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The Indian Insolvency Regime in Practice-An Analysis of Insolvency and Debt Recovery Proceedings

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Abstract

This paper analyses 45 cases of insolvency and bankruptcy resolution in order to measure the efficiency and problems of the present laws for firm bankruptcy in India. These cases have been selected to cover a month of judgements under the reorganisation provisions of the Sick Industrial Companies Act, (SICA) 1985, the winding up provisions of Companies Act, 1956, and the debt enforcement provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI), 2002. I find that the time taken from the start of the application to the final judgement was over 10 years for more than 40% of the cases heard at the High Court. Winding up of companies or debt recovery took more than 5 years. The analysis identifies the underlying themes driving these delays as conflicts arising from having multiple laws to protect the interests of the debtor and different stakeholders, conflicts from having these different laws being implemented in the Civil Courts and Tribunals, and the pro-rehabilitation stance of the adjudicators in resolving insolvency and bankruptcy.

Keywords: Bankruptcy law reforms, Maximise economic value, Collective default resolution, Debt enforcement, Conflicts in law, Conflicts in adjudication, Multiple adjudicating fora, Unified insolvency and bankruptcy resolution, Case law.

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Working Paper

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Introduction

The existing legal framework for resolving corporate insolvencies in India has been the subject of much criticism for over two decades. The operation of the Sick Industrial Companies (Special Provisions) Act, 1985 ("**SICA**") has attracted scathing criticism almost since its enactment for its lengthy delays in determining the viability of sick enterprises and for lending itself to significant abuse by debtor companies looking to siphon off their assets from creditors. Another commonly heard complaint was the implementation of winding up and liquidation proceedings in the High Courts, which could take years or decades to be completed. The World Bank's *Ease of Doing Business Index 2015* ranked India 137 out of 189 countries on the ease of resolving insolvencies based on various indicators such as time, costs, recovery rate for creditors, the management of a debtor's assets during the insolvency proceedings, creditor participation and the strength of the insolvency law framework.[2]

While the insolvency law framework and processes have been subject to universal condemnation, there has to date been little systematic study of how Indian insolvency and insolvency-related laws have been implemented in practice. In this paper, I have attempted to piece together the process that a company in distress goes through upon entering the legal system through an analysis of the judgments of the High Courts and debt recovery tribunals in insolvency and insolvency related proceedings. The goal of my analysis is to consider the factors that have contributed to the current framework being broken and to identify where the delays, inefficiencies and bottlenecks in the process lie. As India considers enacting a comprehensive new bankruptcy code, I hope that this analysis may provide insights for the structure and direction that the code must take to avoid some of the pitfalls of the current regime.

A recent exception to the lack of literature on insolvency proceedings in India is Kristin van Zwieten's "Corporate Rescue in India – The Influence of the Courts."[3] Based on an extensive study of high court judgments relating to liquidation proceedings and the implementation of SICA, van Zwieten points to certain judicial innovations that contributed to the delays and ineffective resolution of corporate insolvencies in India. These innovations relate in large part to the pro-debtor stance of the High Courts and their reluctance to liquidate even unviable businesses. She notes, for example, that many high courts had developed an informal policy of exploring the rehabilitation of companies even after the Board for Industrial and Financial Reconstruction ("BIFR") had issued a liquidation opinion based on the non-viability of the debtor.[4] My analysis of the case law confirms some of her findings and provides additional insights on the functioning of insolvency and debt recovery proceedings by

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[2] World Bank Group, Ease of Doing Business in India, available at http://www.doingbusiness.org/data/exploreeconomies/india

[3] Kristin van Zwieten, "Corporate Rescue in India – The Influence of the Courts," Journal of Corporate Law Studies (1) (2015) [forthcoming].

[4] *Ibid.*, p. 23.

looking beyond SICA into the interactions among the patchwork of different laws in India that together govern companies in distress.

Two themes have emerged from my analysis of the case law which I argue have contributed to our current system's failure in effectively resolving corporate insolvencies. First, the multi-layered legal framework that involves different statutes for different actors and processes as well as multiple legal fora has led to numerous instances of parallel proceedings and conflicts among the different statutes that deal with companies in distress. This has, in turn, led to further inefficiencies in resolving insolvency proceedings and has also resulted in the courts offering inconsistent interpretations of the laws when conflicts arise. Second, the significant delays in winding up and liquidation proceedings have been caused in large part by the pro-rehabilitation stance adopted by the High Courts and Supreme Court and the laws and practices that have allowed liquidation proceedings to continue for several years after a winding up order has been passed. The High Courts (usually based on Supreme Court precedent) often allow debtors to explore rehabilitation options even after a winding up petition has been passed and entertain petitions to stay winding up orders.

In Part I of this paper, I provide a description of the characteristics of insolvency law regimes in different jurisdictions and then give an overview of the existing legislation and the legal forums that deal with companies in distress in India. This discussion is not intended to be a comprehensive survey of all such legislation, but only includes legislation relevant to the discussion of cases that follows. Part II describes the scope and methodology of the study and, in particular, the methodology used for selecting the cases reviewed. In Part III, I present the analysis of my findings from the case law review that focuses largely on three themes – (i) the significant inefficiencies, confusion and conflicts that has resulted from having multiple fora and laws to govern companies in distress, (ii) the reasons for enormous delays in certain insolvency related proceedings, in particular liquidation and (iii) issues that have arisen in the context of the implementation of debt recovery proceedings under the SARFAESI Act. I conclude by briefly considering the implications of these findings for drafting a new bankruptcy code.

I. The Context and Existing Legal Framework

A. Characteristics of Insolvency Law Regimes

In the event of a debt default or the likelihood of a debt default by a corporate entity, there are, in general, three kinds of legal procedures that are available to creditors and debtors that are common to all jurisdictions: (a) foreclosure or enforcement of the debt by a creditor or group of creditors, (b) liquidation of the debtor and a distribution of its remaining assets to creditors, and (c) a reorganization or revival of the business, which may result in a liquidation and a piecemeal sale of assets or in the sale of the business as a going concern.[5] The first of these options is a debt recovery procedure, typically governed by relevant debt enforcement laws, while the latter two fall into the camp of corporate insolvency procedures. While closely related, debt enforcement and corporate insolvency are distinct concepts. Debt enforcement refers to a mechanism by which individual creditors attempt to recover the debt due to them upon a default by the borrower. By contrast, corporate insolvency procedures provide a collective mechanism to deal with a distressed company's overall position and affect the rights of all stakeholders.

The purpose of insolvency law has often been described as a means of providing sufficient incentives for creditors to favour collective insolvency proceedings over individualized debt enforcement mechanisms.[6] Thomas Jackson famously considered insolvency law through the prism of creditors negotiating from behind a Rawlsian veil of ignorance.[7] While each creditor would have an incentive to race towards individual enforcement of its debt, that would result in a chaotic run on the assets of the business and would produce a worse outcome for creditors as a whole, particularly for those who are at the loosing end of the race for recovery. As creditors would not know whether they would win the race, they would prefer the collective insolvency proceeding that, at least in theory, is intended to maximize aggregate recovery for creditors.

