

# The Chamber of Tax Consultants

## *Seminar on issues related to IBC and resolution*

- Bidding plans
- Preferential, Undervalued, Fraudulent and Extortionate transaction (PUFE)
- Role of other professional agencies such as Forensic Auditors etc.

By

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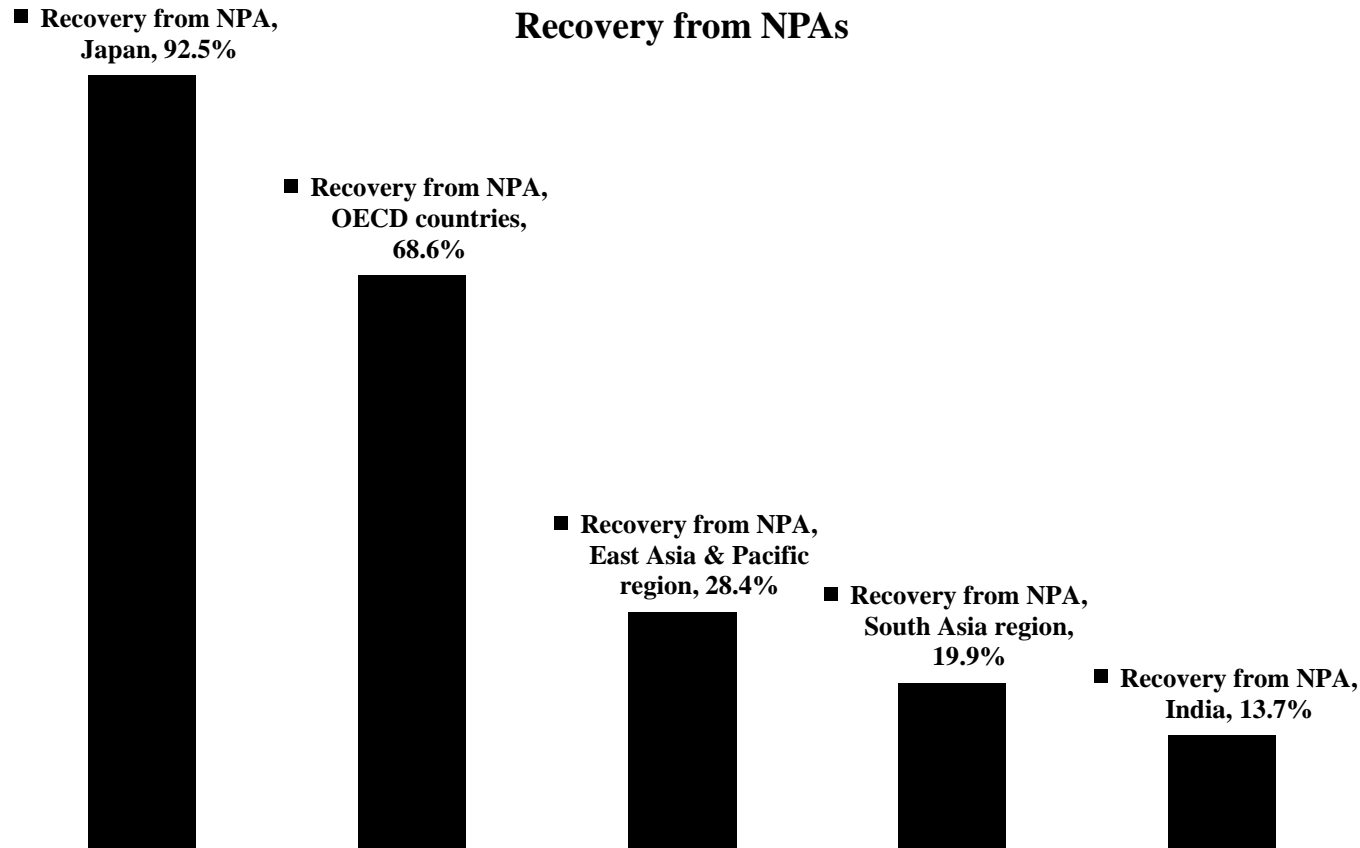
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  - Preferential, undervalued, fraudulent, and extortionate transactions
- 
- Role of other professional agencies

# Introductory remarks – NPA problem

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## NPAs: How big and why?

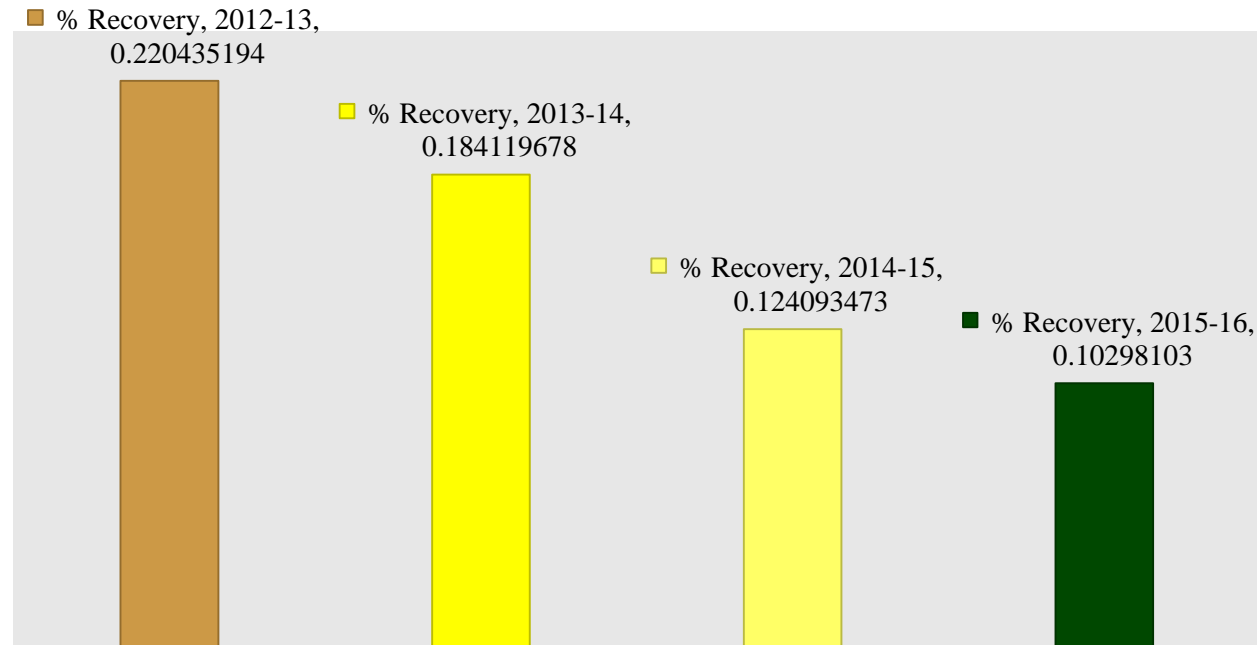
- According to World Bank study, India's NPA recovery is among the poorest



# Introductory remarks – NPA problem

- RBI data broadly match with World Bank study
- Only IBC can expedite NPA handling

