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MAXIMISING VALUE OF NON- PERFORMING ASSETS

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**Developing the Asian Markets for Non-Performing Assets:
Developments in India**

by

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What is a Non Performing Asset

In India, an asset is classified as Non-Performing Asset (NPA) if interest or installments of principal due remain unpaid for more than 180 days. However, with effect from March, 2004, default status would be given to a borrower if dues are not paid for 90 days. If any advance or credit facilities granted by a bank to a borrower becomes non-performing, then the bank will have to treat all the advances/credit facilities granted to that borrower as non-performing without having any regard to the fact that there may still exist certain advances / credit facilities having performing status.

Non Performing Assets in India: An overview of NPA status

India has acquired an alarming number of Non-Performing Assets (NPA's) over the last two decades. NPA's surfaced in the Indian banking scenario around the eighties. As on 31.3.2003, the banks and financial institutions in India hold NPA's worth Rs. 1,10,000 crore² (approximately).

As at 31.03.2001, the aggregate gross NPA's of all scheduled commercial banks amounted to Rs.63,883 crore. **Table 1** provides the figures of gross and net NPA's for the last four years. It shows an increase of Rs.13,068 Crore (more than 25%).

TABLE 1³

NPA Statistics - Scheduled Commercial Banks (Amount in Crore) Year	Total Advances	Gross NPA	Net Advances	Net NPA	%-age of Gross NPA to total advances	%-age of Net NPA to net advances
1997-98	352697	50815	325522	25734	14.4	7.3
1998-99	399496	58722	367012	27892	14.7	7.6
1999-2000	475113	60408	444292	30211	12.7	6.8
2000-2001	558766	63883	526329	32632	11.4	6.2

The apparent reduction of gross NPA's from 14.4% to 11.4% between 1998 and 2001 provides little comfort since this accomplishment is on account of credit growth, which was higher than the growth of Gross NPA's and not through appreciable recovery of NPA's. There is neither reduction nor even containment of the threat.

The gross NPA's and net NPA's for Public Sector Banks (PSBs) as at 31.03.2001 are 12.39% and 6.74% are higher than the figures for Scheduled Commercial Banks

² One Crore comprises of Ten Million Rupees.

³ Source: *Personal website of R Kannan*.

(SCB's) at 11.4% and 6.2%. The comparative figures for PSBs, State Bank of India (SBI) Group and Nationalised Banks are provided in **Table 2 to 4**.

TABLE 2⁴

NPA of PSBs (Amount in Crore) Year	Total Advances	Gross NPA	Net NPA	%-age of Gross NPA to total advances	% of Net NPA to net advances
1996-97	244214	43577	20285	17.8 %	9.2 %
1997-98	284971	45563	21232	16.0 %	8.2 %
1998-99	325328	51710	24211	15.9 %	8.1 %
1999-2000	380077	53033	26188	14.00 %	7.9%
2000-2001	442134	54773	27967	12.39 %	6.74%

TABLE 3⁵

NPA of State Bank Group (Amount in Crore) Year	Total Advances	Gross NPA	Net NPA	%-age of Gross NPA to total advances	%-age of Net NPA to net advances
1997-98	113360	15522	6829	14.57%	6.98 %
1998-99	118959	18641	7764	15.67 %	7.74 %
1999-2000	129253	19773	7411	14.08 %	6.77 %
2000-2001	150390	20586	8125	12.73 %	6.26 %

TABLE 4⁶

NPA of Nationalised Banks (Amount in Crore) Year	Total Advances	Gross NPA	Net NPA	%-age of Gross NPA to total advances	%-age of Net NPA to net advances
1997-98	166222	30130	14441	16.88	8.91
1998-99	188926	33069	15759	16.02	8.35
1999-2000	224818	33521	17399	13.99	7.80
2000-2001	264237	34609	16096	12.19	7.01

The above figures are surely based on approximate values. Experience reveals that commercial banks in general suffer a tendency to understate their NPA figures.

⁴ Source: *Personal website of R Kannan*.

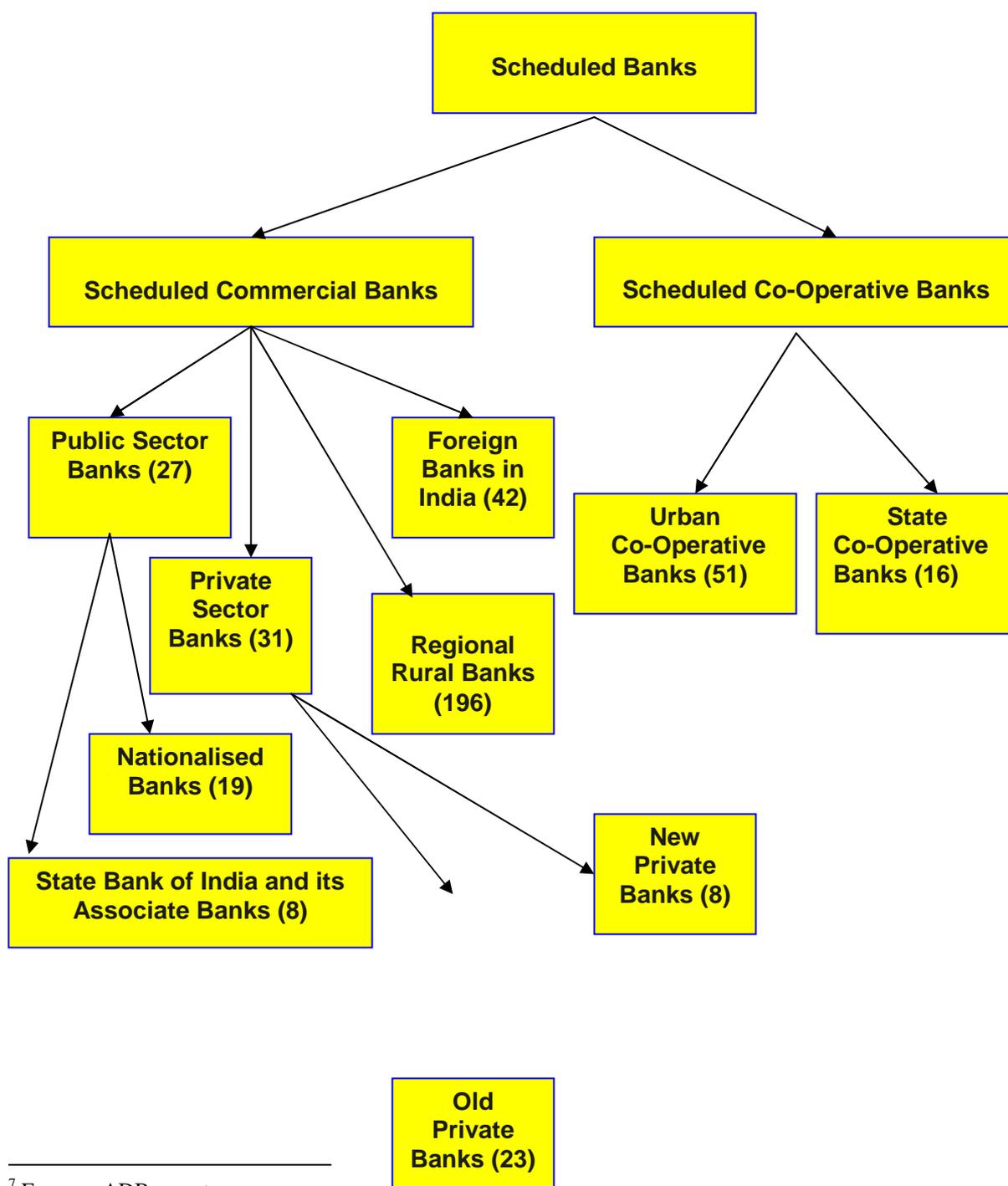
⁵ Source: *Personal website of R Kannan*.

⁶ Source: *Personal website of R Kannan*.

There is the practice of 'ever-greening' of advances, through subtle techniques. As per a report appearing in a national daily, the banking industry has under-estimated its NPAs by whopping Rs. 3,862.10 crore as on March 1997. The industry is also estimated to have under-provided to the extent of Rs 1,412.29 crore. Nineteen nationalised banks are stated to have underestimated their NPAs by Rs 3,029.29 crore.

Following is an overview of the structure of the Indian banks:

Structural Pattern of Scheduled Banks In India (As on March 31, 2001)⁷



⁷ From an ADB report.

An analysis of factors contributing to NPA's

An analysis of the contributory factors resulting in the emergence of NPA's on a stupendous scale amongst Commercial Banks and Financial Institutions in the preceding decade and particularly in the early Nineties would lead to the following conceptualisation:

- PSBs performed creditably all through in respect of all parameters set for them. But in the early Nineties the truth emerged that PSBs were suffering from acute capital inadequacy and many of them were depicting negative profitability. This is because the parameters set for their functioning were deficient and they did not project the paramount need for these corporate goals. Incorrect goal perception and identification led them to wrong destination.
- Pre-reform era witnessed PSBs functioning under the overall control and direction of the Finance Ministry. Along with Reserve Bank of India (RBI) it decided/directed all aspects of the working of the banks. Banks were not free to price their products in competition with each other. They could not freely cater their products to any segment of their choice. They were unable to invest their funds in the best interest as they considered. It was thus a directed banking and the role of the Bank management was "executory".
- Since the 70s, the SCBs of India functioned totally as captive capsule units cut off from international banking and unable to participate in the structural transformations, the sweeping changes, and the new type of lending products emerging in the global banking Institutions. The personnel lacked desired training and knowledge resources required to compete with international players. Such and other chaotic conditions in parts of the Indian Banking industry had resulted in the accumulation of assets, which were termed as non-productive in an unprecedented level⁸.
- Major policy decisions were taken externally by the Finance Ministry / RBI. Though Directors were to be appointed based on their possession of specialised knowledge in Banking and related discipline, the environment of receiving decisions from a political background as distinguished from a professional outfit, prevented the best talents coming to occupy the position as Directors of PSBs and taking part an active role in the deliberations of the Boards of these Banks.
- "Audit and Inspections" remained as functions under the control of the executive officers, which were not independent and were thus unable to correct the effect of serious flaws in policies and directions of the higher ups.
- The quantum of credit extended by the PSBs increased by about 160 times in the three decades after nationalisation (from around 3000 crore in 1970 to 475113 Crore on 31.03.2000).⁹ The Banks were not developed in terms of

⁸ From the title page of the project - "Indian Banking Today & Tomorrow" issued by RBI

⁹ 6 data is taken from a source called *Personal website of R kannan*

skills and expertise to regulate such stupendous growth in the volume and manage the diverse risks that emerged in the process.

- The need for organising an effective mechanism to gather and disseminate credit information amongst the commercial banks was never felt or implemented. The archaic laws of secrecy of customers-information that was binding Bankers in India, disabled banks to publish names of defaulters for common knowledge of the other Banks in the system.
- Effective recovery of defaulters and overdue of borrowers was "hampered on account of a sizeable overhang component arising from infirmities in the existing process of debt recovery, inadequate legal provisions on foreclosure and bankruptcy and difficulties in the execution of court decrees". But in India Legal remedies were beset with too many formalities and too very time-consuming. Laws continued favouring willful defaulters and the Banks were left helpless.
- Effective Corporate management was a concept alien to the corporate houses then. In respect of PSBs the boards were ineffective and the only/main shareholder was the Government of India. Government exercised multiple roles and concerns, and the instinct to act as a watchful shareholder and increase the shareholder's value of these corporate bodies (banks & Financial Institutions) was never felt/experienced by the Government.
- Credit management on the part of the lenders to the borrowers to secure their genuine and bonafide interests was not based on pragmatically calculated anticipated cash flows of the borrower concern, while recovery of installments of Term Loans was not out of profits and surplus generated but through recourse to the corpus of working capital of the borrowing concerns. This eventually led to the failure of the project financed leaving idle assets.
- Functional inefficiency was also caused due to over-staffing, manual processing of over-expanded operations and failure to computerise Banks in India, when elsewhere throughout the world the system was to switch over to computerisation of operations.

Impacts of NPA's on the working of Commercial Banks

NPA has affected the profitability, liquidity and competitive functioning of Public and Private Sector Banks and finally the psychology of the bankers in respect of their disposition towards credit delivery and credit expansion.

Impact on Profitability

Between 01.04.93 to 31.03.2001, commercial banks incurred a total amount of Rs.31251 crore towards provisioning NPA's¹⁰. This has brought Net NPA's to Rs.32632 crore or 6.2% of net advances. The enormous provisioning of NPA together with the holding cost of such non-productive assets over the years has acted as a severe drain on the profitability of the PSBs. Equity issues of nationalised banks that have already tapped the market are now quoted at a discount in the secondary market. This has alternatively forced PSBs to borrow heavily from the debt market to build Tier II Capital to meet capital adequacy norms putting severe pressure on their profit margins.

It is worthwhile to compare the aggregate figures of the 19 Nationalised banks for the year ended March 2001, as published by RBI in its Report on trends and progress of banking in India (**Table 5**).

TABLE 5*

Nationalised banks operational statistics (Amount in Crore) Performance indicator	Year ended Mar. 2000	Year ended Mar. 2001
Earnings - Non-interest	6662.42	7159.41
Operating expenses	14251.87	17283.55
Difference	- 7589.45	- 10124.14
Earnings - interest income	50234.01	56967.11
Exp.-Interest expenses	35477.41	38789.64
Interest spread	14756.60	18177.47
Int. on Recap bonds	1797.88	1795.48
Operating Profit	5405.27	6257.85
Provisions	4766.15	5958.24
Net Profit	639.12	299.61

Though nationalised banks (except Indian Bank) are able to meet norms of Capital Adequacy, as per RBI guidelines, the fact that their net NPA in the average is as much as 7% is a potential threat for them. RBI has indicated the ideal position as Zero percent Net NPA. Even granting 3% net NPA within limits of tolerance the nationalised banks are holding an uncomfortable burden at 7.1% as at March 2001¹¹. They have not been able to build additional capital needed for business expansion through internal generations or by tapping the equity market, but have resorted to II-Tier capital in the debt market or looking to recapitalisation by Government of India.

