

Settlement Finality and Insolvency Priority: Reconciling the SMC with the IBC



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The Securities Markets Code, 2025 (SMC), if enacted in its present form, represents the most significant reform of India's securities law framework in nearly three decades. It consolidates and replaces three foundational enactments, namely, the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992, and the Depositories Act, 1996, each of which was enacted at different points in time to regulate distinct components of the securities market.

By bringing these dispersed legal regimes within a single legislative framework, the SMC reconceptualises securities regulation as an integrated ecosystem rather than a set of institution-specific statutes. It provides a unified architecture for market governance in which regulatory, infrastructural, and transactional components are treated as functionally interconnected. Within this framework, SEBI is no longer the organising principle of a standalone statute; instead, it becomes one institution

embedded within a broader statutory structure governing the securities market as a whole.

The SMC also reflects a broader legislative movement towards codification. Unlike an ordinary statute, a Code is generally intended to provide a complete and coherent statement of law in a defined field. Its provisions are not interpreted as isolated commands but as mutually reinforcing components of an integrated legal system. As the Supreme Court observed in *Joseph Peter v. State of Goa, Daman and Diu*, a Code is characterised by its self-contained and comprehensive nature. The SMC aspires to occupy such a position in relation to securities markets.

Codification of this nature inevitably generates interface questions with other comprehensive statutory regimes, particularly other Codes that claim plenary authority within their respective domains. These questions acquire special significance when provisions relating to market infrastructure, settlement finality, netting, collateral, and insolvency intersect with the Insolvency and Bankruptcy Code, 2016 (IBC), which the Supreme Court has recognised as a complete Code governing insolvency resolution and liquidation. At first sight, certain provisions of the SMC appear to pull in different directions, while others may seem difficult to reconcile with the moratorium, insolvency estate, and waterfall provisions of the IBC.

The more significant issue, however, lies beyond questions of statutory conflict. The SMC expressly contemplates the insolvency, liquidation, winding-up, and resolution of clearing corporations (CCs) and clearing members (CMs), and accords protection to the consequences of such proceedings. Yet neither the SMC nor the IBC provides a pathway for resolving the insolvency of these entities. The law recognises the possibility of their distress but does not establish a mechanism to address it.

This article argues that the perceived conflict between the SMC and the IBC is largely illusory. Properly construed, the two Codes operate in distinct, though complementary, fields: the SMC safeguards settlement finality, market integrity, and systemic stability, while the IBC governs insolvency resolution and the distribution of the debtor's estate. The real policy challenge is the absence of a resolution framework for CCs and CMs. The article, therefore, examines the internal coherence of the SMC, analyses its interface with the IBC, and explores how the combined operation of the two Codes may bridge this gap until a dedicated statutory resolution regime is enacted.

Harmony within SMC

The starting point is Clause 142 of the SMC, which provides that the provisions of the Code are "in addition to, and not in derogation of" any other law for the time being in force. This is a familiar legislative formulation. It signifies that the SMC is intended to coexist with other statutes and not to repeal, abrogate, or displace them. The Supreme Court, while interpreting an identical formulation in *KSL and Industries Ltd. v. Arihant Threads Ltd.*, observed that such a provision reflects a legislative intention that the enactment should operate alongside other laws rather than supersede them. Clause 142, therefore, embodies the general principle that the SMC supplements the existing legal framework.

The SMC, however, also contains provisions designed to address the distinctive requirements of securities market infrastructure. Clause 68, which begins with a non obstante clause, accords statutory finality to settlements undertaken through a CC. It provides that settlements shall be conducted in accordance with the approved settlement procedures and that, once the amount of money, securities, or other obligations is determined, the settlement becomes final and irrevocable, irrespective of whether the actual transfer has taken place. Clause 70 similarly provides that, notwithstanding anything contained in any other law, a CC shall have the first right to recover dues arising from the

clearing and settlement obligations of a CM from the collateral, deposits, and other assets of the CM held by the CC.