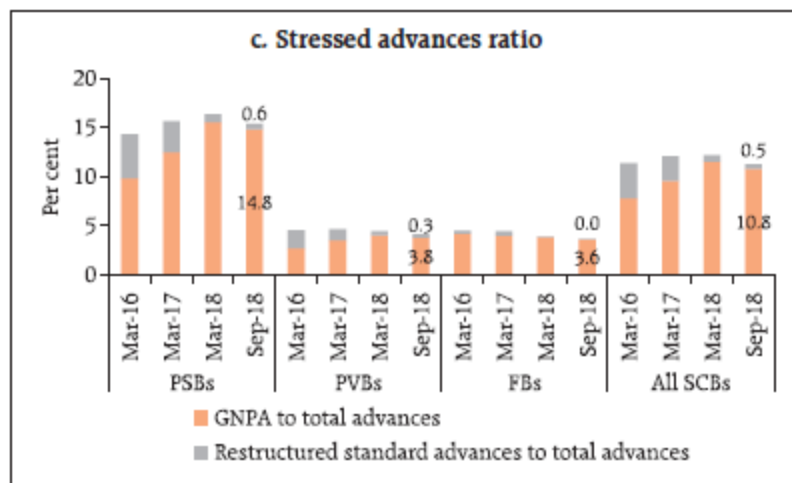
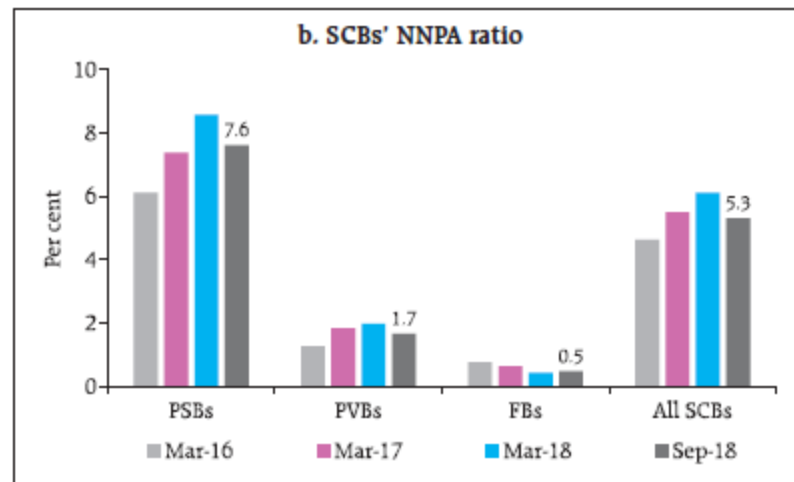
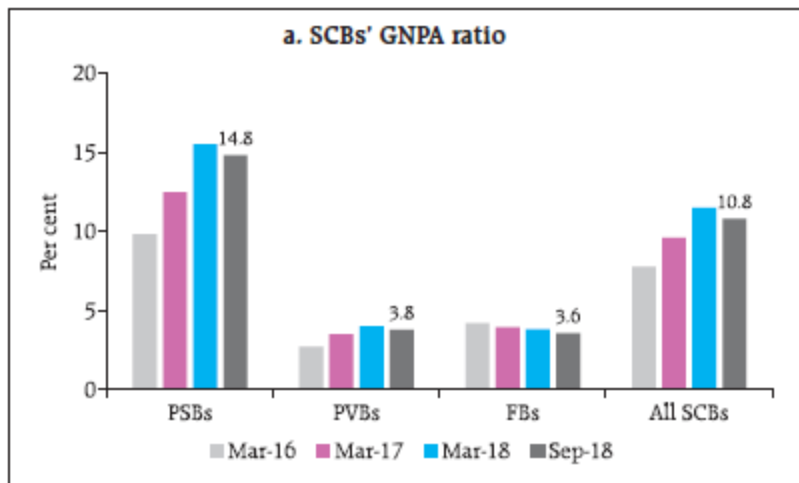
**% Recovery from NPAs**



Improved recovery seen in FY-2018 due to IBC

# Introductory remarks – Severe asset quality deficit

- Gross NPAs were 10.2% & the Restructured Standard Advances (RSA) were 2.0% of the total assets, as on September 2017 across all SCBs



Source: RBI Financial Stability Report, Dec. 2018

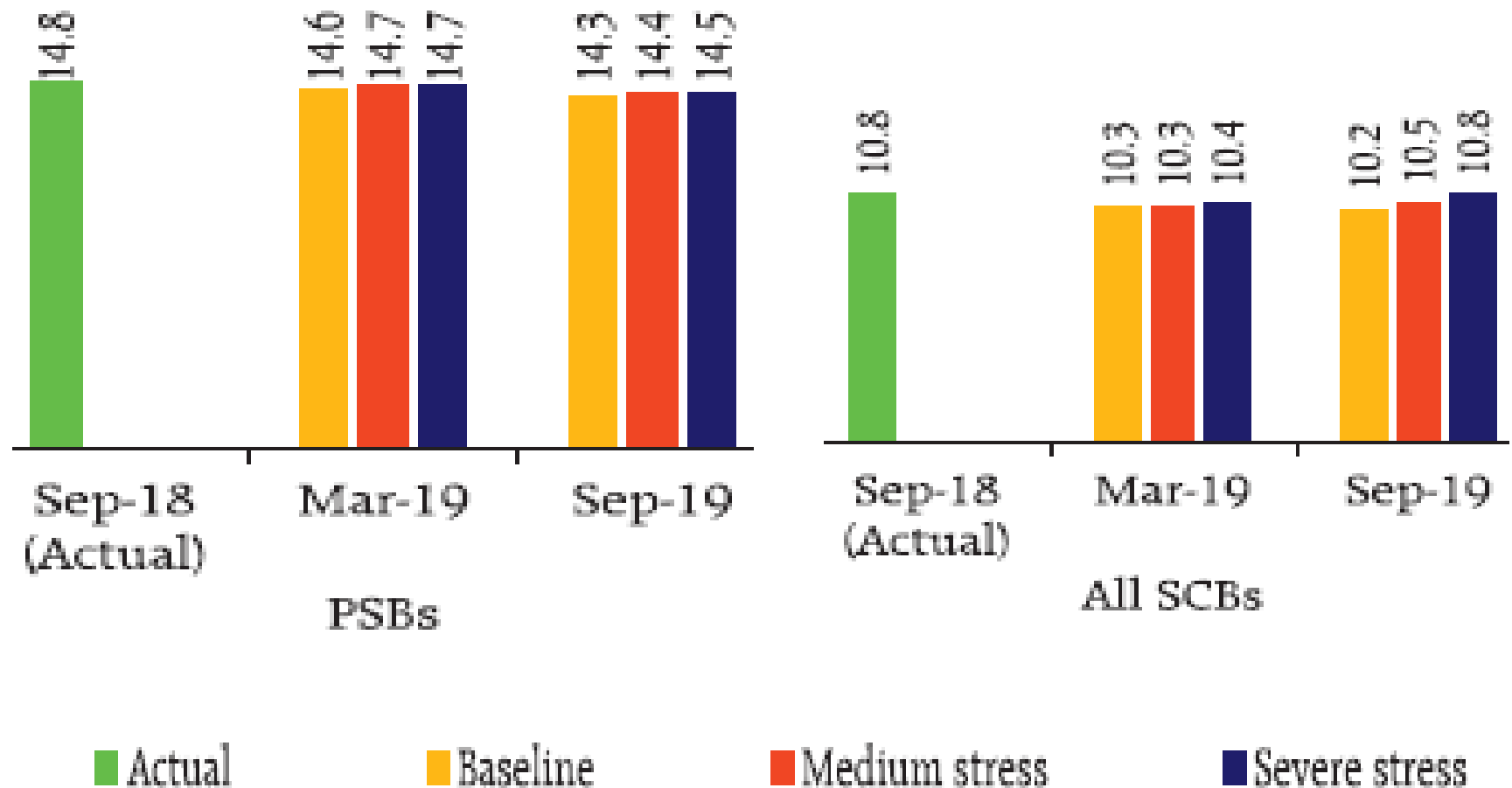
PSB: Public Sector Banks  
PVB: Private Banks