Over time, insolvency law has evolved to incorporate a broader set of considerations such as asset preservation, a means to revive a debtor's business if it is viable and to consider the interests of other stakeholders in addition to financial creditors, including trade creditors and employees.[8] However, the idea of providing for a collective process for insolvency resolution has still remained at the core of most attempts at insolvency law reform. The UNCITRAL Legislative Guide on Insolvency, for example, states nine broad objectives of an insolvency law regime all of which also rest on having a collective mechanism for insolvency resolution:[9]

(1) *Provision of certainty in the market to promote efficiency and growth*
(2) *Maximization of value of assets*
(3) *Striking a balance between liquidation and reorganization*
(4) *Ensuring equitable treatment of similarly situated creditors*

[5] Djankov et. al. "Debt Enforcement Around the World" (2006).
[6] See, for example, T. Jackson, "Bankruptcy, Non-Bankruptcy Entitlements and the Creditor's Bargain," (1982) 91 The Yale Law Journal 857; and TH Jackson and RE Scott, "On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain," (1989) 79 Virginia Law Review 155.
[7] T. Jackson (1982).
[8] S. Paterson, "Rethinking the Role of the Law of Corporate Distress in the Twenty-First Century," LSE Law, Society and Economy Working Papers 27/2014, available at
[9] UNCITRAL Legislative Guide to Insolvency Law, Part I, pp. 10 – 14, available at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf. Last accessed on September 3, 2015.

(5) *Provision of timely, efficient and impartial resolution of insolvency*
(6) *Preservation of the insolvency estate to allow equitable distribution to creditors*
(7) *Ensuring a transparent and predictable insolvency law that contains incentives for gathering and dispensing information*
(8) *Recognition of existing creditor rights and establishment of clear rules for ranking priority of claims*
(9) *Establishment of a framework for cross-border insolvency.*

The objectives outlined above are inter-related and rest on three fundamental characteristics that are shared by most well developed insolvency law regimes: (a) a linear step-by-process for a debtor and creditors to follow when insolvency is triggered, which allows for predictability and certainty in terms of process and outcomes, (b) a collective mechanism for resolving insolvency that helps preserve value and also serves to advance principles of equity and fairness by involving all stakeholders in the process, and (c) a time bound process for resolving insolvency that either ends in a rescue and restructuring of the debtor's business or a liquidation and distribution of the debtor's assets to various stakeholders. This last principle is particularly important to ensure efficiency and preserve value in the debtor's estate which will erode with the passage of time. Adhering to strict time frames for resolution of insolvency also provides a further incentive for creditors to have faith in the collective resolution process rather than to press ahead with individual enforcement.

Despite the existence of widespread differences in structure and content, most insolvency law regimes the world over largely (either through statutory provisions or their implementation in practice) adhere to the above characteristics. In the United States, Chapter 11 of the US Bankruptcy Code provides for an orderly insolvency resolution process under the supervision of a central authority (the bankruptcy court) that is governed by detailed rules and procedures. Chapter 11 proceedings provide a linear and debtor friendly process for insolvency resolution, though changes have been made to the regime in recent years to provide for a more balanced approach towards creditors. Some characteristics of Chapter 11 include: (i) an automatic stay that prevents debt enforcement actions and other lawsuits to seize assets once a debtor has filed under Chapter 11, (ii) a 120-day period for the debtor to come up with a resolution plan, and (iii) the availability of post-petition financing for the debtor. While the primary goal of Chapter 11 is to allow for the rehabilitation of a debtor's business, Chapter 11 proceedings can have various outcomes including a consensual plan arrived at by debtor and creditors on reorganizing the debtor's business, a sale of all or part of the debtor's business as a going concern or a liquidation plan that involves the sale of individual assets and distribution of the proceeds to creditors and other stakeholders.

The insolvency regime in the UK is more complex and includes three avenues for insolvency resolution, as well as a combination of these options. The UK Insolvency Act, 1986 (the "Insolvency Act") provides for a formal administration process that includes the possibilities of both rescue and liquidation. The Insolvency Act shares some common features with Chapter 11 proceedings–in particular, the imposition of a stay or moratorium to protect the debtor's assets from enforcement action. However, it also has significant differences from Chapter 11 as the UK administration procedure involves the appointment of an administrator to manage the business of a debtor in distress in contrast to the debtor-in-possession style regime in the U.S. Despite the Insolvency Act providing for a comprehensive and formal process for insolvency resolution, schemes of arrangement and company voluntary arrangements (CVAs) are, in practice, the more commonly used vehicles for restructuring debtors in distress.[10] Both these avenues offer flexible procedures for arriving at a rescue plan through a consensual negotiation process, but do not provide for a stay on enforcement proceedings. However, while the UK regime does not appear to be as linear as the U.S. model, its implementation in practice has been relatively linear with, for example, courts not allowing enforcement proceedings while debtor and creditors are in the process of negotiating a scheme of arrangement.

In Australia, provisions on corporate insolvency are housed within the Australian Corporations Act 2001. The Australian insolvency framework for corporate insolvencies provides for three kinds of procedures – voluntary administration, liquidation (which would be voluntary by the members, voluntary by the creditors or court ordered) and receivership which involves a secured creditor appointing a receiver whose main role is collect and sell enough of the debtor company's assets for the secured creditor to realize its security. While voluntary administration and liquidation are collective insolvency procedures, receivership is most akin to debt enforcement.

I describe the examples above not to provide a comprehensive survey of insolvency law regimes but to show that insolvency law regimes can follow vastly different structures and procedures even in the developed world. The U.S. model shows an explicitly linear, collective and time bound process. While the U.K. and Australian systems are not obviously linear and involve a range of options, their implementation is largely linear and coordinated. The next sub-section provides a brief description of the existing Indian legal framework around insolvency and debt recovery to provide the context for the review of cases and types of proceedings.

[10] See, for e.g., Linklaters Banking Update: An Overview of Creditor Schemes of Arrangement (January 2010), available at http://www.linklaters.com/Insights/Publication2051Newsletter/20100118/Pages/Creditorschemes.aspx

B. The Indian Legal Framework

In India, the legal framework that deals with companies in distress is multilayered, involving a combination of collective insolvency and debt enforcement laws. Further, each of these types of legal proceedings are often applicable to specific stakeholders (for e.g., only secured creditors or only banks and financial institutions) and are dealt with in different legal fora ranging from the BIFR to debt recovery tribunals to the civil courts and high courts.

Collective Insolvency Proceedings:

In the area of collective insolvency proceedings, India has separate laws to deal with rescue and rehabilitation, on the one hand, and liquidation, on the other hand. The only law currently in force that provides for the rescue and rehabilitation of distressed companies is the Sick Industrial Companies (Special Provisions) Act, 1985 ("**SICA**"), which applies exclusively to industrial companies. Under SICA, industrial companies in distress (based on a test involving an erosion of their net worth by 100%) make a reference to the BIFR, which, after considering the viability of the debtor company, either sanctions a rehabilitation scheme or refers the company to the High Court for winding up. However, it did not take long for SICA to acquire a reputation for delays and come under much criticism for lending itself to significant abuse by debtors who often used the BIFR as a "safe haven" to siphon off assets from creditors.[11] In fact, SICA had been universally condemned from so many different quarters that an act was passed for its repeal in 2002.[12] However, the repeal legislation could not be notified as accompanying amendments to the older Companies Act 1956 ("**CA 1956**") could not be operationalized.[13] More recently, Chapters IXX and XX of the Companies Act 2013, which provide for rescue and liquidation frameworks, respectively, for all companies and take into account some of the criticisms of SICA, have been introduced, but these provisions too are not yet operational. As a consequence, SICA remains the only statutory mechanism for the rehabilitation of distressed companies, though it only covers a subset of companies.

