Evaluating the need for sectoral insolvency frameworks in India: The telecom sector as a case study

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Abstract: *Ever since the enactment of the Insolvency and Bankruptcy Code in 2016 - a unified legislation regarding insolvency resolution - demands for sectoral insolvency frameworks have emerged without clear analytical underpinning. Undoubtedly, a downturn or crisis in a particular sector affecting companies' ability to pay debts may necessitate evaluating the possibility of such frameworks. However, such frameworks can also result in unequal standards and principles being applied to businesses. This paper investigates the conditions under which sectoral insolvency frameworks might be necessary or appropriate. In particular, they may be required when (i) there is a large volume of insolvency processes in a sector, (ii) the corporate debtor has sectorally distinct characteristics, and there are (iii) delays in the insolvency process in that sector. Given its strategic importance, complex regulatory nature, and the most recent call for a sectoral framework, we apply this framework to the Indian telecom sector. We find that the necessary requirements are not met for the telecom sector, suggesting that there may not be a need for a sectoral insolvency framework at this point. We hope that our framework and methodology for arriving at this conclusion will serve as a useful reference point for future legal analysis, policy formulation, and scholarly inquiry on this issue.*

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I. INTRODUCTION

The Insolvency and Bankruptcy Code (**‘Code’**), enacted in 2016, was intended to be the sole legislation regarding insolvency in India.[2] To ensure clarity, erstwhile provisions across legislations that dealt with insolvency were omitted, and all questions concerning insolvency were only intended to find an answer in the Code.[3]

However, the Code has not been without its shortcomings. Till December 2022, only 10% of insolvency resolution processes led to a resolution plan.[4] The realisable asset value as a percentage of claims fell to 30.4%, and, on average, it took 587 days for the final approval of a resolution plan - more than double the 270-day threshold provided in the Code.[5] This, coupled with increased debt exposure and interest rate hikes, has led to worries that several entities will be driven into distress and will require a suitable framework for insolvency resolution.[6] Studies have shown differential outcomes for varying sectors, with delays in approval of the resolution plan being significantly longer in the electricity, retail trade, and construction sectors, and corporate debtors from the service industry facing more delays than non-service or manufacturing industries.[7]

One proposed solution to these challenges has been the call for sectoral insolvency frameworks. There has been a growing consensus that India, like the UK, needs sectoral frameworks for other industries. It is argued that separate frameworks for sectors would enhance value maximisation and protect corporate debtors.[8] Notably, the drafters of the Code were conscious of the need for sectoral frameworks. They provided exemption to entities with a *‘dominantly*

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[2] Ministry of Finance, ‘The Report of the Bankruptcy Law Reforms Committee’ (2015), para 3.4.3. As per the Supreme Court of India, the IBC is a complete Code. It intends to cover all processes relating to reorganisation to ensure effective and timely resolution. *See*, *Innoventive Industries Ltd. v ICICI Bank* (2018) 1 SCC 407.

[3] *See* The Insolvency and Bankruptcy Code, Sections 245 – 255 and Eleventh Schedule.

[4] Insolvency and Bankruptcy Board of India, ‘The Quarterly Newsletter of the IBBI, October - December 2022’ (2022).

[5] ibid.

[6] Ajay Shah, ‘Five Questions for 2023’ (*Business Standard*, 12 December 2022) <https://www.business-standard.com/article/opinion/five-questions-for-2023-122121100875_1.html> last accessed 16 August 2023.

[7] Insolvency and Bankruptcy Board of India, ‘Assessment of corporate insolvency and resolution timeline’ (February 2021) 6.

[8] *See*, for instance, Shreeja Sen, 'Should there be different IBC resolution mechanisms for different sectors' (*Business Standard*, 12 February 2019) <https://www.business-standard.com/article/opinion/should-there-be-different-ibc-resolution-process-for-different-sectors-119021100002_1.html> last accessed 16 August 2023; Neeti Shikha and Rebecca Parry, ‘The Case for Sectoral Approach to Insolvency Resolution in India’ (*Mint*, 03 February 2023) <https://www.livemint.com/opinion/columns/the-case-for-a-sectoral-approach-to-insolvency-resolution-in-india-11675355567427.html> last accessed 16 August 2023; Neeti Shikha, ‘Go First’s insolvency has policy riddles we must resolve’ (*Mint*, 10 May 2023) <https://www.livemint.com/opinion/columns/global-airline-insolvency-crisis-lessons-for-india-s-aviation-industry-on-protecting-creditors-and-passengers-11683655751046.html> last accessed 16 August 2023.

financial function',[9] whose failure can be highly disruptive for households and threaten the financial stability and health of the economy.[10]

In an extension of the need to exempt entities with unique characteristics from the uniform insolvency framework, there have also been calls for sectoral insolvencies in the real estate and micro, small and medium enterprise (**'MSME'**) sectors. This is not surprising. Together, these sectors constitute 31% and 30% of all resolution (corporate insolvency resolution process or **'CIRP'**) and liquidation processes under the Code, respectively.[11] As a result, the Code was amended to recognise allottees in a real estate project as financial creditors[12] and to introduce an out-of-court pre-packaged resolution process with necessary checks and balances to resolve MSMEs and provide speedier resolutions.[13]