FB: Foreign Banks  
SCB: Scheduled Commercial Banks

RSA: Restructured Standard  
Advances  
GNPA: Gross Non-Performing Assets

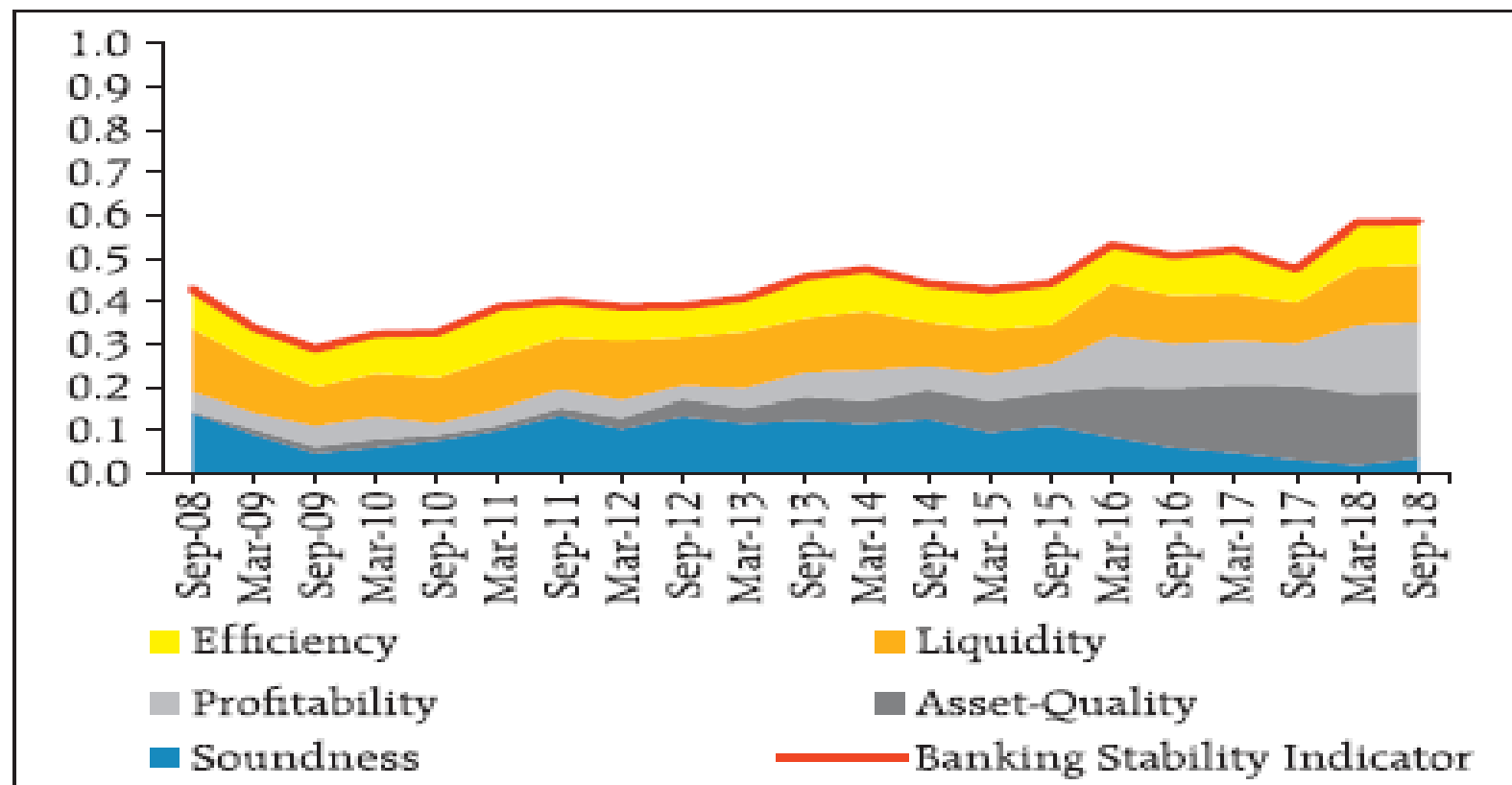
NNPA: Net Non-Performing Assets  
(GNPA minus Provisions)

# Introductory remarks – Severe asset quality deficit



# Introductory remarks – Severe asset quality deficit

**Chart 2.5: Banking stability indicator**

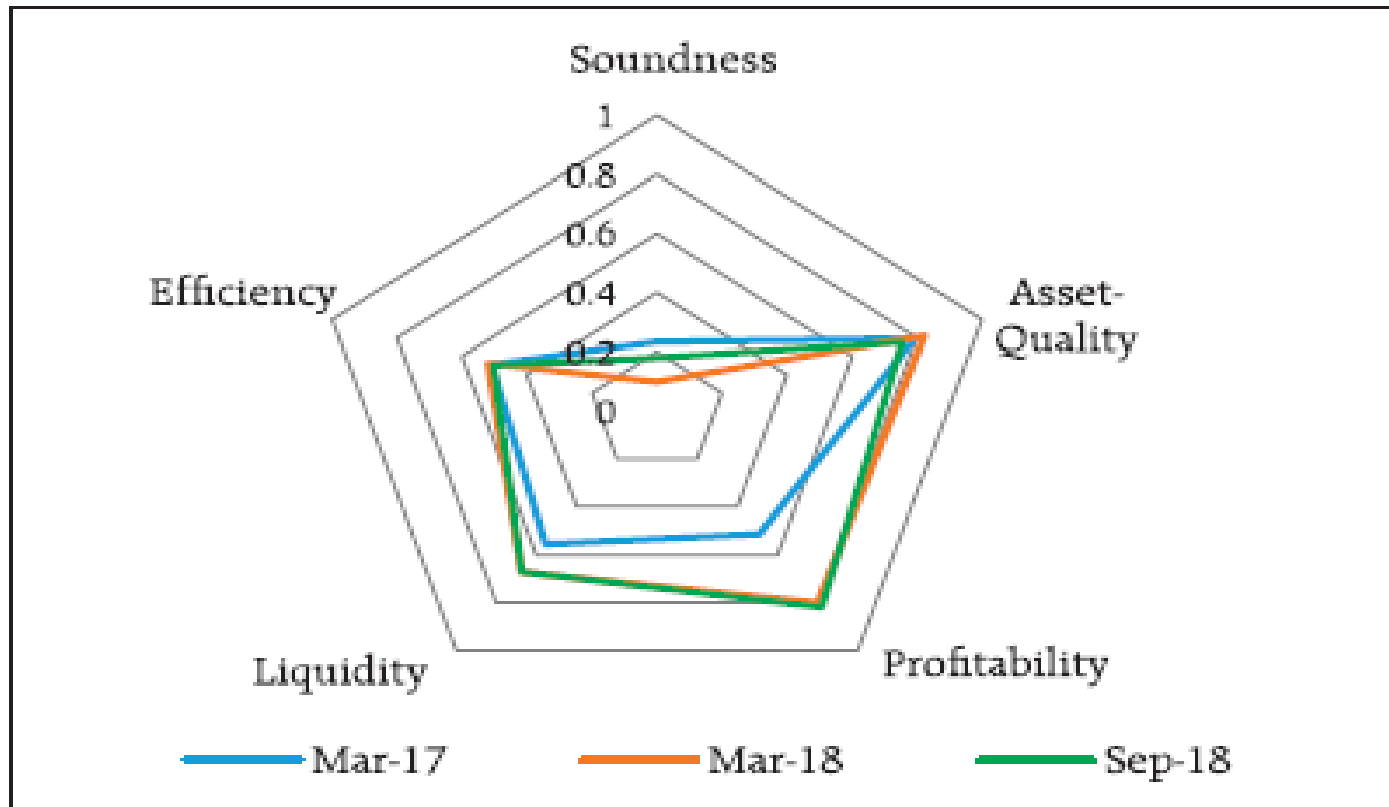


**Note:** Increase in indicator value shows lower stability. The width of each dimension signifies its contribution towards risk.

