Legal 500
Country Comparative Guides 2025

India

Restructuring & Insolvency

Contributor

Solaris Legal

Debarshi Dutta

Partner | debarshi.dutta@solarislegal.in

Rajat Pradhan

Associate Partner | rajat.pradhan@solarislegal.in

Shivam Tiwari

Senior Associate | shivam.tiwari@solarislegal.in

This country-specific Q&A provides an overview of restructuring & insolvency laws and regulations applicable in India.

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India: Restructuring & Insolvency

1. What forms of security can be granted over immovable and movable property? What formalities are required and what is the impact if such formalities are not complied with?

Under Indian law, security interests over immovable property are primarily created through mortgages under S.58 of the Transfer of Property Act, 1882 (**TPA**). A mortgage can be created by different modes such as simple mortgage, mortgage by conditional sale, usufructuary mortgage, English mortgage, mortgage by deposit of title-deeds and anomalous mortgage. Save a mortgage created by deposit of title deeds, TPA requires all other mortgages to be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Failure to register a mortgage may be prejudicial as an unregistered mortgage deed may not be admissible in evidence.

As regards movable property, the following forms of security can be created:

i. Hypothecation: This creates a charge, floating or fixed, over tangible movable property (present and future) without delivery of possession to the secured creditor. Common examples include hypothecation of inventory, shares, vehicles, plant and machinery, etc. There is no statutory framework governing hypothecation, and it is rather the creation of a contract. A deed of hypothecation is generally entered into between the borrower and the lender which sets out the enforcement rights available to the secured creditor, including the authority to crystallize the charge and acquire possession of the hypothecated assets if the borrower defaults in its obligations. Hypothecation deeds are commonly executed in favour of banks and financial institutions for creating security over moveable assets of a debtor which can be plant and machinery, office equipment, etc.
ii. Pledge: A pledge involves the bailment of goods as security for payment of a debt or performance of a promise. Unlike hypothecation, a pledge requires the actual or constructive delivery of the asset to the pledgee (lender). It is commonly used for financial instruments such as shares and securities.
iii. Lien: This creates a charge over a debtor's property in favor of the creditor until such obligation is satisfied. Lien is statutorily recognized under S.171 of The Indian Contract Act, 1872 (**Contract Act**) which provides that bankers, factors, wharfingers, attorneys and policy-brokers have a general right of lien i.e., they can retain any goods bailed to them as security for general balance of account. Insofar as other stakeholders are concerned, a lien can be created through a contract.

The registration and stamp duty requirements of instruments creating charge over assets depends upon the place where such instruments are executed. Under the Indian Constitution, both the Central Government and respective State Governments are empowered to make laws on these aspects. If a company creates a charge on its assets, all such charges must be registered with the jurisdictional Registrar of Companies (**RoC**) within 30 days of creation. Details of charges created and registered by a company with the RoC are available in the public domain.

2. What practical issues do secured creditors face in enforcing their security package (e.g. timing issues, requirement for court involvement) in out-of-court and/or insolvency proceedings?

While there are multiple remedies available to secured creditors to enforce their security interests, the decision is largely driven by factors such as the choice of judicial forum; filing and procedural comfort; level of documentation involved and the attendant scope of opposition by borrowers; availability of quick and effective appellate remedies; etc. Secured creditors in India often face challenges in enforcing their security interests.

Out-of-court enforcement

One of the statutes which enable secured creditors to enforce security interests without the court's intervention is the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**SARFAESI Act**). It empowers secured creditors (such as banks, financial institutions, debenture trustees, asset reconstruction companies) to take possession of secured assets, take over management, appoint a receiver, and auction the assets to recover dues. Some practical issues which creditors face while enforcing security interests under SARFAESI Act, are as follows:

a. Secured creditors cannot resort to SARFAESI Act for enforcing security interests created by way of liens, pledges, interests created in agricultural land, debts below INR 100,000 (c. GBP 1000), or where dues are less than 20% of the principal and interest.
b. The SARFAESI Act requires a mandatory 60-day notice period to the borrower before taking possession of secured assets. This mandatory waiting period gives defaulting borrowers significant time to contest the notice, attempt dissipating assets, or take unwarranted court actions aimed at delaying the recovery.
c. Foreign lenders, except scheduled commercial banks and foreign branches of Indian banks, cannot enforce security interests under SARFAESI Act. This creates a significant disadvantage for international lenders providing secured financing in India, who may then have to resort to contractual remedies or approach civil courts.

