

Exploring the Distressed Assets Merger and Acquisition in India Under the Insolvency and Bankruptcy Code

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Abstract

This paper examines the legal elements of distressed asset merger and acquisition (M&A) transactions in India, highlighting the specific risks and difficulties involved. Distressed asset deals need a strategic knowledge of the deal's worth, a focus on avoiding target company meltdowns during the sale, and immediate action to offset possible reputational harm. The implementation of the Insolvency and Bankruptcy Code (IBC) in India has significantly altered the landscape, transforming distressed assets from being disregarded by investors to becoming a genuinely beneficial investment opportunity. The IBC has played a pivotal role in alleviating challenges associated with banks' balance sheets, fostering the reallocation of capital for more efficient use. The study explores how the time-bound procedures mandated by the IBC have expedited the resolution process, enabled successful distressed asset acquisitions and contributed to the overall efficiency of capital deployment in the Indian market. The adoption of the Insolvency and Bankruptcy Code (IBC) in India has substantially transformed the environment, changing distressed assets from an afterthought by investors into a legitimate investment opportunity. The IBC has played a critical role in addressing difficulties related with banks' balance sheets, promoting capital reallocation for more efficient usage. The research looks at how the IBC's time-bound processes have accelerated the resolution process, allowing for successful distressed asset purchases and adding to the overall efficiency of capital deployment in the Indian market.

Keywords: *distressed assets, insolvency, merger and acquisition, corporate insolvency resolution process, debt restructuring.*

JEL Classification: *G34, G33, K22, G38, M21*

1. Introduction

India's economy, the fifth largest in the world, is among the fastest expanding. Over the previous three decades, the growth rate has been roughly 7%. Following the negative effects of the pandemic, there is increasing evidence of a V-shaped economic rebound. According to the International Monetary Fund's most recent World Economic Outlook, published in October 2021, the Indian economy will expand by 9.5 percent in 2021 and 8.5 percent in 2022. Over time, the nation has seen an improvement in the investment climate along with increased innovation and competitiveness. Considering how big the economy is and how quickly it is expanding, it makes sense to see a constant stream of distressed assets entering the market. However, since the beginning of the epidemic, advisors and investors have been prepared for an influx of troubled asset M&A

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transactions.

Following independence, India saw higher rates of credit expansion and government spending, which supported the country's development goals. The early to mid-2000s global economic boom coincided with a sharp rise in the Indian economy, particularly in the manufacturing and non-financial business sectors. This expansion was facilitated by fiscal and monetary policy, and credit increased to fuel the boom. As loan repayments decreased, this raised total debt and the percentage of non-performing assets (NPAs). Since 1980, attempts have been undertaken to monitor and regulate distressed assets. To address the issue of increasing distressed assets, committees such as the Tiwari Committee (1981)³ and the Narasimham Committee (1991)⁴ were established. The Narasimham Committee's recommendations led to the establishment of Debt Recovery Tribunals (DRTs)⁵.

The IBC's implementation has produced a productive market for distressed asset resolution. The distressed asset transactions generally includes players who are forced into selling due to poor financial conditions. The distressed asset investment landscape in India now has a clear legal framework, as well as defined roles, duties, and deadlines. It appears that distressed asset investing has matured in India, providing shrewd investors with the chance to grab "value" assets. Due to the absence of a strong and effective regulatory structure, these investors had generally avoided this market. The reallocation of assets among businesses plays a significant role in determining how quickly the economy recovers from negative shocks. Investors seeking to expand their businesses now have an easier path thanks to the Code, which entails a time-bound, information-rich procedure culminating in a plan that is legally enforceable on all parties involved. Through mergers, amalgamations, and demergers, existing businesses can now be bought without being associated with the previous wrongdoers' transgressions. This has broadened the range of resolution options available.

2. Objectives of the study

The main objective behind writing this research paper is to study the distressed asset market in India. How has it now in the changing paradigm with the Insolvency and Bankruptcy Code ("IBC") has become a good opportunity for investors along with protecting the reputation of the target company. Through this research also wishes to emphasizes on how the new code is playing a vital role in resolving the issues related to bank balance sheets which ultimately helps in promoting capital reallocation for more efficient usage.

3. Research question

The research questions are:

³ Report of the Committee to examine legal and other difficulties faced by Banks and Financial institutions in rehabilitation of industrial undertakings and suggest remedial measures including changes in the law, headed by T. Tiwari., Chairman, IRCI, Published by RBI, 1984.