The demand for sectoral frameworks has been echoed by the Lok Sabha Standing Committee on Energy.[14] In 2018, the Committee addressed the Reserve Bank of India's (**'RBI'**) Revised Framework for resolving stressed assets in the energy sector.[15] It observed that energy is a *'vital sector of our economy which acts as a core to shoulder the other engines of the economy'* and thus requires that *'specifics and realities of the sector should be taken into account'*.[16]

Finally, in 2022, the Department of Telecommunication released the Draft Indian Telecommunication Bill, 2022 (**'Draft Telecom Bill'**). It aimed to address sectoral difficulties of when the spectrum is not being used due to insolvency and ensure its continuous utilisation.[17] This was a response to judicial pronouncements that treating dues in the telecom sector requires a differential approach and that to ensure continuous utilisation, telecom spectrums under insolvency can only be sold after clearing government dues.[18] Notably, the UK's approach to insolvency demonstrates the benefits of such a framework, which emphasises safeguarding

[9] Ministry of Finance (n 2), para 5.1.
[10] Ministry of Finance, 'The Report of the Financial Sector Legislative Reforms Commission' (2013), para 7.1.
[11] For this calculation, we take 'retail trade' to mean the MSME sector.
[12] The Insolvency and Bankruptcy Code (Second Amendment) Act 2018. *See also*, Ministry of Corporate Affairs, 'Report of the Insolvency Law Committee' (2018).
[13] The Insolvency and Bankruptcy Code (Amendment) Act 2021. *See also*, Ministry of Corporate Affairs, 'Report of the Insolvency Law Committee on pre-packaged insolvency resolution process' (2021).
[14] Lok Sabha Standing Committee on Energy, 'Impact of RBI's Revised Framework for Resolution of Stressed Assets on NPAs in the Electricity Sector' (2018).
[15] Reserve Bank of India, 'Resolution of Stressed Assets – Revised Framework' (2018).
[16] Lok Sabha Standing Committee on Energy (n 14) 53.
[17] Draft Indian Telecommunication Bill, 2022.
[18] *Union of India v Vijay Kumar Iyer*, Company Appeal (AT) (Insolvency) No. 733 of 2020, 103, 106.

vital services, prioritising consumers and members, and placing the broader public interest above traditional creditor concerns during insolvency proceedings.[19]

Like other jurisdictions, the development of frameworks for financial service providers (**'FSPs'**) and the Real Estate and MSME sectors have been informed by a rigorous process, extensive public consultation, and a nuanced understanding of these sectors' distinct characteristics and requirements. These frameworks were introduced after a careful evaluation that ensured the need for such sectoral frameworks, considering specific challenges and exigencies. This process was reflective of a comprehensive strategy that acknowledges the specificities of each sector, aiming to address the unique challenges they face in the context of insolvency.

However, recent demands for sectoral frameworks have not been based on any analysis of when a country should adopt such frameworks. Allowing such frameworks can result in unequal standards and principles being applied to businesses based on their sectors. This may reduce fairness, consistency, and predictability in the insolvency process. On the other hand, a uniform insolvency law can help reduce the complexity of the insolvency process, making it easier for businesses, creditors, and stakeholders to understand and navigate the process.[20] This can help preserve the value of businesses, protect the interests of creditors, and minimise the negative impact of insolvency on the wider economy.[21]

Informed by examining past considerations and experiences, we develop criteria to guide the formulation and application of sectoral insolvency frameworks. It aims to reflect a multidimensional approach and incorporate normative considerations, thus providing a robust foundation for analysing and addressing the unique insolvency challenges within various industrial contexts. We note that such frameworks may be required when (i) there is a large volume of insolvency processes in a sector, (ii) the corporate debtor has sectorally distinct characteristics, and (iii) there are significant delays in the insolvency process in that sector.

In this regard, this paper uses the example of the Indian telecom sector – the latest in a series of sectors that may require such frameworks – where both the legislature and the judiciary have

[19] *See*, for instance, the Building Societies Act 1986 (UK), the Water Industry Act 1991 (UK), the Railways Act 1993 (UK), and the Energy Act 2004 (UK).
[20] Irit Mevorach, 'Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?' (2021) 22 European Business Organization Law Review 283.
[21] Catherine Bridge Zoller, 'Corporate Restructuring Laws Under Stress: Policymaking in Uncertain Times' (2023) 24 European Business Organization Law Review 387.

echoed the demand for a sectoral framework. The telecom sector holds substantial importance within the Indian economy. It facilitates communication, supports digital infrastructure, and drives economic growth. Due to its significance and wide-ranging impact, understanding the applicability of sectoral insolvency frameworks becomes crucial. It also represents a distinct industry with unique characteristics and operational dynamics, notably marked by the sector's capital-intensive nature. The financial structure of the telecom industry includes substantial investments in infrastructure and technology, resulting in a high degree of leverage and long-term financing arrangements.

Moreover, the possession and utilisation of the spectrum, often the primary asset, is based on a concession that governs the industry's operational modalities. These unique factors underscore the complex interplay between regulatory compliance, capital allocation, and asset utilisation. Examining the telecom sector allows us to understand how these aspects may influence the need for sectoral insolvency frameworks in other industries or sectors.

By evaluating the telecom sector's requirements for insolvency resolution when the legislature conceptualises its sectoral framework and constructing a criterion to guide the formulation and application of sectoral insolvency frameworks, we aim to provide insights into whether such frameworks suit other sectors in India. The analysis of the telecom sector can provide insights that extend beyond the sector itself. Consequently, the paper contributes a more general understanding of when sectoral insolvency frameworks may or may not be required across different industries or sectors.