Insolvency proceedings under The Insolvency and Bankruptcy Code, 2016 (IBC)

IBC brought a fundamental shift in India's insolvency regime, particularly a shift from a debtor-centric to creditor-driven approach. However, IBC's primary objective is the reorganization and insolvency resolution of borrowers (called corporate debtors under IBC) in a time-bound manner to maximize asset value, and it is not to be treated as a debt recovery mechanism. However, IBC is often resorted to by secured and unsecured creditors as a pressure tactic to enable the corporate debtor to settle the matter before it is admitted into the corporate insolvency resolution process (**CIRP**), the consequences of which are drastic. The IBC also provides for proceedings which can be initiated by secured creditors against personal guarantors, which can be initiated irrespective of whether the proceedings against the corporate debtor are initiated or not.

A secured creditor intending to enforce its security interest against a borrower which has already been admitted into CIRP may face the following practical challenges:

a. Moratorium: Soon after an insolvency application is admitted under IBC, a moratorium under S.14 of IBC is imposed, which prohibits actions by a secured creditor under the SARFAESI Act and other legal proceedings. This effectively suspends the rights of secured creditors to independently enforce their security interests, including an enforcement under the SARFAESI Act.
b. Lack of control: Unlike the SARFAESI Act where the lender stays in control over the sale of secured assets, secured creditors lose direct control over their security during the CIRP. The IBC shifts control to the Resolution Professional (**RP**) and the Committee of Creditors (**CoC**), who look after the functioning of the borrower once CIRP is initiated. This collective decision-making process can lead to delays and may not always align with the interest of individual secured creditors. This is further aggravated when there are more than 2-3 secured creditors.

3. What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how is a restructuring plan approved and implemented? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play?

Some of the key restructuring and rescue procedures for companies in India are as follows:

(a) Corporate Insolvency Resolution Process (CIRP)

- Entry-level requirements: The minimum amount of the default to initiate CIRP is INR 1 crore (c. GBP 100,000). Any financial or operational creditor or the corporate debtor itself may initiate CIRP by filing an application before the jurisdictional National Company Law Tribunal (**NCLT**), which adjudicates the proceedings under the IBC.
- Process:
    i. NCLT reviews the application and either admits or rejects it. Upon admission, a moratorium is declared, preventing creditor actions and other legal proceedings against the corporate debtor.
    ii. An interim resolution professional (**IRP**) is appointed, who takes control of the corporate debtor's management.
    iii. IRP constitutes a CoC comprising all financial creditors. The CoC can confirm the IRP or appoint a new RP. The RP invites resolution plans from eligible applicants. A resolution plan provides the quantum and manner in which the dues of the creditors are to be paid.
    iv. CoC evaluates and may approve a resolution plan with 66% voting share. The approved plan is presented to NCLT for final approval. Upon approval by NCLT, the successful resolution applicant is tasked with implementing the plan in the manner provided in the resolution plan.
    v. The approval of a resolution plan can however be challenged by an aggrieved party before the National Company Law Appellate Tribunal, the

appellate forum which decides appeals against orders and judgments of NCLT.
vi. While there is no statutory mandate to do so, the NCLT, in some cases, while approving the resolution plan constitutes a monitoring committee comprising the RP and members of the CoC to oversee the effective implementation of the resolution plan.

- Management control and supervision: The powers of the corporate debtor's board of directors are suspended upon commencement of CIRP. The RP takes control of the corporate debtor's assets and manages its operations. The erstwhile directors are required to cooperate with the RP.
- Roles of relevant stakeholders: During the CIRP, various stakeholders play distinct and critical roles. The NCLT initiates the CIRP by admitting the application, confirming the RP, and ultimately approving or rejecting the resolution plan. The CoC comprising financial creditors holds the primary decision-making authority, including the approval of resolution plans. The RP is responsible for managing the corporate debtor's day-to-day operations during the CIRP, verifying creditor claims, constituting the CoC, and facilitating the resolution process.
- Timelines: The entire process must be completed within 180 days, which may be extended to 270 days and further to 330 days (including all extensions and the time taken in legal proceedings). However, the 330-day timeline for completing the CIRP is not strictly mandatory and can be extended in exceptional circumstances, which has happened in a few cases. Adhering to this timeline sometimes become a challenge if there are multiple parties/stakeholders involved in the CIRP process, and the possibility of multiple claims being preferred against the corporate debtor (even beyond the prescribed time period, which can be entertained with NCLT's permission).