⁴ Report of the Committee on the Financial System headed by M Narasimham, with a note by Prof M. Datta Chaudhari and Shri M R Shroff.

⁵ A quasi-judicial statutory body established under the Recovery of Debt and Bankruptcy Act 1993.

1. Has the issue of distressed assets hampered the appropriate allocation of the capital for an efficient use, which ultimately has vacuumed out good investment opportunities?

2. How has Insolvency and Bankruptcy code (“IBC”) played a pivotal role in resolving the issues related with banks’ balance sheets for promoting capital reallocation?

3. How has the incorporation of the Insolvency and Bankruptcy code (“IBC”) helped in correctly valuing the distressed assets during any takeover or an acquisition deal?

4. Literature review

The paper titled “*The Benefits of Buying Distressed Assets*”⁶ is a research which talks about how mergers and acquisitions has had difficulty pinpointing the elements of M&A deals that are reliably linked to profitable outcomes for purchasers. The authors of this study explore how the stock price of failing companies or assets is affected by corporate announcements of acquisitions. The purpose of their inquiry is to determine the gains made by purchasers in fire sales. From 1982 to 2012, the rate of buyer returns in fire sales was around two percentage points higher compared to conventional M&A agreements. It is demonstrated that the decrease in the sellers' bargaining power explains this outcome. In line with that theory, the authors discovered no distinction between fire sales and the combined announcement returns of buyers and sellers, nor between the operating profitability of the buyers following acquisitions.

In another research paper titled “*Asset Allocation in Bankruptcy*”⁷ the authors have done research that investigates the impact of Chapter 7 liquidation and Chapter 11 reorganisation on the reallocation and subsequent use of assets in bankruptcy. A novel dataset has been created that monitors the occupancy and utilisation of real estate assets over time, and we identify 129,000 bankrupt establishments. Due to the fact that approximately 80% of real estate is vacant five years following bankruptcy, asset reallocation is common. As a natural experiment, we employ the random assignment of judges to bankruptcy cases, forcing certain businesses into Chapter 7, even though they were initially in Chapter 11.

One of the articles published by Trilegal on the topic of “*The Distressed Assets Sector: Poised for Growth*”⁸ how until 2010, the market for non-performing assets (NPAs) was very tiny and mostly unfamiliar to regular investors. However, during the last decade, it has emerged as one of the biggest sectors in India, especially after the government introduced the Insolvency and Bankruptcy Code (IBC) in 2016 to curb the unchecked growth of non-performing assets (NPAs) following the alarming levels of NPAs observed in 2015. India's status as a favourable location for business has been

⁶ Jean-Marie Meier, Henri Servaes, „The Benefits of Buying Distressed Assets”, *Journal of Applied Corporate Finance*, Volume 32, Issue 4, Fall 2020, pp. 105-116, <https://doi.org/10.1111/jacf.12436>.

⁷ Shai Bernstein, Emanuele Colonnelli & Ben Iverson (2017). „Asset Allocation in Bankruptcy”, *Working Paper* 23305, National Bureau of Economic Research, <https://www.nber.org/papers/w23305>, DOI: 10.3386/w23305.

⁸ Yogesh Singh, Ankush Goyal & Rohan Kohli, “The Distressed Assets Sector : Poised for Growth” *Trilegal Quarterly Roundup*: Oct-Dec 2021, <https://trilegal.com/magazine/issue2/the-distressed-assets-sector-poised-for-growth.html>.

supported by the implementation of the Insolvency and Bankruptcy Code (IBC), as seen by the country's rise in the Ease of Doing Business rankings published by the World Bank. Both domestic and international entities have contributed to the development of a robust insolvency ecosystem in the nation.

Another article published by Shardul Amarchand Mangaldas titled “*Distressed Asset Opportunities in India*”⁹ discusses the significance of the Insolvency and Bankruptcy Code (“IBC”) as a pioneering and essential piece of law. The loan market in India is being revitalised, since it is now facing a collapse due to non-performing assets, bad loans, and bank fraud. The Code has had a transformative impact on all stakeholders in the country within the brief span of two years after its implementation. According to the quarterly bulletin of the Insolvency and Bankruptcy Board of India, the average percentage of total claims allowed in the majority of cases resolved in the January-March quarter of 2018 was 69.7%.

