

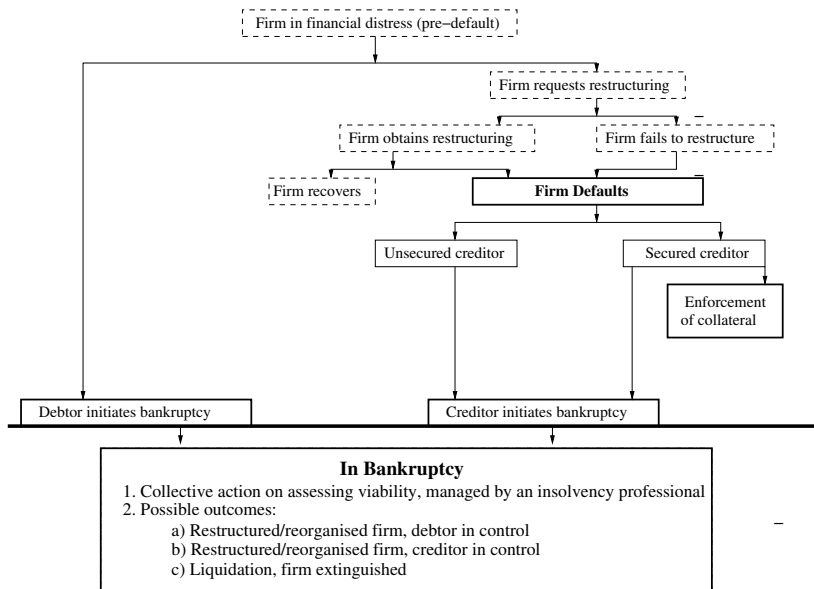
# BLRC thinking about the Indian Bankruptcy Code

Susan Thomas

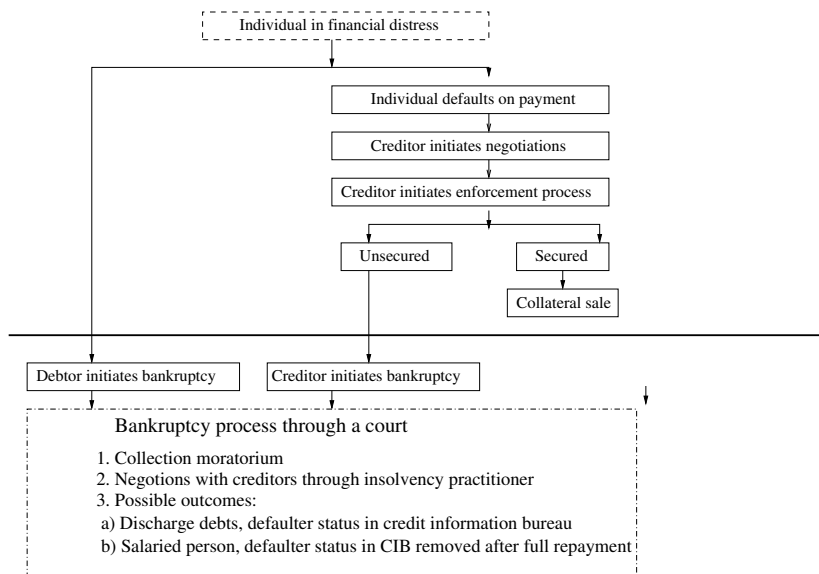
May 15, 2015

# The case of corporate insolvency

# Process flow of firms in stress



# Not so different for individuals in stress



# The economic problem of bankruptcy

- ▶ With a failure of repayment (*default*), a creditor will reconsider the long term viability of investment.
  - ▶ **Viable**: the problem is in the financial structure of the firm.  
→ financial solution (restructuring, reorganisation)
  - ▶ **Unviable**: A problem in the economic model of the firm  
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→ financial solution (restructuring, reorganisation)
  - ▶ **Unviable**: A problem in the economic model of the firm  
→ firm is closed down.
- ▶ In an environment with high information asymmetry
  - individual creditors hurry to enforce their contracts as quickly as possible.
  - higher stress of repayment on the firm.
- ▶ Add poor legal certainty,
  - (individual) creditors actions escalate;
  - stress on the firm escalates.

# What good bankruptcy law can do

- ▶ In a bad combination of high information asymmetry + poor legal certainty,
- ▶ Bankruptcy process can serve as **calm period** where,
- ▶ Viability is answered by
  - ▶ a collective decision of all parties – debtor, creditors –
  - ▶ managed by an insolvency professional,
  - ▶ within the supervision of the court,
  - ▶ where the judge is not required to take a view on questions of business.

# Some principles

- ▶ The core problem of assessing viability is *hard*.
  - ▶ Collective decision delivers better outcomes on value maximisation.
    - involve the larger market in defining outcomes.
  - ▶ The final decision must be negotiated by creditors in a majority vote.
  - ▶ The legislature or the courts should not be asked to make this decision.



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- ▶ **Delays**  $\implies$  **loss of value**. Dilatory tactics by any party must result in penalties commensurate with resultant loss in value.
- ▶ **Courts are scarce public** resources. Its use must be priced accordingly.

Efficiency measures: time to resolution, loss given default, cases filed to appeal outcomes.

