

INSOLVENCY AND BANKRUPTCY CODE, 2016 - LAW AND OPPORTUNITIES

30 DECEMBER 2016

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Introduction

- Concept of rescue and rehabilitation introduced
- Reducing asymmetry of information
- Time bound process to preserve economic value
- Applicable to Indian companies, limited liability partnerships, partnership firms and individuals
- Not applicable to 'financial service provider'

Erstwhile Legal Framework

***Presidency Towns Insolvency Act, 1909/
Provincial Insolvency Act, 1920/ Indian Partnership Act***

Individuals and partnerships

Companies Act, 2013 / Companies Act, 1956

Rehabilitation / revival / winding up of companies

**only court supervised winding up available now under the 2013 Act; other proceedings under the Code*

Limited Liability Partnership Act, 2008 r/w. Limited Liability Partnership (Winding up and Dissolution) Rules, 2012

Limited liability partnerships

** No provisions for rehabilitation / revival of LLPs*

SICA

Revival / rehabilitation of only sick industrial companies

SARFAESI / Recovery of Debt Due to Banks and Financial Institutions Act, 1993

Debt recovery / enforcement of security

No revival / rehabilitation of the defaulting entity

CDR , JLF, SDR and S4A

Introduced by RBI as out of court process

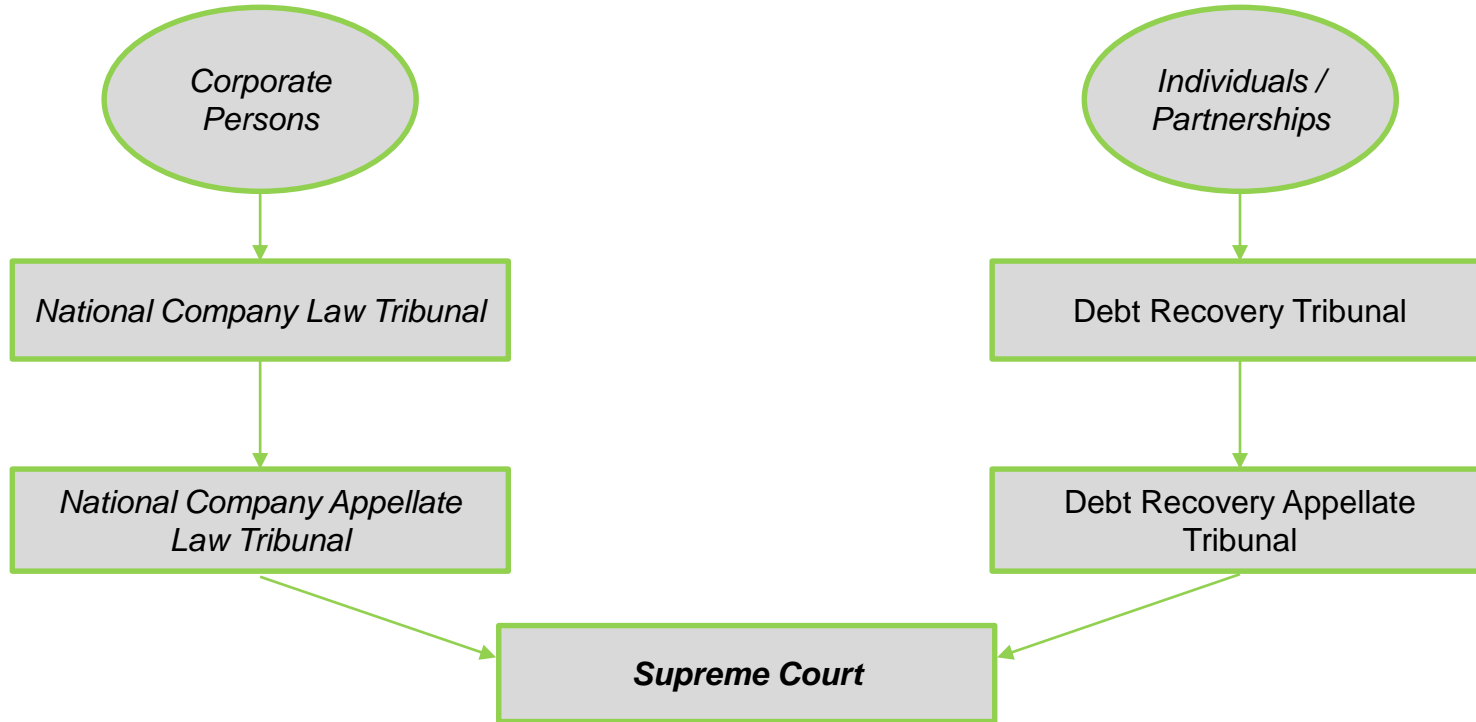
No legal sanction

- Established on 1 October 2016
- Head office: New Delhi
- Chairperson: Sh. Madhu Sudan Sahoo
- Sh. Ajay Tyagi, Additional Secretary (Investment - MoF)
- Sh. Amardeep Bhatia, Joint Secretary (nominated by MCA)
- Sh. G.S. Yadav, Joint Secretary and Legal Advisor (nominated by Ministry of Law and Justice)
- Sh. A. Unnikrishnan, Legal Advisor, Legal Department (nominated by Reserve Bank of India)
- Whole-time members yet to be appointed