Viewed in isolation, Clauses 68 and 70 may appear inconsistent with Clause 142. On closer examination, however, the provisions operate at different levels and are readily harmonised. Clause 142 lays down the general rule of coexistence. Clauses 68 and 70, by contrast, address specific subjects - settlement finality, netting, close-out, collateral appropriation, and settlement obligations - and prescribe the consequences of inconsistency in those limited fields. Applying the settled principle that a specific non obstante provision prevails over a general saving clause, Clauses 68 and 70 govern their designated subject matter, while Clause 142 continues to operate in all other respects. The SMC, therefore, adopts a familiar legislative technique: coexistence as the norm, coupled with limited overriding provisions where necessary to preserve market integrity, settlement certainty, and systemic stability.

The Competition Act, 2002 provides a useful illustration of this legislative technique. Section 60 gives the Competition Act an overriding effect over inconsistent provisions contained in any other law, while Section 62 simultaneously declares that its provisions are in addition to, and not in derogation of, any other law for the time being in force. Parliament thus recognised that a statute may embody both a principle of coexistence and a mechanism for resolving specific inconsistencies. The presence of a saving clause does not eliminate the possibility of conflict; equally, the existence of an overriding clause does not confer wholesale supremacy over every neighbouring statute. Rather, the coexistence clause signals that overlap should ordinarily be resolved through harmonious construction, and that the overriding provision should operate only within the field of genuine inconsistency. The judicial task, therefore, is to identify the precise area of conflict and confine the overriding effect to that area.

The same principle applies to the SMC. Clause 142 expresses the general legislative intent that the Code should operate alongside other laws. Clauses 68 and 70 identify limited areas in which Parliament considered market stability and settlement finality sufficiently important to warrant an overriding effect. Properly construed, therefore, these provisions are not contradictory. They are complementary components of a coherent legislative design. Indeed, the internal structure of the SMC itself demonstrates that codification does not require absolute exclusivity. A Code may simultaneously accommodate coexistence and limited supremacy, provided each operates within its intended sphere. This understanding is also the key to resolving the relationship between the SMC and the IBC.

Harmony Between the SMC and the IBC

The more difficult question concerns the relationship between the SMC and the IBC. The IBC is undoubtedly a complete Code governing insolvency resolution and liquidation. In *Innovative Industries Ltd. v. ICICI Bank*, the Supreme Court recognised that the IBC is exhaustive of the matters it deals with and emphasised the significance of Section 238, which gives the Code overriding effect over inconsistent provisions contained in any other law. The Court observed that Section 238 is couched in the widest possible terms so that rights available under other enactments do not impede the insolvency process. In *Principal Commissioner of Income Tax v. Monnet Ispat and Energy Ltd.*, the Court reaffirmed that, by virtue of Section 238, the IBC prevails over inconsistent provisions even in special statutes. Thus, where a genuine inconsistency exists, the IBC ordinarily prevails.

That, however, is only the starting point. The existence of an overriding provision in one Code does not mean that every provision of another Code is inoperative to the extent of inconsistency. The first task of interpretation is always to determine whether the provisions can be harmonised and whether they in fact operate in the same field. In *Solidaire India Ltd. v. Fairgrowth Financial Services Ltd.*, the Supreme Court observed that where two special statutes contain competing non obstante clauses, the later statute may prevail if the inconsistency is irreconcilable. But that is not a mechanical rule. Courts also consider legislative purpose, subject-matter specificity, and the possibility of harmonious construction before concluding that one statute overrides another. The judicial preference is first to reconcile the statutes and only thereafter, if necessary, to identify the limited field in which one must yield to the other.