¹⁰ data herein is taken from a source called *Personal website of R kannan*

¹¹ data is taken from a source called *Personal website of R kannan*

Impact on the outlook of Bankers towards Credit Delivery

The psychology of the banks today is to insulate themselves with zero percent risk and turn lukewarm to fresh credit. This has affected adversely credit growth compared to growth of deposits, resulting a low C/D Ratio around 50% to 54% for the industry.

It is evident that the existence of collateral security at best may convert the credit extended to productive sectors into an investment against real estate, but will not prevent the account turning into NPA. Further blocked assets and real estate represent the most illiquid security and NPA in such advances has the tendency to persist for a long duration. Nationalised banks have reached a dead-end of the tunnel and their future prosperity depends on an urgent solution of this hovering threat.

Excessive focus on credit risk management

The most important business implication of the NPAs is that it leads to the credit risk management assuming priority over other aspects of bank's functioning. The bank's whole machinery would thus be pre-occupied with recovery procedures rather than concentrating on expanding business.

As already mentioned hereinabove, a bank with high level of NPAs would be forced to incur carrying costs on a non-income yielding assets. Other consequences would be reduction in interest income, high level of provisioning, stress on profitability and capital adequacy, gradual decline in ability to meet steady increase in cost, increased pressure on net interest margin (NIM) thereby reducing competitiveness, steady erosion of capital resources and increased difficulty in augmenting capital resources.

The lesser-appreciated implications are reputational risks arising out of greater disclosures on quantum and movement of NPAs, provisions etc. The non-quantifiable implications can be psychological like 'play safe' attitude and risk aversion, lower morale and disinclination to take decisions at all levels of staff in the bank.

Two decades of regimented and directed banking to credit delivery has deprived bank managers of the instinct skill and knowledge. Nationalised banking did not produce a spring of talent resources from within. Directive Inputs and course-direction came externally from RBI and Finance Ministry which were/are external to the day-to-day affairs and problems of the Indian banking industry. The system did not promote initiative and talent, but bred corruption and nepotism.

This is the scene of Indian Banking struggling hard to transition from old primitive systems and values to modern professional business ethics and corporate good governance.

High cost of funds due to NPAs

Quite often genuine borrowers face the difficulties in raising funds from banks due to mounting NPAs. Either the bank is reluctant in providing the requisite funds to the genuine borrowers or if the funds are provided, come at a very high cost to compensate the lender's losses caused due to high level of NPAs.

Therefore, quite often corporates prefer to raise funds through commercial papers (CPs) where the interest rate on working capital charged by banks is higher.

Impact on banks scrips on Stock Exchanges

In further of a report, the RBI has said informational asymmetries arising from less on-site/off-site inspection, declining performance and shooting NPAs weighed heavily on bank stocks.

The RBI has for the first time included stock market behaviour of bank scrips in its annual review of the banking sector. As per a RBI Report, despite the various reforms being carried out in Indian stock exchanges, many bank scrips remain illiquid and thinly traded. In fact, out of 25 banks traded on the National Stock Exchange (NSE), the share of the top five banks in turnover and capitalisation constituted 96.4 per cent and 82.82 per cent respectively during 1998-99.

Meanwhile, the share price of HDFC Bank Ltd, a private-sector bank, showed a decline of a mere 1.1 per cent during the year 1998-99. The RBI Report says "Private sector bank stocks whose market performance was affected included Bank of Rajasthan, Federal Bank and HDFC Bank," and attributed the battering the scrips got in the secondary market to their poor performance in general and the concern of the market over their NPAs.

There are various other pressing factors that are relevant from the point of view of Indian banking operations with a view to focusing on NPAs and its related effects:

a. Excess liquidity-lending-default

The banks in India are faced with the problem of increasing liquidity in the system. Further, the Reserve Bank of India (RBI) is increasing the liquidity in the system through various rate cuts. Banks can get rid of its excess liquidity by increasing its lending but, often shy away from such an option due to the high risk of default.

In order to promote certain prudential norms for healthy banking practices, most of the developed economies require all banks to maintain minimum liquid and cash reserves broadly classified into Cash Reserve Ratio (CRR) and the Statutory Liquidity Ratio (SLR).

A rate cut (for instance, decrease in CRR) results into lesser funds to be locked up in RBI's vaults and further infuses greater funds into a system. However, almost all the banks are facing the problem of bad loans, non-performing assets, thinning margins,

etc. as a result of which, banks are little reluctant in granting loans to corporates. As such, though in its monetary policy RBI announces rate cut but such news are no longer warmly greeted by the bankers.

b. *Importance of credit rating in assessing the risk of default for lenders*

Credit rating has been explained by Moody's, a credit rating agency, as forming an opinion of the future ability, legal obligation and willingness of a bond issuer or obligor to make full and timely payments on principal and interest due to the investors. Banks do rely on credit rating agencies to measure credit risk and assign a probability of default. However, credit rating is not foolproof. In fact, Enron was rated investment grade till as late as a month prior to its filing for Chapter 11 bankruptcy when it was assigned an in-default status by the rating agencies. It depends on the information available to the credit rating agency. Besides, there may be conflict of interest, which a credit rating agency may not be able to resolve in the interest of investors and lenders.

Stock prices are an important (but not the sole) indicator of the credit risk involved. Stock prices are much more forward looking in assessing the creditworthiness of a business enterprise. Historical data proves that stock prices of companies such as Enron and WorldCom had started showing a falling trend many months prior to it being downgraded by credit rating agencies.

c. *RBI guidelines on NPAs and ICAI Accounting Standard 9 on revenue recognition*

In view of the guidelines issued by the Reserve Bank of India (RBI), income on NPAs should be recognised only when it is actually realised. As such, a doubt may arise as to whether the aforesaid guidelines with respect to recognition of interest income on NPAs on realization basis is consistent with Accounting Standard 9, 'Revenue Recognition'. For this purpose, the guidelines issued by the RBI for treating certain assets as NPAs seem to be based on an assumption that the collection of interest on such assets is uncertain.

Therefore complying with AS 9, interest income is not recognized based on uncertainty involved but is recognized at a subsequent stage when actually realized thereby complying with RBI guidelines as well. In order to ensure proper appreciation of financial statements, banks should disclose the accounting policies adopted in respect of determination of NPAs and basis on which income is recognized with other significant accounting policies.

d. *Usage of financial statements in assessing the risk of default for lenders*

For banks and financial institutions, both the balance sheet and income statement have a key role to play by providing valuable information on a borrower's viability. However, the approach of scrutinizing financial statements is a backward looking

approach. This is because the focus of accounting is on past performance and current positions.

The key accounting ratios generally used for the purpose of ascertaining the creditworthiness of a business entity are that of debt-equity ratio and interest coverage ratio. Highly rated companies generally have low leverage. This is because; high leverage is followed by high fixed interest charges, non-payment of which results into a default.

e. *Capital Adequacy Ratio (CAR) of RBI and Basle committee on banking supervision (BCBS)*

Based on the Basle norms under the Basle Capital Accord 1988, the RBI also issued similar capital adequacy norms for the Indian banks. According to these guidelines, the banks will have to identify their Tier-I and Tier-II capital and assign risk weights to the assets. Having done this they will have to assess the Capital to Risk Weighted Assets Ratio (CRAR). The minimum CAR which the Indian banks are required to meet is set at 9 percent. It should be taken into consideration that the bank's capital refers to the ability of bank to withstand losses due to risk exposures.

The Basel Committee on Banking Supervision (BCBS) has also laid down certain minimum risk based capital standards that apply to all internationally active commercial banks. That is, bank's capital should at least be 8% of their risk-weighted assets. This in fact helps bank to provide protection to the depositors and the creditors.

f. *Capital Adequacy Ratio-Strengthening Further*

The one important parameter that essentially relates to the bank's ability to sustain the losses due to risk exposures is the bank's capital. The intermediation activity exposes the bank to a variety of risks. Cases of big banks collapsing due to their bank's inability to sustain the risk exposures are readily available. Considering this, it is highly essential to examine the capital vis-à-vis the risk weighted assets. This is the Capital to Risk Weighted Assets Ratio (CRAR) as given by the Basle Committee.

This will indicate the comparative performance of a bank in relation to each group and the banking system as a whole. But if one prepares the comparative statistics for one's bank for the last three years, it will also indicate the direction in which his/her bank is progressing.

Current Status of NPA's and Indian Banks – A Statistical Introspection

Indian Banking in 2002 represents a sea change from what it was a preceding decade. It is a decade of Professional banking moving towards global standards. NPA in immediately after reform era began was a nightmare. Today it is still a problem (albeit a major problem, but under process of apparently firm control). Banks in general have performed extremely well in 2001-02.

In 1992-93, "the profitability of the PSBs as a group turned negative with as many as twelve nationalised banks reporting net losses¹². By March 1996, the outer time limit prescribed for attaining capital adequacy of 8 per cent, eight public sector banks were still short of the prescribed Limit." The public sector banks which suffered losses of Rs.3,293 crore in 1992-93 and Rs.4,349 crore in 1993-94, i.e. in the initial years of introduction of prudential norms, have ended the year 1997-98 with a net profit of Rs.5027 crore. Net NPAs of public sector banks formed 8.2% of the net advances and 3.3% of the total assets as at the end of March 1998. Corresponding figures as at 31.03.2002 is 5.82% and 2.42%. PSBs recorded an aggregate net profit of Rs.8,301.24 crore in 2001-02. NPAs as at 2001-2002 group-wise can be seen from following table that reveals movement of scheduled banks activities in respect of NPAs:

Table 6*

Non-Performing Assets as Percentage of Total Assets – All Scheduled Commercial Banks									
Sr No	Name of the Bank	Gross NPAs/Total Assets				Net NPAs/Total Assets			
		1998- 1999	1999- 2000	2000- 2001	2001- 2002	1998- 1999	1999- 2000	2000- 2001	2001- 2002
1	Nationalised Banks	6.83	6.0	5.44	5.21	3.26	3.15	2.95	2.16
2	State Bank Group	6.52	5.88	5.11	4.39	2.94	2.60	2.35	2.00
3	Total PSBs	6.71	5.95	5.31	4.89	3.14	2.94	2.72	2.42
4	Private Sector Banks (old)	5.78	5.22	5.14	5.20	3.56	3.27	3.28	3.22
5	Private Sector Banks (new)	2.26	1.60	2.05	3.91	1.59	1.08	1.18	2.10
6	Foreign Banks	3.10	3.16	3.04	2.43	1.10	1.03	0.77	0.82

¹² data is taken from a source called *Personal website of R kannan*

Table 7*

Non-Performing Assets as Percentage of Total Advances – All Scheduled Commercial Banks									
Sr No	Name of the Bank	Gross NPAs/Total Advances				Net NPAs/Total Assets			
		1998- 1999	1999- 2000	2000- 2001	2001- 2002	1998- 1999	1999- 2000	2000- 2001	2001- 2002
1	Nationalised Banks	16.02	13.91	12.16	11.01	8.35	7.80	7.01	6.01
2	State Bank Group	15.67	14.08	12.73	11.25	7.74	6.77	6.27	5.45
3	Total PSBs	15.89	13.98	12.37	11.09	8.13	7.42	6.74	5.82
4	Private Sector Banks (old)	13.06	10.78	10.94	11.01	8.96	7.06	7.30	7.11
5	Private Sector Banks (new)	6.19	4.14	5.13	8.87	4.46	2.88	3.09	4.94
6	Foreign Banks	7.59	6.99	6.84	5.38	2.94	2.41	1.82	1.89

[Source: RBI Publication - Trends and Progress in Indian Banking 2002]

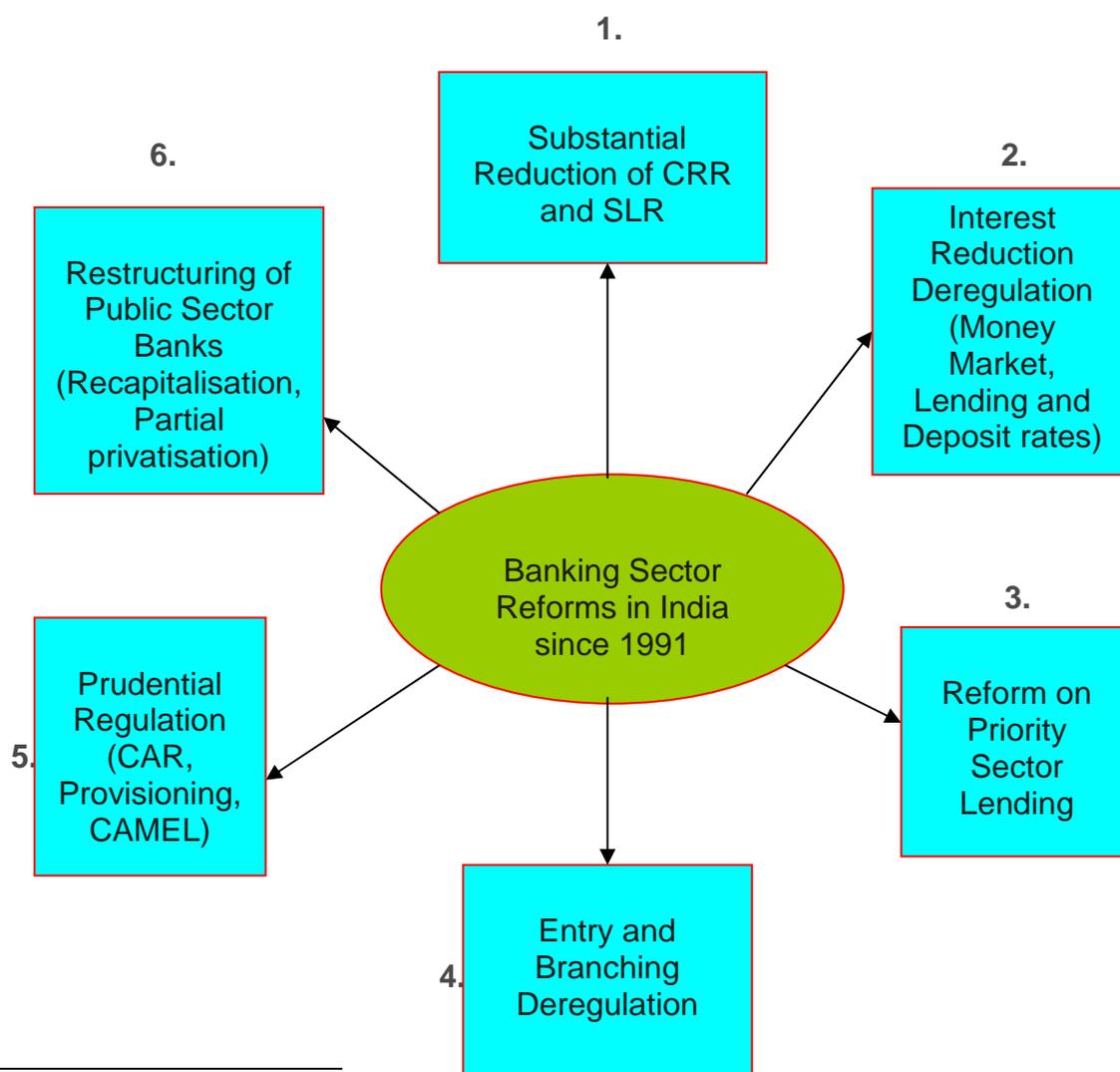
The hangover of the financial crises beginning this century called for urgent restructuring of financial institutions and public banks. That issue has been partly met by the government. In its section on issues and priorities for the economy, the Economic Survey, 2001-2002, considers that "...the time is now ripe for further development of the financial sector." It also candidly summarises the primary issue in this sector. For my inability to express it any better, I quote, "the dominance of public sector finance firms has important consequences for the allocative efficiency of the financial system and for corporate governance in the country. With the domination of public sector finance firms, a controlling interest in many listed companies is effectively held indirectly by the Government...This inhibits the market for corporate control and the development of widely held, board managed, professionally run companies" (Economic Survey, 2001-2002:37).

