

MODERN CORPORATE INSOLVENCY REGIME IN INDIA: A REVIEW

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Insolvency and Bankruptcy Code (IBC), Corporate Insolvency Resolution Process (CIRP) in particular, has emerged as one of the most successful regulations in India for a number of reasons and this paper would explore these very reasons and present the major factors, which contributed towards success of the Code so far. Since the constitution of the Expert Committee on the subject in August 2014, a great level of transformation has happened in the law, policy and practice in dealing with financial distress. The reference points have changed to the extent that a default in payment of debt, which was considered routine before IBC, is now a major concern for enterprises. It has contributed towards evolving a 'culture of compliance', which is termed as the 'modern corporate insolvency regime'. The regime witnesses a change from 'debtor-in-possession' to 'creditor-in-possession', clarity on the concept of 'default', concept of financial creditor, and a predictable framework of timely, efficient and fair resolution; the hallmark of the modern regime. The institutional pillars under the Code make the process of CIRP smooth, handled by professionals trained to handle stressed assets as a going concern. A regulator with a difference facilitates creation of an ecosystem to further the objectives of the Code. This paper would briefly trace the development of the modern corporate insolvency regime in India, elaborate the functioning of the institutional pillars and analyze some of the major jurisprudential developments. At the end, some major areas which require further progress or the unfinished agenda, will be brought forward. The paper intends to provide a general overview of the modern corporate insolvency regime in India.

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I. INTRODUCTION

A robust ecosystem for entrepreneurship must provide for smooth transition in case of business failures.¹⁵⁹ It is important to have an ecosystem, which not only fosters ‘the freedom of entry’ for a commercial entity (that is, the freedom to start a business) and ‘the freedom of doing business’ or to continue doing business (by providing a level playing field), but also ‘the freedom to exit’ or discontinue the business.¹⁶⁰

Economic reforms in early 1990s in India focused mainly on freedom of entry by dismantling the *license-permit-quota Raj*. The reforms then shifted focus to freedom of doing business, i.e., to ensure that freedom granted in the first phase of reforms is not misused and to avoid market failure, restraints had to be placed on economic agents.¹⁶¹ But even a firm enjoying freedom of entry and freedom to do business could fail to deliver as planned for a variety of reasons. It could be because of faulty conceptualization of business, inefficient execution of business, change of business

¹⁵⁹ “While reducing the stigma associated with bankruptcy may be difficult, policy makers can minimize the negative effects of business failures and take advantage of their positive effects by adopting efficient and well-functioning bankruptcy laws”. See ‘Resolving insolvency: Measuring the strength of insolvency laws, Doing Business 2015 Going Beyond Efficiency’ pp 96-101 <<https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB15-Chapters/DB15-CaseStudy-Resolving-Insolvency.pdf>>.

¹⁶⁰ IBBI and IFC (World Bank), ‘*Understanding the IBC: Key Jurisprudence and Practical Considerations - A Handbook*’, Delhi (2020).

¹⁶¹ Monopolies and Restrictive Trades Practices Act, 1969 and now the Competition Act, 2002 ensures this.

environment, or even *mala fide* design in some cases.¹⁶² The modern corporate insolvency regime in India, also referred to as the Corporate Insolvency Resolution Process (“CIRP”) expressly and elaborately lays down the freedom to exit in an orderly and a time-bound manner, ensuring non-erosion or less erosion of capital. The stream of insolvency laws can be segregated chiefly under two heads, i.e., personal insolvency¹⁶³ and corporate insolvency.¹⁶⁴ The focus of this paper is on corporate insolvency.

Modern corporate insolvency regime in India began its formal journey with the passage of the Insolvency and Bankruptcy Code, 2016 (“IBC” / “the Code”). IBC paved way for a futuristic, clean, professionally-driven and resolution-based law for resolving insolvency.¹⁶⁵ It also marks a major economic reform by India only next to the implementation of GST.¹⁶⁶ This is clearly reflected by the significant improvement on ‘*Resolving Insolvency*’ parameter in the Ease of Doing Business Ranking (“EoDB”), i.e., a progression to rank 47 in 2019 from rank 138 in 2009.

