
**CENTRALIZED INSOLVENCY, FRAGMENTED
ENFORCEMENT: REMEDY SHOPPING IN DEBT
RECOVERY BETWEEN DRT, NCLT, AND ARBITRATION
TRIBUNALS**

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ABSTRACT

Debt recovery in India does not follow one route. Instead, it entails the complex arena of at least three different dispute resolution mechanisms in which the debtor, creditor, guarantor. Or even insolvency applicant brings out all their strategies: the DRT established under the RDBA of 1993; the NCLT operating within its power as per the IBC of 2016; and finally, arbitration tribunals, whether domestic or international, invoked through arbitration clauses incorporated into lending, facility, or security documents.

This article analyses remedy shopping in the debt recovery arena as a strategic game; it examines the jurisdictional framework of each forum, identifies the zones of overlap that provide opportunities for remedy shopping, surveys the litigation tactics used by both creditors and debtors in these overlaps, and examines how judicial and legislative authorities have responded to remedy shopping. I argue that remedy shopping in debt recovery neither consists of unmitigated abuse nor constitutes benign behaviour which is completely harmless it only reflects a reasonable response to the incoherence of a multi-forum system and deserves a rational solution in return.

Introduction

Each forum has its own procedure, its own time frame, its own tools for relief, and above all its own incentives for the parties appearing before it. In cases where there is a concurrent or overlapping jurisdiction of multiple forums over the same dispute, the strategic selection of the remedy in different forums, we often fail to compartmentalize each proceeding and take the entire proceeding as an ecosystem of debt recovery this takes on a more substantive character, because the selection is made precisely for its substantive effect on recovery, time frame, availability of assets, and enforcement of judgments.

The Three Forums: Jurisdictional Architecture

The Debt Recovery Tribunal

DRT was set up under the RDBA to provide a specialised and speedy forum for the recovery of debts that are owed to banks and financial institutions. As per section 17 of the RDBA¹, the jurisdiction of DRT extends to those applications where the amount involved exceeds rupees twenty lakhs. It has been made a deliberate attempt by law makers to make the procedure followed by DRT more streamlined as it does not have to follow Civil Procedure Code in its totality and thus avoids the procedural delays found in civil courts².

As far as SARFAESI is concerned, DRT works as a twin agency as it acts as a forum for defending enforcement proceedings under section 17 of the Act³. The dual role of DRT as the forum for protection as well as the recovery process has been examined in the case of Mardia Chemicals Ltd. Vs. Union of India⁴, and it was decided that there should be a substantial measure of protection against the wide powers given to the secured creditors. Recovery certificate, attachment, sale, and receiver are some of the powers available to the DRT.

Strategically the DRT prefers institutional creditors who are secured. First the procedure followed in DRTs is faster than the procedure in civil courts. Second, the burden of proof in DRTs works in favour of the creditors. Third, the deposit that must be paid before applying for a stay of recovery proceedings increases the burden of the debtor as well as raises a barrier to

¹ Recovery of Debts and Bankruptcy Act 1993, s.17.

² Recovery of Debts and Bankruptcy Act 1993, s.22.

³ Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, s.17.

⁴ Mardia Chemicals Ltd. vs Union of India, (2017) ibelaw.in 16 SC (India)

making such an application, which still exists even after Mardia Chemicals in modified form.

However, the functioning of DRTs has been highly disappointing in comparison to their legislative intent.

The National Company Law Tribunal

The NCLT, appointed by virtue of the Companies Act, 2013, and having been vested with jurisdiction with respect to insolvency under the IBC, works entirely differently. In the case of the NCLT the main procedure either the CIRP under Section 7 (financial creditor) or Section 9 (operational creditor), is neither debt collection nor debt recovery. This is rather, a process of collective insolvency wherein either resolution takes place or liquidation of assets takes place by default. The NCLT does not pass a decree for money, either the former orders a resolution or the latter a liquidation of the assets⁵.