Measures taken to deal with NPAs

Having discussed the nature, cause, impacts and related issues with regard to NPAs in Indian banking scenario, we shall leap forward to next segment of the article where I shall bring forth various measures taken by the RBI, Government of India and other related agencies with only an aim to contain the ever increasing NPAs arising Indian banking functions and its immediate effect on Indian economy. To begin with, I must say the RBI and Government of India have been hecticly engaged themselves independent of each other to deal with the matter on various counts. Remarkably all that started and giving effects since India came out with reform package under Industrial Policy in 1991. These are discussed below:

Financial & Banking Sector Reforms

Indian Banking Sector (Financial & Legal) Reforms Since Industrial Policy of 1991 to reform Indian banking industry¹³



¹³ Idea generated from an ADB report.

- Dismantling of controls and deregulation of working of commercial banks, permitting entry of new private sector Banks and permission for foreign banks to open more branches are steps that were carried out under banking sector reforms. These steps had the effect of opening Indian banking to global standards by making them to function efficiently in a competitive environment. This is the initial step to create a structural framework for the public sector banks to enable them to adjust to the new environment and turn into dynamic and self-reliant operating units.
- The process of deregulation freed the banks from the control of the Finance Ministry and RBI. The RBI, hereafter, acts a regulator. In the year 1994 RBI further fine-tuned the process by constituting a separated a Board of Financial Supervision (BFS) with the objective of segregating the supervisory role from the regulatory functions of RBI. Banks now operate independently in a competitive financial market, but have to comply with prudential norms and safeguards essential for their well-being.
- RBI in the year 1993 introduced prudential norms¹⁴ as conveyed by Basel Accord of 1988 applicable to Indian banks. These included standards relating to Capital Adequacy, Income Recognition, Asset Classification and Provisioning for non-performing assets. This had the effect of providing a much-needed transparency with regards to the state of affairs of each bank and enabled instant corrective measures to be executed.
- Banks were permitted to seek infusion of fresh equity from the public retaining Government share of equity capital at 51%. A number of PSBs entered the market and raised Tier I and Tier II capital accordingly. This has created a new class of stake-holder (albeit share-holders) vitally interested in the well being of the banks and qualified/empowered to question the Board of Directors at the appropriate forum.
- Norms of Corporate Good Governance: Corporate Governance, a phenomenon of recent origin in the wake of increasing competition and globalization, stipulates parameters of accountability, control and reporting functions of the Board of Directors and encompasses the relationship among various participants in determining the direction and performance of the corporation, the Board, management team, shareholders and other stake-holders. RBI emphasises the paramount importance of accepting this discipline by Banks. While SEBI has introduced a general set of norms applicable to all companies including banking companies, RBI has further covered the special needs of banking companies by appointing a group of experts under chairmanship of Dr. A. S. Ganguly and bring out appropriate set of standards, to make recommendations towards more effective functioning of bank boards. The Group was to review the supervisory role of Boards of banks and financial institutions and to obtain feedback on the functioning of the Boards vis-à-vis compliance, transparency, disclosures, audit committees

¹⁴ For details of the said prudential norms, one can see schedule 2.

etc. and submit recommendations for making the role of Board of Directors more effective with a view to minimising risks and over-exposure. PSBs and other commercial banks are now asked to implement the recommendations.

- In order to expedite credit and investment decisions by banks and financial institutions, and curb the accretion of fresh NPAs, Credit Information Bureau (India) Ltd., (CIBIL) was set up by State Bank of India in association with HDFC in August 2000, The CIBIL was to be technology driven to ensure speedy processing, periodic updating and availability of error-free data at all times in the system. As a first step towards activating the Credit Information Bureau (CIB), it was decided to initiate the process of collection and dissemination of some relevant information, within the existing legal framework. The RBI accordingly decided to constitute a Group drawing representation from CIB, Indian Banks' Association (IBA), select banks and FIs to examine the possibility of the CIB performing the role of collecting and disseminating information on the list of suit-filed accounts and the list of defaulters, including willful defaulters, which is presently handled by the Reserve Bank. The Group is expected also examine the other aspects of information collection and dissemination, such as, the extent, periodicity and coverage including the feasibility of supplying such information on-line, to members in future.
- Norms of Lenders' Liability: While successfully piloting the "The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Bill" in the houses of the Parliament by way of moderating the possible misuse of the powers under the legislation by Banks and Financial Institutions, the Finance Minister gave an assurance to bring out a code of Fair Practices defining Lenders Liability to the borrowers in respect of loans and advances extended by them. Consequent to the assurance by the Finance Minister, RBI during December, 2002 has come out with broad guidelines for framing the Fair Practices Code with regard to lenders' liability " to be followed by commercial banks and financial institutions, emphasising on transparency and proper assessment of borrowers' credit requirements". RBI has issued a draft of the model code and has advised the individual banks to adopt model guidelines for framing their respective Fair Practices Code with the approval of their Boards. This is a balancing measure. It imposes a self-discipline on the part of the Banks, which indirectly will only prevent accounts turning into NPA on account of Bank's own failures or wrong actions. (details can be seen from schedule 6 or from the RBI's official website www.rbi.org.in)
- Risk Assessment & Risk Management: There can be minimum risk in a captive controlled economy, where industry is protected by high tariff walls and banks by directed credit and directed interest rates, and directed investments. But along with such minimum risk, there would also be minimum growth of the economy. In India after total regulation for several decades, the economy witness around 3% average growth. The changing environment, on account of on-going process of liberalisation and reforms all round, of easing of import restrictions, resulting in an emerging New Indian Economic Order (NIEO) increases risks content whilst also unfolding new opportunities.

Banks in the process of financial intermediation are confronted with various kinds of financial and non-financial risks viz., credit, interest rate, foreign exchange rate, liquidity, equity price, commodity price, legal, regulatory, reputational, operational, etc. These risks are highly interdependent and events that affect one area of risk can have ramifications for a range of other risk categories. All these decades before the advent of reforms the exercise of risk assessment and risk management were never seriously considered or attempted, as the banks were operating in a captive economy.

Since the year 1998, the RBI have been making serious efforts towards evolving suitable and comprehensive models for Risk-management by the Banks and to integrate this new discipline in the working systems of the Banks. The RBI has identified risk-prone areas in Asset-Liability Management, Credit Management, Changes in Market conditions and counter-party & Country Risks and has evolved suitable models for managing all such risk. RBI has also evolve a system of Risk based Supervision Banks. It also advised banks a parallel scheme for carrying out internal audit based on risk perception.

- e-banking & VRS: The influence of these areas of banking reforms may not appear directly relevant for handling reduction of NPAs. But computerisation provides for data-accuracy and operational efficiency and results in better Management Information Service (MIS). VRS rationalises the work force, which in turn results in better productivity and operational efficiency.
- Banks were told to hone credit skills to contain NPAs. The RBI in a circular November 2002 had said that increasing provisioning of already impaired assets and close monitoring of credit at the levels of sanction, disbursement and operations should be the priority for banks in the country.
- Even though RBI has expressed satisfaction over the sustained efforts of public sector banks in recovering problem loans, it has said the provisioning for NPAs of PSBs in fiscal year ended March 31, 2002, was only 42.5 per cent of gross NPAs. The current level of coverage is quite low against international standards, which are often as high as 140 per cent and, full provisioning towards already impaired assets needs to be a priority corporate goal.
- RBI made it clear in the report that it is not in favour of banks sustaining themselves on trading profits. While asking banks to follow a "more prudent policy on investments", the regulator goads them to sharpen their skills in credit assessment and disbursement.
- Suggesting an integrated approach by the banking system to identifying and dealing with defaults, the RBI says that the method of NPA management should be "multi-pronged, necessitating varied strategies suited to different stages" of passage of credit facility. Recognising a menace that bankers have always been trying to tackle - - unscrupulous borrowers playing one bank against the other - - the regulator says, "The banking system ought to be so geared that a defaulter in one place is recognised as a defaulter by the system" for which exchange of credit information is of utmost importance.

The central bank, apart from stiffer asset classification norms it has said would introduce, has suggested, "although not commonly practised, it might be desirable to include other criteria, some of which exhibit forward-looking features.

- RBI has also cautioned banks on the use of gains from sale of investments. It has advised banks "to follow a more prudent policy for utilising the gains realised on sale of securities arising from decline in interest rates and also for building up adequate reserves to guard against any possible reversal of interest rate environment due to unexpected developments". Accordingly, banks are required to build an investment fluctuation reserve (IFR) of minimum 5 per cent of all investments in the 'held for trading' and 'available for sale' categories within five years. As on March 31, 2002, the IFR of all the banks put together stood at Rs 3,223 crore or 0.71 per cent of the total investment of Rs 4,54,000 crore. Of the total investments, the State Bank of India group alone accounted for Rs 1,85,587 crore against which it has set aside Rs 1,228 crore in IFR or a coverage of 0.66 per cent. (Details of such circular can be accessed from the RBI's official website www.rbi.org.in)
- RBI Guidelines on Fair Practices Code for Lenders applicable to SCBs/AIFIs (excluding RRBs and LABS): According to the "fair practices code", which is at the core of the lender liability, the lenders must treat their borrowers fairly, and when they do not, they can be subject to litigation by the borrower for a variety of reasons, inter alia, two broad categories - breach of contract, breach of fiduciary duty, fraud and misrepresentation, negligent loan processing and administration.
- Consequent to the assurance by the Finance Minister, RBI during December 2002 has come out with broad guidelines for framing the Fair Practices Code with regard to lenders' liability " to be followed by commercial banks and financial institutions, emphasising on transparency and proper assessment of borrowers' credit requirements". (Details can be seen from schedule 6 or from the RBI's official website www.rbi.org.in)

As regards internal factors leading to NPAs, the onus rests with the banks themselves. This calls for organisational restructuring, improvement in managerial efficiency, skill upgradation for proper assessment of creditworthiness and a change in the attitude of the banks towards legal action which is traditionally viewed as a measure of the last resort. These are the elements on the agenda of the second phase of reforms.

Compromise settlement schemes

- Banks are free to design and implement their own policies for recovery and write-off incorporating compromise and negotiated settlements with the approval of their Boards, particularly for old and unresolved cases falling under the NPA category. The policy framework suggested by RBI provides for setting up of an independent Settlement Advisory Committees headed by a

retired Judge of the High Court to scrutinise and recommend compromise proposals

- Specific guidelines were issued in May 1999 to PSBs for one time non-discretionary and non-discriminatory settlement (OTS) of NPAs of small sector. The scheme was operative up to September 30, 2000. [Public sector banks recovered Rs. 668 crore through compromise settlement under this scheme.]
- Guidelines were modified in July 2000 for recovery of the stock of NPAs of Rs. 5 crore and less as on 31 March 1997 (RESERVE BANK OF INDIA, BP.BC.11/21.0.040/99-00, July 27, 2000, Guidelines for recovery of dues relating to Non-Performing Assets (NPAs) of public sector banks). [The above guidelines which were valid up to June 30, 2001 helped the public sector banks to recover Rs. 2600 crore by September 2001 which can be accessed from the RBI's official website www.rbi.org.in]]
- An OTS Scheme covering advances of Rs.25000 and below continues to be in operation and guidelines in pursuance to the budget announcement of the Hon'ble Finance Minister providing for OTS for advances up to Rs.50,000 in respect of NPAs of small/marginal farmers are being drawn up.
- Guidance Notes for Securitisation Companies and Reconstruction Companies Reserve Bank of India: RBI has framed Guidelines and Directions to Securitisation Companies and Reconstruction Companies relating to registration and other matters pertaining to their working viz; prudential norms relating to income recognition, classification of assets, provisioning, accounting standards, capital adequacy, measures for asset reconstruction, deployment of funds and acquisition of financial assets.