Debtors and creditors started using the Code for resolution by the end of 2016, as the ecosystem for CIRP was already put in place.¹⁶⁷ Initially, skepticism surrounded the implementation of the Code as matters were required to be handled by professionals who were just born, like the Adjudicating Authority (“AA”) being new to the system of corporate insolvency (previously being handled by High Courts). Another reason for the initial skepticism was the historical baggage of the sluggish Non-Performing Asset (“NPA”) resolution mechanism. Within few months of the implementation of the Code, clarity began to emerge with the operationalization of the Code, and the plugging of gaps through interpretation by the National Company Law Tribunal (“NCLT”)/ National Company Law Appellate Tribunal (“NCLAT”) / Supreme Court and the consequent amendments in Regulations.¹⁶⁸ Whether the CIRP regime has passed the litmus test is the answer we are looking for in this paper.¹⁶⁹

IBC’s success rests on four basic pillars, i.e., the AA, Insolvency and Bankruptcy Board of India (“IBBI”), Insolvency Professional Agencies (“IPAs”) including Insolvency Professionals

¹⁶² Shubhanker Yadav & Anindita Chakraborty, ‘Corporate Collapses in India: Issues and Challenges’ (2016) 7 RKGJM 47-54.

¹⁶³ Deals with individuals and partnership firms governed by Provisional Insolvency Act, 1920 and Presidency Towns Insolvency Act, 1908.

¹⁶⁴ Under the Companies Act, 2013, Insolvency and Bankruptcy Code, 2016 and Limited Liability Partnership Act, 2008.

¹⁶⁵ Speech by Smt. Nirmala Sitharaman, Hon’ble Union Minister of Finance and Corporate Affairs on Third Annual Day of the Insolvency and Bankruptcy Board of India at New Delhi on 1st October, 2019 (December 2020), <<https://ibbi.gov.in/uploads/resources/418c870b4d2004c7cc2569c7456b53fb.pdf>>.

¹⁶⁶ Ministry of Finance, Press Release dated 11th May, 2016 “This (The Insolvency and Bankruptcy Code, 2016) is considered as the biggest economic reform next only to GST.”

¹⁶⁷ M. S. Sahoo and Anuradha Guru, ‘Indian Insolvency Law’ (April-June 2020) 45 (2) Vikalpa: The Journal for Decision Makers.

¹⁶⁸ IBBI, Section-wise Jurisprudence on IBC upto 30.09.2020 (December 2020) <<https://www.ibbi.gov.in/uploads/legalframework/4a38b0aa7994e2bdb63d67fd0a5d212.pdf>>.

¹⁶⁹ Sumant Batra, ‘IBC has passed many litmus tests, will continue to weather storms’ *Financial Express* (May 21, 2019), <<https://www.financialexpress.com/opinion/ibc-has-passes-many-litmus-tests-will-continue-to-weather-storms/1583818/>>.

(“IPs”), and Information Utilities (“IUs”). There has been an improvement in functioning of all these pillars in the last four years, which would be discussed in section II of the paper.

In terms of achieving the primary objectives of the Code, i.e., (i) maximizing value (ii) rescuing a viable business and (iii) keeping the order of claims stable,¹⁷⁰ a broad overview of statistical analysis provided by IBBI in its latest newsletter¹⁷¹ is very encouraging. Some snapshots are worth mentioning here for the benefit of the readers.

- The Code was able to rescue 277 Corporate Debtors (“CDs”) with an asset value of Rs. 1.02 lakh crore, which was about 193 percent of the realizable value.¹⁷² The BIFR regime was not at all efficient due to its debtor-in-possession model.
- 1025 CDs ended up with orders of liquidation, with liquidation assets valued at Rs. 0.42 lakh crore, of which 132 have been fully liquidated. Time taken for liquidation was 10 years on an average.
- The Code helped bring a behavioral change in debtors towards resolution of distress in its early stages. 14884 applications for initiation of CIRPs of CDs, having underlying default of Rs. 5,15,170 crores, were resolved before their admission.
- The process of resolution saw a distinct speed compared to previous regime. It took average of 384 days to complete the CIRP process yielding resolution, average 318 days were taken for CIRP process, leading to liquidation order. Voluntary liquidation processes took an average of 359 days for closure.
- An analysis of cost of CIRP works out to be on average 0.79% of liquidation value and 0.42% of resolution value.
- India’s rank on ‘Ease of Resolving Insolvency’ improved to 47 from 95 in 2019.

II. TRACING THE PATH OF DEVELOPMENT

Modern corporate insolvency regime in India has seen several iterations in the past until the Bankruptcy Law Reform Committee (“BLRC”) was assigned the responsibility to examine this comprehensively. This was done to meet the lofty goals of improving EoDB, facilitating more investment, leading to higher economic growth and development.¹⁷³ It is important to note that the recommendations of BLRC build upon a series of work already undertaken in this area since 1964. In the past, bankruptcy reforms had involved treating the broad landscape of the bankruptcy process as given by undertaking certain incremental changes. The BLRC had the mandate of comprehensive reform, covering all aspects of bankruptcy of individuals and nonfinancial firms.