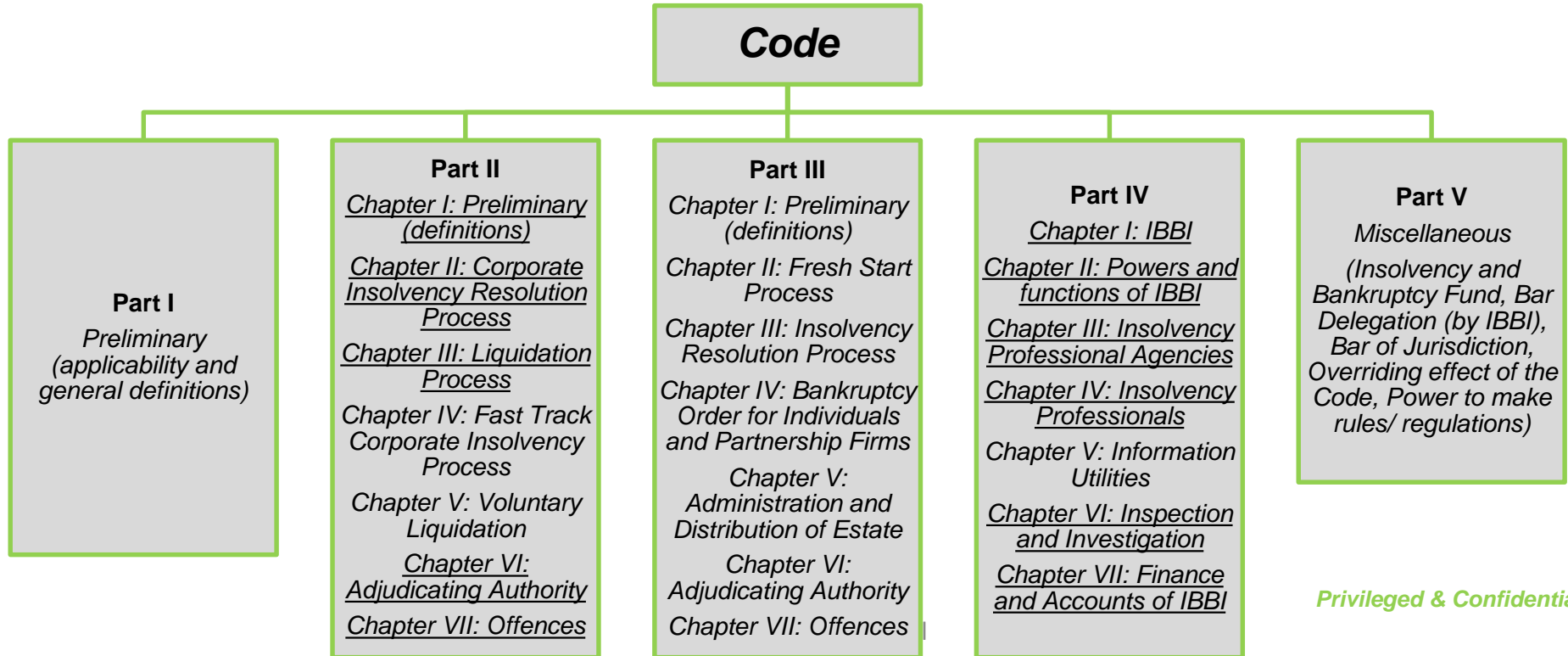
○ **Functional Roles and Duties:**

- **Registration of insolvency professional agencies, insolvency professionals, information utilities**
- **Issuance of rules / regulations**
- **Provision of model bye-laws (for standards of professional and ethical conduct)**
- **Provision of curriculum for enrolment as insolvency professionals**
- **Collection and maintenance of records relating to insolvency and bankruptcy cases**