The Bank recognizes the fact that since the asset reconstruction activity mainly centers around non-performing loan assets, the whole process of asset reconstruction and matters related thereto has to be initiated with due diligence and care warranting the existence of a set of clear instructions which shall be complied with by all Securitisation Companies or Reconstruction Companies so that the process of asset reconstruction proceeds on smooth and sound lines. In addition, there is a need for specific guidance to these companies on certain matters. Accordingly, the Bank has framed a set of guidance notes listed below in certain matters, which are recommendatory in nature. (Details can be seen from schedule 14 and 15 or from the RBI's official website www.rbi.org.in)

- Circulation of information on defaulters: The RBI has put in place a system for periodical circulation of details of willful defaults of borrowers of banks and financial institutions. This serves as a caution list while considering requests

for new or additional credit limits from defaulting borrowing units and also from the directors /proprietors / partners of these entities. RBI also publishes a list of borrowers (with outstanding aggregating Rs. 1 crore and above) against whom suits have been filed by banks and FIs for recovery of their funds, as on 31st March every year. It is our experience that these measures had not contributed to any perceptible recoveries from the defaulting entities. However, they serve as negative basket of steps shutting off fresh loans to these defaulters. (RBI Circular on Wilful defaulters and action thereagainst, numbered DBOD. No.. DL(W).BC. /110 /20.16.003(1)/2001-02), May 30, 2002 which can be seen from schedule 13 or from the RBI's official website www.rbi.org.in).

- Recovery action against large NPAs: After a review of pendency in regard to NPAs by the Hon'ble Finance Minister, RBI had advised the public sector banks to examine all cases of willful default of Rs 1 crore and above and file suits in such cases, and file criminal cases in regard to willful defaults. Board of Directors are required to review NPA accounts of Rs.1 crore and above with special reference to fixing of staff accountability. On their part RBI and the Government are also contemplating several supporting measures including legal reforms, some of them I would like to highlight.

- Special Mention Accounts: In a recent circular, RBI has suggested to the banks to have a new asset category - 'special mention accounts' - for early identification of bad debts. This would be strictly for internal monitoring. Loans and advances overdue for less than one quarter and two quarters would come under this category. Data regarding such accounts will have to be submitted by banks to RBI. However, special mention assets would not require provisioning, as they are not classified as NPAs. Nor are these proposed to be brought under regulatory oversight and prudential reporting immediately. The step is mainly with a view to alerting management to the prospects of such an account turning bad, and thus taking preventive action well in time. An asset may be transferred to this category once the earliest signs of sickness/irregularities are identified. This will help banks look at accounts with potential problems in a focused manner right from the onset of the problem, so that monitoring and remedial actions can be more effective. Once these accounts are categorised and reported as such, proper top management attention would also be ensured. Borrowers having genuine problems due to temporary mismatch in funds flow or sudden requirements of additional funds may be entertained at the branch level, and for this purpose a special limit to tide over such contingencies may be built into the sanction process itself. This will prevent the need to route the additional funding request through the controlling offices in deserving cases, and help avert many accounts slipping into NPA category.

- The Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003¹⁵: The Bank is in the process of framing a set of standard guidelines in the matter of takeover of the management, sale or lease of whole or part of the business of the borrower. Securitisation Companies and Reconstruction Companies are, therefore, advised to refrain from exercising the measures of take over of management, sale or lease of the borrowers' business as provided for in Section 9 of the Act, until guidelines in this regard are notified by the Reserve Bank of India. As regards enforcement of security interest, Securitisation Companies and Reconstruction Companies may follow the Security Interest (Enforcement) Rules, 2002 notified by the Government of India as also the relevant provisions in the Act.

- RBI guidelines on classification of bank advances: Reserve Bank of India (RBI) has issued guidelines on provisioning requirement with respect to bank advances. In terms of these guidelines, bank advances are mainly classified into:

Standard Assets: Such an asset is not a non-performing asset. In other words, it carries not more than normal risk attached to the business.

Sub-standard Assets: It is classified as non-performing asset for a period not exceeding 18 months

Doubtful Assets: Asset that has remained NPA for a period exceeding 18 months is a doubtful asset.

Loss Assets: Here loss is identified by the banks concerned or by internal auditors or by external auditors or by Reserve Bank India (RBI) inspection.

In terms of RBI guidelines, as and when an asset becomes a NPA, such advances would be first classified as a sub-standard one for a period that should not exceed 18 months and subsequently as doubtful assets.

It should be noted that the above classification is only for the purpose of computing the amount of provision that should be made with respect to bank advances and certainly not for the purpose of presentation of advances in the banks balance sheet.

The Third Schedule to the Banking Regulation Act, 1949, solely governs presentation of advances in the balance sheet. Banks have started issuing notices under the Securitisation Act, 2002 directing the defaulter to either pay back the dues to the bank or else give the possession of the secured assets mentioned in the notice. However, is a potential threat to recovery if there is substantial erosion in the value of security given by the borrower or if

¹⁵ Details can be had from schedule 14 and 15 or from the RBI's official website (www.rbi.org.in)

borrower has committed fraud. Under such a situation it will be prudent to directly classify the advance as a doubtful or loss asset, as appropriate.

- Prudential Regulations: The prudential norms on income recognition, asset classification and provisioning thereon, are implemented from the financial year 1992-93, as per the recommendation of the Committee on the Financial System (Narasimham Committee I). These norms have brought in quantification and objectivity into the assessment and provisioning for NPAs. We at the central bank constantly endeavour to ensure that our prescriptions in this regard are close to international norms. We are neither strict nor lax but just correct in tune with our needs and capabilities.

Under the prudential norms laid down by RBI:

Income should not be recognised on NPAs on accrual basis but should be booked only when it is actually received in respect of such accounts.

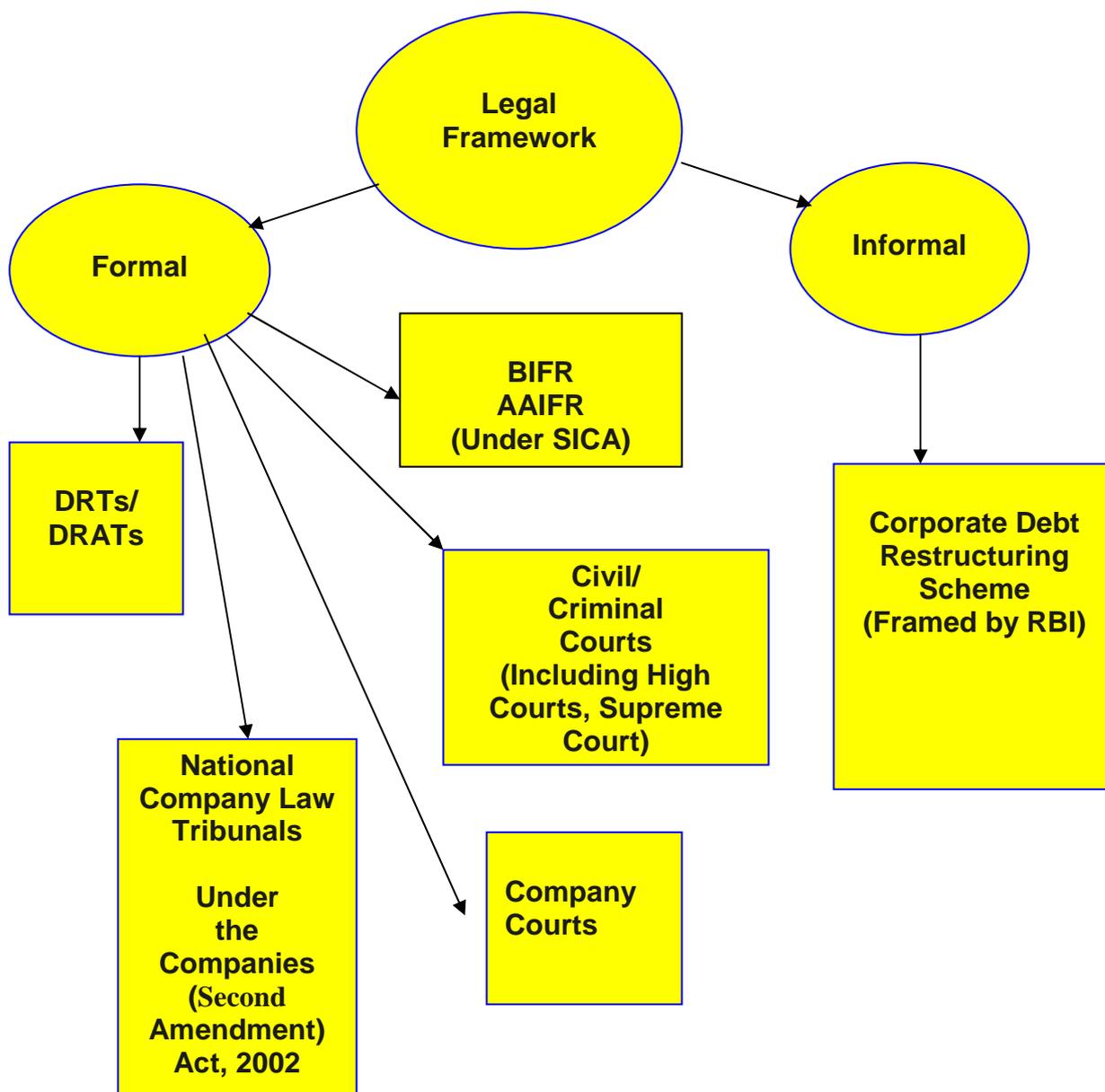
An asset is considered as "non-performing" if interest or installments of principal due remain unpaid for more than 180 days (the lag would get reduced to 90 days from March 31, 2004 to conform to international norms). Any NPA would migrate from sub-standard to doubtful category after 18 months (as against 12 months under international norms). It would get classified as loss asset if it is irrecoverable or only marginally collectible.

The banks should make full provision for loss assets, 100 per cent of the unsecured portion of the doubtful asset plus 20 to 50 per cent of the secured portion (depending on the period for which the account is doubtful), and a general 10% (it is 20 per cent under international norms) of the outstanding balance in respect of sub-standard assets."

RBI has issued detailed guidelines in October 2000 on valuation and provisioning for investment portfolio including credit substitutes.

Legal Reforms

Various legal reforms have been undertaken by the Government to improve the legal framework. Broadly, the formal and informal relevant legal framework is as under:



Formal Framework

Applicable Laws:

The Recovery of Debts Due to Banks and Financial Institutions Act, 1993;

The Recovery of Debts Due to Banks and Financial Institutions (Amendment) Act, 2000;

Code of Civil Procedure, 1908;

Code of Civil Procedure, 2002;

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

The Transfer of Property Act, 1882;

State Financial Corporations Act, 1951;

The Indian Contract Act, 1872;

The Companies Act, 1956;

The Companies (Amendment) Act, 2002;

The Negotiable Instrument Act 1881, and

The Negotiable Instrument (Amendment) Act 1988 and 2003.

The banks and financial institutions can enforce their securities by initiating recovery proceedings under the the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (DRT Act) by filing an application for recovery of their dues before the DRT constituted under the said Act in various states in India. Once their claim is adjudicated, a Recovery Certificate for the amount found due and payable is issued by Debt Recovery Tribunal. On the basis of the Recovery Certificate, execution proceedings are initiated by the Recovery Officer appointed for facilitating recovery of money under the Recovery Certificate. The DRT Act and the rules and regulations framed there under provide for a self-contained mechanism and procedure for execution of Recovery Certificates. The sale is carried out by auctioneer or by receiver appointed by Recovery Officer under its supervision. DRT has adequate powers to grant injunction against the disposal or transfer or creation of third party interest by debtors in the properties charged to creditor. The DRT has the power to pass attachment orders in respect of charged properties. The power to appoint Receiver or remove any person from possession or custody of the property is also vested with the Tribunals. The execution proceedings before the Tribunals involve attachment of charged properties and sale thereof by way of public auction. The power to appoint Receiver for the properties is also available. In case of non realization of the decreed amount by way of sale of charged properties, the personal properties of the guarantors/sureties of the debtor company can also be attached and sold.

For claims below Rupees Ten Lakh (One Million Rupees), the banks and financial institutions are required to initiate proceedings under Code of Civil Procedure, 1908, as amended from time to time, in a Civil Court. The execution is carried out under Code of Civil Procedure. Under the Code of Civil Procedure, the Courts are empowered to pass injunction order restraining the debtor through itself or through its directors, authorized representatives, agents etc. from disposing of or parting with or dealing in any manner the subject property. The Courts are also empowered to pass attachment and sale order for subject property before judgment in case necessary. The procedure for execution of judgments/decrees is also very well laid down in the Code. In execution proceedings the powers for arrest or deposit of

security amount are also been given to the Courts. The procedure for sale of subject property has also been well laid down. The sale of subject property is normally carried out by way of open public auction subject to confirmation of the Court. The provisions for appointment of Receiver and foreclosure, sale or redemption of mortgaged property by the Court and the procedure thereto have also been laid down in the Code.

The foreclosure proceedings, where DRT Act is not applicable, can be initiated under The Transfer of Property Act, 1882 by filing a mortgage suit where the procedure is the same as laid under Code of Civil Procedure.

State Financial Institutions established under the provisions of the State Financial Corporations Act, 1951 have been granted the rights to take over the management or possession or both of the industrial concern as well as the right to transfer by way of lease or sell and realise the property pledged, mortgaged, hypothecated or assigned to them under Section 29 of the said Act without intervention of the Court in case of default in payment by the borrower.

The enforcement of guarantees (not covered by DRT Act) and pledged security is under the Indian Contract Act, 1872.

The secured creditors, other than banks and financial institutions have to approach the Civil Court for enforcement of security by way of an ordinary suit for recovery or by filing a mortgage suit. In such case, the provisions of Code of Civil Procedure are invoked.

In the event of failure to honour the cheques issued by the borrowers to fulfill his financial obligations, the recovery through a legal notice is empowered by the Negotiable Instrument Act, 1881 and such provisions has been recently in 2003 to help the banks and financial institutions to recover its dues from the defaulters and in process thereby, banks can effectively avoid accumulation of NPAs.

Recent Significant Developments in Law making

In December 2002, the Indian Parliament passed the Companies (Second Amendment) Act, 2002 (Second Amendment) to restructure the Companies Act, 1956 (1956 Act) in a big way leading to the new regime of tackling corporate rescue and insolvency. The provisions of the Second Amendment are, however, yet to be notified and the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) which presently deals with the revival and rehabilitation of companies still remains to be repealed by passing of the Sick Industrial Companies (Special Provisions) Repeal Bill, 2001 by the Parliament. Till then, while the Board for Industrial and Financial Reconstruction (BIFR) set up under SICA continues to deal with revival and rehabilitation of companies, the High Court retains its jurisdiction as the liquidation court under the 1956 Act.