(b) Pre-packaged Insolvency Resolution Process (PIRP)

- Entry-level requirements: PIRP is available only for micro, small and medium enterprises (**MSMEs**). The criteria to qualify as a MSME is provided under the Micro, Small and Medium Enterprises Development Act, 2006 (**MSMED Act**) and rules and regulations framed thereunder and are revised from time to time. These thresholds were revised recently by the Central Government and MSMEs are classified as follows:

Category	Investment Limit (INR)	Turnover (INR)
Micro Enterprises	Up to 2.5 crores	Up to 10 crore
Small Enterprises	Up to 25 crores	Up to 100 crore
Medium Enterprises	Up to 125 crores	Up to 500 crore

- Process:

i. Unlike CIRP, an application before NCLT for initiating PIRP can only be filed by the corporate debtor falling under the MSME category. However, before filing the application, the corporate debtor must have a resolution passed by at least three-fourths of its directors or partners and an approval from its financial creditors (who are unrelated to the corporate debtor) holding at least 66% of the financial debt.
ii. Pertinently, prior to seeking approval from the financial creditors, the corporate debtor must provide such financial creditors with a base resolution plan. Financial creditor must propose the name of an insolvency professional who will submit a report confirming the eligibility of the corporate debtor and compliance of the base resolution plan.
iii. Upon filing of the application, the NCLT is required to admit or reject the application within 14 days, with a 7-day rectification window for defects.
iv. Upon admission of PIRP, a moratorium is imposed, and RP is appointed. The RP must constitute CoC within 7 days of PIRP commencement and submit a base resolution plan to the CoC for review. The final resolution plan must receive at least 66% approval from the CoC, after which the NCLT's approval is required.
v. The NCLT must approve the resolution plan within 30 days of its receipt, failing which the PIRP can be terminated.

- Management control and supervision: PIRP allows MSMEs a fair chance to restructure while continuing as a going concern and therefore, the management and control remains with the corporate debtor. However, the CoC may resolve (by at least 66% vote) to transfer control to the RP, subject to NCLT's approval. The entire process is supervised by the RP who ensures compliance with the statutory provisions.
- Roles of relevant stakeholders: During PIRP, while the corporate debtor retains management, it is responsible for obtaining internal and creditor approvals. The RP plays a supervisory role, verifies compliance, and submits reports, oversees the resolution process in consultation with the corporate debtor. Financial creditors also play a more direct role in PIRP from proposing an insolvency professional, reviewing the base resolution plan, approving the initiation of PIRP. They also have the power to transfer management control of the corporate debtor to the RP.
- Timelines: PIRP must be completed within 120 days, with the RP submitting the approved plan within 90 days. However, this timeline is again directory and not

mandatory and the NCLT may extend the time beyond 120 days where the delay is not due to the fault of parties and the extension serves stakeholders' interests.

(c) Scheme of Arrangement

- Entry requirements: There is no threshold for entering into schemes of arrangements. Companies are free to restructure through mergers, demergers, capital reorganization, or debt restructuring, on terms suitable to all relevant stakeholders.
- Process: The process begins with approval of the draft scheme by the board of directors. In case of listed companies, a no-objection from stock exchanges must be obtained before approaching the NCLT, before which such matters are heard and decided. Thereafter, the scheme is presented to and examined by NCLT which ensures compliance with legal requirements and protects the interests of shareholders, creditors, and other stakeholders. If the NCLT is satisfied with the scheme, it directs the meetings of shareholders and creditors to be convened. After approval from the shareholders and creditors, the scheme is again presented to NCLT for final approval. Separately, S.233 of the Companies Act, 2013 provides for fast-track mergers for small companies, startups, and holding-subsidiary relationships. This allows for a simplified merger process for certain companies, bypassing the mandatory court intervention required under the standard merger process.
- Management control and supervision: Generally, directors of a company remain in control unless the scheme of arrangement is structured in a way to give control to any creditor or any other person. Also, there is no independent supervision for implementing a scheme of arrangement if the scheme has been approved by the NCLT.
- Roles of relevant stakeholders: The board of directors initiates and approves the scheme, prepares explanatory reports, and oversees its implementation. Shareholders and creditors review and vote on the scheme. Further, approval from regulators such as Registrar of Companies, Reserve Bank of India (**RBI**) for banking companies, Securities and Exchange Board of India (**SEBI**) for listed companies, is also required before presenting the scheme for NCLT's approval. Finally, the NCLT orders meetings, reviews legal compliance, considers objections, and sanctions or rejects the scheme.

4. Can a debtor in restructuring proceedings obtain new financing and are any special priorities afforded to such financing (if available)?