¹⁷⁰ World Bank, the International Finance Corporation, and Oxford University Press, *Doing Business in 2004 Understanding Regulation*, The International Bank for Reconstruction and Development / The World Bank (2004).

¹⁷¹ IBBI, *Insolvency and Bankruptcy News* July – September 2020, p. 20 Vol. 16.

¹⁷² The realisable value of the assets available with the 277 CDs rescued when they entered the CIRP was only Rs. 1.02 lakh crore though they owed Rs. 4.89 lakh crore to creditors.

¹⁷³ Report of the Joint Committee on the Insolvency and Bankruptcy Code, 2015, Sixteenth Lok Sabha, (April 2016) para 3 <http://ibbi.gov.in/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf>.

Here, the term “non-financial firms” was included but was not restricted to limited liability corporations. The only element which was not covered in the BLRC was the recent work of the Financial Sector Legislative Reforms Commission (“FSLRC”), which had a comprehensive solution for the failure of financial firms.¹⁷⁴

Table I.1: Government committees on bankruptcy reforms

Year	COMMITTEE	OUTCOME
1964	24th Law Commission	Amendments to the Provincial Insolvency Act, 1920
1981	Tiwari Committee (Department of Company Affairs)	SICA, 1985.
1991	Narasimham Committee I (RBI)	Recovery of Debts Due to Banks and Financial Institutions Act (RDDBFI Act), 1993
1993	Onkar Goswami Committee (Min. of Finance)	Report of the Committee on Industrial Sickness and Restructuring
1998	Narasimham Committee II (RBI)	Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002
1999	Justice Eradi Committee (GOI)	Companies (Amendment) Act, 2002, Proposed repeal of SICA
2001	L. N. Mitra Committee (RBI)	Proposed a comprehensive bankruptcy code.
2005	Irani Committee (RBI)	Enforcement of Securities Interest and Recovery of Debts Bill, 2011. (With amendments to RDDBFI and SARFAESI).
2008	Raghuram Rajan Committee (Planning Commission) ¹⁷⁵	Proposed improvements to credit infrastructure.
2013	Financial Sector Legislative Reforms Commission (Ministry of Finance)	Draft Indian Financial Code ,which includes a “Resolution Corporation” for resolving distressed financial firms

¹⁷⁴ Report of the Financial Sector Legislative Reforms Commission, Volume I: Analysis and Recommendations, Government of India (March 2013) (Chairman: Justice B.N. Srikrishna), <http://dea.gov.in/sites/default/files/fslrc_report_vol1_1.pdf>.

¹⁷⁵ Raghuram Rajan, ‘A Hundred Small Steps’, Report of the Committee on Financial Sector Reforms (2008).

BLRC submitted its final report¹⁷⁶ in less than 15 months on 4th November 2015 and within another six months it was signed by the President on 28th May, 2016 to be the modern insolvency law of the land. The next step for the implementation of the Code was to have the necessary paraphernalia in place.

A. Revival of Sick Companies

In the wake of sickness in the country's industrial climate prevailing in the eighties, the Government of India set up in 1981, a Committee of Experts, under the Chairmanship of *Shri T. Tiwari* to examine the matter and recommend suitable remedies. Based on the recommendations of the Committee, the Government of India enacted a special legislation namely, Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA").¹⁷⁷ The legislative framework for revival and rehabilitation of sick companies has evolved over a period of time. SICA was followed by the Companies (Second Amendment) Act, 2002, which incorporated the provisions for revival of sick industrial companies in Companies Act, 1956. Thereafter, the Sick Industrial Companies (Special Provisions) Repeal Act, 2003, was enacted; and finally, the Companies Act, 2013, was passed. The provisions relating to sick companies have undergone significant changes during each of these transitions.¹⁷⁸

The main objective of SICA was to determine sickness and *expedite the revival of potentially viable units or closure of unviable units* (unit herein refers to a Sick Industrial Company). It was expected that by revival, idle investments in sick units will become productive and by closure, the locked-up investments in unviable units would get released for productive use elsewhere (the basic philosophy behind the insolvency resolution laws and policy).