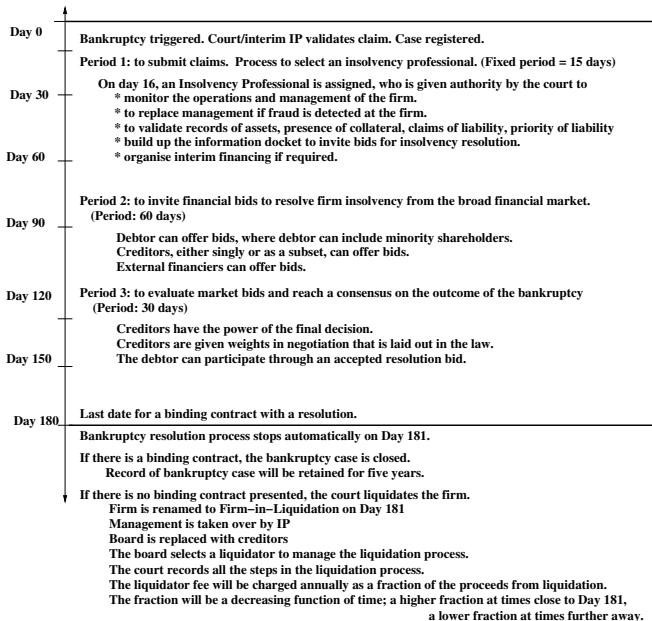
# The approach in the BLRC

The objective of the new bankruptcy framework should be to maximise economic value for all creditors to a firm.

It seeks to:

- \* Ensure creditor rights, and priority of rights among creditors
  - helps business certainty.
- \* Establish a single law for all entities for insolvency resolution
  - helps legal clarity.
- \* Clarify role of the adjudicating authority and the role of the insolvency professional.
  - helps implementation.
- \* Reduce information asymmetry in insolvency
  - helps implementation.
- \* Reduce stalemate situations with well-defined ‘cram-down’ procedures
  - helps implementation.
- \* Ensure swift and efficient liquidation
  - helps business certainty.
- \* In either bankruptcy and liquidation, ensure criminal liability for fraud
  - disincentivise lying.

# Process flow in bankruptcy



# Key takeaways

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→ lowers information asymmetry in decisions.
- 3 Viability assessment runs parallel to the outcome.  
→ faster path to resolution.
- 4 Linear flow from assessment to resolution / liquidation.  
→ higher clarity and certainty of processes for participants,  
→ collective participation reduces the probability of appeals

# Enabling speedy outcomes

1. One law to rule them all: repeal provisions that are legislative overlaps.

List of laws/provisions to repeal: CA2013, ESIRDLA2012, SARFAESI2002, RDDBFI1993, SICA1983, Presidency Towns Insolvency Act 1909, Provincial Insolvency Act 1929, *Idots?*

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2. Rules of trigger; rules of liquidation.  
Learning from other jurisdictions.

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What exists? What needs to be created afresh? What processes to ensure efficacy during insolvency?

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4. The role of the **insolvency practitioner**:

Creation of regulator; guidelines for qualifications; access to information for resolution; monitoring performance; action against conflict of interest.

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5. The role of the **adjudicating authority**.

Rules about the role; form, processes and structure of the court.

## Next steps for the workplan

# Overall workplan of BLRC

1. What has been done so far: An interim report is on the MOF website, led by Vidhi Centre for Legal Policy.
2. Volume 0 of the report: A collection of papers, also released as IGIDR FRG Working Papers.
3. Volume 1: An argument for design of the bankruptcy code leading up to drafting instructions.
4. Volume 2: The draft Indian Bankruptcy Code.

Late June: A conference in Goa with a draft Volume 1 in hand, refine it, and then turn it into code.



## Research papers that are presently under preparation

1. *The evolution of corporate bankruptcy in India*, Anjali Sharma and Susan Thomas
2. *Debt recovery and insolvency resolution proceedings in India: case review*, Aparna Ravi and Susan Thomas. Presented last time.
3. *Comparing corporate bankruptcy law: India, U.K., Singapore*, Anjali Sharma and Rajeswari Sengupta
4. *Comparing individual insolvency process: India, Australia, Canada*, Renuka Sane and Susan Thomas
5. *Information infrastructure for the bankruptcy process*, Ajay Shah and Susan Thomas. Presented last time.
6. *Issues around land as collateral in insolvency*, K. P. Krishnan, Venkatesh Panchapagesan, and Madalasa Venkataraman
7. *Building an insolvency professional industry in India*, Anirudh Burman, M. S. Sahoo, Shubho Roy
8. *Adjudication infrastructure for the bankruptcy proceeding*, Anirudh Burman, Pratik Dutta, Shubho Roy.

# Table of contents of volume 1 of the report

1. Review of bankruptcy process in India today (both firms and individuals)
2. Information infrastructure for improved functioning of the credit market and of the bankruptcy process
3. Creating the profession of insolvency practitioners
4. Obtaining modern adjudication infrastructure
5. Designing the bankruptcy process
6. Designing the liquidation process

# Presentations for today

- ▶ Learning from other jurisdictions
  - ▶ Corporate insolvency law in the U.K. and Singapore: *Anjali Sharma, Rajeswari Sengupta*
  - ▶ Individual insolvency in Australia: *Renuka Sane*
- ▶ Bankruptcy Information systems
  - Issues around land as collateral in insolvency: *K. P. Krishnan, Venkatesh Panchapagesan, Madalasa Venkataraman*
- ▶ The role of the insolvency professional
  - Role and rules for the insolvency professional: *Anirudh Burman, M. S. Sahoo, Shubho Roy*
- ▶ Processes, form and structure of the bankruptcy court
  - ▶ A court for efficient bankruptcy proceeding: *Anirudh Burman, Pratik Dutta, Shubho Roy*
  - ▶ Learning from the FSAT Task Force: *Pratik Dutta*

Thank you

susant@igidr.ac.in  
<http://www.ifrogs.org>