II. INDIA'S EXPERIENCE WITH SECTORAL INSOLVENCIES

In India, the call for sectoral insolvency frameworks is not new. Historically, insolvency laws were disparate and scattered across various statutes, often leading to inconsistent regulatory approaches and outcomes. Many of these approaches were either ineffective or untested, culminating in consolidating the Code as a unified insolvency law. The recent demand for sectoral frameworks emphasises the need to re-examine the country's relationship with these tailored approaches.

This section explores India's historical experiences with sectoral insolvency frameworks, shedding light on when and how they were adopted and critically evaluating their performance since inception. This includes experiences concerning FSPs, Real Estate, and MSME sectors.

It aims to provide context and insight into the contemporary demands and challenges of implementing sectoral insolvency solutions.

A. Financial Service Providers

Compared to firms that typically rely on equity and debt, some FSPs manage substantial amounts of consumers' money.[22] The failure of these entities often holds the potential to disrupt the financial system and adversely affect the economy. It is essential to ensure that the failure of an FSP is *orderly* so that consumers are protected, and systemic stability and resilience are preserved.[23] Thus, standard insolvency processes are generally deemed unsuitable for such entities, especially those of systemic significance.[24] In other jurisdictions, too, non-systemic financial firms are resolved per their respective laws, while a specialised framework applies in cases of systematically determined firms.[25]

Presently, the Code excludes FSPs from the definition of corporate persons.[26] Instead, it empowers the Union Government (in consultation with the appropriate financial sector regulator) to modify the provisions of the Code when they apply to FSPs.[27] In line with this provision, the government has enacted Rules concerning FSPs,[28] isolating insolvency processes for FSPs from other legislations and granting primary and supervisory roles to the concerned FSP's primary regulator.[29] Interestingly, these FSP Rules have been structured in line with the principles of the IBC, ensuring a harmonised approach to insolvency resolution.

However, these Rules were meant to be an interim measure until the enactment of a comprehensive framework. In 2017, the government proposed such a framework - the Financial Resolution and Deposit Insurance Bill (**'FRDI Bill'**).[30] This was, however, withdrawn in 2018 due to widespread public opposition and criticism, particularly regarding a

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[22] Reserve Bank of India, 'Report of the Working Group on Resolution Regime for Financial Institutions' (2014).
[23] Department of Economic Affairs, 'Report of Committee to Draft Code on Resolution of Financial Firms' (2016) 4.
[24] ibid; Reserve Bank of India (n 22).
[25] *See*, for instance, the Dodd-Frank Act 2010 (USA), the Banking Act 2009 (UK), the German Restructuring Act 2011 (Germany), and the Dutch Intervention Act 2017 (Netherlands).
[26] The Insolvency and Bankruptcy Code (n 3), s 3.
[27] ibid, s 227.
[28] Debanshu Mukherjee, Astha Pandey, and Anjali Anchayil, 'Insolvency and Liquidation Proceedings of Financial Service Providers Rules, 2019' (*Vidhi Centre for Legal Policy*, 05 July 2019) < https://vidhilegalpolicy.in/research/insolvency-and-liquidation-proceedings-of-financial-service-providers-rules-2019/> last accessed 16 August 2023.
[29] Until December 2022, only four processes had been initiated regarding FSPs, out of which a resolution plan had been approved for one.
[30] Financial Resolution and Deposit Insurance Bill, 2017.

controversial bail-in clause. The provision would have allowed for the conversion of depositors' savings into equity in the event of a bank failure (albeit under specific circumstances to be detailed in delegated legislation), sparking fears about the safety of deposits.[31] The withdrawal of the FRDI Bill underlined the complexities and challenges of developing sectoral frameworks.

B. Real Estate

The insolvency resolution of real estate companies has posed a major challenge due to the peculiarities of the sector. In 2018, the law clarified the status of the allottees in a real estate project as financial creditors. It made them a part of the committee of creditors - a group of creditors meant to represent the financial interests of a company undergoing resolution. It was reasoned that often real estate projects are largely funded by allottees. However, the delay in completing such projects had become a common phenomenon and halted significant investments by the allottees without giving them due representation.[32] Unlike other corporate debtors, real estate companies previously had the power to unilaterally structure contracts with little regard for the views or interests of their financiers, i.e., the allottees.[33] This imbalance was especially concerning given the real estate sector's status as the second-largest proportion of insolvency processes.[34]

In 2023, reflecting on practical experiences and judicial insights, the Union Government acknowledged the complexities of classifying allottees as financial creditors. This classification had inadvertently created a committee of creditors with divergent interests, leading to conflicts within the resolution process.[35] Members often prioritised ownership and possession of the

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[31] Express News Service, 'Won't let Centre pass FRDI Bill in Parliament: Abhishek Banerjee' *The Indian Express* (26 December 2017) <https://indianexpress.com/article/india/wont-let-centre-pass-frdi-bill-in-parliament-abhishek-banerjee-4995134/> last accessed 16 August 2023; Archis Mohan, 'FRDI Bill: Panacea for banking sector set for quiet burial after PNB scam?' (*Business Standard*, 22 February 2018) <https://www.business-standard.com/article/economy-policy/frdi-bill-govt-s-panacea-for-banking-sector-headed-for-a-quiet-burial-118022200119_1.html> last accessed 16 August 2023.