The Board of Experts, namely the Board for Industrial and Financial Reconstruction (BIFR), was set up in January, 1987 and was functional with effect from 15th May 1987. The Appellate Authority for Industrial and Financial Reconstruction (AAIFR) was constituted in April 1987. Government companies were brought under the purview of SICA in 1991 when extensive changes

¹⁷⁶ The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, November 2015 [Chairperson Dr. T. K. Viswanathan], available at <http://ibbi.gov.in/BLRCReportVol1_04112015.pdf> BLRC also submitted an interim report Interim Report of the BLRC February 2015, available at <http://www.finmin.nic.in/sites/default/files/Interim_Report_BLR_0.pdf>.

¹⁷⁷ <<http://www.bifr.nic.in/introduction.htm>>

Industrial sickness had started right from the pre-Independence days. Government had earlier tried to counter the sickness with some ad-hoc measures. Nationalisation of Banks and certain other measures provided some temporary relief. RBI monitored the industrial sickness. A study group, came to be known as Tandon Committee was appointed by RBI in 1975. In 1976, H.N. Ray committee was appointed. In 1981, Tiwari Committee was appointed to suggest a comprehensive special legislation designed to deal with the problem of sickness laying down its basic objectives and parameters, remedies necessary for revival of sick Units. The committee submitted its report to the Govt. in September 1983 and suggested the following: Need for a special legislation, Need for setting up of exclusive quasi-judicial body. Thus the SICA came into existence in 1985 and BIFR started functioning from 1987

¹⁷⁸ A. Ramaiya, 'Guide to the Companies Act: Providing guidance to the Companies Act, 2013', Volume 3, 2015, p. 4365.

were made in the Act including, inter-alia, changes in the criteria for determining industrial sickness.

The failure of BIFR and the misuse of the provisions of SICA were being reported to the extent that BIFR was itself termed sick.¹⁷⁹ Former Prime Minister and one of the chief architects of the SICA, *Shri. V.P. Singh*, stated in 2001 that “BIFR” has failed.¹⁸⁰ One of the major reasons for BIFR’s failure was attributed as, “*BIFR lacks professional expertise in conserving cash, managing working capital and dealing with equity conversion options, which are necessary to turn around a business.*”¹⁸¹ The biggest criticism of the system adopted by the BIFR, under the provisions of SICA was that during restructuring, control of the company was left in the hands of the old management. “If the same people, who were responsible for the downfall of the company, take over the revival process, there is a lack of confidence [among the creditors],” notes *Abizer Diwanji* from EY.¹⁸² IBC addresses the aforesaid two main drawbacks of SICA and has now become the primary legislation in India to deal with the situations of corporate insolvency, coupled with the concept of rehabilitation. As the preamble outlines, IBC has come into existence to consolidate and amend the laws relating to both reorganisation and insolvency resolution.

B. The NPA Resolution Conundrum

As a guardian of monetary policy, the Reserve Bank of India (“RBI”) keeps an eye on the bad debts and NPAs. In this regard, the RBI prescribes prudential standards to regulate the activities of commercial and other banks. To prescribe a uniform and consistent approach for the classification of assets by banks, and to ensure an adequate level of provisioning on those assets on the basis of an objective criteria, the RBI keeps updating the *Master Circular on Prudential norms on Income Recognition, Asset Classification and Provisioning*, pertaining to Advances (“the Master Circular”).¹⁸³ As part of its supervisory processes, the RBI also assesses the extent of compliance by banks with prudential norms on income recognition, asset classification and provisioning. As per the Master Circular, an asset, including a leased asset, becomes non-performing when it ceases to generate income for the bank.¹⁸⁴ Banks are required to classify non-performing assets further into the following three categories based on the period for which the

¹⁷⁹ ‘Sick firms seek cure, but BIFR itself is sick’ *DNA* (Sep 18, 2006) available at <<https://www.dnaindia.com/business/report-sick-firms-seek-cure-but-bifr-itself-is-sick-1053830>>.

¹⁸⁰ ‘BIFR has failed: VP Singh’ *Business Line* (Kolkata, March 07 2001) “*Sick units which have no hopes of recovery could not carry on*” and “*An alternative mechanism had to be devised to tackle industrial sickness.*”

¹⁸¹ Raghavendra Verma, Tooling up: Deprived of adequate insolvency protection, Indian companies in distress are struggling to restructure, *India Business Law Journal*, Dec 2011, pp. 11, available at <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Deprived_of_adequate_insolvency_protection-_Indian_companies_in_distress_are_struggling_to_restructure.pdf> need to provide journal name, publisher, page number.

¹⁸² *Ibid.*

¹⁸³ Master Circular - Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances RBI/2015-16/101 DBR.No.BP.BC.2/21.04.048/2015-16 (1 July 2015). <https://rbi.org.in/scripts/BS_ViewMasCircularDetails.aspx?id=9908>. The latest circular of RBI on this point is Prudential Framework for Resolution of Stressed Assets, RBI/2018-19/203 dated June 7, 2019.