**Source:** RBI supervisory returns and staff calculations.

# Introductory remarks – Severe asset quality deficit

**Chart 2.6: Banking stability map**



**Note:** Away from the centre signifies increase in risk.

**Source:** RBI supervisory returns and staff calculations.



# Introductory remarks – NPA problem – Summing up

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- High level of NPAs are not due to economic meltdown. These are due to major mismatch between costs on the books and actual costs – Cost padding and Working Capital leakage
  - Credit recovery legislations such as RDDBFI Act, and SARFAESI Act have failed to deliver
  - Indefinitely long adjudication periods under RDDBFI and SARFAESI Acts cause asset impairment and reduce recovery further
  - In India, IBC is being branded as a legislation for resolution, not credit recovery. This is oxymoron
  - Worldwide, efficacy of bankruptcy codes is judged from credit recovery. IBC cannot be tested based on any other parameter
  - Only IBC can expedite NPA handling effectively
  - Bidding under IBC poses challenges due to very high credit levels relative to asset value / firm value
  - Successful bidding entails pro-active approach by all concerned
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# Resolution plan – Conceptual aspects

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- Effective settlement is possible if the enterprise value is “maximised”
- Maximum enterprise value is key to effective settlement
- Let’s look at the following formula

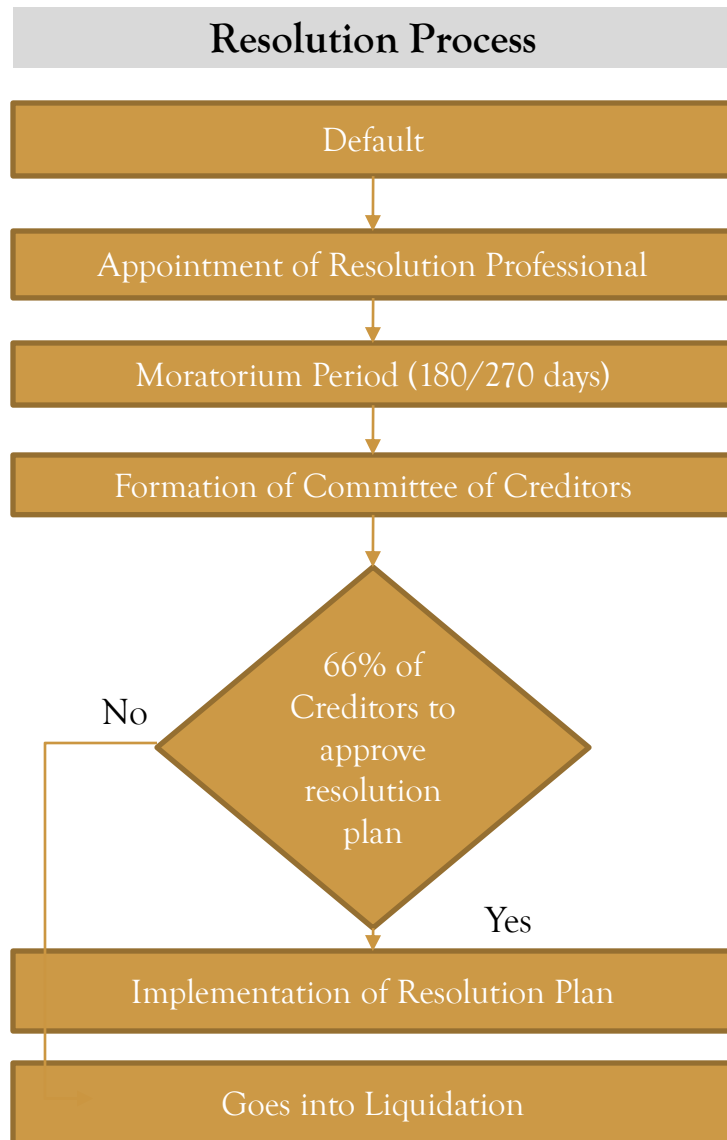
$$\text{Equity value} = \text{Max} (V-D, 0)$$

V = Enterprise value

V-D is residual after debt serviced (full or part)

- The corporate debtor seeks to maximise “V-D” and the creditor seeks to maximise “D”
  - Successful Resolution Plan is one where both the creditors and corporate debtors agree to “D”
  - Maximisation of “V” enhances chances of effective settlement i.e. Successful Resolution Plan: Challenges for advisors on buy-side. Entails bottom up approach and estimation of enterprise value
  - The key lies in catalysing transparent competitive bidding from parties present in the business or PE / Hedge funds – This is expected to come in the RFQ document to be introduced by IBBI
  - Investment banking skills of RP can facilitate efficient bottom up approach by the Resolution Applicants and result in optimum Resolution Plan
- 
- Availability of data room for sufficient period along with credible Info. Memo. can lead to effective settlement – This is coming in the RFQ document to be introduced by IBBI

# Resolution process



- Public announcement
- Moratorium
- Appointment of valuers
- Submission of proof of claims
- Committee of Creditors (CoC) formation
  - Financial Creditors or 18 largest operational creditors by value
- First Meeting of the CoC
- Voting by the CoC for selecting RP
- Preparation of Information Memorandum
- Inviting EoI from potential Resolution Applicants
- Submission of Resolution Plans by eligible Resolution Applicants
- Selection of best the best Resolution Plan by the CoC
- Approval of the CoC approved Resolution Plan by NCLT
- Handover of business to the new management
- Liquidation if no acceptable Resolution Plan emerges

**Time Period:** 180 days extendable by another 90 days, excluding time elapsed in judicial proceedings, if any

# Bidding plans: Critical aspects

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- Seeking Information Memorandum (IM): Section 29
  - Understanding eligibility aspects: Section 29A
  - Meeting criteria specified in section 25(2)(h) and CIRP regulation 36A(1)
  - Extracting information from IM: Formulating Resolution Plan (RPlan)
  - Strategic and tactical aspects
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# Section 29: Information Memorandum

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29(1): Preparation of Information Memorandum (IM) as per CIRP regulation 36

29(2): Providing to the Resolution Applicant (RA) access to all relevant information in physical and electronic form, provided such resolution applicant undertakes-

- a. to comply with provisions of law relating to confidentiality and insider trading;
- b. to protect any intellectual property of the corporate debtor; and
- c. not to share relevant information with third parties unless clauses (a) and (b) of this sub-section are complied with.

**Relevant information:** Information required by the RA to formulate **Resolution Plan**. It must include details of financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor.

In other words, IM must encompass complete status of:

- a. Business, operating & financial performance,
- b. Assets & liabilities,
- c. Legal, fiscal, and regulatory risks

With this, the RA is enabled to present comprehensive Resolution Plan along with legal, fiscal, and regulatory risk mitigation.

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# CIRP: Information memorandum

CIRP Regulation 36(2)	Information memorandum	Remarks
(a)	Assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values assigned to each category;	<ol style="list-style-type: none"> <li>Details from (a) to (i) must be completed before the first COC meeting</li> <li>These details capture complete and updated details of the corporate debtor's assets and liabilities</li> <li>This part facilitates constitution of COC</li> <li>This part facilitates identification and action on "Avoidance transactions" u/s 43 (preferential transactions), 45 (undervalued transactions) and 50 (extortionate transactions)</li> <li>Facilitates for a Resolution Applicant: <ol style="list-style-type: none"> <li>Estimation of values of assets and liabilities</li> <li>Restructuring of liabilities</li> <li>Estimation of salaries &amp; wages costs</li> <li>Waivers to be sought from statutory authorities</li> <li>Further due diligence by the Resolution Applicant for acquisition</li> </ol> </li> </ol>
(b)	Latest annual financial statements;	
(c)	Audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the application;	
(d)	List of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;	
(e)	Particulars of a debt due from or to the corporate debtor with respect to related parties;	
(f)	Details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party;	
(g)	Names and addresses of the members or partners holding at least one per cent stake in the corporate debtor along with the size of stake;	
(h)	Details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;	
(i)	Number of workers and employees and liabilities of the corporate debtor towards them;	

# CIRP: Information memorandum

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CIRP Regulation 36(2)	Information memorandum	Remarks
(j)	Liquidation value ( <i>Omitted w.e.f. December 31, 2017</i> )	Reflects asset value
(k)	Liquidation value due to operational creditors; ( <i>Omitted w.e.f. December 31, 2017</i> )	Earlier it was needed for allocation for dissenting and operational creditors in the resolution plan. Now this is not needed. Rationale for valuation no more exists
(l)	Other information, which the resolution professional deems relevant to the committee.	<ol style="list-style-type: none"><li>1. Very crucial</li><li>2. This includes comprehensive analysis of the corporate debtor's financial performance and position, operations, organization, industry, peer performance, etc.</li><li>3. This can help in estimation of synergy for the resolution applicant</li></ol>

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# Section 29A : Effective filter

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## Section 29A

A person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person—

- (a) is an undischarged insolvent;
- (b) is a wilful defaulter in accordance with the guidelines of the Reserve Bank of India issued under the Banking Regulation Act, 1949 (10 of 1949);
- (c) whose account is an NPA (as promoter or in management of such account) for one year at the time of submission of the resolution plan except when he clears all overdues before submitting resolution plan

This does not apply to a resolution applicant which is a financial entity and is not a related party to the corporate debtor.