In a paper published by Mr. Arjun Khanna on “*The Relationship between Mergers and Acquisitions and the Insolvency and Bankruptcy Code in India: A critical analysis*”¹⁰, the author has conducted a study through a rigorous examination of the relationship between mergers and acquisitions (M&A) and the Insolvency and Bankruptcy Code (IBC) in the Indian environment. The implementation of the IBC in 2016 has resulted in substantial improvements to India's system for dealing with bankruptcy. It has established an effective process for resolving troubled assets and revitalising financially struggling firms. This has been especially significant considering the recent increase in mergers and acquisitions, which has been motivated by market consolidation, globalisation, and strategic synergies.

5. Insolvency law and distressed asset acquisition

The Insolvency and Bankruptcy Code¹¹ (“IBC”) was created as a comprehensive set of regulations to unify the rules regulating corporate restructuring and bankruptcy settlements. The entire process, starting from the initiation of legal proceedings to the endorsement of a resolution plan or liquidation has been designed with specific time limits in order to speed up this process. The Insolvency and Bankruptcy Board (“IBBI”) has formulated the Corporate Insolvency Regulation Process (“CIRP”) Regulations¹² which comprehensively address many aspects of the insolvency resolution procedure for corporate entities. The IBC divides the legal and commercial aspects of insolvency and bankruptcy procedures, allowing the National Company Law Tribunal (“NCLT”), the adjudicating authority, and the stakeholders to make prompt decisions in their respective domains¹³. When all other options have been exhausted, the Supreme Court noted in a

⁹ Shardul Amarchand Mangaldas, *Distressed Asset Opportunities in India*, July 10, 2019 <https://www.ams.shardul.com/insight/distressed-asset-opportunities-in-india/>.

¹⁰ Arjun Khanna, „The Relationship Between Mergers and Acquisitions and the Insolvency and Bankruptcy Code in India: A critical analysis”, *Indian Journal of Law and Legal Research*, Jun 19, 2023, Volume V Issue III, <https://www.ijlrr.com/post/the-relationship-between-mergers-and-acquisitions-and-the-insolvency-and-bankruptcy-code-in-india>.

¹¹ The Insolvency and Bankruptcy Code, 2016.

¹² IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 .

¹³ Vidushi Trehan, ‘IBC (Insolvency and Bankruptcy Code, 2016) – the Bankruptcy Law of India’ [2019] Mondaq, <https://www.mondaq.com/india/insolvencybankruptcy/829988/ibc-insolvency-and-bankruptcy-co>

landmark decision¹⁴ that liquidation is the final option. However, in 2019, there was an amendment¹⁵ made to the IBC Act which specified that the resolution plans could incorporate measures for the restructuring of the corporate debtor's organisation, through merger, amalgamation, and demerger. The process has been defined as follows as per the provisions of IBC:

1. In order to commence the process, the financial creditor is required to submit an application¹⁶ before the tribunal. The NCLT verifies the occurrence of non-payment and, if convinced, accepts the request or dismisses it accordingly within a period of 14 days¹⁷. In the case of operational creditors, either the creditor or the debtor must send a demand notice¹⁸. If the debtor fails to make payment or raises a disagreement within 10 days of receiving the notification, the creditor¹⁹ has the option to submit an application to the NCLT.

2. The NCLT may admit the application if it is satisfied with the creditor's claim. In the event of a corporate debtor's failure to meet financial obligations, they have the option to seek insolvency through an application to the NCLT. This application must be supported by a resolution that has been adopted by three-fourths of the partners or members. The CIRP commences on the date of admission²⁰.

3. Moratorium Period refers to a specified period of time during which a particular activity or action is temporarily suspended or delayed. Following the commencement of the CIRP, the NCLT imposes a moratorium period²¹ in which all proceedings by creditors are prohibited or temporarily halted, while the bankruptcy court evaluates the possibility of restoring the company to a viable state. This measure is used to safeguard the debtor's assets from being utilised in a manner that could be detrimental to the interests of all or a subset of creditors. The court in a landmark judgement²² has considered government actions taken against corporate debtors to be deemed "illegal" and "ineffective" during the moratorium period.