This particular structure has huge strategic advantages. As soon as a financial creditor commences a CIRP against the corporate debtor under Section 7 of the IBC, it automatically places pressure on the corporate debtor with respect to its control and management being removed, and all actions taken against the company suspended until such time as a resolution plan has been arrived at⁶.

Any financial creditor having debts worth one crore rupees or more (as modified by the COVID-19 notification and its subsequent modifications) can commence the CIRP proceedings⁷. In combination with the tight 14-day period set out in the IBC to accept a claim for bankruptcy the NCLT becomes the ideal place for creditors looking to gain power than for debt collection⁸.

As far as the constitutional validity of such a classification of creditors is concerned, it has been approved by the supreme court in the case of *Swiss Ribbons Pvt. Ltd. V. Union of India* (2019)⁹. The Supreme Court ruled that the differentiation between financial creditors and operational creditors in the IBC law is based on a reasonable criterion and has a logical

⁵ Insolvency and Bankruptcy Code, 2016, sec 7,9 (India)

⁶ Insolvency and Bankruptcy Code, 2016, sec 14,17 (India)

⁷ Ministry of Corporate Affairs Notification S.O. 1205(E), dated 24 March 2020 < <https://ibclaw.in/notification-no-s-o-1205e-dated-24-03-2020-ibc/>>

⁸ Insolvency and Bankruptcy Code, 2016, sec 7(4) – 7(5) (India)

⁹ *Swiss Ribbons Pvt. Ltd. v. Union of India*, (2019) 4 SCC 17 (India)

connection to the purpose of the law, thus not violating Article 14 of the Constitution. Most importantly, the Supreme Court also made it clear that the IBC law is not only a debt recovery law but also a beneficial legislation.

This characterisation has direct implications for the remedy shopping analysis: creditors who invoke the NCLT primarily as a debt recovery tool, rather than as a genuine insolvency mechanism, are in tension with the legislative purpose that Swiss Ribbons identified. The decision simultaneously legitimised the IBC's architecture and exposed the normative gap between its statutory purpose and its operational use as a coercive collection instrument.

Arbitration Tribunals

In contrast, arbitration takes up a unique place in this scheme of things. Unlike the DRT or NCLT, arbitration is a forum that requires consent before proceedings can be initiated. Within the debt recovery process, arbitration is included within loan documents in sophisticated financial transactions, especially those that have syndicated loan structures, structured finance documents, external commercial borrowing (ECB), and inter-creditor agreements. The Arbitration and Conciliation Act of 1996 (amended in 2015 and 2019) govern this process¹⁰.

The strategic value of arbitration is unique. It offers confidentiality, party autonomy in choosing arbitrators, and (at least theoretically) efficiency. In cases where creditors are involved in complex commercial litigation disputes regarding the interpretation of contracts such as interest computations, covenants, or guarantee provisions, arbitration can offer a more efficient solution than the DRT and NCLT. Once an arbitral award is issued, it can be enforced through a decree under Section 36 of the Arbitration Act¹¹.

Yet, arbitration is not a full-fledged process for recovering debts. The award issued after an arbitration proceeding cannot have the forceful power of a CIRP as it will not divest the management, declare a moratorium, or initiate winding up. An enforcement order obtained from the court against a party unwilling to cooperate will still need to follow either a civil court process or execution, which could take as long as any other civil order. Thus, arbitration becomes more relevant when applied to solve the core issue of the case that is determining the

¹⁰ Arbitration and Conciliation Act, No. 26 of 1996, amended by Arbitration and Conciliation (Amendment) Act, No. 3 of 2016 and Arbitration and Conciliation (Amendment) Act, No. 33 of 2019 (India).

¹¹ Arbitration and Conciliation Act, No. 26 of 1996, sec 36, amended by Arbitration and Conciliation (Amendment) Act, No. 3 of 2016 (India).

debt.