[32] Of the 782 construction projects monitored by the Ministry of Statistics and Programme Implementation, 215 were delayed for 1 to 261 months. Khyati Rathod and Niharika Dhall, 'India: Delays in Construction Projects' (*Mondaq*, 24 January 2017) <https://www.mondaq.com/india/construction--planning/562100/delays-in-construction-projects> last accessed 16 August 2023; *See also*, Lavina Mulchandani, 'Why are housing projects delayed? Industry, buyer groups hope to have answers soon' *Hindustan Times* (06 May 2017) <https://www.hindustantimes.com/real-estate/why-are-housing-projects-delayed-industry-buyer-groups-hope-to-have-answers-soon/story abMs34y2V7h8G92aVur9SJ.html> last accessed 16 August 2023.

[33] Ministry of Corporate Affairs (n 12).

[34] It followed the manufacturing sector, which represented the highest proportion.

[35] *See*, for instance, *Flat Buyers Association Winter Hills-77, Gurgaon v Umang Real* Tech (2019) Company Appeal (AT) Insolvency No. 926 of 2019 and *Ram Kishor Arora v Union Bank of India,* 2022 SCC OnLine NCLAT 239.

property rather than repayment of their advances with suitable haircuts or commencement of liquidation.[36] As a response, the government proposed a more nuanced approach, suggesting that the Code be applied to the real estate sector with the flexibility for necessary modifications from time to time.[37] It recognised the inherent challenges in forming a one-size-fits-all insolvency framework for the real estate sector and paved the way for more tailored solutions to suit specific needs and dynamics.

C. Micro, small, and medium enterprises

Insolvency processes are often complex, lengthy, and rigid, making them ill-suited for addressing the needs of insolvent MSMEs.[38] It is often more difficult for MSMEs to combat macroeconomic shocks than for larger enterprises.[39] They often need more collateral and have undiversified suppliers and consumers, leading to lower access to finance and more dependence on counterparties for survival.[40] This results in their creditors being reluctant to participate in insolvency processes, as the cost of participation often fails to outweigh the expected recovery.[41]

Timely resolution in the MSME sector is vital, not only for economic considerations but also for the public interest. Delays can lead to loss of jobs and stunted economic development, eroding public trust in the system. To address these concerns, the Code was amended in 2021 to effectively resolve MSMEs and introduce an out-of-court pre-packaged insolvency resolution process. This was because the Code had been designed to focus on resolving insolvencies in large firms and did not provide a separate framework for distressed MSMEs.[42] It also aligned with international reports and practices, highlighting that such formal processes may need to be revised for MSMEs.[43]

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[36] Ministry of Corporate Affairs, 'Invitation of comments from the public on changes being considered to the Insolvency and Bankruptcy Code, 2016' (2023).
[37] ibid, 9; "The provisions of the Code, as they apply to the CIRP of a corporate person, shall, with necessary modifications, be made applicable to the CIRP of such real estate projects."
[38] Wolfgang Bergthaler and others, 'Tackling Small and Medium Sized Enterprise Problem Loans in Europe', IMF Staff Discussion Note (2015).
[39] Ronald B. Davis and others, *Micro, Small, and Medium Enterprise Insolvency: A Modular Approach* (1st ed, OUP 2018); KP Krishnan, Ajay Shah, and Susan Thomas, 'New Thinking on Resolution of Small Firms', Insolvency and Bankruptcy Board of India - A narrative (2020).
[40] ibid.
[41] World Bank, 'Report on the Treatment of MSME Insolvency' (2017).
[42] KP Krishnan, Ajay Shah, and Susan Thomas (n 39).
[43] *See* World Bank, 'Principles for Effective Insolvency and Creditor Debtor frameworks' (2021); United Nations Commission on International Trade Law Working Group V, 'Draft Text on a Simplified Insolvency Framework' (2021); Singapore Insolvency, Restructuring and Dissolution (Amendment) Act 2020.

However, till December 2022, only four applications were admitted under such a specialised framework and were pending beyond the provided timeline.[44] The framework found limited traction. It was said to be too technical, and stakeholders faced challenges complying with the law. This was due to limited market awareness regarding the framework, making it difficult to implement it successfully.[45]

III. CONCEPTUALISING A FRAMEWORK FOR SECTORAL INSOLVENCIES

Conceptualising sectoral insolvency frameworks requires a nuanced understanding of the challenges faced by a sector, its complexities, and intricacies. Most of all, it requires understanding whether a sector requires a specific framework in the first place or whether it should be governed by a uniform non-sectoral insolvency law. In particular, insolvency law should not be used to address other challenges in a sector. It should only concern itself with resolving stressed companies and consequent exit and value maximisation. Thus, building on the analysis above, a sectoral framework may only be required when:

- **There is a large volume of insolvency processes in a sector**: The purpose of a sectoral insolvency framework would only be served if there are instances of insolvencies in that sector. For instance, in the real estate sector, it had been observed that amendments were required in the law since difficulties had been faced in its implementation despite the sector representing the second-largest proportion of insolvency processes. Otherwise, the framework would only enable arbitrage opportunities for companies in other sectors to portray an activity belonging to this sector where the law is conducive to a higher profit rate.