The IBC provides a well-defined framework for "interim finance" during CIRP and PIRP. S.5(15) of the IBC defines "interim finance" as "any financial debt raised by the RP during the insolvency resolution process period and such other debt as may be notified". Further, S.20(2) of IBC empowers the IRP to raise interim finance to maintain the corporate debtor as a going concern provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property. However, prior consent is not required if the value of the property is not less than twice the amount of the debt.

Further, IBC also provides significant protection to lenders extending interim finance through priority treatment. Interim finance forms part of the insolvency resolution process costs and therefore, any resolution plan must provide for the payment of these costs in priority to other claims. Similarly, interim finance, by virtue of it being a part of the insolvency resolution process costs, receives highest priority when the corporate debtor goes into liquidation.

Unlike IBC, the Companies Act, 2013 does not contain explicit provisions for new financing during the restructuring process. However, existing or new lenders may, during informal or non-statutory restructuring, inject additional capital. Having said that, new financing through this route is often challenging because the lender would acquire a super-priority status in respect of the new funding which generally requires the unanimous approval of all existing creditors.

5. Can a restructuring proceeding release claims against non-debtor parties (e.g. guarantees granted by parent entities, claims against directors of the debtor), and, if so, in what circumstances?

There is no automatic release of claims against non-debtor parties in any of the aforesaid restructuring mechanisms and the same depends on terms of the resolution plan or the Scheme of Arrangement, as the case may be.

As regards the guarantee given by the parent company or promoters of the corporate debtor, the Supreme Court of India has held that the liability of a corporate guarantor and the corporate debtor is co-extensive. Similarly, the Supreme Court in *Lalit Kumar Jain v. Union of India* held that the approval of a resolution plan for a corporate debtor does not *ipso facto* discharge personal guarantors from their liabilities under the contract of guarantee.

6. How do creditors organize themselves in these proceedings? Are advisory fees covered by the debtor and to what extent?

The CoC is the primary decision-making body during CIRP which is constituted by the IRP after collating all claims and determining the financial position of the corporate debtor. The CoC comprises of financial creditors only who have voting rights based on the value of financial debt owed to them by the corporate debtor. The operational creditors (usually unsecured creditors) are not part of CoC but can participate in CoC meetings without voting rights.

Advisory fees are not paid by the corporate debtor itself, but such costs, including the fee of the RP (as confirmed by the CoC) and professional advisors, forms part of the insolvency resolution process costs under the IBC. Insolvency resolution costs are accorded highest priority if the corporate debtor goes into liquidation.

7. What is the test for insolvency? Is there any obligation on directors or officers of the debtor to open insolvency proceedings upon the debtor becoming distressed or insolvent? Are there any consequences for failure to do so?

Under the IBC, the test for initiating insolvency proceedings against a corporate debtor is based on 'default' in payment of debt. There must be a debt owed by the corporate debtor, which has become due and payable, and the corporate debtor has defaulted on the payment of the debt upon becoming due and payable. The default must be for a minimum amount of INR 1 crore (c. GBP 100,000).

The IBC does not explicitly require directors or officers to mandatorily file for insolvency when a company becomes distressed or insolvent. Although a company can file for voluntary insolvency under S.10 of the IBC, this decision is completely discretionary.

8. What insolvency proceedings are available in the jurisdiction? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually take to complete?

CIRP and PIRP are primary forms of insolvency proceedings for distressed and insolvent companies under IBC. Please refer to our answer to Q.4 above for a detailed overview on the entire process, management control and statutory timelines in respect of the insolvency proceedings. The CIRP and PIRP proceedings are subject to supervision by NCLT, which monitors and ensures that the process is in accordance with the IBC. The RP is required to file compliance/status reports before the NCLT as to the various actions taken during the CIRP.

9. What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the enforcement of creditors' claims? Does that stay or moratorium have extraterritorial effect? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?

S.14 of the IBC prescribes a comprehensive moratorium that comes into effect upon the admission of an insolvency petition against a corporate debtor. The moratorium prohibits the following activities:

i. Institution or continuation of pending suits or proceedings ***against*** the corporate debtor, including execution of any judgment, decree, or order in any court of law, tribunal, arbitration panel, or other authority;
ii. Transferring, encumbering, alienating, or disposing of any assets or legal rights or beneficial interests by the corporate debtor;
iii. Any action to foreclose, recover, or enforce any security interest created by the corporate debtor in respect of its property, including actions under the SARFAESI Act;
iv. Recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

The moratorium remains in effect from the date of the order when NCLT admits the IBC petition and declares moratorium until the completion of the CIRP and PIRP or once the resolution plan is approved by the NCLT.