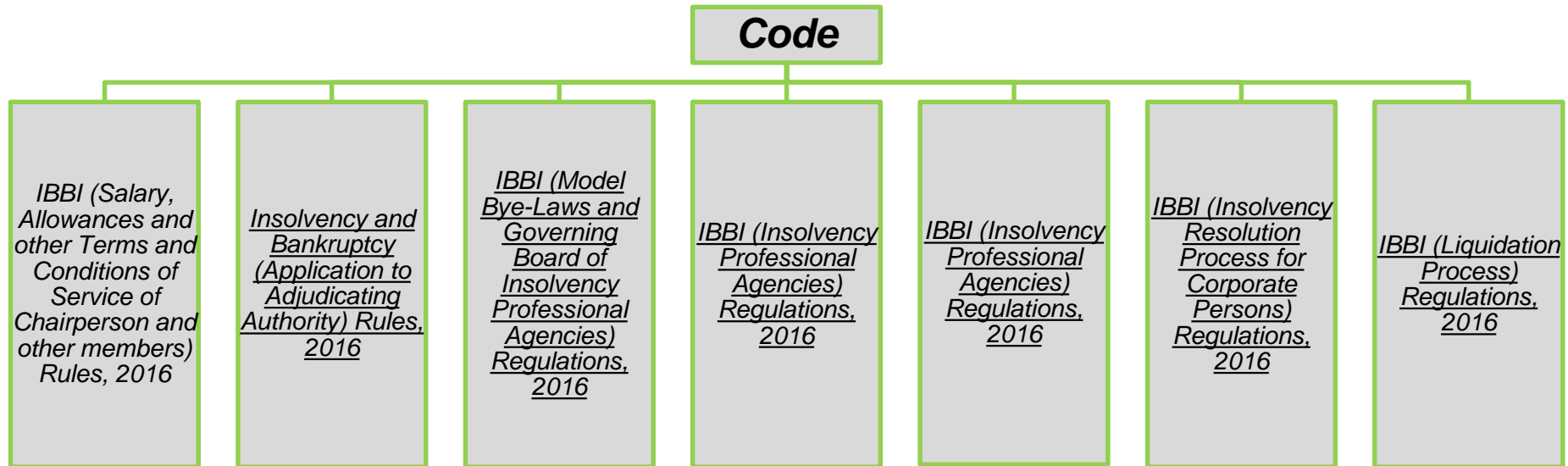
Construct of the Code



Construct of the Code



Legislations in effect



Corporate Insolvency Resolution Process

- Who can start the IRP – (i) Financial Creditor (ii) Operational Creditor (iii) Corporate Debtor
- Timelines for completion of IRP
- Results of IRP being successful or otherwise

Corporate Insolvency Resolution Process

Initiation of Corporate IRP by Financial Creditor (Indicative Timelines)