The relationship between the SMC and the IBC should, therefore, not be approached on the assumption that one Code invariably prevails over the other. The more appropriate inquiry is whether the two Codes operate in the same field and pursue the same objective. A close examination suggests that they largely do not. The SMC is concerned with the integrity of the securities market, particularly the finality and continuity of the clearing and settlement process. The IBC is concerned with the resolution or liquidation of an insolvent entity and the distribution of its estate among creditors. Once this distinction is appreciated, much of the apparent conflict disappears.

Settlement Finality and Market Stability

The first area of harmony lies in the treatment of settlement finality. Modern securities markets operate through highly compressed settlement cycles, typically on a T+1 basis and increasingly through near-instantaneous settlement mechanisms. Settlement finality is not merely a matter of contractual convenience; it is the foundation of market integrity and systemic stability. The failure of a participant cannot be permitted to unravel completed settlements or destabilise the clearing system.

Clauses 68 and 70 of the SMC are directed towards this objective. Clause 68(2) provides that no order relating to insolvency, resolution, liquidation, winding-up, or dissolution of a CM, or any of its clients, shall affect a settlement that has attained finality. It also preserves the right of a CC to appropriate margins, collateral, deposits, and other assets furnished by the concerned CM towards settlement obligations. Clause 68(3) extends similar protection to the insolvency, liquidation, winding-up, or resolution of the CC itself. In such circumstances, all payment obligations and settlement instructions between the CC and its CMs, including transactions already admitted for future settlement, are required to be immediately determined in accordance with the approved netting and settlement procedures. The

resulting determination is final and irrevocable. Clause 68(4) further directs any resolution professional, liquidator, administrator, receiver, or assignee not to reopen or disturb such determinations.

These provisions reveal a clear legislative intention: insolvency proceedings should not interrupt the settlement process. Even the insolvency of the CC itself does not suspend or unwind settlements. The focus of the SMC is, therefore, not insolvency resolution or creditor distribution, but the preservation of settlement finality and market stability. Properly understood, the SMC addresses a question that arises before the insolvency process can meaningfully begin, namely, the determination of what settlement obligations exist and how they are to be discharged.

This distinction is important. Settlement finality is not the same as creditor priority. Finality determines whether a transaction, netting determination, or settlement instruction can be reopened after insolvency. Priority determines how the debtor's estate is distributed among competing creditors. Clauses 68 and 70 are defensible to the extent that they perform the former function. They become controversial only if they are read as performing the latter function by altering the statutory waterfall under the IBC.

Third-Party Assets, Collateral and Netting

The second area of harmony concerns the nature of the assets involved in the clearing and settlement process. A substantial portion of the assets handled by CCs and CMs does not belong beneficially to them. These assets belong to investors, counterparties, and other market participants and are held in a custodial, fiduciary, or contractual capacity.

The IBC itself recognises this distinction. Section 18 excludes from the insolvency estate assets owned by third parties but held by the corporate debtor under trust or contractual arrangements, including bailment. Section 36 excludes from the liquidation estate assets held as security collateral by financial service providers (FSPs) and assets subject to set-off or netting arrangements in multilateral trading or clearing transactions.

These exclusions are significant. They indicate that Parliament did not intend insolvency proceedings to absorb into the insolvency estate assets that are merely passing through a market intermediary or are dedicated to the settlement process. To the extent that margins, collateral, deposits, securities, and settlement assets fall within these exclusions, they are outside the insolvency estate altogether. The operation of Clauses 68 and 70 is, therefore, not inconsistent with the IBC; rather, it is expressly accommodated by the IBC itself.

The same approach is reflected in the insolvency framework applicable to FSPs under Section 227 of the IBC. The relevant rules require the administrator to identify and segregate assets belonging to customers and counterparties and to deal with them in accordance with the applicable contractual and regulatory arrangements. The insolvency framework thus recognises that financial intermediaries frequently hold substantial volumes of third-party assets that are unavailable for distribution among general creditors.