In the same month of the year 2002, the Indian Parliament passed another significant legislation - The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFESI) to regulate, for the first time

in the country, the securitisation and reconstruction of financial assets. SARFESI also deals with enforcement of secured interest by secured creditors without the intervention of court.

The Companies (Second Amendment) Act, 2002: A critical analysis of the main provisions

The Companies (Second Amendment) Act, 2002 (Second Amendment) proposes amendment of the provisions of the 1956 Act for setting up of a National Company Law Tribunal¹⁶ (NCLT) and its Appellate Tribunal¹⁷. Under the proposed legislation, NCLT will have -

- The power to consider revival and rehabilitation of companies¹⁸ – a mandate presently entrusted to BIFR under SICA.
- The jurisdiction and power relating to winding up of companies presently vested in the High Court. The winding up proceeding pending in High Courts shall stand transferred to the Tribunal.
- The jurisdiction & power exercised by the Company Law Board under the 1956 Act. The Company Law Board will stand abolished.

A composite law will, therefore, now deal with reorganization and liquidation of companies. The Second Amendment is a sound attempt towards creating a balance between reorganization and liquidation. However, it still remains to be seen as to how effective it proves in providing an orderly exit mechanism for failed enterprises, ending unproductive uses of business assets and transferring them to more efficient market participants.

Composition of NCLT, qualifications of Members & its benches

- NCLT will consist of a President and such number of Judicial and Technical Members not exceeding sixty-two in numbers.
- The President of NCLT will be a former judge or any person qualified for appointment as a High Court Judge.
- The Principal Bench will be located at New Delhi and Benches may be constituted at other places.

¹⁶ A new Part IB (Section 10FB to 10FP) has been incorporated by the Companies (Second Amendment) Act, 2002.

¹⁷ A new Part IC (Section 10FQ to 10GF) has been incorporated by the Companies (Second Amendment) Act, 2002.

¹⁸ A new Part VIA (Section 424A to 424L) has been incorporated by the Companies (Second Amendment) Act, 2002.

- Each of the Benches of NCLT will comprise of at least a Judicial Member and a Technical Member. The winding up and reorganization matters will, however, be handled by Special Benches having three or more members comprising of at least one Judicial Member, Technical Member and Member appointed under Labour related category¹⁹.
- While the Judicial Member will be a person who has the prescribed experience as a judicial officer or as a member of Indian legal Services or Indian Company Law Services or has fifteen years experience as a practitioner, the Technical Member will be a person who has requisite experience as a Chartered Accountant, Cost and Works Accountant, Company Secretary etc.

No such qualifications are provided under SICA for appointment of Members with the result that BIFR has become a rehabilitation center for retired bureaucrats. There is no permanent Judge presiding over Liquidation Court and the Chief Justice designates a High Court Judge as a Company Court Judge by rotation of roster.

The Second Amendment seeks to improve upon the standards to be adopted to measure the competence, performance and services of a bankruptcy court by providing specialized qualification for appointment of members of NCLT and a transparent process for their selection and appointment. However, the quality and skills of judges, newly appointed or existing will need to be reinforced by continuing appropriate training. No provision has been made for appropriate valuation procedures to evaluate the performance of judges based on the standards.

Commencement: applicability, accessibility & the test for determining sickness

The Second Amendment seeks to provide easy, convenient, inexpensive and quick access while providing adequate safeguard against misuse of the provisions by defaulting and dishonest debtors as experienced under SICA. The Second Amendment requires that when an industrial company has become a sick industrial company²⁰, the Board of Directors of the said company shall make a reference to NCLT, and prepare a scheme for its revival and rehabilitation and submit the same to NCLT for determination of the measures, which may be adopted with respect to the company. The reference would be accompanied with Auditors Certificate from an Auditor from a panel of Auditors appointed by NCLT certifying causes of the net worth being fifty percent or less or default in repayment of debt.

The trigger point under SICA is different. SICA requires the Board of Directors of a sick industrial company to make a reference to BIFR within sixty days from the date of finalization of the duly audited accounts of the company for the financial year as at the end of which a company has become a sick industrial company. A sick industrial company under SICA means an industrial company (being a company registered for

¹⁹ Section 10FA of the Companies (Second Amendment) Act, 2002.

²⁰ Section 46AA the Companies (Second Amendment) Act, 2002 defines sick industrial company as an industrial company which has at the end of any financial year accumulated losses equal to fifty percent or more of its average net worth during four years immediately preceding such financial year or failed to pay its debts within any three consecutive quarters on demand for its repayment by a creditor or creditors of such company.

not less than five years and employing fifty or above workmen), which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth²¹. If the Board has sufficient reasons even before finalization of accounts to form an opinion that the company has become a sick company, it shall, within sixty days after it has formed such an opinion, make a reference to BIFR.²²

Inquiry by NCLT and declaration of sickness

On receipt of a reference, the NCLT may make an order as to if the said industrial company has become a sick industrial company and such an order shall be final. NCLT may make such inquiry as it consider fit for determining whether the industrial company has become a sick industrial company. NCLT may require an Operating Agency²³ (OA) to enquire and make a report with respect to such matters as may be specified by it.

Similar provisions exist under SICA except that now it has been provided that the order of NCLT in this regard shall be final and further that the definition of OA is limited to public financial institutions, banks or any other person which may be specified as OA by BIFR.

Preparation and sanction of scheme

- If after making an inquiry about the sickness of the company, NCLT is satisfied that a company has become sick, the NCLT shall decide whether it is practicable for the company to make its net worth exceed the accumulated losses or make the payment of its debt within a reasonable time. If NCLT decides that it is practicable for a sick company to make its net worth exceed the accumulated losses or make the payment of its debt within a reasonable time, it shall give the company, such directions as it may deem fit to make its net worth exceed the accumulated losses or make the payment of its debt within a reasonable time.
- If NCLT decides that it is not practicable for a sick industrial company to make its net worth exceed the accumulated losses within a reasonable time and it is necessary to adopt remedial measures, it may direct an OA to prepare a scheme

²¹ The definition of “net worth” under SICA has been retained under the Second Amendment and means has been defined as the sum total of the paid up capital and free reserves. For the purposes of net worth, “free reserves” means all reserves credited out of the profits and share premium account but does not include reserves credited out of re-valuation of assets, write-back of depreciation provisions and amalgamation.

²² Section 15(1) of Sick Industrial Company (Special Provisions) Act, 1985.

²³ Section 31AA of the Companies (Second Amendment) Act, 2002 defines Operating Agency as a group of experts consisting of persons having special knowledge of business or industry in which the sick industrial company is engaged and includes public financial institutions, banks or any other person which may be specified as the Operating Agency by NCLT.

providing for such measures in relation to such company as it considers necessary from out of the parameters laid down under the Second Amendment.

- The OA shall prepares a scheme providing, *inter alia* for any one or more of the measures – the financial reconstruction of the sick company by change in or take over of, management of the sick company; the amalgamation of the company with any other company; the sale or lease of a part or whole of any industrial undertaking of the sick company; the rationalization of managerial personnel; such incidental, consequential or supplemental measures as may be necessary; change in Board of Directors etc.
- The creditors (if approved by atleast three fourth of creditors) of the company may also prepare a scheme for revival and rehabilitation and submit to NCLT.

Similar provisions exist under SICA except that the time frame has been defined or redefined for various stages and it has been added that the ability of the company to make the payment of its debt within a reasonable time will also required to be seen by NCLT while issuing directions after it finds that the company has become a sick industrial company. Though a specific provision has been made for creditors to file a scheme, there was no bar against there filing a scheme under SICA.

Circulation/Sanction of scheme & its binding effect

The Second Amendment provides that where the scheme prepared by the OA relates to preventive, ameliorative, remedial and other measures with respect to any sick industrial company, it may provide for financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices from the Central Government, State Government, any scheduled bank or other bank, a public financial institution or state level institution or any institution or other authority to the sick industrial company.

Every such scheme is required to be circulated to every person to provide financial assistance for its consent within a period of sixty days from the date of such circulation. If no consent is received, it is deemed that consent has been given and NCLT shall sanction the scheme and on and from the date of such sanction, the scheme shall be binding on all concerned.

However, if the consent so required is not given, in that case NCLT may adopt such other measures, including the winding up of the sick industrial company, as it may deem fit.

Similar provisions exist under SICA.

The Second Amendment provides a number of broad guidelines to OA to prepare the scheme. All the options are made available. However, the most common types of plans that are framed are based on hair cut by creditors and sale of surplus assets or on one time settlement of dues of creditors. However, the law does not address the manner in which the priority has to be accorded to classes of creditors. The parties are left to negotiate the best deal between themselves on the basis of a realistic scenario.

As regards the approval of plan, for a scheme to be sanctioned, the law provides that the consent of all secured creditors or a statutory bodies which are required to provide financial assistance under the proposed scheme either by way of reliefs or concessions or sacrifices shall be required. Therefore, every such creditor has a right to veto the scheme. Little discretion lies with the Court in the matters of approval of scheme.

Implementation, modification and the binding effect

Under the Second Amendment, once sanctioned, the scheme has a binding effect on all concerned by operation of statute. A scheme based on One Time Settlement of dues deals with discharge of creditor(s). The implementation of the sanctioned scheme will be monitored by court and if required, the scheme can be modified. Any person aggrieved by the sanction of the plan can challenge it before the Appellate Tribunal or seek review of the order.

Winding up of sick industrial company

Where the NCLT comes to the conclusion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time while meeting all its financial obligations and that it is not possible to revive the company in future and that it is just and equitable that the company should be wound up, it shall record its finding and order winding up of the company.

Under SICA, the BIFR does not have the jurisdiction to order winding up of the company. If the BIFR concludes that it is not possible to revive the company and that it is just and equitable that the company should be wound up, it records its opinion and forwards the same to the concerned High Court which, on the basis of this opinion, may order winding up of the company and may proceed and cause to proceed with the winding up of the sick industrial company in accordance with the provisions of the 1956 Act.²⁴

New time frame

This is one of the few highlights of the Second Amendment. The new time frame requires:

- Reference to be filed within 180 days from the date on which the Board of Directors has come to know the causes of making a reference or within 60 days of adoption of final accounts.
- Enquiry by OA to determine whether the company is a sick industrial company – 21 days, which is extendable to 40 days.
- Time for OA to prepare the scheme - 60 days extendable by 90 days.
- Sanction within 60 days from receipt of suggestions/objections to draft scheme.
- Consent of creditors required to give financial assistance in any form – 60 days.

²⁴ Section 20 of Sick Industrial Company (Special Provisions) Act, 1985.

Appellate Tribunal

There will be a National Company Law Appellate Tribunal (NCLAT) to hear appeals from the orders of NCLT. The Chairperson of NCLAT will be a retired Judge, of Supreme Court of India or Chief Justice of a High Court.

The Appeal from the order of NCLAT will lie to the Supreme Court of India.

Under SICA, there is an Appellate Authority for Industrial and Financial Reconstruction (AAIFR), which comprises of a retired High Court Judge as its chairman. The AAIFR hears appeals from the parties aggrieved by the orders of BIFR. There is no appeal from the order of AAIFR though the High Court can entertain writ petition under Article 226/227 of the Constitution of India against the orders passed by AAIFR.

Suspension of legal proceedings and Contracts

The Second Amendment does away with the infamous provision under SICA which provides that where in respect of an industrial company, an inquiry is pending or any scheme is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal is pending, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or against its guarantor or for the appointment of a Receiver shall lie or be proceeded with further except with the consent of the BIFR or as the case maybe, the Appellate Authority.²⁵ This provision is one of major causes for the failure of SICA as legislation.

However, taking away the provision altogether appears to be a knee jerk reaction.

Misfeasance proceedings – fixing liability

The Second Amendment requires that if in the course of scrutiny or implementation of a scheme, NCLT find that any person has misapplied or retained or become liable or accountable for any money or property or has been guilty of any misfeasance, malfeasance or non-feasance or breach of trust, it may direct him to repay or restore the money or property or order such compensation as it may deem appropriate. Identical provision exists under SICA.

Formation of Rehabilitation and Revival Fund

The Second Amendment introduces a provision for levy and collection of cess for the purposes of rehabilitation or revival or protection of assets of the sick industrial company at such rate not less than 0.005 per cent and not more than 0.1 per cent on the value of turn over of every company or its annual gross receipt which ever is

²⁵ Section 22 of Sick Industrial Company (Special Provisions) Act, 1985.

more. It also requires the creation and setting up of a Rehabilitation and Revival Fund. The sources from which amounts will be credited to the Fund have also been specified. This fund will be transferred to the Consolidated Fund of India and amount released to NCLT from time to time for the purposes specified in the second Amendment.

The good companies are terming this provision as a premium on good businesses.

Cases in which company may be wound up by the court

Apart from the existing grounds²⁶, the following additional grounds for winding up of a company have been added by way of the Second Amendment:

- If the company has acted against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.
- If the company has defaulted in filing with the Registrar its Balance Sheets and Profit & Loss Account or annual returns for five consecutive financial years.
- If the NCLT comes to the conclusion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time while meeting all its financial obligations and that it is not possible to revive the company in future and that it is just and equitable that the company should be wound up.

Test for insolvency

The test followed in insolvency proceedings is the liquidity test. Liquidity is based on cash-flow criteria and relates to a debtor's inability to service its debts as they come due. Balance sheet test is also applied. However, there is no automatic stay against

²⁶(a) The court may wind up a company
if the company has by special resolution resolved that it be wound up;
if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
if it is unable to pay its debts. A company shall be deemed to be unable to pay its debts - if a creditor to whom the company is indebted in a sum exceeding one lakh, has served on the company a demand by registered post at its registered office requiring it to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum; or if execution or other process issued on a decree or order of any court in favour of a creditor of the company is returned unsatisfied; or if it is proved to the satisfaction of the court that the company is unable to pay its debt;
if a default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;
if the number of members is reduced in the case of a public company below seven and in the case of a private company below two;
if the court is of the opinion that it is just and equitable that the company should be wound up.

the debtor's transfer, sale or disposition of assets or parts of the business without court approval, except to the extent necessary to operate the business. But such an order can be passed on an application made by the petitioning person and if in the opinion of court sufficient ground is made out for injunction.