The governing legislation for liquidation proceedings continues to be the CA 1956 as the new provisions in the Companies Act 2013 have not yet been notified. It should be noted that the CA 1956 governs all types of winding up proceedings, one of which includes winding up as a result of insolvency. Under the CA 1956, winding up could be voluntary at the request of the debtor (an option for solvent debtors) or compulsory upon a winding up order passed by the High Court. Compulsory

[11] Kristin Van Zwieten, "Corporate Rescue in India: The Influence of the Courts," Journal of Corporate Law Studies (1) (2015) [forthcoming]

[1212] Sick Industrial Companies (Special Provisions) Repeal Act, 2002.

[13] The changes made in the older companies act legislation, the Companies Act, 1956 ("**CA 1956**") have not entered into force as Chapter VIA of the CA 1956 which provided for the National Company Law Tribunal ("**NCLT**") to exercise powers in relation to sick industrial companies could not be notified as the NCLT was subject to a long drawn out litigation. The Supreme Court on May 14, 2015 delivered its judgment on the constitutionality of the NCLT. A few amendments to the operation of the NCLT are required before these provisions can be notified.

liquidation proceedings upon an insolvency of the debtor may either reach the High Courts upon a winding up petition filed by the debtor or creditors or through a reference from the BIFR. Sections 433 to 483 of the CA 1956 regulate winding up by order of the court.

Debt Recovery Laws:

The most basic mechanism for debt recovery that is available for all secured and unsecured creditors involves filing a petition in a civil court of competent jurisdiction and this mechanism remains available today. However, a series of laws were enacted in the 1990s and 2000s to facilitate debt recovery for certain classes of creditors given the high pendency of cases in the civil courts and experience of abuse with laws such as SICA. The Recovery of Debt Due to Banks and Financial Institutions Act ("**RDDBFI Act**") was enacted in 1993 to make it easier for banks and financial institutions to recover debt. The RDDBFI Act is available to both secured and unsecured creditors, but they need to be banks or notified financial institutions. This Act provided for the establishment of DRTs and DRATs and any cases pending before the civil courts that involved debt of over Rs. 10,00,000 were automatically transferred to the DRTs.

Yet another act enacted nearly ten years after the RDDBFI Act, largely in response to the abuse of SICA and to make it easier for secured creditors to recover their debts, was the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("**SARFAESI Act**"). This Act provided a mechanism for secured creditors to take possession of the securities and sell them to recover debts due. The most interesting feature of the SARFAESI Act is that its enforcement does not require the involvement of a court or tribunal. Section 13 of the SARFAESI Act allows secured creditors to take steps to enforce their security interest in respect of any debt of a borrower that is classified as a non-performing asset without the intervention of a court or tribunal if certain conditions specified in the Act are met. Any debtor who then wants to contest the action taken by a creditor under the SARFAESI Act may do so through an appeal to the DRT within 45 days of the enforcement action being taken.[14]

The enactment of the SARFAESI Act involved an accompanying amendment to SICA to provide that (a) a reference to the BIFR could not be made once an enforcement action under the SARFAESI Act had commenced, and (b) to the extent that a reference to the BIFR had had already been made and was pending, such a reference would abate if secured creditors holding at least three-fourth in value of the outstanding debt of the borrower commenced proceedings under SARFAESI.[15] Thus, SARFAESI intended to protect secured creditors by ensuring that their enforcement under the Act would take precedence over any reference by a debtor to the BIFR. It appears that SARFAESI has been at least

[14] SARFAESI Act, Section 17.
[15] SICA, Section 15(1).

partially effective since its enactment in terms of debt enforcement, though as described below there still remains much confusion over the interface between SARFAESI and SICA as well as with the interpretation of SARFAESI by the courts and tribunals in the face of challenges to SARFAESI enforcement action. It should also be noted that SARFAESI is available only to one group of creditors – secured creditors. Unsecured creditors would need to continue to pursue remedies for debt recovery in the civil courts or, if they are a bank or a notified financial institution, under the RDDBFI Act.

The validity of various provisions of the SARFAESI Act was initially challenged in *Mardia Chemicals Ltd. v. Union of India.*[16] The petitioners challenged the Act on the grounds that it allowed banks to take drastic measures for the seizure and sale of assets of a borrower and to take over the management or possession of secured assets. The primary contention was that it was a draconian legislation as it allowed secured creditors to take measures to recover debt due without the involvement of an adjudicatory authority. The Supreme Court rejected these challenges quoting widely from the legislative history on the impetus for the SARFAESI Act's enactment. The Court stated that banks faced tremendous difficulties in recovering debts due and that this was a major impediment to financial liquidity for industry and, as a consequence, economic growth.[17] However, as discussed in Part III, validating the Act has not put an end to the controversies over SARFAESI's interactions with other laws, particularly SICA and ongoing proceedings in the BIFR.

As the above discussion suggests, India appears to be an outlier among other jurisdictions in having a fragmented legal regime and multiple fora for dealing with companies in distress. In theory, it could still be possible to achieve a linear process for resolving insolvency by ensuring smooth and coordinated implementation across these different laws and fora. In the United Kingdom, for example, the Insolvency Act, 1986 is used primarily for liquidation and winding up of insolvent debtors while schemes of arrangement are used for rescue and rehabilitation. Yet, the implementation across these different procedures is smooth and courts would, in practice, never allow these procedures to go on in parallel or for one procedure to defeat the purpose of the other even though there is no explicit prohibition in the law. In the case of the Indian insolvency regime, however, implementation across the different laws and fora has been far from seamless. On the contrary, as I will show in the rest of this paper, my review of court judgments related to various insolvency and debt recovery proceedings suggests that one major source of the inefficiencies, delays and uncertainty is the fragmented nature of the insolvency law regime in the country.

[16] (2004) 4 SCC 311.
[17] *Ibid.*, para 34.

II. The Review of Judgments: Analytical Framework, Scope and Methodology

As discussed above, (leaving out the civil courts) three different legal fora adjudicate insolvency and debt enforcement proceedings:

- The BIFR deals with rescue and rehabilitation proceedings of sick industrial companies.
- The DRTs and DRATs adjudicate debt enforcement proceedings under the RDDBFI Act and SARFAESI.
- The High Courts consider winding up petitions and also hear appeals from the BIFR and the DRATs.

The analysis in this paper is based on a detailed review of 45 judgments of the High Courts and 15 judgments from the DRTs and DRATs, as well as a review of important judgments of the Supreme Court that have had a significant impact on the interpretation of existing insolvency legislation. The BIFR's orders do not include the details of its reasoning as they are in the form of Summary of Proceedings (SOPs) and are, therefore, not a part of this analysis. However, because the High Courts consider references from the BIFR for liquidation as well as appeals from the BIFR, it has been possible to gain an insight into the BIFR's adjudicatory processes as well as interpretive issues with SICA from High Court judgments. All of the judgments reviewed are from the period after June 2002 which was the year when the SARFAESI Act came into effect and are intended to provide a picture of how a debtor in distress or a creditor seeking recovery goes through the legal system as it exists today.

<u>Case Selection:</u>

The purpose of reviewing these judgments is to gather insights into the functioning of the corporate insolvency resolution process in India and, in particular, on the efficacy of the insolvency regime in providing for the three features discussed in Part I: linearity, a collective mechanism and a time bound process. The judgments selected for the detailed review were chosen from a much larger group of High Court and tribunal judgments with the goal of obtaining judgments that covered the entire gamut of the types of insolvency related matters that were heard by the courts and tribunals. For the High Courts, the types of insolvency related cases adjudicated can be broadly classified into the following four categories:

(a) References from the BIFR for liquidation: Under SICA, if the BIFR determines that the rescue of a sick company is not feasible, it may make a reference to the High Court for liquidation of the debtor. The role of the High Court in such instances is to implement the liquidation decision of the BIFR by passing a winding up order.