Clause 70 must be understood against this backdrop. The provision grants the CC the first right to appropriate collateral and other assets of the CM held by it towards settlement obligations. Properly construed, the provision does not confer a priority over the general estate of the insolvent entity. Rather, it enables the CC to enforce rights against collateral and settlement assets that the IBC itself treats differently from ordinary estate assets. In that sense, Clause 70 complements rather than contradicts the IBC.

Going-Concern Operations During Insolvency

The third area of harmony arises from the IBC's insistence that the corporate debtor continue as a going concern during the insolvency resolution process. A debtor undergoing resolution may continue to participate in securities market transactions and, consequently, continue to incur settlement obligations. Many of these obligations arise on account of transactions undertaken for clients and other market participants rather than for the debtor's own account.

The IBC is fully capable of accommodating such obligations. To the extent liabilities arise in the course of preserving the debtor as a going concern, they constitute insolvency resolution process costs and are payable in priority during the resolution process. The continuation of settlement obligations during insolvency, therefore, does not undermine the objectives of the IBC; rather, it is consistent with the Code's broader objective of preserving enterprise value and maintaining the debtor as a functioning business.

Viewed through this lens, the relationship between the SMC and the IBC is not one of competing statutory regimes but of complementary legal frameworks addressing different aspects of the same commercial reality. The SMC is concerned with ensuring the finality, certainty, and continuity of market settlements and with protecting assets dedicated to the settlement process. The IBC is concerned with the resolution or liquidation of the debtor's estate and the distribution of assets among creditors. Much of what the SMC regulates lies outside the insolvency estate altogether, while the limited overlap between the two regimes is addressed through specific exclusions and protections contained within the IBC itself. Properly construed, therefore, the two Codes operate in harmony: the SMC safeguards systemic stability in the securities market, while the IBC provides an orderly framework for insolvency resolution without disturbing the integrity of market settlements.

Insolvency Resolution of Financial Service Providers

The conclusion that the SMC and the IBC can largely be harmonised does not answer a more fundamental question: under what insolvency framework are CCs and CMs to be resolved? The answer is not readily available in either statute. Indeed, the most significant challenge at the intersection of the SMC and the IBC is not one of statutory conflict but of statutory silence.

The SMC unmistakably contemplates the possibility of the insolvency, liquidation, winding-up, or resolution of CCs

and CMs. Clauses 68 and 70 prescribe the treatment of settlement obligations, netting arrangements, collateral, and the role of resolution professionals and liquidators when such events occur. Yet the Code stops short of establishing a framework for conducting the insolvency resolution of these entities. Nor does it identify the legislation under which such proceedings are to take place. The SMC thus assumes the existence of an insolvency process without creating one.

This omission is significant because CCs and CMs are FSPs, and the insolvency of FSPs raises considerations that differ materially from those arising in the insolvency of real sector enterprises. Financial institutions frequently hold customer assets, perform critical intermediary functions, and may generate systemic consequences if their distress is not managed in an orderly manner. For this reason, several jurisdictions have developed specialised resolution regimes for financial institutions that differ from conventional corporate insolvency frameworks.

India too recognised this distinction. The Financial Resolution and Deposit Insurance Bill, 2017 sought to establish a dedicated Resolution Corporation for banks, insurance companies, and other financial institutions. The proposal was eventually withdrawn in 2018 following widespread public concern, leaving India without a comprehensive resolution framework specifically designed for financial institutions.

The IBC, while providing a consolidated framework for the insolvency resolution and liquidation of corporate persons, expressly excludes FSPs from its ordinary ambit. Section 3(7) defines a “corporate person” in a manner that excludes FSPs, while Section 3(17) defines an FSP as a person engaged in the business of providing financial services pursuant to authorisation or registration granted by a financial sector regulator, including SEBI. The exclusion is not merely theoretical. In *Nitin Pannalal Shah v. Vipul H. Raja*, the National Company Law Appellate Tribunal held that a stockbroker registered with SEBI is an FSP and therefore falls outside the corporate insolvency resolution process contemplated by the IBC.