Timeline	Activity
X – (~days)	Default by Corporate Debtor
X	Application by FC before the NCLT
X + 14	Ascertaining of default by NCLT to its <u>satisfaction</u>
X + (~21 days)	Communication of acceptance or rejection of the application; in case of rejection, 7 days notice to rectify the application
X + (~ 14-21 days) = Y	Commencement of Corporate IRP <ul style="list-style-type: none"> - Declaration of moratorium - Appointment of interim RP - Public announcement for initiation of Corporate IRP
~	Appointment of interim RP <ul style="list-style-type: none"> - Term of interim RP to not exceed 30 days - Management and affairs of the Corporate Debtor to vest in the interim RP and powers of board / partners of the Corporate Debtor to be exercised by the interim RP - Manage the operations of the Corporate Debtor as a going concern

Moratorium:

- To have effect from date of admission order until completion of Corporate IRP or 180/270 days
- Prohibits institution of suits or continuation of pending suits including execution of judgments, orders or decrees
- Prohibits transfer, encumbrance or alienation of any assets or any legal rights
- Prohibits foreclosing, recovery or enforcement of any security interest including under SARFESI
- Supply of essential goods or services to the Corporate Debtor not prohibited

Corporate Insolvency Resolution Process

Initiation of Corporate IRP by Financial Creditor (Indicative Timelines) (Continued)

Timeline	Activity
Y + (~days)	Receive and collate claims; constitute the CoC
Y + (~days)	First meeting of the CoC to be held within 7 days from the constitution; CoC may either confirm the appointment of the interim RP or replace the interim RP; <u>a FC may appoint an insolvency professional other than the RP to represent such FC</u>
~	Preparation of IM by RP
~	Preparation of resolution plan by resolution applicant basis the IM and submission to the RP
~	Review of resolution plan by the RP and submission to the CoC
~	Approval of resolution plan by the CoC (by vote of not less than 75%)
~	Submission of approved resolution plan to the NCLT
~	Review and approval of the resolution plan by the NCLT to ensure compliance with the provisions of the Bankruptcy Code
~	Moratorium to cease; all records of the Corporate IRP to be forwarded to the Board
Y + (180) + (90)	<u>Completion</u> of Corporate IRP; one time extension of the Corporate IRP (to be supported by 75% vote of the CoC)

CoC:

- To comprise only of FC
- All decisions of the CoC to be taken by a vote not less than 75% of voting share of the FC
- CoC may at any time during the IRP replace the appointed RP

Liquidation and Winding-up (Distribution of Assets)

Liquidation of Corporate Debtor

- Order of liquidation:
 - Resolution plan is not submitted within the prescribed timeline
 - Rejection of resolution plan
 - Upon resolution of the CoC
 - Contravention of approved resolution plan
- No suit or other legal proceeding by or against the corporate debtor, except suit or legal proceeding by liquidator with the prior approval of the NCLT
- Order of liquidation - Notice of discharge to the officers, employees and workmen of the corporate debtor (not applicable if liquidator continues the business of the corporate debtor during the liquidation process)

Liquidation and Winding-up

Liquidation of Corporate Debtor (Indicative Timelines)

Timeline	Activity
X	Order for liquidation of Corporate Debtor; RP to act as liquidator unless replaced by the NCLT
X + (~ days)	Formation of liquidation estate by the liquidator
X + 30	Consolidation of claims by the liquidator; a creditor may withdraw or vary claim within 14 days from submission
X + (~ days)	Verification and acceptance / rejection of claims by the liquidator; appeal from any rejection within 14 days
X + (~ days) = Y	Distribution of assets from the liquidation estate (<i>please see distribution waterfall in the following slide</i>)
Y + (~ days) = Z	Dissolution of the Corporate Debtor by the NCLT
Z + 7	Copy of dissolution order to be forwarded to the authority with which the Corporate Debtor is registered

Liquidation estate to include all assets of the Corporate Debtor, except:

- Assets owned by third parties but in possession of the Corporate Debtor
- Personal assets of shareholders or partners of the Corporate Debtor
- Assets of Indian or foreign subsidiaries of the Corporate Debtor