4. The resolution plan is a strategic document that outlines the steps and measures to be taken in order to resolve a particular issue or problem. As per the initial bankruptcy code, an opportunity was given to any individual to become a resolution applicant, however, as per an amendment²³, the Resolution Professional²⁴ can only invite Resolution Applicant who are not disqualified²⁵ to submit a resolution plan if they meet

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¹⁴ *Swiss Ribbons (P) Ltd. v. Union of India* [2019] 4 SCC 17.

¹⁵ The Insolvency and Bankruptcy Code (Amendment) Act, 2019 No. 26 of 2019.

¹⁶ The Insolvency and Bankruptcy Code, 2016, Section 7(1).

¹⁷ The Insolvency and Bankruptcy Code, 2016, Section 7(4).

¹⁸ The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, Rule 5.

¹⁹ The Insolvency and Bankruptcy Code, 2016, Section 5(20).

²⁰ The Insolvency and Bankruptcy Code, 2016, Section 7(6).

²¹ The Insolvency and Bankruptcy Code, 2016, Section 14 (1).

²² *State Bank of India v. Orissa Manganese & Minerals Ltd.* [2017] SCC Online NCLT 20886.

²³ The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (NO. 26 OF 2018).

²⁴ The Creditors' Committee (CoC) selects a Resolution Professional during their initial meeting through a majority vote of at least 66% of the voting share of financial creditors. He is granted authority over the debtor's administration and board of directors. His responsibility is to supervise the assets, finances, and operations of the debtor, with the aim of evaluating its financial condition while ensuring the debtor continues to operate.

²⁵ The Insolvency and Bankruptcy Code, 2016, Section 29A.

the criteria set by the RP with the approval of the Committee of Creditors ("CoC"). This distinctive attribute of the code broadens the options for mergers and demergers by enabling the sale of the firm or its business to the general public.

5. Any individual or collective entity has the right to suggest a distressed merger or amalgamation of the corporate debtors with another organisation as the resolution applicant. Once the CoC approves it with at least 6% of the voting share of financial creditors, the proposals of the resolution receive judicial approval. This approval ensures that the entity continues to operate as a "going concern" to maximise its value as a corporate debtor.

Due diligence has become a very crucial part of the M&A transactions as it significantly influences the outcome of the deal. The Supreme Court²⁶ has emphasised the obligation of the investor business to carry out thorough and effective due diligence before to making any investments in a company. The firm of these investors cannot justify in neglecting the mandatory and essential precautions before entering into any deal. The CIRP offers a comprehensive data on distressed assets which facilitate the commercial operations.

6. Foreign investments in stressed assets in India

The Indian Laws²⁷ allow a foreign fund to officially register as a 'foreign portfolio investor' ("FPI") with the securities market regulator, the Securities and Exchange Board of India ("SEBI"). Investors have the option to invest in securities using the specific instruments designated by the Reserve Bank of India ("RBI"). Foreign Portfolio Investors (FPIs) may get access to the Indian distressed assets market by investing in the instruments listed below:

1. Investors in India primarily acquire distressed assets through Asset Reconstruction Companies ("ARCs"), which are regulated by the SARFAESI²⁸ and regulations issued²⁹ by the RBI. ARCs that have been authorised by the RBI to acquire the distressed assets are allowed to participate in the activity of asset reconstruction and purchase financial assets from any bank or financial institution. This authorisation by RBI includes procurement of any loan or advance, debentures or bonds, guarantees, letters of credit, or any other credit facility provided by the aforementioned bank or financial institution³⁰. According to the RBI Task Force's 2019 Report on the Development of Secondary Market for Corporate Loans³¹, there are only a few ARCs in the market that possess the required skill, capital, and expertise to acquire and restructure Non-Performing Assets. As a result of this limitation, these ARCs have a dominant

²⁶ *Nirma Industries Ltd. v. SEBI* [2013] 8 SCC 20.

²⁷ The Securities and Exchange Board of India (Mutual Funds) Regulations, 1996.

²⁸ Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

²⁹ The Asset Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003 (vide Notification No. DNBS.2/CGM(CSM)-2003, dated April 23, 2003) together with Master Circular – Asset Reconstruction Companies (vide Notification No. DOR.SIG.FIN.REC 1/26.03.001/2022-23).

³⁰ Rule 10 of the Foreign Exchange Management (Non-Debt Instruments) Rules 2019, Schedule 1 Paragraph 1 of the Foreign Exchange Management (Debt Instruments) Regulations, 2019 and Regulation 20 of the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations 2019.