DRT and NCLT: The Concurrent Jurisdiction Problem

However, the most important and most practically consequential area of overlap is the one involving DRT on the one hand and NCLT on the other. It is possible for the financial creditor to approach both these fora against the same debt, and there is nothing in the respective statutes preventing this from happening. For example, a financial creditor having a non-performing loan in the form of a bank loan can approach the DRT for initiating Section 17 proceedings¹² (and also pursue SARFAESI remedy¹³), along with approaching the NCLT under Section 7 of the I&B Code¹⁴.

Here are the strategic consequences. Pursuing a claim before the DRT forum leads to the securing creditor realizing a certain benefit in terms of the secured property being attached and sold off. However, the NCLT procedure, if adopted by a financial creditor, results in a moratorium on any form of enforcement proceedings including those by way of DRT proceedings and the subject corporation being subjected to the collective insolvency regime. Therefore, approaching both the fora means exercising a choice based on which procedure is more beneficial for the securing creditor.

This issue has been directly tackled in *Innoventive Industries Ltd. v. ICICI Bank* by the Supreme Court, which observed that once a CIRP petition has been admitted by the court, Section 14 of the IBC ensures that all the pending proceedings in any other court or tribunal, including DRT, would be stayed. The intent behind the statement of the Court that IBC is a complete code was clearly to indicate the supremacy of the NCLT vis-à-vis DRT after the process of insolvency had begun. Nevertheless, the supremacy of the NCLT can be said to be valid only after the admission of the CIRP petition; prior to that, a pre-insolvency DRT suit remains an open avenue for forum shopping¹⁵.

SARFAESI enforcement as an independent system was reaffirmed by the Supreme Court in *Transcore v. Union of India* (2008), albeit in a different context. The Supreme Court in

¹² The Recovery of Debts and Bankruptcy Act, No. 51 of 1993, sec 17 (India).

¹³ The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act. No.54 of 2002 (SARFAESI Act) (India)

¹⁴ The Insolvency and Bankruptcy Code, No. 31 of 2016, sec 7 (India).

¹⁵ *Innoventive Industries Ltd. V. ICICI Bank*, (2018) 1 SCC 407

Transcore ruled that the RDBA and the SARFAESI Act are “complementary” to each other rather than “mutually exclusive.” In other words, the Supreme Court ruled that a creditor could resort to either of these two systems at one point or the other without having to make a choice. Although Transcore predates the IBC, its ruling that secured creditors need not choose between the enforcement options is still doctrinally relevant: It has laid down the fundamental rule of concurrent enforceability that the moratorium provisions under the IBC needed to override.¹⁶

The Illusion of Jurisdictional Clarity

The debt recovery framework in India purports to establish jurisdictional clarity. But functionally, encourages piecemeal litigations in multiple forums. At first glance, the allocation of jurisdictional powers by statute may seem coherent and structured. Section 60 of the IBC¹⁷ confers exclusive jurisdiction on the NCLT in respect of corporate insolvency. Section 179¹⁸ confers exclusive jurisdiction on the DRT in individual insolvency. Section 238¹⁹ of the IBC provides for an overriding effect over other laws. Section 14²⁰ confers an automatic moratorium on the initiation of any action or proceeding against the debtor upon commencement of a CIRP. Nevertheless, such clarity is only a mirage. The statutory regime does not resolve the issue of overlapping jurisdiction; rather, it defers hierarchy to the time of admission to the CIRP process. Prior to such admission and throughout the large span of time preceding it the structure is far from being transparent. Complex creditors keep pursuing parallel litigation under the DRT, SARFAESI, NCLT, arbitration, and High Court jurisdictions.

The truth of the matter, however, is that the situation involves concurrent de facto adjudication notwithstanding the de jure segregation. DRT jurisdiction according to the RDB Act remains active as it operates independently till moratorium. SARFAESI proceedings remain effective until a moratorium is declared. The arbitration process will survive by virtue of the contract made between the parties. The guarantors may have their own separate proceedings irrespective of what happens to the principal debtor’s bankruptcy.