(b) Winding up petitions filed in the High Court: These cases involve winding up petitions filed by creditors pursuant under the CA 1956.

(c) Appeals from the BIFR or the BIFR's Appellate Tribunal: The decisions of the BIFR and AAIFR may be appealed to the High Courts. These cases typically involved the interpretation of specific provisions of SICA and other laws and play an important role in the development of jurisprudence in this area.

(d) Appeals from the DRT/DRAT and the Interaction between Debt Enforcement and Collective Insolvency Laws: The decisions of the DRATs are also appealable to the High Courts and typically involve the interpretation of the RDDBFI Act or the SARFAESI and, very often, the interaction between these two laws. Many of these cases also involved conflicts between the RDDBFI Act or SARFAESI, on the one hand, and collective insolvency laws, such as SICA or the CA 1956, on the other hand.

The cases selected for the detailed review include 10 or more judgments from each of the categories described above. For each of the categories, I have tried to choose judgments that involve a range of common fact patterns and stakeholders – these include cases with a single secured creditor, multiple secured creditors and those that involved other complicating factors such as the presence of labour or workmen whose claims had to be adjudicated by the courts. In addition, I have chosen these judgments from different High Courts across the country.

The judgments of the DRT and DRAT that related to companies in distress typically involved enforcement proceedings under the RDDBFI Act or an appeal by a debtor from enforcement action taken under SARFAESI. Most of these judgments centred on the interpretation of particular provisions of these acts or the interaction between the two acts and I have selected judgments that involved different questions of law and a mix of issues under both the RDDBFI Act and SARFAESI.

The methodology and case selection described above has its limitations and is not intended to be an exhaustive review of all insolvency or insolvency-related proceedings in these fora. I also do not claim that the specific cases reviewed provide a representative sample of insolvency related proceedings before the High Courts and tribunals. However, I believe that the selected cases do capture the range of the categories of cases that were heard by the High Courts and tribunals on the subject and are, therefore, useful in providing insights into the resolution of insolvency cases in the legal system.

Unlike other reviews of insolvency proceedings, the analysis that follows is based on a review of both collective insolvency and debt recovery proceedings. I have chosen this approach because I believe that these two types of proceedings are closely related and often interact with each other, particularly in the Indian context which involves a multiplicity of laws and fora. On the one hand, secured creditors tend to use security enforcement tools such as SARFAESI even after collective insolvency proceedings have commenced and, often with a view to superseding the collective insolvency proceeding. Conversely, winding up petitions are often filed in High Courts as a tool to aid debt recovery, i.e., situations where the creditors use the possibility of a winding up order being passed to induce repayment by the debtor. I believe that understanding this interaction between collective insolvency and debt recovery proceedings is a key to understanding how the insolvency legal framework works in practice.

One type of insolvency proceeding that was largely absent in the judgments reviewed was rescue and rehabilitation. Almost all the cases reviewed involved debt recovery and enforcement of security or winding up and liquidation. To the extent that there were cases involving rehabilitation schemes, they usually involved the schemes being rejected by the creditors. This finding is perhaps in part because BIFR proceedings, which would be the forum that where rescue and rehabilitation is considered, were not reviewed. However, there is evidence to indicate that a very small number of references made to the BIFR actually end up in rehabilitation. For example, between 1987 and 2006, a total of 5,412 references were made to the BIFR, of which 1,707 were dismissed as non-maintainable, 218 were dismissed as repeat references, 1,303 were referred to the High Courts for liquidation, and only 760 were approved for rehabilitation.[18] While such aggregated data for later years is not available, a look at the references made to the BIFR in more recent years, suggests a similar pattern. In 2013, a total of 93 references were made to the BIFR and, as of now, only 5 of these are being considered for rehabilitation.[19] Thus, I believe that the absence of rehabilitation proceedings is indicative of the current insolvency landscape which is dominated by liquidation and debt recovery proceedings.

III. Learnings from the Case Law

Two major themes emerged from my review of the cases that I believe provide insights into the reasons for the current system being unable to achieve two of the fundamental principles of any insolvency law regime – certainty in the law and, consequently, a certain degree of predictability in outcomes and the timely resolution of insolvency. These are the existence of multi-layered insolvency law framework with multiple fora for hearing different types of proceedings and various judicial innovations and provisions in the law that have contributed to significant delays, particularly in liquidation. I take each of these themes in turn below. Finally, I look briefly at one other theme that

[18] Ministry of Finance, Economic Survey of India, 2006 (Government of India), paragraph 7.47.
[19] BIFR Website, “Year-Wise Registered Cases,” available at http://bifr.nic.in/casesregd.htm

was reflected in my case review on the enforcement of SARFAESI proceedings. My review shows that while SARFAESI is envisaged to be a quick out-of-court process, when challenged by a debtor in court, it is often mired by the usual delays and problems with enforcement that plague other insolvency related proceedings.

A. The Problem of Multiple Fora, Parallel Proceedings and Conflicts

A very large majority of cases reviewed did not involve a single legal proceeding in one forum, but multiple proceedings across different fora. Each proceeding was typically initiated by a different party and the High Courts were often left with having to decide which proceeding was to take precedence over the others and how conflicts among the different laws were to be resolved. The case of *BHEL v. Arunachalam Sugar Mills* ("ASM") that was decided by the Madras High Court in 2011[20] provides a good illustration of this. ASM and its sister concern defaulted on their credit facilities which gave rise to numerous proceedings by secured and unsecured creditors alike:

- A bank, the main secured creditor, filed an application in the DRT for debt recovery.
- Another creditor of ASM, filed a company petition for the winding up of ASM.
- Another secured creditor that had lent funds to ASM through a credit facility, entered into an MoU with the bank for the bank to sell the debtor's properties and pay the secured creditor its due from the proceeds.
- A company that had leased machinery to ASM, initiated proceedings invoking the arbitration clause in the agreement and filed an application in the High Court restraining ASM from transferring/ selling its assets
- A secured creditor of ASM's sister concern initiated proceedings under SARFAESI Act, took possession of its assets and sold the same by auction.
- An unsecured creditor, which had supplied a boiler to ASM, filed a civil suit against ASM for recovery of money due to it by sale of immovable properties of ASM.

While this might be at the extreme end of the spectrum in terms of the number of parallel proceedings, almost all of the cases reviewed involved proceedings in at least two fora and more often than not proceedings going on in parallel. There were situations where the debtor company had made a reference to the BIFR under SICA while a secured creditor had filed a winding up petition in the High Court[21] or initiated enforcement action under SARFAESI[22] and other cases where creditors had each

[20] *BHEL v. Arunachalam Sugar Mills Ltd.*, (High Court of Madras), O.S.A. Nos. 58, 59, 63, 64 and 81 of 2011, decided on 12.04.2011.

[21] See, for example, In re: *Oswal Foods Limited*, [2008]145CompCas259(All), decided on 16.11.2006; *In Re: Consolidated Steel and Alloys*, CA Nos. 165, 385, 706 and 992/07 and 1031/08 in C.P. No. 428 of 2002, decided on 07.11.2008

[22] *Asset Reconstruction Co. India P. Ltd v Shamken Spinners Ltd.* AIR 2011 Del 17, decided on 22.11.2010; *M/S Digivision Electronics Ltd. v. Indian Bank*, WP 13056/2005 and others, decided on July 7, 2005

initiated proceedings in different fora or under different statutes.[23] In all of these situations, the task before the High Courts was to resolve the conflicting rights of these different parties arising from different statutory provisions. *Oswal Foods Limited*[24], for example, involved a situation where the debtor company had made two references to the BIFR, while a creditor filed a winding up petition in the High Court. In *B.S.T. and P.S.P. Workers Union v. Union of India,*[25] secured creditors sought to enforce under SARFAESI while the BIFR was considering the sickness of the debtor company and made a reference to the High Court for liquidation. The question before the Kerala High Court in this instance was whether the BIFR proceedings should have abated on account of the SARFAESI enforcement action. In *Jeevan Diesels and Electricals v. HSBC,*[26] the Calcutta High Court had to consider whether a creditor could file a winding up petition in the High Court while another creditor had initiated enforcement action in the DRT under the RDDBFI Act.