³¹ RBI Report of the Task Force on the Development of Secondary Market for Corporate Loans, 3rd September, 2019.

position in the market. Under these circumstances, it might be difficult for new investors to enter the market if the ARCs already have established exclusive commercial relationships with the current FPIs.

2. FPIs can invest in debt instruments issued by Corporate Debtors in the Corporate Insolvency Resolution Process (“CIRP”). Foreign portfolio investors (FPIs) who invest in these securities are not subject to the restriction on investors to invest up to 50% of the total corporate bond issue size or the requirement for a minimum remaining period³². FPIs are permitted to participate in the equities of financially unstable companies who have been underperforming in their previous financial years and are on the verge of going under the insolvency process, but they must follow the sector-specific rules and regulations stated in the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019.

The RBI's External Commercial Borrowings (“ECB”) provide the guidelines³³ for domestic companies to obtain commercial loans from non-resident businesses, covering external commercial borrowings, trade credits, and structured obligations. These guidelines talk about the requirements for lenders and borrowers to be eligible in order to obtain these loans and how these funds can be used, the minimum duration for loan maturity, the maximum cost of borrowing, and the obligations for reporting on loans provided through the ECB route. The Reserve Bank of India (RBI) issued a circular³⁴ on July 30, 2019, which has relaxed the ECB framework. Through this circular, the RBI has implemented relaxation which allows the sale or assignment of specific distressed loans to the eligible ECB lenders. Corporate borrowers domestically acquire these loans for capital expenditure in the industrial and infrastructure sectors. These loans are categorised as Special Mention Account (“SMA”) or NPAs³⁵. Furthermore, the resultant ECB must adhere to the maximum cost limit, minimum average maturity period, and other pertinent criteria outlined in the ECB Master Directions.

Looking forward, the Task Force Report has acknowledged the necessity of establishing a secondary market that would function as a platform for those investors who would like to purchase significant amounts of a distressed borrower's debt in the form of their assets or other securities. The objective of these investors would be to get a controlling interest in the company or to facilitate the insolvency proceedings of the borrower. Looking at the recommendations made by the Task Force Report, the RBI has initiated a discussion paper³⁶ in January 2023 on the Securitisation of Stressed Assets Framework (“SSAF”). The paper talks about allowing the companies other than ARCs to securitise non-performing and stressed assets by establishing a Special Purpose Entity (“SPE”). The discussion paper has recently also requested public comments on various important aspects regarding the distressed asset market regularisation. These include determining the types of investors who are eligible to participate in the SSAF, implementing a minimum retention ratio requirement, specifying which assets should be

³² SEBI (Foreign Portfolio Investors) Regulations, 2019.

³³ The RBI Master Directions - External Commercial Borrowings, Trade Credits and Structured Obligations (updated as on September 30, 2022).

³⁴ RBI/2019-20/20, A.P. (DIR Series) Circular No. 04 dated 30th July, 2019

³⁵ Under the ECB Master Directions, the lender must be from a FATF or IOSCO compliant country in order to qualify as an ‘eligible ECB lender’.

³⁶ RBI Discussion Paper on Securitisation of Stressed Assets Framework (SSAF).

considered as 'Stressed assets', involving an independent Resolution Manager ("RM"), providing credit enhancement facilities, and ensuring access to interim finance for resolving stressed assets.

7. How do other statutes affect distressed assets acquisition

It is a widely known practice of the competitive companies of acquiring the distressed assets of the other rival firms during the time of their insolvency process. The provisions of Competition Act³⁷, clearly mentions the importance of reporting the threshold before acquiring any of these assets in order to ensure that the dominant player is not abusing its position³⁸ in the market. The Competition Act make sures that whenever there is any kind of acquisition per say regarding the distressed assets, such an acquisition should not make an "*Appreciable Adverse Effect on the Competition*"³⁹. To smoothen the process of acquisition of the distressed assets, a Green Channel was created under the CCI Amendment Regulations⁴⁰. Expanding the use of Green-Channel to the Corporate Insolvency Resolution procedure will speed up the whole process by allowing automatic approval from the Competition commission of India ("CCI")⁴¹. This would eliminate the time-consuming procedure of seeking permission by accelerating the speed of approval⁴² and also alleviate the compliance and stress on resolution applicants.