- **The corporate debtor has sectorally distinct characteristics**: The purpose of an insolvency framework is to resolve a failing corporate debtor.[46] It is not to rescue a particular asset of that corporate debtor. The framework provides a process for managing the debtor's affairs, protecting its creditors' interests, and ultimately either resolving or liquidating its business. It is meant to allow creditors to recover as much of their debt as possible while also providing an opportunity for the debtor to either restructure and continue its operations or to close its business in an orderly manner.[47]

[44] Insolvency and Bankruptcy Board of India (n 7) 19.
[45] Ministry of Corporate Affairs (n 36).
[46] International Monetary Fund, 'General Objectives and Features of Insolvency Procedures' (1999).
[47] ibid.

When this is not possible under a uniform non-sectoral insolvency law due to the nature of the corporate debtor, which requires extraordinary means to protect the interests of its creditors or attain finance etc., sectoral insolvency may be required. This has been the case for FSPs, where the corporate debtor is not subject to the uniform law if it is of 'systemic significance'.[48]

- **There are delays in the insolvency process in that sector:** Insolvency resolution processes must be concluded promptly. Otherwise, it can lead to value destruction, making creditors less likely to be repaid. However, the importance of timely resolution goes beyond economic considerations. It holds substantial importance for the public interest. Delays in sectors with broader societal impact can lead to a loss of jobs, stunted economic development, and erode public trust. The importance of public interest in timely resolution emphasises the need for a tailored approach in sectors that significantly affect the community and the economy. Where insolvency processes in a particular sector are more delayed than their counterparts, there may be reasons unique to that sector causing such delays. A sectoral insolvency framework may help to address these delays, ensuring that the insolvency process aligns with the public's interest in the sector.

In addition to these criteria, any demand for a sectoral insolvency framework should assess the challenges such a framework may pose. The preservation of capital and its sources and the importance of public interest must be carefully weighed. For instance, as the Union Government has acknowledged, the amendments in the Code regarding real estate allottees have warranted reconsideration due to conflicts between a post-amendment committee of creditors members. At the same time, any sectoral framework should also account for conflicts amongst laws and regulators which may result in no one regulator having a full picture of the risks involved in a process.

IV. INSOLVENCY AND THE TELECOM SECTOR

Maximising revenues from spectrum allocation has remained a key state interest in the telecom sector.[49] This has resulted in the call for a sectoral insolvency framework, which has also been

[48] Reserve Bank of India (n 22); Department of Economic Affairs (n 23).
[49] Varadharajan Sridhar, *The telecom revolution in India: Technology, regulation, and policy* (OUP 2011); Rahul Matthan, 'Telecom', in Devesh Kapur and Madhav Khosla (ed), *Regulation in India: Design, Capacity,*

reflected by judicial and legislative actions. In 2021, the National Company Law Appellate Tribunal (**'NCLAT'**) held that while spectrum licences were assets of telecom operators and could be transferred as part of the insolvency resolution process, resolution applicants could not claim rights to the spectrum unless requisite payments were made to the government.[50] Unlike other assets, operators could not be said to be owners in possession but only in occupation of the right to use spectrum. It held that this was because the spectrum is a natural resource and *'belongs to the nation'*.[51] In effect, the transfer of the right to use spectrum in the case of an insolvency resolution process would be subject to the government's approval.

Even the Draft Telecom Bill treated the right to use the spectrum as a distinct asset in insolvency cases - unlike those ordinarily owned or possessed by the debtor.[52] It prioritised continuous spectrum utilisation and aimed to address situations where such a spectrum was not used due to insolvency.[53] An entity undergoing insolvency could only continue operating the spectrum if it complied with certain requirements.[54] If it could not comply with these requirements, the spectrum and corresponding rights would revert to the control of the Union Government.[55]

While the decision of the NCLAT and the Draft Telecom Bill gained favour amongst commentators and were similar to some international examples,[56] they were not based on the ground realities of insolvency and the telecom sector. A decision regarding a sectoral insolvency framework will impact various stakeholders. It should be based on reliable and accurate data on how insolvency processes have previously operated in the sector and should not be based on biases or assumptions regarding its necessity.

Performance (Hart Publishing 2017); TV Ramachandran, 'Truly revolutionising telecom: Govt must stop thinking of the sector from a revenue-maximisation perspective' (*Financial Express*, 23 February 2022) < https://www.financialexpress.com/opinion/truly-revolutionising-telecom-govt-must-stop-thinking-of-the-sector-from-a-revenue-maximisation-perspective/2441894/> last accessed 16 August 2023.

[50] NCLAT (n 35).

[51] ibid 64.

[52] Draft Indian Telecommunication Bill 2022 (n 17), clause 20 (3).

[53] Explanatory Note to the Draft Indian Telecommunication Bill 2022.

[54] This included continuing to provide telecommunication services or operating the telecommunication network or utilising the assigned spectrum; not defaulting in the payment of any dues under such licence or assignment, including any fees, charges, and other amounts payable under such licence or assignment of spectrum; and complying with such additional or modified terms and conditions, as may be prescribed.

[55] ibid.

[56] For instance, in Singapore, an installation used for telecommunications of a public telecommunication licensee can only be taken under any process in any bankruptcy or insolvency proceeding with the Minister's prior written approval. The Minister may also order a 'special administration' concerning a telecommunication licensee and omit or modify the provisions of the Insolvency, Restructuring and Dissolution Act 2018. *See* Telecommunication Act 1999 (Singapore), ss. 29, 46, and 47.