The real irony in structure here is that the Indian system both centralizes insolvency and decentralizes enforcement. Insolvency, once acknowledged, is an affair of collectives, but

¹⁶ Transcore v. Union of India, (2008) 1 SCC 125

¹⁷ The Insolvency and Bankruptcy Code, No. 31 of 2016, sec 60 (India).

¹⁸ Id. sec 179

¹⁹ Id. Sec 238

²⁰ Id. Sec 14

enforcement, prior to that point, is a decentralized affair. This is no mere oversight, however, since it stems from the inability of lawmakers to reconcile the inherent conflict that arises when the two policy goals at odds are both equally attractive.

Reform Agenda

What is needed is a comprehensive system for debt resolution that clearly and exclusively delegates jurisdiction to one court alone for all disputes arising from a particular class of cases. Far from being a fresh proposition, the very legislative history of the IBC itself demonstrates continued acknowledgment of this problem. The Report of the Bankruptcy Law Reforms Committee (2015), which was headed by Dr. M.S. Sahoo and set up under the Ministry of Finance, served as the blueprint for the IBC and called for a comprehensive system of time-bound insolvency resolution that would supersede the existing system of SICA, winding up provisions in the Companies Act, and RDBA. It is the core understanding of the BLRC that India's poor performance in debt resolution stemmed from the multiplicity of forums²¹.

The T.K. Viswanathan Committee²², appointed to evaluate the execution of the IBC and suggest amendments, similarly raised the issue of jurisdictional disputes persisting and proposed steps to consolidate the NCLT's exclusive jurisdiction in corporate insolvency cases. While subsequent reports of the Insolvency Law Committee²³, particularly the reports published in 2018 and 2020, covered the gaps in the law in relation to cross-border insolvency²⁴, the personal guarantor mechanism, and pre-packaged insolvency, respectively, they did not suggest consolidating the jurisdiction as envisaged by the BLRC in its initial recommendations. Part of the reason for the problem of remedy shopping highlighted in this paper is the failure of these incremental reforms to resolve the inherent overlap between the enforcement and insolvency mechanisms. The difficulty lies in the fact that the DRT practitioners have vested interests in their practice, banks are used to the SARFAESI process, and the difficulties of converting ongoing cases²⁵.

²¹ Bankruptcy Law Reforms Committee, The Report of the Bankruptcy Law Reforms Committee: Volume I – Rationale and Design (Nov. 2015), Ministry of Finance, Government of India < https://ibbi.gov.in/BLRCReportVol1_04112015.pdf>

²² T. K. Viswanathan, Report of the Insolvency Law Committee (Mar. 2018), Ministry of Corporate Affairs, Government of India < https://ibbi.gov.in/ILRReport2603_03042018.pdf>

²³ Insolvency Law Committee, Report of the Insolvency Law Committee (Mar. 2018)

²⁴ Insolvency Law Committee, Report of the Insolvency Law Committee on Cross Border Insolvency (Oct. 2018)< https://ibbi.gov.in/uploads/resources/Report_on_Cross%20Border_Insolvency.pdf>

²⁵ Insolvency Law Committee, Report of the Sub-Committee of the Insolvency Law Committee on Pre-

The reforms should entail, as a minimum, that the exclusive post-default jurisdiction of NCLT be extended to all disputes involving corporations above a threshold limit, while the DRT's jurisdiction would be limited to dealing with matters pertaining to individual and partnership debtors, enforcing judgments, and issues regarding SARFAESI. The channelling concept would ensure that forum shopping for matters relating to corporate debt does not take place.

