacy of unnecessary procedures, stop adjournments for a start.

➤ I would like to suggest that self-sustaining NCLT - one which is not dependent on the government for funds - would a go a long way in addressing infrastructure woes. One of the core issues plaguing the NCLT concept is the lack of funds even at the start-up stage.

➤ Further I would like to suggest that for the system to work it should attract the best and brightest minds. And to attract them, adequate infrastructure has to be provided and the judges and administrative staff need to be compensated appropriately.

➤ If we tell the largest banks that we need to have the Insolvency and Bankruptcy Code started quickly, they would be more than willing to provide a loan to the government to fund the infrastructure set-up costs and to pay a higher compensation to attract quality judges and administrative staff. The government should increase the fee for the insolvency resolution proceedings and then pay back the loan taken from the banks over a period of time; post which the fees could be used to continuously improve the NCLT.
 ➢ **ESTABLISH MORE NCLT BENCHES**
   In insolvency, the number of benches in the National Company Law Tribunal matters for speedy disposal of cases. Right now, the criteria for establishing benches is unknown. But the benches should be set up based on the number of cases which a bench can be expected to handle. The rationalization is required on the basis of a number of cases – pending and expected. This is the time to make the best use of available data.

 ➢ **ENCOURAGE MERITOCRACY AND SELECT YOUNGER MEMBERS**
   Merit should not take a back seat in the selection of members sitting on benches. NCLT members (technical or judicial) are expected to deal with a specialized subject of company law and IBC. Selection should be based on merit and not on personal equations or with a preset mind. There is a need to opt for a cleaner selection system with qualitative and objective criteria.
   The NCLT’s members often have little exposure to company law, breeding discontent amongst stakeholders. The tribunals in India have become a destination for post-retirement employment, and the NCLT is also seen as moving in that direction. Lowering the minimum age criteria needs to be considered, in order to bring in a younger lot with knowledge of the subject, clarity of thought, excellent writing skills and possession of a rational mindset.

 ➢ **Transfer Cases from High Courts quickly**-The dual system never works, and the High Courts are saddled with winding-up cases even today. The transfer of cases from the High Court to the NCLT is taking place in slower batches. The Government should concentrate on creating more benches and transferring all cases in one go in order to spread confidence amongst the stakeholders. The present state of affairs will see India’s ranking dip further. Quicker transitions would energize the system and bring results.
   ➢ If the NCLT doesn’t address the procedure hangover and infrastructure woes in its early days, it’ll just end up being a prettier version of the CLB, BIFR and DRT.

 ➢ While earlier it used to take about 4 or 5 years time to liquidate a company on an average, after introduction of new Insolvency and Bankruptcy Law, it should be
completed in 180 days, with one time extension of 90 days. To comply with the new requirements there is need for qualified professionals who are experts.

- IP plays a key role in managing rescue and liquidation processes envisaged under the Code. In the process of rescue, IP is the resolution professional and who gathers financial information about the debtor, has to verify the claims of the creditors, forms a committee of creditors on the basis of credit exposure, protects the estate, administer the business of the debtor and aids in reaching and administering a consensual rescue plan. In a liquidation proceeding, the IP is liquidator and sells the assets of the insolvent company and uses the proceeds to pay off all its creditors. To be an IP one has to pass the Limited Insolvency Examination, and must have 15 years of experience in management or ten years of experience as a chartered accountant or a company secretary, or a cost accountant or an advocate. IP could also be registered for a limited period without passing the Limited Insolvency Examination subject to experiences given above. The Institute of Company Secretaries of India (ICSI) has stepped up efforts to train and produce insolvency practitioners citing that the sector has huge need of professionals. ICSI has set up Insolvency Professional Agency to train insolvency professionals as there is huge need for professional in this sector and there is also huge growth potential.

- Finally, the IUs need to be operationalised. In their absence, the IBBI needs to specify clear guidelines that enable the timely admission and disposal of the existing cases. This means a rapid creation of regulatory capacity in terms of people, processes and information technology systems.

So in view of the above, the review of the existing companies’ insolvency regime is a gargantuan task as it requires the balancing of numerous interests which, at times, may be in conflict with each other. Adequate institutional capacity is essential to ensure that the IBC does not suffer from the predicament of earlier reform attempts such as the DRTs. Doing all of these needs time and needs proper planning. Rushing through the implementation of the new law may serve to improve India’s ranking in World Bank’s ‘Doing Business’ report but may not result in a de facto improvement of the insolvency resolution framework, thereby defeating the very purpose of the IBC. The IBC is an important reform for India and its successful implementation depends on meticulous transition planning. The manner in which the IBC is currently being implemented seems to focus more on expeditiously
operationalizing the law rather than effectively implementing it. These concerns, if not addressed satisfactorily, will defeat the very purpose and objective of enacting a new insolvency law to improve the recovery rate in order to promote the development of credit markets and entrepreneurship.