To understand if the sector's nature had impacted insolvency processes, we went through every interim and final order (if any) between 2016 and 2022 related to the resolution or liquidation of a telecom company.[57] Notably, of the 6199 processes initiated in the study period, only 12 were related to telecom companies. Annexure A compares processes regarding these 12 companies with all processes initiated under the Code.

Given that there was only one instance of a successful resolution process in the telecom sector (see Annexure A), we did not observe any explicit impact of the sector - including the spectrum - on the conduct of such a process. At the same time, the proportion of completed and pending processes in the telecom and other sectors was comparable. For instance, 17% and 23% of telecom-related and other sector processes, respectively, were pending liquidations. However, closing such processes in the telecom sector took significantly longer. While closure usually took between 400 to 500 days, this rose to 780 days for telecom companies. Non-completed processes had also been pending longer in the telecom sector. As the NCLAT decision and explanations to the Draft Telecom Bill suggest, telecom insolvencies may require extensive deliberation due to the involvement of the spectrum, which may have led to delays in the conduct of processes.

Thus, one reason for a distinct insolvency framework for the telecom sector may be to address delays, which may have been caused due to the characteristics of the sector. However, of the 6199 processes initiated since 2016, only 12 (0.19%) were related to telecom companies. They are unlikely to capture the diversity of how other insolvency processes in the sector would be conducted. Any policy decision supporting a specialised framework, similar to that supported by the NCLAT and the Draft Telecom Bill, that relies on these experiences runs the risk of relying on features distinct to these companies rather than the telecom sector. The conclusion that delays in these processes justify the need for a specialised framework may not represent the complete picture. While these processes took longer, the proportion of processes was comparable to other sectors. Drawing conclusions based on a small sample can lead to inaccurate, biased, or erroneous conclusions. It requires a detailed examination of the challenges of telecom-specific insolvencies and previous experiences with sectoral insolvencies.

[57] The IBBI marked these companies as working in the 'posts and telecommunication' sector. We supplemented our research by referring to the Memorandums of Associations and the Articles of Associations of companies and excluded those not involved in providing, facilitating, or maintaining telecom-related services but are merely equipment manufacturers.

V. CHALLENGES OF A TELECOM-SPECIFIC INSOLVENCY FRAMEWORK

Any telecom insolvency framework, which aims to deviate from the Code, would naturally do this to ensure continuous utilisation and value maximisation of the spectrum, i.e., it would focus on an asset of a failing corporate debtor rather than the corporate debtor itself. This poses challenges. For instance, since the spectrum has been held to be a *'public resource'*, any framework may prioritise the government over other creditors and conditions on the sale of the spectrum may also restrict realisation. Further, unless such a framework is carefully drafted, it may lead to conflict amongst laws (Code vs the telecom insolvency framework) and regulators (Insolvency and Bankruptcy Board of India (**'IBBI'**) vs the Telecom Regulatory Authority of India or any other regulator under such a framework). Notably, these challenges would emerge in any telecom insolvency framework focusing on the spectrum, not the corporate debtor. This section does not intend to evaluate the provisions of the Draft Indian Telecom Bill. Instead, it only aims to assist the decision-making concerning whether such a framework may be required.

A. Priorities in payments

Given the key state interest to maximise revenue from spectrum allocation,[58] it is not unforeseeable that prioritising the spectrum during an insolvency process may result in prioritising the government dues.[59] It may also want to ensure that the entity managing the spectrum has the capacity to do so and pay the necessary dues. This is because the spectrum is a public resource licensed to telecom companies, having consequential licensing fees (dues).[60] This will have a natural consequence of requiring priority in payments during the insolvency resolution process, thus placing equally or better-placed creditors on a better footing than the government. Such priorities must be evaluated on the long-term incentives of creditors.[61]

However, it's essential to recognise that revenue generation through spectrum allotments also depends on banks and financial institutions (**'FIs'**), albeit indirectly, as FIs finance the

[58] Varadharajan Sridhar (n 49); Rahul Matthan (n 49).
[59] *See*, for instance, Draft Indian Telecommunication Bill (n 17), clause 20 (2) and (3).
[60] Telecom Regulatory Authority of India, 'Recommendations on Spectrum Management and Licensing Framework' (11 May 2010).
[61] Siddharth Srivastava, Mohit Kishore, and Shikha Mohini, 'Insolvency of a Telecommunication Company Under the Draft Indian Telecommunication Bill, 2022' (*Mondaq*, 29 September 2022) < https://www.mondaq.com/india/insolvencybankruptcy/1234862/insolvency-of-a-telecommunication-company-under-the-draft-indian-telecommunication-bill-2022> last accessed 16 August 2023; Shreya Sircar and Ayesha Bharucha, 'Conflict Between the Draft Indian Telecommunication Bill, 2022 and the Insolvency and Bankruptcy Code, 2016' (*Lexology*, 17 January 2023) < https://www.lexology.com/library/detail.aspx?g=972ad39a-3332-4301-8f01-315e83631c14> last accessed 16 August 2023.