Commencement: applicability and accessibility

The Second Amendment clearly identifies the entities to which it applies. All enterprises or corporate entities including the State-owned corporations are subject to the same insolvency law as private corporations. An application to the NCLT for the winding up of a company, can be by way of a petition presented

- By the company;
- By any creditor or creditors including contingent or prospective;
- By any contributory or contributories;
- By the Registrar of Companies;
- In a case falling under Section 243 of the 1956 Act, by any person authorised by the central government in that behalf.

The financial institutions and insurance companies are dealt with under the Banking Regulations Act though liquidation, if initiated under the said Act, ends up before the ordinary liquidation court.

The provisions provide easy excess to creditors and debtors.

Power of court on hearing petition

The provisions in this head have not been changed under the Second Amendment. On hearing a petition, the NCLT may dismiss it or adjourn it conditionally/unconditionally or make any order of winding up or pass any interim order or make any other order as it may deem fit. However, it has been added that in case the ground for filing the petition is non filing of statutory report, the NCLT may direct that such a report be filed and impose costs instead of making order of winding up.

Disclosure of information.

The Second Amendment provides for a specific provision for debtor to disclose the relevant information in liquidation proceedings. It has further been provided that where a petition for winding up is opposed, that company shall file its statement of affairs, last known addresses of all directors and company secretary, details of location of assets and their value, details of debtors and creditors with addresses, details of workmen/employees and of the amount outstanding to them and such other details as may be specified.

The Court has inherent power to seek information on the causes of the debtor's financial difficulty and a review of past transactions that may be avoided under the avoidance provisions of the insolvency law.

Governance: management, creditors and creditors committee

Under the 1956 Act, there is an OL attached to every High Court, which acts as a Liquidator. The OL is an employee of the government and represents a highly inefficient and bureaucratic department. The Second Amendment provides for appointment of court appointed professionals as Liquidators who will be capable and competent of handling insolvency proceedings much more efficiently. It provides for OL to be appointed from a panel of Chartered Accountants, Cost Accountants, Lawyers and Company Secretaries.

This is a star feature of the Second Amendment.

In rehabilitation proceedings, the debtor remains in possession and administers the company. The OA appointed by BIFR acts as an extended arm of BIFR and assists in discharge of its functions which are confined to holding inquiry in sickness of company, preparation of scheme and its monitoring.

There is no drastic curtailing of the powers of management and only a close watch is maintained.

This is another area where adequate provisions will required to be introduced by further amendment and/or in the drafting of the new rules.

There is no creditors' committee. Creditors protect their interests through directly participating in the proceedings or through the liquidator. There is an adequate participation by creditors at every important stage of the proceedings.

Administration: collection, preservation, disposition of property – inadequate provisions

Though the Second Amendment provides for obtaining information on debtors assets, it only slightly improves upon the provisions for the collection, preservation and disposition of all property belonging to the debtor, including property obtained after the commencement of the case.

There is a need to make provisions to deal with some of the complex issues that sometimes arise in the course of proceedings.

Though a transparent system for disposing of assets exist they are neither flexible nor efficient. Private sales are virtually out of question.

The law allows for sales free and clear of security interests, charges or other encumbrances, subject to preserving the priority of interests in the proceeds from the assets disposed. Often, certain assets of an enterprise will be subject to a security interest, pledge, mortgage or other collateral interest in favor of one or more creditors.

Where a winding up order has been made or where a Provisional Liquidator has been appointed, the Liquidator shall take into his custody or under his control all the property, effects and actionable claims to which the company is or appears to be

entitled. All the property and effects of the company shall be deemed to be in the custody of the court as from the date of the order for the winding up of the company.²⁷

Voluntary winding up

A company may be wound up voluntarily when the period if any, fixed for the duration of the company by the Articles has expired or the event, if any, has occurred on the occurrence of which the Articles provide that the company is to be dissolved and the company in general meeting passes a resolution requiring the company to be wound up voluntarily or if the company passes a special resolution that the company be wound up voluntarily. The provisions under this heading remain unchanged under the Second Amendment.

Commencement: moratoriums and suspension of proceedings in liquidation proceedings.

The Indian law prohibits the unauthorized disposition of the debtor's assets, if requested and suspends actions by creditors to enforce their rights or remedies against the debtor or the debtor's assets by operation of law. There is wide discretion on granting injunction.

The law does not provide a statutory moratorium on repayment of debts but stays enforcement of creditors rights in liquidation proceedings.

When a winding up order has been made or the OL has been appointed as Provisional Liquidator, no suit or legal proceeding can be commenced, or if pending at the date of the winding up order, can be proceeded with against the company except by leave of the NCLT and subject to such terms as the court may impose.²⁸ However, after the coming into the effect of Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Supreme Court of India, while interpreting its various provisions has held that the Banks and Financials do not require to obtain leave of the Company Court for initiating proceedings under the said Act²⁹.

The NCLT, which is winding up the company shall have jurisdiction to entertain or dispose of any suit or proceeding by or against the company; any claim made by or against the company. Secured creditors, however, can choose to stay outside the winding up proceedings. Any suit or proceeding by or against the company which is pending in any court other than in which the winding up of the company is proceeding may be transferred to and disposed of by that court.

Recognition of creditor's rights & preferential payments

²⁷ Section 456 of Companies Act, 1956.

²⁸ Section 446 of Companies Act, 1956.

²⁹ Allahabad Bank vs Canara Bank: 2000(1) Bank CLR 481 SC

The provisions under this heading remain unchanged under the Second Amendment except that the remuneration of OL shall be treated as first charge on the realization of the assets.

The Indian law recognizes the rights and priorities of creditors established prior to insolvency under commercial laws.

In the winding up of a company, workmen's dues and debts due to secured creditors to the extent such debts rank *pari passu* with such dues, shall be paid in priority to all other debts. The debts payable shall be paid in full unless the assets are insufficient to meet them in which case they shall abate in equal proportions.³⁰

Directors and officers liability – a crusade

This issues has been part of national debate on corporate governance. A number of provisions already exist in the 1956 Act and SICA in this regard. A few more amendments were introduced earlier in the year 2002 in the 1956 Act to make the provisions more stringent.

Another significant provision has been added by the Second Amendment in this direction which provides that if in the course of winding up, NCLT find that any person has misapplied or retained or become liable or accountable for any money or property or has been guilty of any misfeasance, malfeasance or non-feasance or breach of trust, it may direct him to repay or restore the money or property or order such compensation as it may deem appropriate.

Fraudulent or preferential transfers

Fraudulent Preference

Any transaction with a creditor entered into by a Company in preference of other creditors within six months prior to the date of commencement of winding up is to be deemed a fraudulent preference of its creditors and is accordingly invalid³¹. But if a Company makes payment to a creditor who is pressurizing the Company with a threat of a suit and attachment of property, then such a payment cannot be called 'fraudulent' provided the debt was really due.

Voluntary Transfer

Under Section 531A of the 1956 Act, a transfer of property whether movable or immovable or any delivery of goods by the Company within a period of one year prior to the presentation of a winding up petition is void as against the Liquidator, unless the transfer/ delivery was made in the usual course of Company business; and the transfer was in favor of a purchaser or encumbrance in good faith and for real and valuable consideration.

Transfer of Shares

³⁰ Section 529 of Companies Act, 1956.

³¹ Section 531 of The Companies Act, 1956.

When a Company is undergoing voluntary winding up, any transfer of shares or changes in the status of member after commencement of such proceedings is void, unless a prior permission of the Liquidator is taken³². The same position prevails in case of winding up by Court or under supervision of Court, with the difference that such a transfer is valid if permission of Court is obtained either before or after the making of the transfer.

Transfers for benefit of all creditors to be void.

Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors is void³³.

Effect of floating charge

Where a company is being wound up, a floating charge on the undertaking or property of the company created within the twelve months immediately preceding the commencement of the winding up, is invalid unless it is proved that the company immediately after the creation of the charge was solvent, except to the amount of any cash paid to the company at the time of, or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate notified by the Central Government in this behalf.³⁴

Disclaimer of onerous property in case of a company, which is being wound up.

Where any part of the property of a company which is being wound up consists of (a) land of any tenure, burdened with onerous covenants; (b) shares or stock in companies; (c) any other property which is unsaleable or is not readily saleable, by reason of its binding the possessor thereof either to the performance of any onerous act or to the payment of any sum of money; or (d) unprofitable contracts; the liquidator of the company may, with the leave of the Court, by writing signed by him, at any time within twelve months after the commencement of the winding up or such extended period as may be allowed by the Court, disclaim the property. The Court may make an order rescinding the contract on such terms or otherwise as the Court thinks just and any damages payable under the order to any such person may be proved by him as a debt in the winding up.

The Court may make an order for the vesting of the property in, or the delivery of the property to, any person entitled thereto or to whom it may seem just that the property should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose provided that, where the property disclaimed is of a leasehold nature.

Pre-bankruptcy period within which transfers may be reviewed and are subject to avoidance

Any transaction with a creditor entered into by a Company in preference of other creditors within six months prior to the date of commencement of winding up is to be

³² Section 536 of The Companies Act, 1956.

³³ Section 532 of the Companies Act, 1956.

³⁴ Section 534 of The Companies Act, 1956.

deemed a fraudulent preference of its creditors and is accordingly invalid. Under Section 531A of the 1956 Act, a transfer of property whether movable or immovable or any delivery of goods by the Company within a period of one year prior to the presentation of a winding up petition is void as against the Liquidator.

Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act 2002 (SARFESI): the broad features

SARFESI – the Security Interest Legislation

SARFESI provides for the enforcement of security interests in movable (tangible or intangible, including accounts receivable) and immovable property without the intervention of court, by way of a simplistic, expeditious and a cost effective process. Where any borrower makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt has been classified by the secured creditor as non-performing asset, then, the secured creditor may call upon the borrower by way of a written legal notice to discharge in full, his liabilities within sixty days from the date of the notice failing which the secured creditor would be entitled to exercise all or any of the rights set out under SARFESI. The notice must contain details of debt and secured assets.

Any bank or public financial institution or any other institution or non-banking financial company as specified by Central Government or International Finance Corporation or a consortium thereof can invoke the provisions of SARFESI relating to security of interest.

The main provisions relating to enforcement of Security Interest

SARFESI provides that where any borrower makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt has been classified by the secured creditor as non-performing asset, then, the secured creditor may call upon the borrower by way of a written legal notice to discharge in full, his liabilities within sixty days from the date of the notice failing which the secured creditor would be entitled to exercise all or any of the rights set out under SARFESI. The provisions of SARFESI relating to security of interest can be invoked by:

- any bank or
- public financial institution under Section 4A of the Companies Act, 1956 or any institution specified by Central Government under sub clause (ii) of clause (h) of section 2 of Recovery of Debt due to Banks and Financial Institutions Act, 1993 or
- any other institution or non banking financial company as specified by Central Government or
- International Finance Corporation or a consortium thereof.

Taking Possession of Assets

On the expiry of sixty days if the debt is not fully paid by the borrower, the officer(s) so authorised can enter the premises where the secured asset is lying and take its possession. If there is resistance or there is likely to be resistance from the borrower and/or its agents in the taking over of the possession, such officer may write a request to the Chief Metropolitan Magistrate (CMM) or the District Magistrate (DM) in whose jurisdiction such secured asset is situate to take possession.

Take Over of Management of Secured Assets

Another option available under SARFESI is to take over the management of the secured assets. The manner and effect of take over has been set out under SARFESI. While in possession of borrowers business, the secured asset can be sold simultaneously to recover the dues.

Appointment of Manager for the Secured Assets

The duties and responsibilities of the manager are not defined anywhere in SARFESI. However, it appears that the function of a manager would be confined to managing the asset and not to sell or transfer the asset. The manager would be a custodian of the assets and will otherwise have full control over the asset to the extent empowered. Manager can be assigned the responsibility to manage the asset but cannot be empowered to sell unless the manager is also acting under clause (a) of sub section (4) of section 13 of SARFESI.

Procedure in case of Take Over of Co-financed Assets

In case of financial assets by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any of the rights conferred on him unless exercise of such rights is agreed upon by the secured creditor representing not less than three fourth in value of the amount outstanding as on record date and such action shall be binding on all secured creditors

Appeal before Debt Recovery Tribunal

Any person (including borrower) aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this chapter, may prefer an appeal to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken. However, such appeal shall not be entertained by unless the borrower has deposited with the Debts Recovery Tribunal seventy-five per cent of the amount claimed in the notice. Any person aggrieved by any order by the Debts Recovery Tribunal under section 17 may prefer an appeal to an Appellate Tribunal.

Protection to Secured Creditors

No suit, prosecution or other legal proceedings shall lie against any secured creditor or any of his officers or manager exercising any of the rights of the secured creditor or borrower for anything done or omitted to be done in good faith under SARFESI. However, any offence by the company during the time the Directors of the secured creditor are holding appointment, would be treated as would an offence committed by a company in a normal case is treated.

Jurisdiction of Civil Court barred

No civil court will have jurisdiction over any of the matters stated under SARFESI.

Asset Reconstruction Companies (ARC)

Chapter II of SARFESI provides for the setting up of the Reconstruction and Securitisation Companies for "Securitisation" i.e. acquisition of financial assets from its owner, whether by raising funds by such Securitisation or Reconstruction Company from qualified institutional buyers by issue of security receipts representing undivided interest in such financial assets or otherwise. SARFESI deals with the Registration of these Companies, their pre-requisite qualifications etc.

Measures for Asset Reconstruction

The measures that a Securitisation or Reconstruction Companies can take for the purpose of Asset Reconstruction are:

- Take-over of the management of the business of the borrower.
- Sale or lease of a part or whole of the business of the borrower.
- Reschedulement of payment of debts payable by the borrower.
- Enforcement of security interest in accordance with the provisions of the Act.
- Settlement of the dues payable by the borrower.
- Taking possession of secured assets.

Additionally, such Company can perform the following functions:

- Acting as an agent for any bank or financial institution for the purpose of recovering their dues from the borrower on payment of such fees as may be mutually agreed.
- Acting as a Manager.
- Acting as a Receiver.