The issue that emerges is whether the goal of the CCI is to safeguard competition in the Indian markets or to rescue underperforming or struggling businesses in the market. According to the provisions of the Competition Act⁴³, the CCI must take into account the probability of a company failing when determining whether a merger will result in an adverse effect on competition. This system of accounting the failure is known as the "*Failing Firm Defence*." In the recent times this defence has been getting a lot of statutory recognition through the provisions of the Competition Act, 2002⁴⁴ and in order to take this defence there is a "*Three Step Test*"⁴⁵ which has to be followed:

- The initial step is to examine whether the firm is on the verge of leaving the market due to its recent financial difficulties.
- The second step is to consider if there are any less anti-competitive alternatives to the merger or acquisition being discussed.
- The last step talks about evaluating if the firm would be compelled to leave the

³⁷ The Competition Act, 2002, Section 5.

³⁸ The Competition Act, 2002, Section 4.

³⁹ Jai Sanyal, „Green Channel Approval for IBC-driven Acquisitions?“ [2020] *The Indian Review of Corporate and Commercial Laws (IRCCL)*: <https://www.irccl.in/post/green-channel-approval-for-ibc-driven-acquisitions>.

⁴⁰ The Competition Commission of India (Procedure regarding the transaction of business relating to combinations) Regulations, 2011, Regulation 5.

⁴¹ The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2019 F. No. CCI/CD/Amend/Comb. Reg./2019.

⁴² Bhumika Indulia, 'Green Channelling of CIRPs: Pros and Cons' [2021] SCC Blog <https://www.sconline.com/blog/post/2021/02/17/green-channel/>.

⁴³ The Competition Act, 2002, Section 20(4)(k).

⁴⁴ Ibid.

⁴⁵ Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, (Ch. VIII), Official Journal of the European Union, <https://www.sconline.com/blog/post/2021/02/17/green-channel/>.

market if this combination does not occur.

Shareholder approvals are not required under the LODR Regulations⁴⁶ if they follow the authorised resolution plan by the tribunal under the Code⁴⁷. The matters where generally this rule has been implemented are related to disposal of shares in a material subsidiary or material related party transactions. Recently, the Supreme Court⁴⁸ determined that because the Insolvency and Bankruptcy Code (“IBC”) is a comprehensive set of laws, there is no need to independently adhere to the regulations of the Securities and Exchange Board of India (“SEBI”) and the Companies Act of 2013 in situations when the restructuring aligns with the permission of the National Company Law Tribunal (“NCLT”). Apart from these there are several other Regulations of SEBI on Issue of Capital⁴⁹ where it is clearly mentioned that if the issue of preferential equity shares is made with the approval of the tribunal then during the Insolvency procedure, the ICDR regulations need not be complied with and as per the recent amendments⁵⁰ the acquisitions which are carried out in accordance with authorised tribunal plans are not required to make an open bid as per the Takeover Regulations of SEBI⁵¹.

8. Critical issues in the distressed asset M&A⁵²

1. Managing distressed assets on the face of it appear to have substantially larger risks, yet the risks may not be significantly different when compared to mergers and acquisitions (M&A). Occasionally, an asset may not be undesirable, but due to unanticipated events they are generally not preferred. Completing thorough due diligence and executing an effective strategy can substantially reduce risks and yield considerable advantages for the acquiring party, much like a conventional merger and acquisition procedure. Due diligence in the case of distressed assets becomes a critical exercise in the entire process since the IBC resolution applicant will not have the benefit of representations and warranties from the promoters⁵³.

2. While it remains difficult to obtain capital from foreign sources, domestic financial institutions are generally hesitant to finance the acquisition of distressed properties. The lack of the debtor's representations and warranties often introduces risk into resolution applicants' purchase proposals. Unlike in traditional M&A transactions, resolution applicants depend entirely on accessible facts and verified information gathered via due diligence. Simply put, acquirers buy assets in their existing state, with no assurances or warranties, passing risk to the applicant and leaving little room for error. Because the Resolution Professional depends on current management for data, the

⁴⁶ SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

⁴⁷ Adity Chaudhury, ‘Sebi Regulations Amended for Companies Undergoing CIRP Under IBC’ *Argus Partners* (India, 5 June, 2018), <https://www.argus-p.com/papers-publications/thought-paper/sebi-regulations-amended-for-companies-undergoing-cirp-under-ibc/>.