acquisition of those assets. Their interests need to be protected to ensure credit availability to the telecom industry. Otherwise, future spectrum acquisitions and the overall financial health of the sector may be jeopardised. Specific reference can be drawn to tri-partite relations concerning the financing of spectrum acquisitions, which underlines the complex interdependencies between the government, telecom companies, and financial institutions. The government, an ordinary operational creditor under the Code,[62] would be put on a pedestal and be granted treatment not accorded to other equally or better-placed creditors, thus increasing the risk that such other creditors would have to consider when first entering into a transaction and reducing the availability of credit to the telecom company.[63] This would be despite creditors taking on a higher risk than the government when extending credit, which is seen as having greater resources and the ability to absorb non-payment losses.[64] This arrangement emphasises the need for a balanced approach that considers the interests of all stakeholders, including FIs, to ensure the sustainable growth of the telecom industry. Notably, many FIs are owned and controlled by the government and actively finance the telecom sector as secured creditors. Prioritising government dues attributable to spectrum allocation not only raises questions about future financing of the telecom sector but also causes significant losses to the exchequer.

B. Restricting going concerns

Prioritising an asset of the corporate debtor (the spectrum) over the corporate debtor itself during insolvency may result in such a corporate debtor losing control of the asset.[65] If a telecom company loses control over the spectrum, it may not be able to generate revenue or sustain its operations. In such a case, the sub-stratum of the business would be lost, leading to significant value erosion. This would negatively affect all stakeholders of the corporate debtor, including creditors, employees, and shareholders. Losing management and control of the

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[62] For developments concerning surrounding the payment of statutory dues under the Code, see *State Tax Officer (1) v. Rainbow Papers Limited*, 2022 SCC Online SC 1162; Vishal Bijlani and Widaphi Lyngdoh, 'India: Standing of Government Creditors Under IBC: Rainbow Papers' (*Mondaq*, 07 December 2022) < https://www.mondaq.com/india/insolvencybankruptcy/1256106/standing-of-government-creditors-under-ibc-rainbow-papers> last accessed 16 August 2023; Shreya Prakash, 'SC ruling in Rainbow Papers has stirred up a hornet's nest' (*Hindu Business Line*, 29 September 2022) < https://www.thehindubusinessline.com/opinion/sc-ruling-in-rainbow-papers-has-stirred-up-a-hornets-nest/article65951579.ece#:~:text=The%20court%20also%20held%20that,manner%20with%20uniform%20proportional%20reduction"> last accessed 16 August 2023.

[63] Ministry of Finance, 'The Interim Report of the Bankruptcy Law Reforms Committee' (2015). Ministry of Finance (n 2).

[64] In addition, the government would benefit even though its dues had been subordinated, as this would lead to greater economic growth and better revenues for the exchequer. Ministry of Finance (n 2) 14.

[65] *See*, for instance, Draft Indian Telecommunication Bill (n 17), clause 20 (5).

spectrum may further impede its ability to continue operations. This would lead to an inability to resolve the corporate debtor as a going concern.[66] Any framework that risks losing control of a vital asset of the corporate debtor could jeopardise the entire insolvency resolution process, contrary to the principles and objectives of the resolution. Additionally, losing control over some but not all assets may result in segregation across different processes, leading to further delays and litigation by creditors.[67]

C. Conflict amongst laws and regulators

An approach of multiple sectoral frameworks may induce economic inefficiency. Activities that naturally sit together in one company would be forcibly spread across processes to suit the contours of the Indian insolvency framework.[68] For instance, a company or a group of companies operating in both the telecom and manufacturing sectors would have to be subject to processes under a specialised telecom insolvency framework and the Code.[69] This is not optimal. Legislative architecture should be conducive to greater economies of scale.[70] In addition, when the activities of a company are split up across processes, each of which would have oversight by a different regulator, no one regulator will be able to have a full picture of the risks. A sectoral framework may also enable arbitrage. The same activity may be portrayed as belonging to the sector where the law is conducive to a higher profit rate. On the other hand, a non-sectoral framework that applies uniformly eliminates such inconsistencies in treatment. It also eliminates the problems of gaps and overlaps.[71]

Any specialised framework must align with the foundational principles embedded in the Code. The overriding objective must be to achieve an insolvency resolution that serves the best interests of stakeholders. In framing any specialised mechanism, the focus should be removing obstacles to effective resolution rather than manoeuvring to augment and increase the government's share of the resolution proceeds.

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[66] Siddharth Srivastava and others (n 61); Shreya Sircar and Ayesha Bharucha (n 61).
[67] Vidhi Centre for Legal Policy, ‘Comments on the Draft Indian Telecommunication Bill, 2022: Submission to the Ministry of Communications’ (November 2022).
[68] Ministry of Finance (n 10).
[69] Insolvency and Bankruptcy Board of India, ‘Report of the Working Group on Group Insolvency’ (2019). Ministry of Corporate Affairs, ‘Report of CBIRC-II on Group Insolvency’ (2021).
[70] Vijay Kelkar and Ajay Shah, *In service of the republic: The art and science of economic policy* (Penguin Random House India Private Limited 2022).
[71] Ministry of Finance (n 2).

Given the importance of the telecom sector to the country's infrastructure and the potentially detrimental effect that the discontinuation of telecom services may have the call for a sectoral insolvency framework is understandable. However, while considering tailored processes in insolvency resolution, the government must carefully differentiate its dual roles as regulator and creditor. This requires a nuanced approach where core principles under the Code must be faithfully upheld. Instead of focusing on their own revenue recovery, regulators must focus on aspects of public interest. The substantial debt burden in the telecom sector accentuates the importance of adhering to these principles.