The exclusion of FSPs from the IBC is, however, not absolute. Parliament recognised that certain categories of financial institutions may require the procedural architecture of the IBC while simultaneously requiring modifications tailored to their specialised functions. Accordingly, Section 227 empowers the Central Government, in consultation with the relevant financial sector regulator, to notify specific FSPs or classes of FSPs for insolvency and liquidation proceedings under the IBC, subject to such modifications as may be prescribed.

Pursuant to this power, the Central Government notified the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019. These Rules apply the insolvency resolution and liquidation framework of the IBC, with suitable modifications, to notified categories of FSPs. At present, however, the framework extends only to specified systemically important non-banking financial companies and housing finance companies with assets of ₹500 crore or more. Neither CCs nor CMs have been brought within its ambit.

The result is a conspicuous regulatory gap. The SMC contemplates insolvency and resolution events involving CCs and CMs. The IBC excludes them from its ordinary framework. The modified framework under Section 227 does not presently apply to them. Consequently, while the law recognises the possibility of their failure, it does not provide a complete procedural mechanism for managing that failure.

At the same time, Clauses 68 and 70 of the SMC provide important clues regarding the legislative design. These provisions expressly recognise the existence of resolution professionals, liquidators, administrators, receivers, and assignees. They prescribe the treatment of settlement obligations, netting arrangements, collateral, and close-out rights after the commencement of insolvency proceedings. The legislative assumption appears to be that insolvency proceedings against CCs and CMs will be conducted under a framework external to the SMC, most plausibly a modified insolvency regime applicable to FSPs. In that sense, Clauses 68 and 70 are not a substitute for an insolvency framework. They are best understood as market-stability provisions intended to operate within a broader insolvency process.

The real task, therefore, is not to derive a complete insolvency regime from the SMC itself. Rather, it is to identify how the SMC and the IBC can be read together to construct a workable resolution framework for CCs and CMs until a dedicated statutory regime for financial institutions is established. The provisions of the SMC indicate the modifications required to preserve market stability; the architecture of the IBC provides the procedural machinery through which those modifications can be implemented. The next question is whether such an approach can be achieved without fragmenting India’s insolvency architecture.

Fragmenting the Insolvency Architecture

The IBC was enacted to replace a fragmented and sector-specific insolvency regime with a unified and coherent framework governing insolvency resolution, liquidation, and the distribution of assets. One of its central achievements has been the creation of a common insolvency architecture applicable across sectors, subject only to carefully defined exceptions. If departures from that framework are considered necessary for particular industries or institutions, they should ordinarily be incorporated within the IBC itself. It is neither desirable nor sustainable for individual statutes to create their own insolvency exceptions through isolated non obstante clauses, special priority provisions, or bespoke distribution mechanisms. Such an approach risks fragmenting the insolvency framework, diluting the coherence of the IBC, and generating inconsistencies across different regulatory regimes.

This concern is particularly relevant in the context of CCs and CMs. The case for protecting settlement finality, close-out netting, collateral segregation, and continuity of critical market functions is compelling. Indeed, the analysis undertaken earlier demonstrates that these objectives are already substantially accommodated within the IBC through exclusions relating to third-party assets, collateral, and multilateral netting arrangements. The question, therefore, is not

whether special treatment is justified, but where and how such treatment should be located within the legal framework.

Viewed in this light, Clause 68(4) presents a potential difficulty. If it is understood merely as protecting the finality of settlements and preventing a resolution professional or liquidator from reopening netting determinations, it sits comfortably alongside the broader scheme of the IBC. If, however, it is construed as creating a substantive priority regime in favour of settlement obligations or as altering the distribution waterfall contemplated by Section 53 of the IBC, difficult questions may arise regarding its relationship with Sections 53 and 238 of the Code. The resulting disputes are unlikely to concern the commercial merits of insolvency resolution. Rather, they are likely to revolve around statutory supremacy, legislative intent, and the relative operation of competing non obstante clauses. Such litigation would be both avoidable and undesirable.