⁴⁸ *Innoventive Industries Ltd. v. ICICI Bank* [2018] 1 SCC 407.

⁴⁹ SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009.

⁵⁰ Securities And Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2017 No. SEBI/LAD-NRO/GN/2017-18/015.

⁵¹ SEBI (Substantial Acquisitions of Shares and Takeovers) Regulations, 2011.

⁵² Khaitan, Saloni, *The Case of Asset Acquisition: Are IBC-Led M&A Activities the Way Forward?* (March 25, 2023). <http://dx.doi.org/10.2139/ssrn.4406014>.

⁵³ Adity Chaudhury, *op. cit.*

information given with acquirers may be inaccurate or insufficient.

3. In addition, the process of placing bids on and purchasing assets that are in a state of crisis is sometimes riddled with complex challenges. It is of the utmost importance to provide adequate protection for the values of these assets from previous promoters and owners, who may use proxies to disrupt the auction or unjustly boost prices. Despite legislative protections governing asset marketability, numerous acquirers and investors encountered legal challenges while pursuing their M&A goals. In April 2011, the Supreme Court ruled that any other civil court cannot interfere with any action taken or planned in response to an order⁵⁴ issued by the adjudicating authority, the National Company Law Tribunal ("NCLT").

4. Despite the efforts of the government and the courts to formulate laws that are both comprehensive and effective, there are still certain concerns that have not been addressed. The manner in which the present management will be punished for the previous management's incapacity to comply with regulations is a matter that has not yet been decided upon.

5. To ensure the integrity of the whole process, sensitive information about the corporate debtor that may be accessible by any possible Resolution Applicant, including rivals, must be kept absolutely secret. The IBC recognises the importance of maintaining confidentiality and, as a result, requires all Resolution Applicants who access information about the corporate debtor to comply with current legal provisions governing confidentiality and insider trading, to protect any intellectual property of the corporate debtor to which they have access, and not to share relevant information with third parties unless the foregoing is met.

9. Conclusion

The introduction of the IBC in India has had a positive influence on mergers and acquisitions (M&A) transactions involving financially distressed assets. It is important to emphasise on the fact that banks and financial institutions are actively working to recoup the losses of these underperforming companies and resolve the issue of NPAs, which has generated problems in the banking sector. The main focus of the IBC is on the recovery of these distressed assets which is expected to stimulate the banks to use the tools of mergers and acquisitions to speed up the resolution process. Furthermore, the current economic conditions create an attractive opportunity for prospective investors to enter this market in the times of economic slowdown. The COVID-19 pandemic has caused financial hardship and diminished market value for several businesses. The IBC establishes a methodical structure for resolving financially problematic enterprises, allowing banks to clean up their balance sheets and strengthen their financial condition. In order to increase the success rates of distressed assets M&A, the parties might have to work together to mitigate risks such negotiations with the creditors, vague plans for the agreements, or layoffs of critical staff. During talks, buyers might benefit from favourable terms and circumstances, such as debt-to-equity conversions, to facilitate payback. Increased stakeholder involvement may ensure creditors and other stakeholders' interests are considered. It's important to understand the troubled

⁵⁴ Shashi Prakash Khemka V. NEPC Micon & Others CA 1965-66/2014.

company's ownership structure, commitments, and liabilities. Proper paperwork is essential for protecting buyers from potential responsibilities and dangers. Mergers and acquisitions appears to be a form of art which needs a unique combination of skills and a certain willingness to take risks. Due to the IBC's early stage development and the presence of several ambiguities and uncertainties, it is crucial to exercise caution while evaluating potential future risks and liabilities, as well as when creating a resolution plan. Nevertheless, troubled mergers and acquisitions have their own advantages. An acquirer has the potential to obtain an asset at a lower valuation than under normal conditions.

Establishing a market for distressed assets will not only facilitate business reorganisation but also broaden the options for obtaining funding. Enhancing the liquidity of loans in the secondary market would attract a broader spectrum of institutional investors to aid in corporate restructuring. In the short term, the existence of a market for distressed assets might contribute to a more rapid economic recovery by enabling non-viable companies to depart the market and allowing viable companies to develop. Establishing a market for distressed assets is crucial for a rising country such as India, where the corporate bond market has limited reach and market players mainly depend on bank credit.

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