- (d) has been convicted for any offence punishable with imprisonment –
  - i. for two years or more under any Act specified under the Twelfth Schedule; or
  - ii. for seven years or more under any law for the time being in force:

This does not apply to a person after the two years of his release from imprisonment and to any connected person from financial entity

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# Section 29A : Effective filter

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- (a) is disqualified to act as a director under the Companies Act, 2013 (18 of 2013) .  
This does not apply to any connected person from financial entity
  - (b) is prohibited by the Securities and Exchange Board of India from trading in securities or accessing the securities markets;
  - (c) has been a promoter or in the management or control of a corporate debtor in which order PUFE transactions has been made by the Adjudicating Authority under this Code (except when these irregularities occurred before his takeover of CD
  - (d) has executed a guarantee in favour of a creditor to the corporate debtor undergoing CIRP, such guarantee has been invoked by the creditor and remains unpaid in full or part
  - (e) is subject to any disability, corresponding to clauses (a) to (h), under any law in a jurisdiction outside India; or
  - (f) has a connected person not eligible under clauses (a) to (i).
-

# CIRP: Resolution plan

CIRP Regulation 37: Resolution plan	Remarks
<p>A resolution plan may provide for the measures required for implementing it, including but not limited to the following-</p> <ul style="list-style-type: none"><li>(a) transfer of all or part of the assets of the corporate debtor to one or more persons;</li><li>(b) sale of all or part of the assets whether subject to any security interest or not;</li><li>(c) the substantial acquisition of shares of the corporate debtor, or the merger or consolidation of the corporate debtor with one or more persons;</li><li>(ca) cancellation or delisting of any shares of the corporate debtor, if applicable</li><li>(d) satisfaction or modification of any security interest;</li><li>(e) curing or waiving of any breach of the terms of any debt due from the corporate debtor;</li><li>(f) reduction in the amount payable to the creditors;</li></ul>	<ul style="list-style-type: none"><li>1. Sub-regulations (a) to (h) ensure that there are no constraints in formulation of Resolution Plan.</li><li>2. Sub-regulation (j) enables listing of approvals required from the Central and State Governments and other authorities</li><li>3. Section 31(1) of IBC states as under:  If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.</li></ul>

# Planning to bid u/s 30(1): Bird's eye view

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## Expression of Interest Stage

- ✓ Financial Criteria specified in EoI documents
- ✓ Technical Criteria specified in EoI documents

## Resolution Plan Stage

- ✓ RFP shared with shortlisted bidders
  - ✓ IM shared with shortlisted bidders
  - ✓ Evaluation Matrix shared with shortlisted bidders
    - Upfront cash recovery
    - Deferred payment to financial creditors
    - Payment to operational creditors, workmen dues,
    - Fresh equity infusion
    - Turnaround capability
  - ✓ Data room opened capturing company profile, financials, DD reports, audited, shareholder agreements & loan documents, etc. for DD
  - ✓ Resolution plans invited from shortlisted applicants along with EMD
  - ✓ Evaluation of resolution plans and negotiations
  - ✓ Recommendation of best Resolution Plan to CoC for approval
-

# Planning to bid u/s 30(1)

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- Meeting qualification criteria
  - ✓ Meeting the qualification criteria and submit information as per CIRP regulation 36A(4)
- While submitting the Resolution Plan, following aspects need to be adopted:
  - ✓ Compliance aspects
  - ✓ Evaluation aspects
  - ✓ Formulation
  - ✓ Strategic & tactical aspects
- Compliance aspects
  - ✓ Ensure compliance with provisions of Section 29A and submit with Resolution Plan, an affidavit stating that the RA's eligibility under section 29A
  - ✓ Comply with CIRP regulations as to:
    - CIRP regulation 37: The contents of the Resolution Plan
    - CIRP regulation 38: Mandatory contents of the Resolution Plan which entail the following.

## Planning to bid u/s 30(1)

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38(1):	The amount due to the operational creditors under a resolution plan must be given priority in payment over financial creditors
38(1A)	Include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors of the corporate debtor
38(1B)	<p>Include a statement giving details if the resolution applicant or any of its related parties has failed to:</p> <ul style="list-style-type: none"><li>- Implement, or;</li><li>- Contributed to</li></ul> <p>Failure of implementation of any other resolution plan approved by the Adjudicating Authority any time</p>

- CIRP regulation 38(2): The Resolution Plan must provide
    - a. the term of the plan and its implementation schedule;
    - b. the management and control of the business of the corporate debtor during its term, and;
    - c. adequate means for supervising its implementation.
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# Planning to bid u/s 30(1)

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- CIRP regulation 38(3): The Resolution Plan must demonstrate that
    - a. it addresses the cause of default;
    - b. it is feasible and viable;
    - c. it has provisions for its effective implementation;
    - d. it has provisions for approvals required and the timeline for the same; and
    - e. the Resolution Applicant has the capability to implement the resolution plan.
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# Requisites of successful bidding

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- Domain expertise of RA
    - ✓ Technical, legal, regulatory, accounting, fiscal and organizational due diligence
    - ✓ Prior knowledge helpful
    - ✓ Financial and organizational resourcefulness
  - Bottom up analysis
    - ✓ Use top-down approach only for preliminary decision
    - ✓ Do bottom-up analysis: Prepare financial model
    - ✓ Determine total liability servicing capability: Most likely case
    - ✓ Limit total liability in RPlan based on servicing capability
    - ✓ Do not relate any liability to % of figures mentioned in IM. IM is useful but carries disclaimer as to 100% accuracy. Specify absolute maximum.
    - ✓ Include the figures of future crystallization of disputed claims not in the books but under adjudication, under appropriate category
    - ✓ Schedule liability servicing in a manner which will maximise RA's score under evaluation matrix
    - ✓ Let's see typical evaluation matrix
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# Evaluation matrix: Making the grade

S. No	Parameter(s)	Weightage	Score Range/Matrix	Maximum Score	Calculation of Parameter
(A)	QUALITATIVE PARAMETERS				
1	Experience of resolution applicant in the sector in which Corporate Debtor is operating.	80%	0-10	8	Score will be awarded on the basis of performance of resolution applicant in the immediate past 5 financial years on the basis of operating experience, financial metrics, market metrics and customer metrics.
2	Acquisitions made by Resolution Applicant in the immediate past 5 financial years.	50%	0-10	5	Score will be awarded on the basis of success of resolution applicant in making acquisitions, in taking merger & acquisitions, acquiring and turning of distressed assets etc. In case of multiple acquisitions, the best case is to be considered for scoring. Past success to be judged on the basis of EBITDA improvement (both absolute and % EBITDA margin) of