Apart from the obvious delays and inefficiencies that arise from having to traverse multiple legal fora, the piecemeal structure of insolvency proceedings in India has had at least two major consequences. First, having a combination of winding up petitions and debt recovery proceedings run in parallel means there is little clarity for creditors (or debtors) on the overall position of the insolvent debtor or even on the actions of other creditors. This goes against the very grain of the one of principal objectives of insolvency law of having a linear and orderly to preserve value, provide certainty and maximize recovery for creditors.

For example, in *Kritika Rubber Industries v. Canara Bank,*[27] one group of secured creditors had initiated an action in the DRT, while another group subsequently filed a winding up petition in the High Court of Karnataka. The DRT decided in favour of the creditors and a recovery officer at the DRT ordered the attachment of the property securing the debt, which was subsequently sold in an auction. In the meantime, the High Court had ordered the winding up of the debtor and appointed an official liquidator (OL) to oversee its liquidation. The OL, upon learning of the DRT's actions, sought an order to set aside the sale by auction, which the High Court allowed ruling that once a winding up petition had been filed all disposals of the debtor's property had to be done in association with the OL. An interesting fact in this case is that it appears that the parties to the DRT proceedings were unaware of the winding up petition in the High Court. Indeed, one of the secured creditors claimed to have had no knowledge of the winding up petition (that was filed in 1999) until it received notice of the OL's

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[23] *Kritika Rubber Industries v. Canara Bank,* (Karnataka High Court), C .A. No. 190/2008 in Co. P. No. 167/1999, decided on: 13.06.2013.
[24] Supra note 21.
[25] CP 23 of 2006, decided on 03.08.2009.
[26] APO 254 of 2014 and CP 845 of 2013, decided on 02.12.2014.
[27] Supra note 23.

action to set aside the sale authorised by the DRT (which occurred in 2008).[28] Such cases reveal the complete lack of clarity that creditors have about their recovery under the existing legal framework. Creditors can never be sure of their recovery even after their legal proceedings have closed as they could always be challenged on the basis of another debt recovery or winding up action initiated against the same debtor.

Second, as alluded to above, the existence of multiple laws and fora brought to light numerous conflicts among the legal provisions and the rights of different stakeholders under different statutes. The courts had to grapple with conflicts between SICA and debt enforcement laws such as the RDDBFI Act and SARFAESI, conflicts between winding up proceedings under the CA 1956 and debt enforcement laws and conflicts between the RDDBFI Act and SARFAESI. In addition to conflicts in statutory provisions, the court had to deal with conflicts over jurisdiction and, in particular, on the extent of the DRT's jurisdiction. As is illustrated by the examples below, the High Courts and DRTs/DRATs across the country did not always resolve these conflicts in a consistent manner.

Conflicts between Debt Enforcement Laws (SARFAESI and RDDBFI) and SICA

Conflicts between the provisions of SICA and those of debt enforcement statutes have largely arisen as a result of Section 22 of SICA that provides for a moratorium on any enforcement proceedings once a reference has been made to the BIFR. The SARFAESI Act anticipated this concern to a certain extent through the accompanying amendment to Section 15(1) of SICA. As discussed above, the passing of the SARFAESI Act was accompanied by an amendment to SICA that provided that a reference could not be made to the BIFR under SICA if a creditor had commenced enforcement action under SARFAESI. In addition, any reference that had already been made to the BIFR would have to abate if three-fourths in value of the creditors decided to take enforcement action under SARFAESI. Yet, despite the legislation providing for how the two acts are to be read harmoniously with each other, there have nevertheless been a number of judgments where this conflict has arisen.

The most recent decision of the Supreme Court that dealt with the conflict between rescue and rehabilitation and debt enforcement laws was in *KSL Industries v. Arihant Threads Ltd.*[29] In this case, the conflict was not between SICA and SARFAESI, but between SICA and the RDDBFI Act. The primary issue before the Supreme Court was whether proceedings in the DRT or DRAT under the RDDBFI Act could continue after the debtor company had made a reference to the BIFR under SICA. The provisions in conflict were Section 22 of SICA that provides for a stay and Section 34 of the RDDBFI Act that provides that this statute has overriding effect. The Supreme Court considered the objects of both laws in detail and decided that SICA took precedence over the RDDBFI Act. The

[28] Supra note 23, para 3.3 and para 32.

[29] Supreme Court, Civil Appeal No. 5225 of 2008, decided on October 27, 2014

Court gave a lot of weight to one clause in the RDBFFI Act that stated that the Act was in addition to and not in derogation of, other statutes, including SICA.[30] The Court took this to mean that Parliament intended for SICA to have precedence – *"This in effect must mean that Parliament intended for the proceedings under SICA to go on and for that purpose intended that all other proceedings against the company and its properties should be stayed pending the process of reconstruction."*[31] This has been considered a regressive judgment and goes against the grain of standard statutory interpretation. Typically, as both SICA and the RDDBFI Act are special legislations, the later enactment being the RDDBFI Act would prevail.[32] Further, it is curious that the Court placed much emphasis on the context of SICA's enactment but failed to consider the current status of SICA and that an act had even been passed for its repeal!

Several of the cases that involved conflicts between SARFAESI and SICA were relatively straight forward as they often involved a factual question of whether 75% of creditors had indeed sought enforcement action under SARFAESI in which case the BIFR proceedings would need to abate.[33] However, there were still nuances that required the Courts to use their interpretive powers. For example, in *B.S.T. and P.S.P. Workers Union v. Union of India*[34], the BIFR had made a reference for liquidation in the High Court while secured creditors had sought enforcement action under SARFAESI. The Kerala High Court held that as the secured creditors had not notified the BIFR of the SARFAESI enforcement action, the BIFR retained jurisdiction and the winding up order passed by the High Court was valid. In its judgment, the Court quoted much Supreme Court precedent that suggested that the BIFR was the guardian of sick companies. In another case that proceeded along similar lines,[35] the BIFR had made a reference to the High Court for liquidation but the High Court was yet to pass a winding up order. In such a situation, the Orissa High Court held that the proceedings in the DRT could not proceed ignoring the recommendations from the BIFR for winding up. These cases suggest that despite SARFAESI's attempts to override SICA, this has not always worked in practice.