Mandatory Pre-Filing Notification

However, until a comprehensive solution for forum shopping in India emerges, an interim arrangement could be to institute a compulsory pre-litigation notice system whereby the creditor seeking to commence litigation before the NCLT or DRT is obliged to give notice to all other creditors who have security interests in the same assets. When this is supplemented by a short period of time (for instance, thirty days), during which all creditors decide on a forum in which to litigate, forum shopping can be avoided.

Prudential Framework for Resolution of Stressed Assets (June 7, 2019)²⁶ issued in the wake of the Supreme Court's decision holding the erstwhile February 12, 2018 Circular constitutionally infirm in the case of *Dharani Sugars and Chemicals Ltd. v. Union of India*²⁷ provides a system of mandatory Inter Creditor Agreements (ICA) in respect of any borrower where the aggregate exposure exceeds certain prescribed thresholds. Within the framework, it is imperative for the creditors to follow the decision of the majority creditors as regards the method of resolution, and the creditors will face disincentives in the form of enhanced provisions in case they do not follow suit. While forum selection is not addressed in the Prudential Framework, the reasoning behind the policy that of collective decision making among creditors being superior to race among creditors to enforce their claims individually finds immediate resonance with the problem of forum coordination²⁸.

In this regard, it is necessary for the jurisdictional provisions of the NCLT under section 7²⁹ to clarify that the existence of an ongoing arbitration procedure will not be a ground to deny

packaged Insolvency Resolution Process (Oct. 2020)<
<https://ibbi.gov.in/uploads/whatsnew/34f5c5b6fb00a97dc4ab752a798d9ce3.pdf>>

²⁶ Reserve Bank of India, Prudential Framework for Resolution of Stressed Assets, RBI/2018-19/203, DBR.No.BP.BC.45/21.04.048/2018-19 (June 7, 2019)<

<https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11580&Mode=0>>

²⁷ *Dharani Sugars and Chemicals Ltd. v. Union of India*, (2019) 5 SCC 480

²⁸ Reserve Bank of India, Prudential Framework for Resolution of Stressed Assets, *supra* note 1, paras 6–9 (providing for Inter-Creditor Agreements and majority-driven resolution decisions)

²⁹ The Insolvency and Bankruptcy Code, No. 31 of 2016, sec 7 (India)

admission to the IBC if there is evidence of debt. At the same time, there needs to be a mechanism like the automatic stay of proceedings from the date of filing of a Section 7 petition in the United States Bankruptcy code. This will ensure no admission gap for parallel enforcement proceedings under SARFAESI Act and the DRT.

Ironically, to curtail such remedy shopping that results in undesirable outcomes, the DRT must become an efficient tribunal. In case the DRT worked as it was envisaged to work, and the recovery claims were processed within the timelines stipulated by the statute, with sufficient staffing at the benches, and with an effective enforcement process, there would be fewer cases where creditors preferred to file petitions in the NCLT for the purposes of creating leverage rather than recovery.

Conclusion

On the face of it may not look like a very threatening situation but, if there are three fora with overlapping jurisdictions over the same underlying debt, each with its own procedure timeline, remedies, and strategies, rational actors will choose the forum which gives them the maximum benefit. It is not a question of morals but of economics.

The impact is grave. Forum shopping is a costly process not only for the actors involved but also for the judiciary. It misaligns the incentive structures for both creditors and debtors, creates a possibility of conflicting orders, and finally, creates an inconsistency in the debt recovery regime in India. Every time a creditor succeeds in obtaining a better recovery via pre-CIRP SARFAESI, or every time a debtor defers the onset of the CIRP by opting for arbitration, the IBC's objective to create a structured, collective, and balanced framework for insolvency is compromised.

There is a need for the rationalisation of India's debt recovery mechanism, including delineation of the jurisdiction between the forums, filing-based moratorium to close the admission window, and creditor coordination obligations to limit the first mover advantage that leads to forum shopping. Without such reform, the game theory between DRTs, NCLTs, and arbitrators will remain intact, and the result will hinge on the legal acumen rather than the quality of the substantive case.