<u>Extra-territorial effect of moratorium</u>: Presently, the moratorium under S.14 of the IBC does not have

extraterritorial effect. However, any judgment, order or decree passed against the corporate debtor in a foreign jurisdiction cannot be enforced in India during the CIRP in view of the moratorium. While IBC contains a separate chapter on "Cross-Border Insolvency" (S.234-238), these provisions are not in force yet. S.234 of the IBC empowers the government to enter into treaties with foreign countries for international recognition and enforcement of the IBC provisions, but as per the limited information available in the public domain, the Indian government has not yet entered into reciprocal agreements with foreign countries for such recognition.

Exceptions to moratorium: IBC provides for two significant exceptions to the moratorium which can benefit the creditors during CIRP:

i. Personal Guarantors: S.14(3)(b) of IBC excludes "a surety in a contract of guarantee to a corporate debtor" from the purview of moratorium. This allows the creditors to pursue the personal guarantors (often company promoters) simultaneously by initiating separate recovery actions against them.
ii. Government notified transactions: S.14(3)(a) empowers the Central Government to exempt specific categories of transactions from moratorium "in consultation with any financial regulator or any other authority". This creates a flexible mechanism to accommodate specialized sectors or financial arrangements where strict application of moratorium would be counterproductive. One example of such a transaction is a notification dated 3 October 2023 issued by the Ministry of Corporate Affairs which exempted transactions related to aircraft, aircraft engines, airframes, and helicopters under the Cape Town Convention on International Interests in Mobile Equipment, from moratorium provisions. This exemption significantly benefits aircraft lessors and financiers by allowing them to repossess their assets despite an ongoing CIRP, addressing international concerns about India's aircraft leasing framework and potentially reducing leasing costs for Indian carriers.
iii. Proceedings by the Corporate Debtor: The moratorium does not apply to proceedings initiated by the corporate debtor against a third-party. Accordingly, proceedings such as recovery actions which may result in recovery and improve the financial condition of the corporate debtor are permitted during the CIRP. Such proceedings are prosecuted or carried out by the RP who represents the corporate debtor in such actions against third parties.

10. How do the creditors, and more generally any affected parties, proceed in such proceedings? What are the requirements and forms governing the adoption of any reorganisation plan (if any)?

Creditors who have initiated IBC proceedings have to represent their case before the NCLT. The first hurdle for the creditors is to get the petition admitted against the corporate debtor, upon which CIRP is initiated. The creditors have to be proactive and aware of the steps being taken by the IRP/RP during the CIRP, decisions being taken in the CoC meetings, and once the resolution plan is approved, the steps taken to implement that plan, in accordance with which the creditors' dues shall be paid. Parties affected by the CIRP proceedings can approach the NCLT for the redressal of grievances. If the affected parties are themselves creditors, then such creditors must ensure that their claims are filed before the RP within the prescribed timelines and duly considered.

A resolution plan must provide for the following requirements:

a. Payment of insolvency resolution process costs; payment of debts of operational creditors in priority over financial creditors.
b. Payment to financial creditors, who had a right to vote but did not vote in favor of the resolution plan, in priority over financial creditors who voted in favor of the resolution plan.
c. A statement explaining how the plan addresses interests of all the stakeholders.
d. Implementation schedule, management structure, and supervision mechanisms.

Approval of the resolution plan:

If the resolution plan meets the above conditions, it is sent to for CoC's approval. A resolution plan must receive support from at least 66% of the voting share of financial creditors in the CoC, pursuant to which it is submitted for NCLT's approval. The NCLT's role is limited to ensuring the plan meets legal requirements without evaluating the commercial wisdom of the CoC's decision. Once approved, the resolution plan becomes binding on all stakeholders, including the corporate debtor, employees, members, creditors, and government authorities.

11. How do creditors and other stakeholders rank on an insolvency of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities, DIP financing)?

Could the claims of any class of creditor be subordinated (e.g. recognition of subordination agreement)?

IBC provides for a comprehensive framework with respect to hierarchy of creditor claims, commonly referred to as the "waterfall mechanism," which determines the order of priority for distribution of proceeds from the liquidation of a corporate debtor's assets. S.53 of the IBC establishes the order of priority for distribution of proceeds from the sale of liquidation assets, which is as follows:

First: Insolvency resolution process costs and liquidation costs in full. This includes "interim finance" which serves a similar purpose as debtor-in-possession (DIP) financing recognized in the United States. \

Second: The following debts which rank equally:

- Workmen's dues for the period of twenty-four months preceding the liquidation commencement date.
- Debts owed to secured creditors who have relinquished their security interest under S.52 of the IBC.