<u>Conflicts between SARFAESI and the CA 1956</u>

The SARFAESI Act also often clashed with winding up proceedings that had been commenced pursuant to the CA 1956. The primary question in most of these cases was whether enforcement

[30] RDDBFI Act, Section 34(2).
[31] Supra note 29, para 50.
[32] This was indeed the view of two-judge bench of the Supreme Court from which this decision was appealed.
[33] See, for example, *Triveni Alloys Ltd. v. Board for Industrial and Financial Reconstruction and Ors*. WP No. 4481 of 2005 and 32594 of 2003, decided on July 19, 2005.
[34] CP 23 of 2006, decided on 03.08.2009.
[35] *Sri Bireswar Das Mohapatra and Anr. V. State Bank of India,* W.P. (C) No. 8567 of 2006, decided on 17.08.2006.

action could proceed under SARFAESI in situations where a winding up petition had been filed in the High Court. Unlike in the case of the conflict between SICA and SARFAESI, the interaction between SARFAESI and the Companies Act is not spelled out as clearly in the legislation and it was not surprising that the High Courts and the DRTs resolved this conflict in different ways. In *Indian Bank v. Sub-Registrar,*[36] the High Court of Telangana and Andhra Pradesh held that the debtor's assets could be sold in an auction pursuant to a SARFAESI enforcement action without the leave of the Company Court where a petition had been filed for winding up. The Court held that Section 13 of the SARFAESI Act ousts the jurisdiction of the High Court and that SARFAESI being a special and later legislation, prevailed over the Companies Act. By contrast, in cases involving very similar fact patterns, both the Madras and Karnataka High Courts ruled that the consent of the Official Liquidator was required for such a sale.[37]

The Supreme Court came to quite a different conclusion in *Official Liquidator, U.P. and Uttarakhand v. Allahabad Bank*[38] which involved the role of the company court and official liquidator where the company subject to winding up proceedings was also subject to recovery proceedings under the RDDBFI Act. The Supreme Court upheld the precedence of the RDDBFI Act and held that the company court did not have jurisdiction over matters that were pending before the DRT. While admitting that the official liquidator did have an interest in overseeing the distribution of assets and ensuring that the rights of other stakeholders such as workmen were protected, the Court held that such a role had to be performed *"within the four corners of the RDDBFI Act"* and the official liquidator would have to approach the DRT on appeal rather than the company court. This was in stark contrast to the opinions of the Madras and Karnataka High Courts discussed above where the OL had to grant his consent for enforcement action under SARFAESI to proceed.

<u>Conflicts between SARFAESI and RDDBFI Act</u>

Courts have also had to grapple with the interaction among different debt enforcement laws. Enforcement proceedings under the RDDBFI Act and SARFAESI involve different mechanisms for debt enforcement (with SARFAESI not requiring the intervention of a court or tribunal) and an issue that has often arisen is whether creditors may institute parallel proceedings under these two laws. In *Bank of India v. Ajay Finsec Pvt Ltd and Ors*[39], the DRT ruled that banks and financial institutions may simultaneously pursue proceedings under the SARFAESI Act and RDDBFI Act and that recourse to the SARFAESI Act was not prohibited during pendency of proceedings under RDDBFI Act and vice versa. This view was also upheld by the Supreme Court in *M/S Transcore v. Union of*

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36 *Indian Bank v. Sub-Registrar*, Writ Appeal Nos. 1420 and 1424 of 2013 and O.S.A Nos. 34 and 35 of 2013, decided on 11.11.2014.
37 *BHEL v. Arunachalam Sugar Mills Ltd.,* O.S.A. Nos. 58, 59, 63, 64 and 81 of 2011, decided on 12.04.2011; *Kritika Rubber Industries v. Canara Bank,* C .A. No. 190/2008 in Co. P. No. 167/1999 decided on 13.06.2013.
38 AIR 2013 SC 1823
39 Original Application No. 167 of 2001, decided on 28.11.2003

India,[40] where the Court stated that the two acts were complementary to each other. However, despite both these rulings, nearly two years after *Bank of India v. Ajay Finsec Pvt Ltd.*, the Patna High Court held that the reverse did not apply and that proceedings under the RDDBFI Act could not be initiated if SARFAESI enforcement action had begun.[41]

Conflicts over Jurisdiction

In addition to tensions between the substantive provisions of debt enforcement and collective insolvency laws, a common theme that ran through a number of cases involved a question of jurisdiction. Section 34 of the SARFAESI Act makes clear that no civil court has jurisdiction to entertain a suit or proceeding under the RDDBFI Act or any proceeding that the DRT or DRAT are empowered to hear pursuant to the SARFAESI Act. Nevertheless, issues have still arisen over the extent of the DRT's powers, when the rights of parties other than the debtor and creditor were involved. Unlike the case of conflicting laws, the courts have been relatively consistent in giving the DRT a relatively wide jurisdiction. In *M/S* Super *Sales Corporation and Ramohar Kedia v. The Debt Recovery Tribunal*,[42] the Karnataka High Court considered whether the DRT's jurisdiction extended to contractual relations of the judgment debtor with third parties. In this case, the Court upheld the ability of the DRT to *"pass directions on such matters as are necessary to expedient to give effect to its orders or to prevent abuse of its process or secure the ends of justice."*[43]

The Supreme Court came to a similar conclusion in *Jagdish Singh v. Heeralal*,[44] which involved two parallel proceedings filed in the civil court and DRT regarding an auction sale of the mortgaged property pursuant to an enforcement action taken under the SARFAESI Act. The proceeding in the civil court involved a challenge to the ability of the debtor to sell the property in question on the ground that it was undivided joint family property. The Supreme Court held that the civil court had no jurisdiction over the proceeding on the grounds that Section 34 of the SARFAESI Act ousted the civil court of its jurisdiction completely. The cases involving challenges to jurisdiction did not result in inconsistent judgments along the lines of those judgments that resolved conflicts among different statutes. Yet, these judgments too show the courts struggling to articulate where the jurisdiction of the DRT ends and another court's begins, particularly when other laws unrelated to insolvency and debt recovery come into play.

My analysis of the case law reveals that the multi-layered framework for insolvency and debt recovery has been ineffective in ensuring an orderly process for winding up or for recovery by

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[40] AIR 2007 SC 712
[41] *M/S Punea Cold Storage v. State Bank of India* (AIR 2013 Part I; II (2013) BC 501 Patna HC).
[42] III (2013) BC 202
[43] RDDBFI Act, Section 19 (25)
[44] (2013) 12 SCALE 358

creditors. Apart from the obvious inefficiencies that arise from such a framework in practice, the implementation of these laws reveals a lack of clarity in two areas. First, the prevalence of numerous parallel proceedings and the lack of a coordinated insolvency process, means that in a majority of cases most stakeholders have no clarity of their position vis-à-vis the debtor or other creditors. Even where a creditor may have been successful in debt enforcement or in having its petition disposed in one forum, there is nothing to prevent its recovery from being impacted by another parallel proceeding initiated by a different stakeholder. Second, as the numerous cases involving conflicts between different statutes reveal, there are several issues on which the interaction among the different laws is unclear and the inconsistent interpretation of these conflicts by the courts has only muddied the waters further. In some situations, these conflicts are a result of unclear laws or the failure to consider the collective impact of different statutes, as is the case of the interaction between the RDDBFI Act and SICA. In other cases, it appears to be innovative interpretations of relatively clear laws by the courts as when they interpreted the interface between SARFAESI and SICA.

B. Causes of Delay

In assessing the effectiveness of insolvency regimes, the efficiency and timeliness of the process are emphasized as delays go against the grain of preserving and maximizing the value of the debtor's assets. In this section, I look at what the case review tells us on the major contributing factors for delays.

The table below provides the time taken between the commencement of the first legal action (such as the making of a reference to the BIFR, initiating enforcement action under SARFAESI or filing a winding up petition in the High Courts) and the date of the judgment. The time periods provided below are likely to be an underestimate as the disposal of a case did not mean that the resolution of the insolvency process has been completed.