Liquidation and Winding-up

Distribution Waterfall

Corporate IRP cost and Liquidation Costs (in full)



Pari passu:

- a. Workmen's dues for period of 24 (twenty-four) months preceding liquidation commencement date; and
- b. Debts owed to a secured creditor, if relinquished right to the liquidation estate

c. Wages and any unpaid dues owed to employees (other than workmen) for period of 12 (twelve) months preceding liquidation commencement date

d. Financial debts owed to unsecured creditors



Pari Passu:

- a. Any amount due to the Central Government and State Government (for a period of 2 (two) years preceding the liquidation commencement date; and
- b. Debts owed to a secured creditor for unpaid amounts following enforcement of security interest



Secured Creditor:

- During liquidation proceedings, a secured creditor has the option to either relinquish its security interest to the liquidation trust or realise its security interest
- If realising such security interest, the secured creditor must inform the liquidator
- Secured creditor entitled to enforce, realise, settle, compromise or deal with security interest and apply the proceeds to the debts due
- Any surplus amounts realised by the secured creditor are required to be accounted and tendered to the liquidator.

Liquidation and Winding-up (Distribution of Assets)

Liquidation of Corporate Debtor – Distribution Water

Distribution Waterfall

Any remaining debts and dues



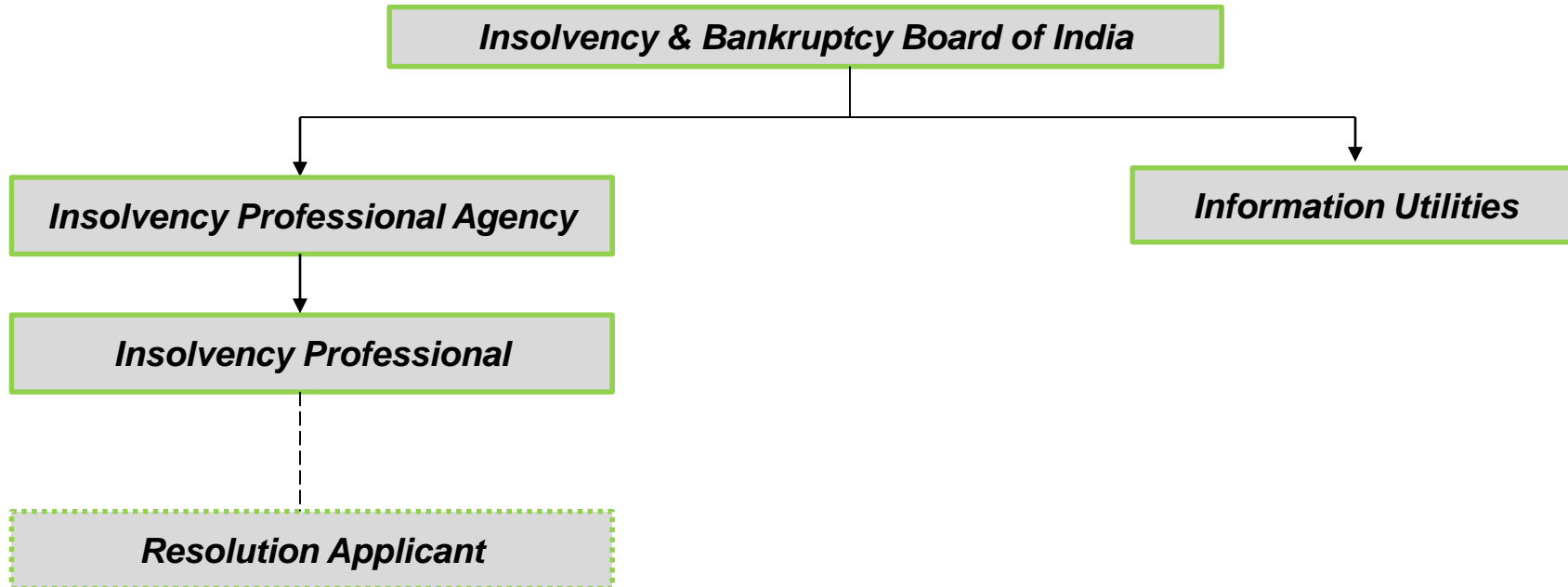
Preference shareholders, if any



Equity shareholders, or partners, as the case may be

**** Any contractual arrangements between recipients as indicated in the distribution waterfall shall be disregarded at the time of distribution***