Legislative practice generally favours locating exceptions within the statute from which the exception is sought. Thus, if Parliament intends to carve out an exception from the framework governing public issues for insurance companies, that exception is more appropriately incorporated within securities law rather than insurance law. Otherwise, each sectoral statute would begin to create its own departures from generally applicable economic laws, leading to a proliferation of fragmented exceptions. Such an approach risks undermining the coherence of the underlying legal framework and may distort the uniform allocation of rights, obligations, and resources that the general law seeks to achieve. The same logic applies with even greater force to insolvency law. If the insolvency of CCs or CMs requires departures from the ordinary insolvency process, those departures are best articulated within the IBC itself, either directly or through the mechanism contemplated under Section 227. This preserves legal certainty, avoids jurisdictional conflicts, and maintains the institutional coherence of the insolvency framework while accommodating the specialised needs of CCs and CMs.

The concern regarding fragmentation would, of course, largely disappear if India were to establish a dedicated resolution regime for financial institutions, similar in concept to the erstwhile Financial Resolution and Deposit Insurance Bill. Financial institutions that hold substantial client assets, perform critical market functions, or pose systemic risks could be resolved under a specialised financial resolution framework, while FSPs whose capital structure and business model more closely resemble those of ordinary commercial enterprises could continue to be resolved under the IBC. Such an arrangement would preserve the coherence of the insolvency framework while recognising the distinctive characteristics of financial institutions.

Until such a framework emerges, however, the preferable course is to preserve the unity of the insolvency architecture. The objective should not be to create parallel insolvency regimes through sector-specific provisions scattered across different statutes. Rather, it should be to accommodate legitimate sectoral concerns within a coherent insolvency framework. A unified insolvency regime with carefully articulated exceptions is preferable to multiple insolvency regimes with uncertain boundaries. The challenge, therefore, is not to choose between the SMC and the IBC, but to ensure that the two operate together in a manner that preserves both market stability and the integrity of the insolvency process.

The Legislative Way Forward

The legislative solution may lie in one of three approaches. First, the Central Government may notify CCs and other systemically important institutions under the SMC for resolution under Section 227 of the IBC, with modifications tailored to such institutions. This is akin to the framework presently available for non-banking financial companies and housing finance companies with assets of ₹500 crore or more.

Second, Parliament may amend the IBC to expressly recognise settlement finality, close-out netting, and the use of collateral in insolvency proceedings involving CC and CMs. This would avoid reliance on sector-specific non-obstante clauses and preserve the coherence of insolvency law. Third, India may enact a dedicated financial-resolution law for systemically important financial institutions, including CCs. Such a regime would integrate both insolvency resolution and continuity of critical financial-market functions. Until one of these approaches is adopted, Clauses 68 and 70 should be read narrowly as market-stability provisions and not as a comprehensive resolution framework.

Conclusion

The SMC has understandably raised questions about its relationship with the IBC. A closer examination, however, suggests that the perceived conflict between the two Codes is largely illusory. The SMC is concerned with settlement finality, close-out netting, collateral enforcement, and the continuity of critical market infrastructure, while the IBC governs insolvency resolution and the distribution of the debtor's estate. Much of what the SMC regulates lies outside the insolvency estate altogether, and the limited areas of overlap are substantially accommodated within the IBC itself. Properly construed, the two Codes are complementary rather than competing regimes.

The more significant challenge is the absence of a credible insolvency-resolution framework for FSPs, whose failure may have systemic consequences. The legislative choice is, therefore, not between the SMC and the IBC, but between continuing with the present gap and creating a dedicated resolution architecture, whether through Section 227 of the IBC or a future financial resolution statute. Until a specialised financial resolution regime emerges, the most coherent solution lies in adapting the existing framework under Section 227 of the IBC, informed by the protections for settlement finality and collateral embodied in Clauses 68 and 70 of the SMC.