An ARC can acquire financial assets by issuing a debenture or bond or any other security in the nature of a debenture for consideration agreed and by incorporating such terms in the agreement; or entering into an agreement for the transfer of such financial assets to such company on such terms and conditions as may be agreed.

The terms and conditions of acquisition can be negotiated and agreed between the parties. However, such terms and conditions would have to be in consonance with the guidelines framed and directions issued by Reserve Bank of India.

Legal Consequences of Acquisition

ARC shall be deemed to be the lender and all rights of lender shall vest in the ARC in relation to such financial assets.

All contracts, deeds, bonds, agreements, power of attorney, grants of legal representation, permissions, approvals, consents or no objections and instruments relating to financial assets subsisting before the acquisition of financial assets by the ARC shall have full force and be enforced as if they had been issued in favour of ARC or as the case maybe.

No suit, appeal or proceedings shall abate or be discontinued for the reasons of acquisition of financial assets by the ARC. However the appeal may be continued, prosecuted and enforced by or against the ARC. However, such company in respect of which an ARC carries out acquisition of assets can file no reference.

Procedure for Acquisition - Notice of Acquisition

Though no procedure, as such, has been laid down under SARFESI, a notice of acquisition may be sent to the Obligor (generally speaking, the borrower) or to any other concerned person (such as, co-lenders, statutory authorities etc.) and the Registering Authority in whose jurisdiction the asset is located. Such notice is not mandatory. The notice is not of proposed acquisition but of the acquisition already carried out. If any payment is received from the Obligor after acquisition, the same shall be in trust and be forwarded to ARC.

Resolution of Disputes

Disputes relating to non-payment of any amount due including interest arising amongst Bank, FIs, ARC and Qualified Institutional Buyer shall be settled by conciliation or arbitration as provided in the Indian Arbitration and Conciliation Act, 1996.

Enforcement of Secured Rights – high on agenda

SARFESI has been enacted only a few months ago with its implementation having been stayed partly by the Supreme Court of India. Therefore, it is difficult to comment how effective its enforcement will be. The provisions of SARFESI appear to provide an efficient, inexpensive, transparent and predictable method for enforcing a security interest in property. It provides self-contained and comprehensive provisions for enforcement of security interest including its management and sale.

The rules framed under SARFESI deal with procedure such as making of inventory, auction process etc. There is still a lot to be done as SARFESI is still in its infancy.

SARFESI provides adequate safeguards to the debtor by court involvement though debtors allege a raw deal in this regard.

Recording and Registration of Secured Rights

Though there exists a cost-effective and simple process for publicizing secured interests in movable and immovable assets by registration, the system is quite inefficient. There is no centralized registration and every State has its Registration Office, which are not inter-linked. The department responsible for registrations of charge lacks transparency, is over-burdened and disorganized. Though access to the registry is inexpensive and open to all for recording and search, the record is hard to locate and information difficult to get. Electronic filing has not yet started though computerization of registry is proposed and things are expected to improve in future. Registry officials do not review filings for accuracy or legality.

Enforcement of Unsecured Rights – waiting for its turn

This issue does not seem to be very high on the agenda of reforms. However, unsecured creditors do have a remedy in the form of an expeditious and summary recovery mechanism before Debt Recovery Tribunals. But the procedure followed by Debt Recovery Tribunals lacks efficiency, transparency, and reliability and are predictable only in a few ways. They are not much of assistance in recovering debt, including seizure and sale of immovable and movable assets and sale or collection of intangible assets such as debts owed to the debtor by third parties. There is no efficient enforcement of judgments particularly for unsecured credit.

Some general observations on the new laws

Second Amendment & SARFESI – do they provide an effective and compatible enforcement system?

Though the Second Amendment and SARFESI came as a pleasant new year gift to the financial institutions and bank, the rejoicing is muted. For, the alternative mechanism drawn up under the Bill is perceived as an old tablet in a new foil. In other words, the Bill merely renames BIFR. The powers and jurisdiction of BIFR are now to lie with the Tribunal with some cosmetic changes with the only substantial difference being that while the BIFR had the responsibility of attempting revival of dying companies, the Tribunal will have to not only attempt revival but also perform the last rites if the attempt to revive fails.

A closer look at some of the provisions of the two legislations sets in a realization that there is a lot more required to be done to make the said laws predictable, transparent and affordable enforcement of both unsecured and secured credit claims

by efficient mechanisms outside of insolvency, as well as a sound insolvency system. Also, the Second Amendment does little to expedite and simplify insolvency procedures. Barring a few significant changes, the Second Amendment does little to solve the problems faced under SICA. SARFESI is a bold and firm initiative in the direction of providing a final and equitable debt collection mechanism for creditors and in improving the enforcement of creditor rights to expand credit flows but the legislation, howsoever, well intended, carries holes leaving scope for further dispute and litigation, rather than proving an efficient vehicle for resolving individual disputes between creditors and debtors.

The laws are nevertheless, a big leap in the direction of providing an effective and compatible enforcement system. The Government has resisted all pressures and is determined to introduce further reforms in this direction. A number of other amendments have been made or are being carried out for facilitating and enforcing corporate governance with emphasis on disclosure norms and strict adherence to accounting and auditing standards.

It is now for the administrators of NCLT to enforce the provisions of law effectively and meaningfully. The guidelines, rules and regulations to be framed under the two laws should be drafted in the light of the World Bank Principles after their reconciliation with the domestic social, economic and other compulsions.

Key Objectives and Policies – largely dealt, many over looked.

The Second Amendment is intended as a step towards providing a corporate regime that strikes a balance between liquidation and reorganization. It redefines the time frame for rehabilitation and proposes an expeditious insolvency process in the event of failure of reorganization so as to maximize the value of a firm's assets, including by providing an option to reorganize. Unfortunately, no definite time frame has been provided for various stages during the liquidation proceedings. It is hoped that with the professionals acting as Liquidators, the proceedings will be conducted in a professional fashion maximizing the value of assets and improving the efficiency of the entire process which presently suffers from delay and inefficiency.

Though both, SARFESI and the Second Amendment cannot be said to contain predictable and clear provisions, they are well intended and if properly implemented, can stand to serve their purpose. For instance, though adequate provisions for disclosure of information have always existed, which have been re-emphasized in the Second Amendment, they have never been effectively enforced. Some of the other issues, which need to be addressed, are discussed below.

Need for effective implementation

The essential features governing a model formal restructuring process in any part of the world are common if not alike though they may be structured differently. SICA, in India, is structured, more or less, on the above principles. The question, which, thus, arises for consideration, is at to why SICA has failed to work. In my opinion, any sound legislative framework for its success is dependent upon predictable and

effective judicial process coupled with efficacious enforcement mechanisms. We need to focus and improve upon our implementation and execution mechanism. Also, there is a need for more creative and commercial approach to corporate entities in financial distress and attempt to revive them rather than applying the more traditional and conservative approach of liquidation or bankruptcy. As such, the socio-economic compulsions dictate that before liquidating financially distressed companies, some attempts must be made towards corporate rescue operations.

Tribunalisation of Justice and an over-burdened Tribunal

Though tribunalisation of justice is now a recognized trend, the Indian experiment with Tribunals has been nothing to boast about. They have largely failed to serve the purpose with which they are set up. Flowing from such diverse dimensions of judicial functions, NCLT would be burdened with workload of enormous magnitude and in the process would be likely to lose focus on revival and rehabilitation of sick entities. Change in eligibility criterion for making a reference would itself generate greater workload. In the process, the objective of expedient disposal of the matter may become casualty; leave aside matters, which NCLT would have to decide relating to its other two functional roles. Though the number of Members has been fixed at sixty two, past performance has shown that even under SICA, with the number of Members fixed at fifteen (including the Chairman) the BIFR has never worked with a full contingent of Members and even now is functioning with less than 50% strength for the last two years.

Suspension of proceedings

The Indian experience with rehabilitation has been so disappointing that there has been a knee jerk reaction by taking away the moratorium provision, which, under SICA, sounded the death bell for many creditors. Hopefully, there will be re-thinking and a brief moratorium would be provided to give the debtor time to negotiate a consensual business solution.

SICA failed on implementation front and it is hoped the new regime will be continuously monitored to ensure that it is being implemented in accordance with the policies and purposes for its design.

Defective trigger point for reorganization

In the existing provisions of SICA, it was experienced that the entry level for seeking ameliorative measures by the sick unit was too late owing to the criterion of hundred percent erosion of net worth. Under the Second Amendment, fifty per cent of erosion in average net worth for the last four years of the reference year or three successive defaults in paying installments to the creditors becomes the deciding factor for entry-level eligibility of a sick unit. However, the objective of bringing into purview of NCLT, a case of incipient sickness would be defeated considering the period of 180 days and a further extension by a further time period of 90 days being provided for filing a reference.

Redefining net worth is a very good development though the proposed definition may also suffer from the same problem which besets the present legislation and that is to prevent and curb the flair for creative accounting by changing the accounting policies to feign sickness. This could have been curbed by making the definition of “erosion of net worth” and “accumulated losses” more clear and unambiguous. The new dispensation could have provided for a water tight definition, which could be linked to delegating the powers to the judicial forum put into place to implement the rescue legislation, to notify the accounting policies on the basis of which net worth/accumulated losses would be worked out for determining sickness.

Certificate by Auditors

The new provision for establishing a panel of Auditors to give certificate with regard to the parameters of sickness is a good move. However, it may turn out to be duplication as under the present dispensation the Statutory Auditors are required to give their opinion on sickness of a company under the Manufacturing and other Companies (Auditors Report) Order, 1988. It is not clear as to how this duplication would help as the Auditors on the panel will come from the same stream of Chartered Accountants and may be liable to the same failings as the Statutory Auditors of the Company except that the Auditors out of the panel maintained by NCLT will be giving the certificate.

Court organization.

The existing insolvency court deals with all the parties fairly, objectively and transparently. The court's budget, internal finances, personnel, facilities and administration and technical support systems are vested primarily within the court system or regulated with substantial input from the court system.

Though the insolvency rules can not be termed as fully sensible and predictable, they vest a lot of discretion with judge to make them flexible. There is a separation of court administrative functions. The courts have discretion to appoint other special experts or call for outside technical knowledge but there is no delegation of responsibility per se.

Though court rules are uniform, the case practice and management varies. There is a need for increased continuity between and standardized practices among courts to improve courts' procedures and judges' effectiveness.

Transparency and accountability.

The insolvency system is not completely transparent and accountable. There are a number of decisions taken on the administrative side in the absence of the parties. All records are not open to inspection by parties. There is a need to frame rules that ensure ready access to court records, court hearings, debtor and financial data and other public information. There is nevertheless, adequate notice through

dissemination of information, notice to creditors and interested parties of hearings and activities that affect their interests, notice for filing claims and pleadings, and disclosure and publication of court decisions, court records and public information. There is no improvement upon the existing laws under the Second Amendment.

Judicial decision-making and enforcement of orders.

The courts do encourage consensual resolution among parties where possible. Timely adjudication of issues with a view to reinforcing predictability in the system through consistent application of the law is however an issue which needs to be addressed. Though courts have clear authority but lack effective methods of enforcing its judgments.

There is no improvement upon the existing laws under the Second Amendment which was much more necessary since the jurisdiction will now pass on from the High Courts to NCLT. The High Courts carry enough power and authority to enforce their orders that NCLT will find lacking.

Integrity of the court and participants.

This has never really been a concern as far as Insolvency Court in India is concerned. They have never attracted allegations of corruption as they are presided by High Court Judges. However, at times, fingers have been pointed at BIFR. There are, however, no written standards, guidelines, advisory opinions, complaint and investigation procedures, and tools to redress impropriety.

The judges in India do not expose themselves to press or public.

There is no improvement upon the existing laws under the Second Amendment particularly when the responsibility shifts from a respected institution like High Court to a Tribunal.

The persons involved in a bankruptcy proceeding are subject to rules and court orders designed to prevent fraud, other illegal activity and abuse of the bankruptcy system. The bankruptcy court has been vested with powers to deal with illegal activity or abusive conduct that does not constitute criminal activity, however, when such issues surface they are not dealt with promptly, firmly and uniformly in an appropriate manner.

Firm and public rules and regulations do not exist to avoid corruption and undue influence that would undermine public confidence in the system.

An independent but accountable department, committee or body is required to be set up which will be responsible for establishing, monitoring and enforcing standards of conduct for judges and other participants. There is no provision in the Second Amendment to deal with this issue.

No Comprehensive Bankruptcy Code and Road Map

The Second Amendment stops short of providing comprehensive Bankruptcy Code to deal with corporate bankruptcy. In the fast changing scenario of growing cross-border investment, trade and commerce, cross-border insolvency problems are bound to increase and a comprehensive Bankruptcy Code alone can address such issues taking into consideration international practices. It does not introduce the required road map of the bankruptcy proceedings viz. application for initiating bankruptcy proceedings; appointment of Trustee: empowerment of the Trustee; operational and functional independence; accountability to the court, including the power of the court to remove Trustee in case of mismanagement; relationship with current management; monitoring or substitution; day-to-day operation, etc; time bound restructuring/recognition plan: who should submit; procedure of acceptance; mechanism to sell off; pro-active initiative of the Trustee; number of time-bound attempts for restructuring; decision to go for insolvency and winding up; and strategies for realization and distribution.

International insolvency in India

Unfortunately, the Second Amendment ignores the recommendation of Eradi Committee and fails to provide a framework for cross-border insolvencies, with recognition of foreign proceedings. The Government of India though proposes to deal with the issue near future.

In this area, the recommendations of Eradi Committee have been ignored in the Bill. Indian insolvency laws do not have any extra-territorial jurisdiction, nor do they recognize the jurisdiction of foreign courts in respect of branches of foreign banks operating in India. Therefore, if a foreign company is taken into liquidation outside India, its Indian business will be treated as a separate matter and will not be automatically affected unless an application is filed before an insolvency Court for winding up of its branches in India. At present, thankfully, the Government is considering the adoption of UNCITRAL Model Law on Cross-Border Insolvency to meet the demands of globalization of economy and to deal with international insolvency. This will radically change the orientation of Indian law and make it suitable for dealing with the challenges arising from globalization and increasing integration of Indian economy with the world economy. While drafting the substantive and procedural rules of bankruptcy, international standards for both national and cross-border insolvency should be taken into consideration which, based on Indian situation, should be suitably incorporated.