# Evaluation matrix

					acquired company post acquisition.
3	<p><b>Financial strength of resolution applicant/group (group net worth, revenue, EBIDTA)</b></p> <p><b><i>For Strategic Investors</i></b></p> <ul style="list-style-type: none"> <li><i>Debt to EBITDA Ratio</i></li> <li><i>Sales Turnover</i></li> </ul> <p><b><i>For Financial Investors</i></b></p> <ul style="list-style-type: none"> <li><i>Fund Size (from which Investment is proposed)</i></li> <li><i>Assets under the management of resolution applicant</i></li> </ul> <p><b><i>For Special Purpose Vehicle (SPV)</i></b></p> <ul style="list-style-type: none"> <li><i>Financial strength of Group or Holding Company which has management control of SPV is to be considered.</i></li> </ul> <p><i>For consortium senior partners to be considered.</i></p>	70%	0-10	7	<p><b>For Strategic Investors</b></p> <p><b><u>Debt to EDITDA Ratio</u></b> Ratio of Net Debt to EBITDA, as per audited financial statements of immediately preceding financial year.</p> <p><b><u>Sales Turnover</u></b> Total Sales Turnover, as per audited financial statements of immediately preceding financial year.</p> <hr/> <p><b>For Financial Investors</b></p> <p><b><u>Fund Size</u></b> Total investment proposed (including upfront cash and capital infusion) / Fund size (from which investment is proposed, as per the last audited financial statements).</p> <p><b><u>Asset under Management</u></b> - As per the last audited financial statement.</p>

# Evaluation matrix

					Measured as a % of maximum value amongst resolution applicants.
4	Reasonableness of financial projections and likelihood of honouring proposed commitments covering future business plan, capacity enhancement, forward/backward integration, modernization/upgradation and ability of resolution applicant to keep corporate debtor as a going concern.	30%	0-10	3	<p>Confidence level on plan &amp; projections, based on, but not limited to:</p> <p>a) <b>Assets Operations:</b> Asset's best achievable operational metrics, subject to asset's current condition and constraints, and planned improvements in asset (deviations in plan above the predicted best achievable operational metrics should be explicitly justified)</p> <p>b) <b>Expansion:</b> Plan of expansion of the asset, including capex deployment plan, timeline, and approvals (estimates referenced against industry best standards).</p> <p>c) <b>Market Share:</b> Market share projected for each product line as against the current share (significant increase in market share</p>

# Evaluation matrix

					to be explicitly justified). d) <b>Synergies</b> with resolution applicant (e.g. use of captive mine, sales to existing customer base, etc.). e) <b>Financing plan</b> (e.g. environmental compliance, investment capex, etc.)
5	<b>Risk Assessment and Mitigation Plans</b>  Risk may include sanctity of raw material sourcing contracts, compliances of corporate debtor, action plan for existing employees / union, plan to protect interests of other stakeholders viz. Statutory authorities, operational creditors etc.	30%	0-10	3	Confidence level on plan All risks mentioned by resolution applicants to be aggregated to form a complete list Feasibility of mitigation plan to be considered across each risk.
6	<b>Availability of additional collateral security and personal/corporate guarantee and value thereof</b>	40%	0-10	4	Additional collateral security, corporate guarantee or personal guarantee of resolution applicant, will indicate the financial credibility of resolution applicant which in turn will ensure ease to the lenders of corporate debtor.

# Evaluation matrix

7	<b>External Credit Rating of the Resolution Applicant</b> <b>India:</b> CARE, ICRA, CRISIL, Fitch/India Ratings <b>International:</b> S&P, Moody's, Fitch If resolution applicant is an SPV, then group / holding company which has management control of SPV to be considered.	30%	0-10	3	If multiple ratings are to be submitted, then highest rating is considered. If international rating submitted, then credit rating adjusted higher or lower as per difference in sovereign credit rating of country and India to be considered. The credit rating report should have been issued within the last 2 preceding financial years from the date of submission of the resolution plan for the external credit rating to be valid for evaluation purposes.  (Refer Annexure 1)
8	<b>Regulatory Compliances of Resolution Applicant</b> If resolution applicant is an SPV, then group / holding company which has management control of SPV to be considered.	20%	0-10	2	Status of compliances of Resolution Applicant on the basis of audited financial statement of resolution applicant of the preceding financial year and on the basis of data available in public domain like MCA Portal, SEBI Portal, RBI Portal etc.

# Evaluation matrix

9	<b>Track record of debt repayment of Resolution Applicant</b>  <b>India:</b> CIBIL, CRILIC <b>International:</b> Transunion  If resolution applicant is an SPV, then group / holding company which has management control of SPV to be considered.	20%	0-10	2	To ascertain the credit worthiness of Resolution Applicant it is important to study their debt repayment capacity and defaults in repayment (if any) made by them.  (Refer Annexure 2)
10	<b>Technological Advancement (if any) introduced by Resolution Applicant</b>	20%	0-10	2	Score will be based on if resolution applicant will be bringing any technological advancement to carry out operations of corporate debtor or replacing obsolete technology framework of corporate debtor or introducing innovative yet cost effective technology to ensure smooth working of corporate debtor's operations/business.
11	<b>Future Prospects</b>	10%	0-10	1	A review of financial statements and industry trends helps in analyzing the future prospects of a company. A SWOT analysis is

# Evaluation matrix

						a commonly used tool for evaluating businesses. When the CoC votes to approve a resolution plan, it must not only consider the monetary value of the fund infusion offered by a resolution applicant, but also keep in mind a multitude of other factors to decide as to which resolution plan is best for the "future prospects" of the enterprise in question. This approach best serves the creation of a "rescue culture" in the legal system.
	Total score of qualitative parameters	100%			100	
	Total weight of qualitative parameters (A)	40%			40	
(B)	QUANTITATIVE PARAMETERS					
1	Upfront cash recovery as per Resolution Plan  a) Resolution plan involving upfront cash should be backed by Letter of	150%	>=35% of the Resolution Debt Amount	10	15	Measured as percentage of the <b>total claims</b> admitted by IRP/RP (as the case may be).

# Evaluation matrix

<p>Commitment from a bank/cheque.</p> <p>b) At the time of acceptance of the Letter of Intent, the resolution applicant is to provide the higher of either the performance guarantee or Letter of Commitment / cheque for the upfront cash.</p> <p>c) Upfront cash will be encashed at the time of signing a definitive agreement with the lenders.</p> <p>d) If upfront cash infusion is by way of equity, the source should be laid out in the plan.</p> <ul style="list-style-type: none"> <li><i>Preference to be given to the resolution applicant who is willing to fund employees pay and pay outstanding and applicable statutory dues of the corporate debtor.</i></li> </ul>			>=30% < 35% of the Resolution Debt Amount	8		
			>=20% < 30% of the Resolution Debt Amount	6		
			>=10% < 20% of the Resolution Debt Amount	4		
			>=5% < 10% of the Resolution Debt Amount	2		
			< 5% of the Resolution Debt Amount	1		



# Evaluation matrix

			No cash recovery	0		
2	<b>Net Present Value (NPV) of continuing portion of debt inclusive (both interest and principal). Cash Flows to include upfront cash payment.</b>  <b>Tiered Discount Rate to be used:</b> <ul style="list-style-type: none"> <li>• &lt;= 5 years: 8%</li> <li>• &gt;5,&lt;=10 years: 10%</li> <li>• &gt;10, &lt;=15 years : 15%</li> <li>• &gt;15 years :30%</li> </ul>	70%	>=70% of the Resolution Debt Amount >=65% < 70% of the Resolution Debt Amount >=60% < 65% of the Resolution Debt Amount >=50% < 60% of the Resolution Debt Amount >=40% < 50% of the Resolution Debt Amount >=30% < 40% of the Resolution Debt Amount >=20% < 30% of the Resolution Debt	10 9 8 6 4 3 2	7	Measured as percentage of the <b>total claims</b> admitted by IRP/RP (as the case may be).