<u>Time Taken for High Court Cases</u>

(Time period known for 42 of 45 cases)

Time Period	Number of Cases	Comments/Breakdown
0 – 2 years	8	• Winding up petitions – 4 (3 involved FCCB holders) • SARFAESI/RDDBFI Act – 4
2 – 5 years	10	• Appeals from BIFR/AAIFR – 5 • SARFAESI/RDDBFI - 5
5 – 10 years	7	• References from BIFR – 2 • Winding up Petition – 1 • Appeal from BIFR – 1

		• SARFAESI/RDDBFI – 3
10+ years	17	• References from BIFR – 8 • Winding up petitions – 3 • Appeals from BIFR – 3 • SARFAESI/RDDBFI – 3

Time Taken for DRT/DRAT Cases

(Time period known for 13 of 15 cases).

Time Period	Number of Cases	Comments/Breakdown
0 – 2 years	5	
2 – 5 years	1	
5 – 10 years	5	One of these cases took 6 years in DRT, but 17 years in total
10+ years	2	

The tables above are not intended to provide average or other statistical data on the time scales for resolution, but rather to get an idea of the time scales involved in the cases reviewed. The tables suggest that resolution is extremely slow in the High Courts with 17 of the 42 cases for which data is available taking over 10 years for resolution. While cases in the DRT/DRAT were disposed more quickly, even these tribunals do not have a track record for particularly speedy disposal. Below I outline some of the reasons for these delays that I could glean from my review of the judgments.

Existence of Multiple Fora:

The existence of multiple fora described in sub-section A above is at least one of the causes for delays as parties move back and forth between these different fora. In several of the cases reviewed, there was typically at least a few years of time lost between the BIFR providing a liquidation opinion and the High Court issuing a winding up order. In *Re: Consolidated Steel and Alloys*,[45] the Delhi High Court actually failed to issue a winding up order following the BIFR's reference and creditors subsequently had to file a separate winding up petition in the court. In that case, the BIFR made a reference for liquidation in 1998, but the High Court issued a winding up order only in 2005 in response to a winding up petition filed by a creditor in 2002. The reason for the High Court's failure to act in this case is unclear, but such delays only lead to further depletion in the value of the debtor's assets and dilute any recovery that creditors might otherwise have been able to obtain.

Pro-Debtor Stance and Deference to the BIFR:

As has been observed by other commentators, the High Courts and Supreme Court have typically adopted a pro-rehabilitation stance and have been reluctant to order winding up proceedings. This is apparent from their judgments when winding up petitions are challenged as well the high level of

[45] CA Nos. 165, 385, 706 and 992/07 and 1031/08 in C.P. No. 428 of 2002, decided on 07.11.2008.

deference accorded to the BIFR. For example, there is a whole line of Supreme Court precedent which suggests that a winding up order does not signal the closure of the process. In *Rishabh Agro Industries Ltd,*[46] a Division Bench of the Supreme Court held that it was open to the directors of the company to explore the possibility of rehabilitation even after the winding up order had been passed. This judgment has since been cited in several later cases when former management of a debtor have attempted to revive a company in the final stages of being wound up.[47]

Another theme seen across several judgments was the significant deference accorded to the BIFR's decisions, despite the later's dismal track record and reputation for delays. This deference appears to stem from the Supreme Court's decisions that have referred to the BIFR as the "guardian of sick companies."[48] In *Sri Bireswar Das Mohapatra and Anr. V. State Bank of India,*[49] the Court echoed a similar view when it held that proceedings in the DRT could not proceed ignoring the recommendations of the BIFR. In *NRC Ltd. v. AAIFR,*[50] the Gujarat High Court in holding that the BIFR had the power to extend the moratorium to the sale of land for which a sale deed had already been executed, again relied on the extensive powers that the BIFR had been granted "*in the interest of the sick industrial company, its creditors, shareholders, in public interest,…"*

<u>Passing a Winding up Order does not signal the end of the matter:</u>

In many of the liquidation cases reviewed, the issuance of a winding up order did not necessarily signal the close of the insolvency process. Instead, liquidation took several more years and sometimes decades to be completed. There were numerous instances of liquidators struggling over the priority of claims and payments many years after the winding up order had been passed. Often these related to issues with workmen's compensation. For example, in *Mining & Allied Machinery Corpn. v. The Official Liquidator,*[51] nearly 10 years after the winding up order was passed, the Calcutta High Court was asked to consider whether contract labourers could be treated as workmen and, therefore, be entitled to proceeds from liquidation as secured creditors. Interestingly, the High Court did not provide an opinion on this issue, but instead directed the official liquidator to make a decision within 12 weeks. In *Official Liquidator, Suganti Alloys Castings Ltd. vs. Edupuganti Subba Rao,*[52] while the Andhra Pradesh High Court passed the winding up order in 1990, the OL was struggling to complete

[46] MANU/SC/0381/2000: (2000) 5 SCC 515.
[47] See, for example, *In re: Oswal Foods Limited*, [2008]145CompCas259(All), decided on 16.11.2006
[48] See, for example, NGEF Ltd. v. Chandra Developers (P) Ltd., (2005) 8 SCC 219, para 219: *"but there cannot be any doubt whatsoever that having regard to the phraseology used in Section 20(2) of the SICA that BIFR is the authority proprio vigore which continues to remain as custodian of the assets of the Company, till a winding up order Is passed by the High Court."*
[49] W.P. (C) No. 8567 of 2006, decided on 17.08.2006
[50] Civil W.P. Nos. 6450, 6462, 6750, 6813 of 2010 with Civil Appln. No. 945, 940, 941 and 943 of 2011, decided o 29.07.2011.
[51] CA Nos. 115, 426, 797/2012 and 1126/2011 and BIFR 510/1992 Decided on: 02.12.2014.
[52] CA 160 of 1995, decided on 19.04.2006.

the liquidation process as late as 2006. The OL finally filed a petition in the High Court alleging that the ex-managing director of the debtor had not been cooperative in providing information required for liquidation and distribution of assets, which the Court allowed, holding the ex-managing director guilty of negligence and breach of trust.

Another reason that a winding up order is not an accurate indicator of closure is that applications are often filed to stay winding up proceedings after an order has been passed. In *Forbes & Company Ltd v. OL*,[53] workmen sought a stay of winding up proceedings under Section 466 of the CA 1956. While the stay application was ultimately dismissed, it held up winding up proceedings for 8 years between 2005 and 2013. A similar fact pattern occurred in *Birds Jute and Exports Ltd. v Official Liquidator, HC*,[54] where employees filed an application for stay of the winding up order that was subsequently dismissed. In *M/S. Anjaney Ferro Alloys v. M/S Raj Hans Steel (In Liq) and Ors.*,[55] the ex-directors of the debtor company filed an application to stay the winding up proceedings, and this matter was eventually appealed to the Supreme Court. Not only did the Supreme Court grant the stay application, but also directed the BIFR to consider whether creditors had been paid off and if a rehabilitation option could be explored. While the High Court passed the winding up order in 2003, the BIFR was still determining these issues as of 2012.

As one of the goals of the insolvency regime is to preserve value, delays in proceedings that lead to further erosion of value are particularly important to guard against. My case review suggests that a combination of factors to do with the law and its interpretation by the courts have contributed to these delays. The courts have often been reluctant to issue winding up orders and appear willing to allow the ex-management of the debtor to explore rehabilitation options during all stages of the process. At the same time, delays are also a consequence of certain provisions in the law, such as Section 466 of the CA 1956 which allows for a stay of winding up proceedings. Further, my case review shows that many of the delays also occur after a winding up order has been passed. This process is often invisible from public scrutiny as the Court no longer has a role to play. Yet, it would be a mistake to assume from this that the issuance of a winding up order implies that the insolvency has been resolved and the liquidation completed. To ensure that the possibility of delays are limited in the new Bankruptcy Code, it would be important to consider adding checks to the winding up process to enable liquidation to be completed in a timely manner.