Need for an effective Out of Court Restructuring mechanism

Presently, the Corporate Debt Restructuring (CDR) Scheme of Reserve Bank of India deals with out of court work out in India. The CDR Scheme has not been very effective and is hardly invoked by debtors. The CDR Scheme is presently under review. The INSOL Global Principles have been made available to the concerned authorities for their consideration and adoption.

Bankruptcy proceeding for banks and financial institutions

Bankruptcy proceedings against banks and financial institutions have a very special significance as it affects the domain of the monetary system and management and financial stability. In several developed countries there is a separate bankruptcy code for banks and financial institutions. In India, this is primarily a responsibility of Reserve Bank of India. The new law and procedure should be structured to handle the bankruptcy proceedings in the case of banks and financial institutions in consultation with the Reserve Bank of India.

Informal Framework

Corporate Debt Reconstruction (CDR) System

Not all customers who have defaulted repayment to the commercial banks and contributed of the burgeoning NPA of these banks are willful defaulters. Quite a few are described as "Sunset" industries. Others have become weak due to changes in external environment, due to delay in execution of the project, due to cost escalation or on account time-up needed to develop an optimum share for the product. These accounts are classified as "NPAs" no doubt, but these pertain to a different category, where hasty coercive action or forced recovery measures cannot be justified. Lenders have an obligation, to consider genuine difficulty of borrowers. If this principle is not accepted the purpose of bank financing industries and other sectors of economy loses the definition "development finance" and becomes reduced to mere money lending.

Successful reconstruction of an ailing unit that has defaulted repayment and bringing it back to standard assets, is also a strategy for dealing with NPAs without causing pain to the defaulted borrower. The process is primarily rescheduling the debt portfolio of the borrowers among its creditors to help the borrowers in the revival of projects and continue operations through reductions in existing debt burden and establishment of new credit lines with implied assumption that the lender would prefer reduction in risk to optimization of returns. The objective of the CDR is to ensure a timely and transparent mechanism for restructuring of the corporate debts of viable corporate entities affected by internal and external factors, outside the purview of BIFR, DRT or other legal proceedings, for the benefit of all concerned.³⁵

Salient Features of the Scheme

legal basis for the mechanism will be provided by ICA (Inter-Creditor Agreement). All participants in the CDR mechanism shall have to enter into a legally binding ICA with necessary enforcement and penal clauses.

³⁵ (Details can be seen from schedule 1 or from the RBI's official website www.rbi.org.in)

It would be a voluntary system based on debtor-creditor agreement and inter-creditor agreement,

The scheme will not apply to accounts involving only one financial institution or one bank; instead, it will cover multiple banking accounts/ syndication/consortium accounts with outstanding exposure of Rs. 20 crore and above by banks and institutions,

The CDR system would only be applicable to standard and substandard accounts, with potential cases of NPAs getting a priority.

Effect of Corporate Debt Restructuring (CDR)

Banks and financial institutions have been gripped by a corporate debt restructuring (CDR) frenzy. Till 31 July, 2003, 45 CDR proposals worth Rs 44,204 crore had been cleared. The Rs 9,863-crore, Essar Oil CDR cleared in last July is, perhaps, the latest and biggest example. But one wonders as how will any of this help clean up India's Rs 100,000-crore bad loan mess?

The answer: not much, not now. Most of the restructuring done so far is for loans that are still reflected as 'standard' in banks' books, i.e. loans that hadn't yet been classified as non-performing assets (NPAs). The major part of the loans which have been restructured so far under CDR are standard assets. Banks account for such restructured debts as standard assets though they are classified in a separate category from the other assets.

The surge in debt restructuring began in mid-2002 with the introduction of the corporate debt restructuring mechanism. Under this, in cases where consortium lending existed (this covers most large loans in India), if 75% of lenders by value agreed to a restructuring of debt, the plan could go ahead.

Earlier, all lenders had to agree to the restructuring - even a small borrower with a couple of crore at stake. The idea behind this was to prevent fresh non-performing loans from emerging. These loans had been made at very high rates to firms in sectors like steel, which had seen a global downturn.

Though Rs 8,000 crore worth of loans are still pending before the CDR cell (till latest data available), most of the big restructurings are over, at least for now. Most pending cases are smaller accounts, between Rs 150 crore and Rs 200 crore. The exceptions are cases like Haldia Petrochemicals, where around Rs 4,000 crore is at stake. As for the big one - Dabhol - the account is unlikely to come up for restructuring as its assets are up for sale.

But the CDR wave is by no means over. This February, the Reserve Bank of India allowed banks to put up even assets it had classified as 'doubtful' into the CDR. These are assets where the possibility of the bank recovering its dues are far less than 'substandard' assets. Banks and FIs have also agreed to help companies whose loans are classed as doubtful, if less than 10% of the outstanding amount are NPAs in the borrowers' books. Cases under the Board for Industrial and Financial

reconstruction (BIFR) are also likely to be discussed under the cell. This step alone would bring over Rs 9,000 crore of NPAs for restructuring.

CONCLUDING OBSERVATIONS

- The ultimate impact of the actions put forward by both the RBI and Government of India, however, will be reflective of the degree of effective enforcement by the regulators themselves.
- Indian banks have to remain focused in their efforts to recover their spiralling bad loans, or non-performing assets, to sustain the positive trend of improving asset quality.
- The lack of research and academic activity in the banking sector is also felt and attended to at institutional level. The areas felt to be looked into, inter alia, are:
 - i) should bankers take substantial exposure to the stock market?
 - ii) Should bankers be exposed to equity financing?
 - iii) Degree and extent to which Indian banking system should often quote the RBI norm which it regards as a universal application.
 - iv) Advances against shares are considered well secured and safe, and the risk factor has to be tackled by higher margin and effective follow up. But do they pass the test of purpose orientation, namely financing only for a productive purpose?
 - v) What should be the guiding principles for RBI for the purpose of orientation and end use principle, when it comes to the question of extending equity finance to corporates?
 - vi) What should be norms / ceiling for Advances to Share Brokers and Market Makers, for meeting working capital needs and surprisingly, in the absence of account wise ceiling prescribed by RBI?
- It is prescribed that the RBI continues with its conservative approach towards bank exposure to capital markets. In view of the recent disastrous experience of banks, consequent to the over exposure to capital markets and real estate sectors in South East Asia and Japan, perhaps RBI's conservatism should be classified as prudential.
- Unsound banking is not always the source of financial problems. They are many macro-economic roads to ruin. When exchange rates are not in alignment with fundamental forces in the economy, there could be financial distress. Banking crises could follow when there is exposure in central bank credit, bubbles in asset prices or in credit creation by banks. Even

deregulation of interest rates resulting in low return on assets may force banks with high cost of funds to take unreasonable risks.

- Better risk management techniques, compliance with the core principles for effective banking supervision, skill building and training, and transparency in transactions could be the solutions. Removal of non-performing loans from the banking system even through government or quasi government funds at times, is essential. But official assistance should be so structured as to avoid moral hazard.
- To conclude with, till recent past, corporate borrowers even after defaulting continuously never had any real fear of bank taking any action to recover their dues despite the fact that their entire assets were hypothecated to the banks. This is because there was no legal Act framed to safeguard the real interest of banks. With the legislatures having given their mind in enforcement of security, the sun probably would shine on the NPAs-ridden Indian banks. Enactment of SARFESI Act, 2002 is evident for this drawing this assumption. Also, the passing of the Securitisation Act, 2002 came as a bonanza for investors in banking sector stocks that in turn resulted into an improvement in their share prices.
- While NPA cannot be eliminated, but can only be contained, it has to be done not at a heavy cost of provisioning and increasing the portfolio of credit. Along with recovery fresh inflow of NPA should be brought down at a level much less than the quantum of its exit. If this specific goal is reached, there is an eventual solution for this problem.
- In-house efforts are needed to pull out of in-house Quandary. They are vested with operational freedom. Risk management and threat-containment is an in-house obligation. In an environment of keen competition and global environment of operation, only the efficient and alert would survive. Looking for external sources towards solution for internal problem conveys lack of self-reliance and ingenuity. Start to look inwards and look at the source or origin. (Malady is also from the "W" from inside and not only from the "T" from outside). Plug the weak points that allow entry. There can be no other solution. Strive to develop robust health and not look to curing immutable sickness, after allowing ailment to breed out of your own surfeit.
- Still, there are several other worries about the banking sector, mainly confusion over ownership and control. Sometime soon India will be forced to apply the norms of developed countries and many banks (including some of the biggest) will show very poor return ratios and dozens of banks will be bankrupt. When that happens the two popular reasons to defend bad banks will disappear. These are: one, to save face in the remote hope of that fortunes will revive' and two, some banks are too big to be allowed to fail, fearing social upheaval.
- However, putting in place radical legal reforms and sound Corporate Good Governance is essential for the success in NPA management.

INTRODUCTION OF SUMANT BATRA

Born on 10th December, 1965, Mr. Sumant Batra is the founding partner of Kesar Dass B. & Associates (KDB), a New Delhi based corporate and commercial law firm.

Areas of specialization

Mr. Batra's areas of specialisation include, amongst others, advising and representing in the matters of corporate restructuring and reorganisation, insolvency and liquidation proceedings, recovery of corporate debt, asset management and reconstruction, take-overs, corporate and commercial litigation/documentation and international arbitration. He also provides foreign investment related legal consultancy and on joint venture documentation, foreign investment approvals, formulation of investment & business strategy, etc.

His professional services are being sought in India, Pakistan, Bangladesh, Nepal, Sri Lanka and other countries in the Indian sub continent.

Involvement in profession related organisations and bodies

Mr. Batra is Hony. Secretary of the AAIFR and BIFR Bar Association (of Restructuring Law Practitioners) of India.

He is Hony. Founder Secretary of INSOL India – the Indian federation of Insolvency Professionals. www.insolindia.com

He sits on the Board of INSOL International (II) – the International Association of Restructuring and Insolvency Professionals with HO in London, U.K. www.insol.org

He is Founding Member of International Insolvency Institute (III), Virginia, U.S.A.

Mr. Batra is Director on the Board of Family Business Network-India, the country chapter of FBN-International, Switzerland.

He is Chairman of Small Practices Issues Committee of INSOL International and Member of its Membership Committee.

He is Vice Chair of the Insolvency Committee of Inter Pacific Bar Association (IPBA) and acts as the Chief Liaison of the Committee with World Bank, UNCITRAL and Asian Development Bank.

He is Member of Advisory Panel of Global Insolvency Website of American Bankruptcy Institute and II.

He is Member of Business Law & Insolvency Committee of LAWASIA.

He is Member of Bar Association of Delhi High Court and Debt Recovery Tribunal Bar Association.

He is Life Member of SAARC Law - the legal arm of South Asian Association of Regional Countries comprising India, Pakistan, Nepal, Sri Lanka, Bhutan, Bangladesh and Maldives.

Involvement with International and other Projects

Mr. Batra was a member of panel of international experts on a World Bank sponsored project for the Chinese State Economy and Trade Commission (SETC) entitled “Studies on Alternative Approaches to Debt Restructuring of Distressed Enterprises” for revival of State Owned Enterprises (SOEs) in Peoples Republic of China.

The World Bank has appointed him as Indian expert to conduct an assessment of the insolvency and creditors rights system in India under a joint World Bank-IMF program to develop Reports on Observance of Standards and Codes (ROSC).

He is Convenor of the Committee of Group of Experts to Review the Indian Personal and Consumer Insolvency Laws set by INSOL India in association with the Law Commission of India.

He has contributed the Indian Report on the INSOL International project and publication titled “Directors in Twilight Zone” relating to liabilities and obligations of Directors.

Mr. Batra is assisting INSOL International on its project for updating the Wiley’s publication on Recognition and Enforcement of Cross-Border Insolvency.

Mr. Batra has provided inputs from India to INSOL International in the UNCITRAL project of drafting the Model Law on Insolvency.

He was associated with the setting up of Business Recovery and Insolvency Practitioners Association of Sri Lanka and Nepal Insolvency Practitioners Association.

He is working in Bangladesh to set up an Insolvency Organisation.

International conferences, seminars and travel

Mr. Batra has addressed various international and domestic conferences as a speaker from India, including:

The 6th World Congress of INSOL International held in London in 2001; Asian Institute of International Financial Law (University of Hong Kong) Symposium on Comparative Study on Insolvency Law held in Hong Kong in April 2002; INSOL Annual Conference held in Beijing in October 2002; University of Hong Kong Conference on Insolvency Law held in Hong Kong in October 2002; Founding Meeting of Nepal Insolvency Professionals Association (NIPA) in Kathmandu in December 2002; 2nd Forum for Asian Insolvency Reform (FAIR) organised by World Bank, OCED, ADB, the Government of Japan, AusAid and Ministry of Justice of Thailand in Bangkok, December 2002; Global Forum on Insolvency Risk Management (FIRM) organised by The World Bank in January 2003 in Washington D.C.; Annual Conference of Inter-Pacific Bar Association (IPBA) held in New Delhi in February 2003; International Insolvency Conference organised by Singapore Government in Singapore in March 2003; Guest of Honour and Speaker at the Meeting of Business Recovery and Insolvency Practitioners Association of Sri Lanka (BRIPASL) in April 2003; Invited to speak at III Conference in New York in June 2003; Invited to speak at American Bankruptcy Institute Conference and II Conference, both to be held in Las Vegas in September, 2003; invited to speak at the 29th Meeting of Phillipine Chamber of Commerce and Industry to be held in November, 2003 in Manila.

He is widely travelled and has, amongst others, frequently visited U.S.A., U.K., Canada, France, Germany, Switzerland, Austria, Netherlands, China, Thailand, Hong Kong, Malaysia, Singapore, Sri Lanka, Bangladesh, Pakistan and Nepal.

Contributions as a writer

He is on the Editorial Board of INSOL India publication, *INSOL Bulletin* and INSOL International's publication, *INSOL World*.

He regularly contributes by writing articles or write-ups for various international and domestic publications including Families in Business produced in official association with The Family Business Network. He reads and writes poetry and has a publication to his credit.

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