# Evaluation matrix

			Amount			
3	Discounted Value of Cash Flows from lender's equity and equity-like instruments	70%	100% (maximum amongst all resolution)	10	7	<p>Measured as a percentage of maximum value amongst all resolution plans.</p> <p>Cash flow from equity is assumed to be all in FY21 (which is then discounted). Cash flow from equity is calculated as per the following formula:            % equity stake proposed for lenders * [(Projected FY21 EBITDA as per resolution plan * Multiple)            - Outstanding debt in FY21            - Minority interest (if any)            + Cash &amp; cash equivalents]</p> <p>Proposed multiple is:  <math>EV/EBITDA = 7</math></p>
			90%	9		
			80%	8		
			70%	7		
			60%	6		
			50%	5		
			40%	4		
			30%	3		
			20%	2		
			10%	1		
			0% (no equity or like instruments given to lenders)	0		
4	Term of resolution plan (number of years after approval of resolution plan by NCLT)	50%	0-10		5	Resolution Applicant offering minimum number of years after approval of resolution plan by Adjudicating Authority will get highest

# Evaluation matrix

						score and for other bidders the score will reduce by 20% against every year difference with highest bidder.
5	<p><b>Fresh Equity Infusion for improving operations, only if the lenders are continuing.</b></p> <p><b>Measured as % of the total financial creditor claims admitted by RP. In case not applicable to a resolution plan, the overall scores to be normalized without the parameter.</b></p>	50%	<p>&gt;30% of the Resolution Debt Amount</p> <p>10</p>		5	<p>Assessment shall be made on the basis of actual cash proposed to be infused by the Resolution Applicant along with the disclosure of source of funding in the Corporate Debtor in the form of Equity or Quasi-Equity within first 6 months from the date of signing of the Definitive Agreements plus discounted cash flows for infusion beyond 6 months, but up to 3 years, at a discount rate of 8% p.a. If the infusion is beyond 3 years, it will not be considered for scoring purposes.</p> <p><b>"Equity"</b> shall mean investment by way of shares.</p> <p><b>"Quasi Equity"</b> shall mean</p>
			<p>&gt;=20% &lt; 30% of the Resolution Debt Amount</p> <p>8</p>			
			<p>&gt;=10% &lt; 15% of the Resolution Debt Amount</p> <p>6</p>			
			<p>&gt;=5% &lt; 10% of the Resolution Debt Amount</p> <p>4</p>			

# Evaluation matrix

			>=1% < 5% of the Resolutio n Debt Amount	2		fund infusion other than by way of shares subject to following criterias:  a) Sub-ordinate to the secured loans. b) Non-interest bearing. c) No redemption without the consent of secured financial creditors.
			No Infusion	0		
6	Fresh Equity Infusion for financial creditors.	50%	>=10% of the Resolutio n Debt Amount	10	5	This shall be computed based upon the amount of equity infused and factoring to the extent of shareholding proposed to be offered to financial creditors.
			>=8% < 10% of the Resolutio n Debt Amount	8		
			>=6% < 8% of the Resolutio n Debt Amount	6		
			>=4% < 6% of the Resolutio n Debt Amount	4		
			>=1% < 4% of the Resolutio	2		

# Evaluation matrix

			n Debt Amount			
			No Infusion	0		
7	Arrangements with regard to sale or transfer of all or part of assets of the corporate debtor.	40%	0-10	4	Assessment shall be based on arrangements made by Resolution Applicant to sell unencumbered assets of the corporate debtor other than in the ordinary course of the business if such sale is yielding better realisation of value under the facts and circumstances of the case.	
8	Corporate Restructuring of corporate debtor by way of Merger or Acquisition of corporate debtor with one or other person.	40%	0-10	4	Assessment shall be based on restructuring plan (if any) for corporate debtor proposed by Resolution Applicant by way of merger or amalgamation/demerger/deb t restructuring etc.	
9	Arrangement with the creditors of corporate debtor	40%	0-10	4	Arrangement with creditors with regard to: a) Reduction of interest rate levied on the loan. b) Reduction with regard to the net amount payable by corporate debtor to the creditor. c) Extension of maturity date of a loan advanced	

# Evaluation matrix

					to the corporate debtor. d) Curing or waving of any breach of the terms of any debt due from corporate debtor. e) Satisfaction or modification of any security interest.
10	Change in portfolio of goods or services produced or rendered by the corporate debtor.	40%	0-10	4	Assessment shall be based on plans proposed by Resolution Applicant with regard to horizontal or vertical expansion of product line or services rendered by corporate debtor thereby creating more market and customer base for corporate debtor.
	Total score of quantitative parameters	100%		100	
	Total weight of quantitative parameters (B)	60%		60	
	Total score of resolution applicant (A+B)				

# CIRP: Resolution plan

CIRP Regulation 37: Resolution plan	Remarks
<ul style="list-style-type: none"><li>(g) extension of a maturity date or a change in interest rate or other terms of a debt due from the corporate debtor;</li><li>(h) amendment of the constitutional documents of the corporate debtor;</li><li>(i) issuance of securities of the corporate debtor, for cash, property, securities, or in exchange for claims or interests, or other appropriate purpose;</li><li>(j) change in portfolio of goods or services produced or rendered by the corporate debtor;</li><li>(k) change in technology used by the corporate debtor; and</li><li>(l) obtaining necessary approvals from the Central and State Governments and other authorities</li></ul>	<p><b>Section 33(3) of IBC states as under:</b></p> <p>Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).</p> <p>As the flexibility ensures emergence of credible and realistic resolution plan, it substantially mitigates risk of failure in erstwhile CDR, SDR etc.</p>

# CIRP: Resolution plan

CIRP Regulation 38: Mandatory contents of resolution plan	Remarks
<p>(1) The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors</p> <p>(1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor</p> <p>(2) A resolution plan shall provide:</p> <ul style="list-style-type: none"><li>(a) the term of the plan and its implementation schedule;</li><li>(b) the management and control of the business of the corporate debtor during its term; and</li><li>(c) adequate means for supervising its implementation.</li></ul> <p>(3) A resolution plan shall demonstrate that –</p> <ul style="list-style-type: none"><li>(a) it addresses the cause of default;</li><li>(b) it is feasible and viable;</li><li>(c) it has provisions for its effective implementation;</li><li>(d) it has provisions for approvals required and the timeline for the same; and</li><li>(e) the resolution applicant has the capability to implement the resolution plan.</li></ul>	<p>These regulations facilitate evaluation of the resolution plan and informed decision by the creditors for voting</p>

# CIRP: Resolution plan

CIRP Regulation 39: Approval of resolution plan	Remarks
<p>(1) Submission of resolution plan by the resolution applicant to the resolution professional electronically within prescribed time</p> <ul style="list-style-type: none"><li>(a) an affidavit stating that it is eligible under section 29A to submit resolution plans;</li><li>(b) an undertaking by the resolution applicant that all information and records submitted is true and correct and discovery of false information / record at any time will render the applicant ineligible to continue in the CIRP, forfeit any refundable deposit, and attract penal action under the Code.</li></ul> <p>(1A) A resolution plan which does not comply with the provisions of sub-regulation (1) shall be rejected.]</p> <p>(2) The resolution professional to submit to CoC all resolution plans which also include details of following transactions, if any, observed, found or determined by him:</p> <ul style="list-style-type: none"><li>(a) preferential transactions under section 43;</li><li>(b) undervalued transactions under section 45;</li><li>(c) extortionate credit transactions under section 50; and</li><li>(d) fraudulent transactions under section 66,</li></ul> <p>(3) The CoC to evaluate the resolution plans strictly as per the evaluation matrix to identify the best resolution plan and may approve it with such modifications as it deems fit (the committee to record the reasons for approving or rejecting a resolution plan)</p>	<p>This ensures very high probability of success of the resolution unlike in erstwhile restructuring schemes of RBI or BIFR</p>



# CIRP: Resolution plan

CIRP Regulation 39: Approval of resolution plan	Remarks
<p>(1) The resolution professional to endeavour to submit the resolution plan approved by the CoC to the Adjudicating Authority at least fifteen days before the maximum period for completion of corporate insolvency resolution process along with a compliance certificate in Form H of the Schedule</p> <p>(7) The resolution professional to forthwith send a copy of the order of the Adjudicating Authority approving or rejecting a resolution plan to the participants and the resolution applicant.</p> <p>(8) Any provision in a resolution plan which would otherwise require the consent of the members or partners of the corporate debtor, as the case may be, in terms of various documents, shall take effect notwithstanding that such consent has not been obtained.</p> <p>(9) No proceedings shall be initiated against IRP / RP, as the case may be, for any actions of the corporate debtor, prior to the insolvency commencement date.</p> <p>(10) A person in charge of the management or control of the business and operations of the corporate debtor after a resolution plan is approved by the Adjudicating Authority, may make an application to the Adjudicating Authority for an order seeking the assistance of the local district administration in implementing the terms of a resolution plan.</p>	

# Resolution plan – Objectives of parties

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## Objectives of the bidder: Buy side

- Acquisition at the best price
- Avoidance of Winner's Curse
- Mitigation of liquidation risk post acquisition
- Strategy to garner requisite vote
- Smart structuring in line with RFQ

## Objectives of the COC: Sell side

- Sale at maximum price
  - Highest up front payments / PV
  - Evaluation of the bidder and projections
  - Voting strategy
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# Code's primacy over other laws

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## Section 31(1) of the Code:

If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.