Third: Wages and unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date.

Fourth: Financial debts owed to unsecured creditors.

Fifth: The following dues which rank equally:

- Any amount due to the Central Government and State Government including amounts to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, for the period of two years preceding the liquidation commencement date.
- Debts owed to a secured creditor for any amount unpaid following the enforcement of security interest.

Sixth: Any remaining debts and dues (which would include operational creditors not covered above).

Seventh: Preference shareholders, if any.

Eighth: Equity shareholders or partners.

12. Can a debtor's pre-insolvency transactions be challenged? If so, by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties impacted?

Yes, the IBC provides for challenging the corporate debtor's pre-insolvency transactions that may have diminished the value of corporate debtor to the detriment of its creditors. These transactions are commonly referred to as "PUFE transactions" (Preferential, Undervalued, Fraudulent, and Extortionate Credit Transactions).

Under the IBC, the responsibility and authority to challenge pre-insolvency transactions primarily rest with the RP during the CIRP and if the corporate debtor goes into liquidation, the liquidator assumes the responsibility of identifying and challenging these transactions.

Grounds and Look-back Period:

- Preferential Transactions:
  1. A transaction is deemed preferential under S.43(2) of the IBC if there is a transfer of property or an interest of the corporate debtor for the benefit of a creditor, surety, or guarantor for or on account of an antecedent debt or liability, and such transfer puts the creditor, surety, or guarantor in a more beneficial position than they would have been in the event of distribution of assets under S.53 (liquidation waterfall mechanism).
  2. The look-back period is two years preceding the insolvency commencement date for transactions with related parties and one year preceding the insolvency commencement date for transactions with unrelated parties.
- Undervalued Transactions:
  1. Under S.45(2) of the IBC, a transaction is considered undervalued if the corporate debtor makes a gift to a person; or enters into a transaction with a person involving the transfer of assets for a consideration significantly less than the value of the consideration provided by the corporate debtor, and such transaction is not in the ordinary course of business. The fair market value of the transferred asset is a relevant reference point for determining whether consideration is inadequate or undervalued.
  2. The look-back period in this case is two years preceding the insolvency commencement date for transactions with related parties while it is one year preceding the insolvency commencement date for transactions with unrelated parties.
- Extortionate Credit Transactions:
  1. These are transactions where the corporate debtor obtained credit on terms requiring exorbitant payments and/or terms that were unconscionable under the principles of contract law.

ii. Two years preceding the insolvency commencement date is the look-back period.

- Fraudulent Transactions: Where the business of the corporate debtor was carried on with intent to defraud creditors or for any fraudulent purpose, there is no prescribed look-back period.

Effects of a successful challenge: For preferential and undervalued transactions, the NCLT can order property or proceeds to be returned to the corporate debtor, release security interests, require payments to be made to the RP, revive previously discharged guarantor obligations, and award interest, as it may deem appropriate. In cases of fraudulent transactions, the NCLT may direct individuals knowingly participating in fraudulent business conduct to contribute to the assets of the corporate debtor.

Third-party rights:

The IBC balances creditor protection with safeguards for innocent third parties who transacted with corporate debtors before insolvency. For preferential transactions, proviso to S.44 of the IBC protects interests acquired in good faith and for value from persons other than the corporate debtor, and shields those who received benefits in good faith from having to repay. For undervalued transactions defrauding the creditors, S.49 offers broader protection by adding the "without notice of relevant circumstances" requirement and limiting liability unless the person was a direct party to the transaction.

13. How existing contracts are treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title and set-off provisions in these contracts remain enforceable? Is there any ability for either party to disclaim the contract?

Generally, contracts remain valid during CIRP, but there's no blanket obligation to continue performance. However, for certain types of contracts such as for essential goods/services, suppliers cannot terminate supplies of critical goods/services identified by the RP; such contracts receive special protection and cannot be terminated. Additionally, government licenses/permits cannot be terminated solely due to initiation of insolvency.

Validity of ipso facto clauses: Ipso facto clauses are contractual provisions which allow a party (**terminating party**) to terminate the contract with its counterparty (**debtor**) due to the occurrence of an 'event of default'. IBC does not explicitly invalidate such clauses, However, the NCLT can restrain termination if the contract is "central to the success of CIRP" and if it is of the opinion that termination would cause death of the corporate debtor.

Set-off rights: No statutory right to set-off during CIRP (unlike in liquidation). Set-off is recognized only in limited circumstances i.e., contractual set-off effective before CIRP commencement; and equitable set-off where claims are clearly linked.