Key Authorities / Intermediaries



Key Authorities / Intermediaries - IPAs

- Registered with the IBBI
- Registration Eligibility:
 - Registration u/s. 8 of the Companies Act, 2013
 - Sole objective to operate as an insolvency professional agency
 - Minimum net worth of INR 10 crores
 - Paid-up share capital of INR 5 crores
 - Controlled by person(s) resident in India
 - Not more than 49% is held by person(s) resident outside India
 - Not a subsidiary of a body corporate through more than one layer
- Other Requirements:
 - Application fees – INR 10 lakh (non-refundable)
 - Registration – valid for 5 years
 - Renewal fees – INR 5 lakh (non-refundable)
 - Annual fees – INR 5 lakh

Key Authorities / Intermediaries - IPAs

- Key Functions:
 - Membership
 - Monitoring
 - Redressal
 - Disciplinary
- **Three registered IPAs:**
 - **Indian Institute of Insolvency Professionals of ICAI;**
 - **ICSI Insolvency Professionals Agency; and**
 - **Insolvency Professional Agency of Institute of Cost Accounts of India**

Key Authorities / Intermediaries - IUs

- Registered with the IBBI
- Key Functions:
 - Collection and consolidation of financial information submitted by financial and operational creditors
 - Verification of financial information before such information can be stored in an universally accepted format
- Financial information stored can be accessed and relied upon for verification of claims during an insolvency resolution process
- Any person submitting financial information to an information utility is obligated to not provide such information to any other person, save and except as may be prescribed

Key Authorities / Intermediaries - IPs

- Registered with the IBBI and enrolled as member of IPA
- Registration Eligibility:
 - Passed the National Insolvency Examination
 - Passed the Limited Insolvency Examination, and, has 15 years of experience in management after receiving a Bachelor's degree
 - Passed the Limited Insolvency Examination, and, has 10 years of experience as CA, CS, Cost Accountant or advocate
- Limited Registration:
 - For chartered accountant, company secretary, cost account, or advocate in practice for 15 years
 - Application Fee: INR 5,000
 - Validity: 6 months

Key Authorities / Intermediaries - IPs

- Other Requirements:
 - Application fees – INR 10,000 (non-refundable)
 - Registration – valid for 5 years
 - Renewal fees – INR 10,000 (non-refundable)
- An LLP, partnership firm or company may be recognised as an insolvency profession entity, if majority of the partners or whole-time directors, as applicable are registered insolvency professionals
- Currently, 166 persons are registered as insolvency resolution professionals with IBBI
- **Key function: Protect and preserve the value of property and manage operations as a going concern**

Opportunities

- IPs
 - Resolution applicant / corporate finance
 - Representing financial institution in the CoC
 - Liquidator
 - Registered valuer
 - Tax advisory
 - Re-structuring
 - Forensic
 - Audit
 - Risk management
 - Multi disciplinary practices
-
- No conflict of interest
 - Limitation of liability
 - Fees, costs and expenses

International experience

[From press articles]

- Fees earned by law firms, administrators and consultants in Lehman Brothers bankruptcy case till September 2013 - approx. USD 2 Billion (Estimated assets of Lehman as of Sept. 2008 was approx. USD 631 billion)
- Energy Trading Firm Enron's bankruptcy case – approx. fees earned by lawyers and administrator is USD 790 million
- Bernard Madoff bankruptcy (total assets USD 17billion) – approx. USD 700 million in fees paid to liquidator and lawyers



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