## Section 238 of the Code

The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

- These provisions have imparted primacy to the Code over other laws
  - Nevertheless appeals have been filed by statutory authorities for recovery inconsistent with resolution plan approved by the AA
  - In case of Monnet Ispat, primacy of the Code over Income Tax Act, 1961 has been established by the Supreme Court
  - Matters relating to indirect taxes pending in NCLAT
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# Code's primacy over other laws

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- The relief relates to the taxable amounts resulting from the resolution plan or forbearance from SEBI for listed shares, etc.
- The resolution applicant must specify the reliefs / concessions so that the same are captured in the AA's order u/s 31(1)

## SEBI

- Securities Contracts (Regulation) Rules, 1957, in rule 19A, after sub-rule (4), sub-rule (5) has been inserted allowing three year period to bring the public shareholding to 25% in case it has fallen below 25% in terms of approved resolution plan of listed companies.
- If the public shareholding falls below ten per cent, the same shall be increased to at least ten per cent, within a maximum period of eighteen months from the date of such fall, in the manner specified by the Securities and Exchange Board of India

## Direct tax

- According to section 115JB of IT Act, 1961, the amount of loss brought forward or unabsorbed depreciation whichever is less is reduced from the book profit. This has been specifically permitted for the resolution plans under IBC from FY-2018, through press release.
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# Skill requirements

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- **Resolution professional**

- Ability to understand business value
- Investment banking skills – Sell side / Acquisition specialist
- Multi-faceted team
- Financial modelling skills

- **Resolution applicant**

- Sectoral expertise
  - Team for undertaking bottom-up approach to estimate enterprise value
  - Innovative financial structuring & management of bidder's expectations
  - Structuring flexibility in debt servicing plan to mitigate default risk and liquidation u/s 33(3) of IBC
  - Structuring sustainable partnerships of Resolution Applicants
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- Garnering requisite vote share for successful adoption of resolution plan by efficient use of evaluation matrix in the RFQ document

# Preferential, Undervalued, Fraudulent and Extortionate transactions (PUFE)

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- PUFE covered u/s 43, 45, 66 and 50 of IBC
  - These seek to restore fairness to the creditors
  - **Preferential transactions (section 43)**
    - ✓ Transfer by corporate debtor of property or interest for the benefit of a creditor or a surety / guarantor
    - ✓ The deal puts such creditor or a surety / guarantor in beneficial position in assets distribution in case of liquidation
    - ✓ Such transaction is reversed u/s 44. The reversal includes the asset and the benefit derived by the beneficiary
    - ✓ Example: Usurious interest rate, excessive guarantee commission given.  
Breach of financial covenant with secured creditor will be often involved in such case
  - **Undervalued transactions (section 45)**
    - ✓ Gift given to a person by corporate debtor
    - ✓ Transaction in which the corporate debtor transfers asset(s) to a person for very low consideration
    - ✓ Such transaction is reversed u/s 47. The reversal includes the asset and the benefit derived by the beneficiary
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## Preferential, Undervalued, Fraudulent and Extortionate transactions (PUFE)

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- ✓ U/s 49, undervalued transactions meant to defraud the creditors are involved. Here the AA can undo the transaction and / or compensate the victims (creditors)
  - ✓ Example: Lease transaction with very low lease rental. Such transactions invariably involve other serious non-compliances
  - ✓ Suppose the CD hands over a plant on 7-year lease to a person at a lease rental of Rs. one lakh / month. The plant is capable of generating EBITDA of at least 50 lakhs a month with negligible working capital. Fair market value of the asset is Rs. 13 crore. What is the benefit from such transaction that must be reversed?
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## Preferential, Undervalued, Fraudulent and Extortionate transactions (PUFE)

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- **Fraudulent transactions (section 66)**
    - ✓ Business carried out by CD with intent to defraud creditors
    - ✓ *Mens-rea* involved. Can be established by showing that the CD's director or partner did not exercise requisite due diligence
    - ✓ U/s 66(2), the AA make the director or partner liable to compensate for the loss
    - ✓ U/s 67(1) AA may pass order that such compensation may be recovered out of any debt obligation from CD to such person (unlikely event)
  - **Extortionate transactions (section 50)**
    - ✓ This involves exorbitant payments made to a creditor
    - ✓ Here excessive returns are provided to such creditor
    - ✓ The section does not apply if any debt extended by a person is in compliance with law
    - ✓ Similar to undervalued transaction
    - ✓ U/s 51, the AA can rescind the transaction, recover from the beneficiary, undo security interest created under such transactions or modify the terms of the transaction
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# Preferential, Undervalued, Fraudulent and Extortionate transactions (PUFE)

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- CIRP regulations now require affirmative action by the RP / liquidator:

Regulation 35A	RP to form an opinion on preferential and other transactions	Within 75 days of Commencement of CIRP
	RP to make a determination on preferential and other transactions	Within 115 days of commencement of CIRP
	RP to file applications to AA for appropriate relief	Within 135 days of commencement of CIRP

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# Preferential, Undervalued, Fraudulent and Extortionate transactions (PUFE)

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- Way forward?
  - Adopt transaction-cum-forensic audit
  - Scope for each company has to be finalised keeping in view the level of operations, credit history, and and sophistication.
  - General scope includes:
    - ✓ Analysis of nature of related party transactions and amounts involved.
    - ✓ Contractual relationships with related parties and balances recoverable / payable.
    - ✓ Genuineness of the nature of funds / loans given / received from parties.
    - ✓ Analytical review of transactions with subsidiaries and associate companies.
    - ✓ Review of current liabilities and provisions made.
    - ✓ Non-moving creditors.
    - ✓ Analysis of advances extended by the company along with review of terms and conditions of the agreement entered into for such advances.
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## Preferential, Undervalued, Fraudulent and Extortionate transactions (PUFE)

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- ✓ Genuineness of the nature of funds and advances given.
- ✓ Verifying whether any advances extended by the company have been offset during the review period.

### **Project / capital expenditure**

- ✓ Analysis of project / capital expenditure items: Tendering process vis-à-vis policy, basis of payments made, related party transactions, deviations from the policy

# Role of other professional agencies

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## Other professional agencies

- Audit firms for transaction–cum–forensic audit.
    - ✓ This goes beyond accounting audit and separates planned fraud and accidental fraud.
    - ✓ Helps determine PUFÉ amounts
    - ✓ Helps RP to meet CIRP compliances
  - Law firm:
    - ✓ The IBC is a crisp document which is supplemented by rules (application to adjudicating authority rules) and regulations (CIRP regulations), etc.
    - ✓ In this evolving profession, novel challenges emerge at regular intervals. A law firm helps the RP and CoC resolve matters. Some examples:
      - Claims in kind
      - Claimants not categorised
      - 29A
      - Contractual issues....
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# Role of other professional agencies

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- Valuation firms: Help determine reasonable reserve price for liquidation
- Tax experts: The RA must ensure accurate tax treatment to avoid tax risk
- Engineering firms: For plant evaluation. This goes beyond valuation firms. Engineering firms are needed by RAs
- Management / HR consultants may be needed by RAs for organizational revamp.

# Thankyou

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