Retention of title claims: S.14(1)(d) of the IBC prohibits the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor. This provision directly impacts the enforceability of 'retention of title' clauses during the moratorium period.

Disclaiming contracts: The IBC does not provide an explicit power for the RP to disclaim contracts during CIRP. While the IRP is empowered to amend contracts during the CIRP, such power must be construed as amending contracts in accordance with the mechanism provided under the contract. During liquidation, the liquidator is allowed to disclaim "onerous property" which includes land burdened with onerous covenants, shares or stocks in companies, property not readily saleable due to performance obligations, unprofitable contracts.

14. What conditions apply to the sale of assets / the entire business in a restructuring or insolvency process? Does the purchaser acquire the assets "free and clear" of claims and liabilities? Can security be released without creditor consent? Is credit bidding permitted? Are pre-packaged sales possible?

The IBC provides a comprehensive framework for asset sales during insolvency and restructuring processes, with different rules applying during CIRP, liquidation, and PIRP. Key takeaways include:

- During CIRP, the RP is permitted to sell unencumbered assets of the corporate debtor outside the ordinary course of business, subject to certain conditions . However, the situation is more comprehensive when the sale of assets is contemplated under a resolution plan. Upon approval of a resolution plan by the NCLT, such decisions become binding on the corporate debtor, its employees, members, creditors, guarantors, and other stakeholders involved in the resolution plan.
- Similarly, the release of security interests during CIRP typically occurs through the resolution plan and

therefore, security cannot be released without the creditors' consent.

- While the purchaser acquires assets free and clear of encumbrances as the sale is part of the CIRP process and usually monitored by the NCLT, the chances of a third-party claiming rights in such assets and initiating proceedings cannot be ruled out. The purchaser will usually have good grounds to oppose such claims.
- While not explicitly addressed, credit bidding concepts exist within the IBC framework, with mechanisms for secured creditors to protect their interests. The IBC permits a financial creditor to be a resolution applicant and even to vote on the resolution plan as a member of the CoC. A resolution plan submitted by a secured financial creditor may contain provisions on credit bidding. However, the consideration of such a plan by the CoC depends on whether it meets the mandatory conditions of the IBC and applicable regulations.
- Further, pre-packaged sales are permissible through PIRP. Please refer to our answer to Q.4 for a detailed overview on PIRP.

15. What duties and liabilities should directors and officers be mindful of when managing a distressed debtor? What are the consequences of breach of duty? Is there any scope for other parties (e.g. director, partner, shareholder, lender) to incur liability for the debts of an insolvent debtor and if so can they be covered by insurances?

S.166 of the Companies Act, 2013 codifies the general duties of directors, which continue to apply even when a company is in financial distress. Additionally, directors and officers of financially distressed companies in India face significant responsibilities and potential personal liability under both the Companies Act, 2013 and the IBC. For example, S.66 of the IBC creates particularly important liability risks on fraudulent and wrongful trading, which can result in directors being personally liable for company debts. This liability extends beyond formal directors to include shadow directors i.e., individuals who effectively direct the company's affairs without formal appointment. When a company enters insolvency, their duties shift from primarily serving shareholders to protecting creditor interests.

These directors and officers can be covered by a D&O insurance cover. D&O insurance provides an important protection mechanism, though its coverage has significant limitations, particularly regarding fraudulent conduct. However, D&O insurance policies typically contain important exclusions that directors and officers should be aware of when managing financially distressed companies.

16. Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions? In which context could the liability of the directors be sought?

The IBC does not provide a general release or immunity to directors and officers for their past actions or decisions. The moratorium under IBC, which suspend certain proceedings against the corporate debtor during the CIRP, apply only to the corporate debtor and does not extend to natural persons such as directors. This means that the natural persons like directors would continue to be statutorily liable under various laws even when the corporate debtor is undergoing CIRP . The IBC provides that directors and officers responsible for conducting business of a corporate debtor can be prosecuted for offences committed prior to CIRP notwithstanding that the corporate debtor's liability shall cease upon the approval of the resolution plan. Hence, the directors and other officers can be held liable for offences committed prior to CIRP.

17. Will a local court recognise foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Does recognition depend on the COMI of the debtor and/or the governing law of the debt to be compromised? Has the UNCITRAL Model Law on Cross Border Insolvency or the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments been adopted or is it under consideration in your country?