As section IV has demonstrated, only 0.19% of all processes initiated since 2016 are related to the telecom sector. It must also be noted that corporate debtors in the sector do not necessarily exhibit sectorally distinct characteristics. Instead, such distinct characteristics are attributable only to their assets – the spectrum. Consequently, any telecom-specific insolvency framework might not aim to resolve the corporate debtor but rather to manage the spectrum. This brings into question whether insolvency law, whose primary function is to resolve stressed companies and ensure value maximisation, should be used to address other sectoral challenges. Furthermore, potential conflicts among laws and regulators and other unforeseen complexities might arise from a sectoral approach. Thus, considering the fundamental goals of insolvency law, there is a need to reconsider the demand for a sectoral insolvency framework in the telecom sector.

Sector	Need			Challenges	
	A large volume of insolvency processes	**A sectorally distinct corporate debtor**	**Delays in insolvency processes**	**Conflict amongst laws and regulators**	**Other Challenges**
FSPs	Yes.[72]	Yes.	Yes.[73]	No.	Beyond the scope of this study
Real Estate	Yes.	Yes.	Yes.	No.[74]	Yes.
MSME	Yes	Yes	Sufficient data is not available.	No.[75]	Beyond the scope of this study
Telecom	No.	No.	Yes.[76]	Yes.	Yes.

[72] While only four processes had been initiated regarding FSPs under the IBC till December 2022, this is because not all FSPs - including Banks - have been notified under this framework. On the other hand, the RBI issued notifications concerning cancelling the licence/ de-registration of 87 banks between 2013 and 2018, with claims totalling more than 570 Crore Rupees. Karan Gulati, Shubho Roy, Renuka Sane 'Delays in Deposit Insurance' (*Leap Blog*, 2019) < https://blog.theleapjournal.org/2019/04/delays-in-deposit-insurance.html#gsc.tab=0> last accessed 16 August 2023.

[73] ibid; Between 2013 and 2018, under the law concerning deposit bank insurance, where a liquidator was supposed to collate and submit claims to the concerned authority for pay-out, it took an average of 2.10 years for such pay-out.

[74] The Real Estate Regulatory Authority ('RERA') regulates the real estate sector. The RERA Act also includes provisions for completing projects when the promoter cannot. However, amendments have been careful to avoid any conflict.

[75] The MSME sector does not have a special regulator or specific provisions for insolvency. As such, sectoral insolvency is de hors the laws otherwise governing MSMEs and thus does not face conflict.

[76] However, this is based on the experience of 12 companies. They are unlikely to capture the diversity of how other insolvency processes in the sector would be conducted. Any policy decision supporting a specialised framework that relies on these experiences runs the risk of relying on features distinct to these companies rather than the telecom sector.

VI. CONCLUSION

This paper has thoroughly examined the criteria that may necessitate sectoral insolvency frameworks, a relatively new area in legal scholarship in India. Through the lens of three pivotal criteria: (i) the volume of insolvency processes within a sector, (ii) distinct sectoral characteristics, and (iii) delays in the insolvency process, the analysis offers a systematic approach to evaluating the appropriateness of specialised frameworks.

An essential principle underscored in this inquiry is that insolvency law is designed to address financial distress and enable orderly resolution. It should not be relied upon as a tool for addressing other challenges in a sector. This is because insolvency law is primarily concerned with the interests of creditors and preserving the value of assets in an insolvency process rather than promoting broader economic goals. This fundamental understanding resonates throughout the examination, including applying the criteria to the telecom sector in India. The observation that using insolvency law to address non-insolvency-related issues can lead to unintended consequences is further illustrated by the inclusion of homebuyers in the Committee of Creditors (CoC). This insight extends beyond the immediate context and adds a new dimension to understanding insolvency law's flexibility and limitations. This inquiry contributes to the literature by bridging the gap between sectoral considerations and overarching insolvency principles and emphasising insolvency law's core purpose. It invites further interdisciplinary exploration and offers a coherent and innovative framework to guide policymakers and scholars.

In conclusion, developing sectoral insolvency frameworks is a complex and multifaceted issue. We hope that the findings presented here, grounded in the fundamental purpose of insolvency law, offer a good foundation for continued examination and a valuable reference for stakeholders navigating the intricacies of insolvency proceedings in India.

Annexure A: Comparison of IBC processes in the telecom and other sectors

We sourced data from the IBBI's database of all insolvency-related processes. This included data on the institution and disposal of all insolvency processes - across sectors - between 2016 and 2022.

	Telecom sector processes	**All processes under the IBC**
Total processes	12	6199
On-going CIRPs (in %)	25%	32%
Successful CIRPs (in %)	17%	10%
On-going liquidation processes (in %)	17%	23%
Successful liquidation processes (in %)	0%	7%
On-going voluntary liquidation processes (in %)	17%	8%
Successful voluntary liquidation processes (in %)	8%	14%
Average time for closure of processes (in days)	780 days	-
Average time for pending processes (in days)	1027 days	-

While the database did not include precise numbers for the duration of all processes under the IBC, it did highlight that successful closure of CIRPs, liquidation, and voluntary liquidation processes took 482, 513, and 413 days, respectively. Over 64% of CIRPs had been pending for more than 270 days, and 51% and 37% of liquidation and voluntary liquidation processes, respectively, had been pending for more than 730 days (two years).