C. ***Challenges to SARFAESI***

Fourteen of the 45 cases from the High Courts and 5 of the 15 cases from the DRTs/DRATs involved applications by debtors to stay SARFAESI enforcement action. In a majority of these cases (12 of 19),

[53] Appeal No. 34 of 2012 in Company Application No. 243 of 2011 in Company Petition No. 1068 of 1997, decided on 23.08.2013.
[54] C.A. No. 283 of 2006 and BIFR No. 520 of 1992, decided on 15.01.2010
[55] Company Appeal 1/2012, decided on 29.08.2012.

the court allowed SARFAESI action to continue or held the SARFAESI Act to prevail over other proceedings, but these judgments are nevertheless worth examining further as they reflect situations where SARFAESI enforcement was not as smooth as the statute intended it to be. While some of these difficulties appear to arise from parallel proceedings in multiple fora and laws that often conflict with one another (some of these cases involving conflicts between SARFAESI and other statutes are described in Part A), these judgments also reveal instances of courts either mis-interpreting the Act or significantly expanding the scope of their review powers in adjudicating challenges to SARFAESI enforcement action.

First, there were instances of applications to stay SARFAESI enforcement actions being filed in civil courts and instances of civil courts adjudicating such challenges despite the explicit provision in the Act that the DRT ousts to jurisdiction of the civil court when it came to actions under SARFAESI. In *Bank of India v. N. Natarajan and Ors.*,[56] the civil court issued an interim stay on the enforcement of SARFAESI proceedings, which it continued to extend over a one-year period. The secured creditor ultimately appealed the decision to the High Court which ruled that the civil court had no jurisdiction over SARFAESI actions let alone the power to issue an interim stay. While this was the correct result, much time was lost as a result of a completely contrary understanding of the SARFAESI Act by a civil court judge.

Second, there were situations where the courts and DRTs went beyond the scope of their permitted review when dealing with challenges to SARFAESI. Under the SARFAESI Act, the role of the DRT or court when considering a challenge to enforcement action is to examine whether the secured creditor's action was taken in accordance with the provisions of the SARFAESI Act and related rules.[57] In practice, however, the DRTs and DRATs often overstepped this line to go on to adjudicate the substance of the claim itself. For example, in *Lakshmi Sankar Mills v. Indian Bank and Ors.*,[58] the DRT did not allow the debtor's application to stay SARFAESI enforcement, but imposed a condition. The DRT held that the asset sale under SARFAESI could proceed only if the debtor did not deposit a fixed amount by a specified date. The debtor appealed this condition to the DRAT which went on to lower the amount of the deposit. Ultimately, the Madras High Court remanded the decision back to the DRT to consider only the narrow question of whether the secured creditors had complied with the provisions of SARFAESI, but this was three years after the banks had initiated enforcement action. In another similar case,[59] the DRT granted the debtor additional time to pay the deposit before the bank

[56] Bank of India v. N. Natarajan and R. Sakadevan, (High Court of Madras), CRP (PD) No. 829 of 2007 and M.P. No. 2 of 2007, decided on 04.07.2007.
[57] SARFAESI Act, Sections 17(2) and (3).
[58] Lakshmi Sankar Mills v. Indian Bank and Ors., W.P. Nos. 37148 and 37534 of 2007, decided on 15.04.2008 (Madras High Court).
[59] Satwanti Automobiles v. State Bank of India, WP (C) No. 4252 of 2014, decided on 17.09.2014.

could initiate the sale while the narrow question it was supposed to have considered was whether the bank had adhered to the enforcement of security rules under SARFAESI.

The purpose of the SARFAESI Act was to provide a relatively quick mechanism for secured creditors to enforce their security interests without the intervention of the court. To the extent that the debtor has the ability to challenge the enforcement action in court, Section 17 of the Act requires the debtor to bring such an application within 45 days and also makes clear that the review by the court or DRT is to be limited to whether the secured creditor complied with the provisions of SARFAESI. These and other provisions of SARFAESI are all aimed at enabling the efficient and timely enforcement of security without much scope for delays. My review of cases, however, suggests that the enforcement of security pursuant to SARFAESI has, in practice, not been immune from the judicial delays and uncertainties that arise in other insolvency proceedings. These delays and inefficiencies arise out of a combination of factors, including the existence of multiple fora and parallel proceedings, a lack of understanding of SARFAESI by many courts and tribunals (particularly the lower courts) and a tendency of courts to expand the scope of their review in the context of SARFAESI enforcement actions. It is, of course, difficult to ascertain the proportion of cases in which SARFAESI enforcement has been allowed to go unchallenged as opposed to those occasions on which it has been challenged in court. However, it appears that in cases where a debtor does challenge SARFAESI enforcement, creditors have experienced long drawn out struggles in the courts.

Conclusion: Implications for a New Bankruptcy Code

In this paper, I have argued that a significant contributor to the problems with the current legal framework for resolving insolvencies in India is its multi-layered structure. India's patchwork of insolvency laws that each applies to a different class of stakeholders or processes has resulted in parallel proceedings, conflicts between different statutes and uncertainty for creditors over their recovery. I have also argued that, apart from the multi-layered legal framework, various factors to do with the law and its implementation have caused major delays in insolvency proceedings, particularly when it comes to winding up and liquidation. These include the reluctance of courts to issue winding up orders and their willingness to allow debtors to explore rescue and rehabilitation even when such an approach may no longer be feasible. Further, there is a need to have an effective legal framework to control the liquidation process post-issuance of the winding up order which is when the greatest delays often occur.

I believe that the conflicts and multiple proceedings that have arisen from the multi-layered insolvency law framework point to a strong need for a unified bankruptcy code that applies to all aspects of a company in distress and for all stakeholders. While different stakeholders in an insolvency process do (and should) have different rights and interests, setting these out in a single code would provide a framework for balancing the competing interests of debtors, secured creditors and other stakeholders. Such an approach would also minimize the possibility of conflicts between the different rights and priorities of various stakeholders as well as the instances of parallel proceedings.

In India, the focus of reforms in the area of corporate distress, as reflected in the RDDBFI Act and SARFAESI, has been on facilitating speedy recovery by banks, financial institutions and other classes of secured creditors. These initiatives are understandable and necessary in light of delays in court proceedings and the significant abuse of SICA by debtors who used the pretext of a stay to impede recovery by creditors. Yet, while banks and secured creditors may have had some success with SARFAESI, this focus on the interests of only banks and secured creditors has come at the cost of an organized insolvency process that preserves value and benefits all stakeholders. Further, as discussed above, the process of enforcing security under SARFAESI has also been beset with problems similar to those that plague the rest of the system. A new unified bankruptcy code is an opportunity to reverse this trend by providing organized and effective mechanisms for collective insolvency rather than debt recovery.

Such a structural change towards a unified bankruptcy code would need to be accompanied by changes to substantive provisions in the law. While my analysis of the case law did not capture all the required changes (most notably in the area of rescue and rehabilitation proceedings), one such change would involve provisions aimed at reducing the exercise of discretion by courts in granting extensions and delaying winding up orders. For example, Section 466 of the CA 1956 that allows applications for a stay of winding up proceedings and does not stipulate the specific conditions under which a stay may be granted, would need to be revisited. Further, much of the delays also appear to take place at the tail end of the insolvency process after a winding up order has been passed and an OL appointed. While the liquidation process is often not at the centre of attention, it would be important that the new bankruptcy code focuses on this part of the process as well as there can be no resolution of insolvency or recovery for creditors until the liquidation is completed.