IBC contains provisions related to cross-border insolvency which are based on UNCITRAL Model Law. However, these provisions have not been effectively implemented yet. S.234 and 235 of the IBC provide a framework for recognition of foreign insolvency proceedings, but their application is contingent on India entering into bilateral agreements with foreign governments. As of June 2025, India has not entered into any such reciprocal arrangements, rendering these provisions largely ineffective. However, adoption of Model Law is under active consideration in India.

In the absence of specific cross-border insolvency legislation, the general provisions for recognition of foreign judgments under the Code of Civil Procedure, 1908 (CPC) apply. S.44-A of the CPC provides for enforcement of foreign judgments issued by courts in reciprocating territories (currently 13 countries, including England), subject to certain exceptions. Accordingly, a local court may recognize a decree passed in foreign restructuring or insolvency proceedings against a local debtor subject to the conditions laid down under the CPC and the objections that the debtor may have in proceedings seeking execution of such decree.

18. For EU countries only: Have there been any challenges to the recognition of English proceedings in your jurisdiction following the Brexit implementation date? If yes, please provide details.

Not Applicable.

19. Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction? What are the eligibility requirements? Are there any restrictions? Which country does your jurisdiction have the most cross-border problems with?

No, as IBC primarily applies to entities incorporated or registered in India. However, foreign companies that have established a place of business in India and are registered under the Companies Act, 2013 (as foreign companies having a place of business in India are required to register) might fall within the scope of insolvency proceedings under the IBC.

20. How are groups of companies treated on the restructuring or insolvency of one or more members of that group? Is there scope for cooperation between office holders? For EU countries only: Have there been any changes in the consideration granted to groups of companies following the transposition of Directive 2019/1023?

The IBC does not currently contain specific provisions for group insolvency or restructuring. It treats each company as a separate legal entity, requiring separate insolvency proceedings for each corporate debtor, even if they belong to the same group. However, Indian courts have developed jurisprudence allowing for both substantive consolidation and procedural coordination of insolvency proceedings of group companies in appropriate cases.

21. Is your country considering adoption of the UNCITRAL Model Law on Enterprise Group Insolvency?

Yes, India is actively involved with relevant stakeholders in evolving a framework for adoption of UNCITRAL Model Law on Enterprise Group Insolvency.

22. Are there any proposed or upcoming changes to the restructuring / insolvency regime in your country?

Yes. As per recent reports, the Central Government is preparing to overhaul the IBC through amendments that may bring the following proposed reforms:

- Curtailing the role of RPs as facilitator rather than decision maker.
- A compressed 165-day resolution window, significantly reducing the existing 330-day timeline.
- Introduction of a group insolvency mechanism.
- Extension of pre-packaged insolvency resolution framework to all companies.

23. Is your jurisdiction debtor or creditor friendly and was it always the case?

India's insolvency regime has undergone a remarkable transformation from being predominantly debtor-friendly to becoming more creditor-oriented with the introduction of the IBC. This shift has been deliberate, responding to the failures of the previous system and aligning with global best practices. The IBC has brought about following major shifts:

- A consolidated and streamlined legal framework
- A shift from debtor-in-possession to creditor-in-control
- Time-bound resolution processes
- Improved recovery rates for creditors
- Better credit discipline among borrowers

24. Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)?

What role does the State play in relation to a distressed business (e.g. availability of state support)?

Sociopolitical factors significantly influence stakeholder dynamics in Indian insolvency proceedings, despite the IBC's attempt to create a more market-driven, time-bound process. The special protection afforded to workers' dues, the government's role in supporting distressed businesses through various schemes, and judicial recognition of broader economic and social impacts demonstrate how sociopolitical considerations shape insolvency outcomes.

The State also plays multiple roles in relation to distressed businesses as a regulator through the IBC framework, as a creditor seeking recovery of dues, and as a support provider through various policy measures.

25. What are the greatest barriers to efficient and effective restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any such barriers?

While the IBC has made significant strides in improving the resolution of distressed corporate assets in India, there are challenges that hinder its full effectiveness. The primary barriers include delays in the resolution process, institutional capacity constraints, issues with RPs, allegations of collusion between the RP and suspended management of the company, resolution applicants acting as proxy for the suspended management, lack of a comprehensive cross-border insolvency framework, and procedural inefficiencies. These factors coupled with the volume of IBC cases that are pending consideration before the respective NCLTs, inadequate members adjudicating IBC cases, hinder the effective implementation of the IBC.

Contributors

Debarshi Dutta
Partner

debarshi.dutta@solarislegal.in

Rajat Pradhan
Associate Partner

rajat.pradhan@solarislegal.in

Shivam Tiwari
Senior Associate

shivam.tiwari@solarislegal.in