¹⁸⁴ *Ibid.*, para 2.1.1 of Master Circular.

asset has remained non-performing and the realisability of the dues, i.e., (i) Sub-standard Assets (ii) Doubtful Assets and (iii) Loss Assets.¹⁸⁵ Recovery of debts/loans remains one of the greatest challenges for the banks, in spite of the fact that several measures were taken by the Government to ameliorate the situation. This was done through special mechanisms of recovery through Debt Recovery Tribunals (“DRT”),¹⁸⁶ securitization under SARFAESI, or the various voluntary mechanisms for debt restructuring.¹⁸⁷

Banking Regulation Ordinance 2017 – The ordinance amended the Banking Regulation Act, wherein the Central Government was empowered to authorize¹⁸⁸ the RBI to direct banks to initiate recovery proceedings against loan defaulters.¹⁸⁹ The RBI issued a revised framework for resolution of stressed assets¹⁹⁰ harmonizing it with IBC, which led to the withdrawal of all voluntary mechanisms. The new framework requires the lenders to report credit information, including classification of an account as Special Mention Account (“SMA”) to Central Repository of Information on Large Credits (“CRILC”) on all borrower entities having aggregate exposure of Rs. 50 million and above. RBI directed twelve large corporate accounts¹⁹¹ to undergo IBC resolution process, which constituted about 25% of total NPAs at that point in time. Nine of these accounts have already been resolved and three are under process. The Code has brought forward the trend of publishing the names of loan defaulters,¹⁹² which brings a sense of urgency for debtors to submit for early resolution and not drag their feet in avoiding loan payments.

C. The BLRC Report

BLRC was set up by the Department of Economic Affairs, Ministry of Finance, under the Chairmanship of *Dr. T.K. Vishwanathan*,¹⁹³ by an office order dated August 22, 2014, to study the “corporate bankruptcy legal framework in India” and submit a report to the Government for reforming the system. During the course of its deliberations, the Committee decided to divide the project into two parts:

- (i) to examine the present legal framework for corporate insolvency and suggest immediate reforms, and

¹⁸⁵ R.C. Kohli, ‘Practical Guide to NPA Resolution’ Taxmann, 4th Ed. (2017).

¹⁸⁶ Presently 39 DRT's and 5 DRAT's are functioning in India, see <<https://drt.gov.in/front/composition.php>>

¹⁸⁷ Corporate Debt Restructuring (“CDR”), Strategic Debt Restructuring (“SDR”), Sustainable Structuring of Stressed Assets (S4A), joint lender’s forum, 5:25 scheme, see RBI Schemes Guidelines, Economic Survey 2016-17.

¹⁸⁸ *Dharani Sugars & Chemicals Ltd. v. Union of India*, 2019(5) SCC 480, “the power to be exercised under the authorisation of the Central Government requires due deliberation and care to refer to specific defaults.”

¹⁸⁹ The Banking Regulation (Amendment) Act, 2017 introduced section 35AA and 35AB.

¹⁹⁰ RBI Circular RBI/2017-18/131 on Resolution of Stressed Assets – Revised Framework dated February 12, 2018.

¹⁹¹ Essar Steel, Monnet Ispat & Energy, Bhushan Steel, Bhushan Power, *Era Infra Engineering*, *ABG Shipyard*, Jaypee Infratech, Amtek Auto, Alok Industries, Jyoti Structures, *Lanco Infratech* and Electrosteel Steels.

¹⁹² ‘Top Wilful Defaulters: Here is the List of 2,426 Who Together Owe Rs1.47 Lakh Crore to Public Sector Banks’ *Money Life* (18 July 2020), <<https://www.moneylife.in/article/top-wilful-defaulters-here-is-the-list-of-2426-who-together-owe-rs147-lakh-crore-to-public-sector-banks/60959.html>>.

¹⁹³ Former Secretary General, Lok Sabha and former Union Law Secretary.

- (ii) to develop an ‘Insolvency Code’ for India, covering all aspects of personal and business insolvency.

BLRC in its eight chapters of volume I provides a comprehensive analysis of its suggestions including the economic thinking behind the Code. The seven principles which drive the design of the Code are as follows:¹⁹⁴

- The Code will facilitate the assessment of viability of the enterprise at a very early stage.
- The Code will enable symmetry of information between creditors and debtors.
- The Code will ensure a time-bound process to better preserve economic value.
- The Code will ensure a collective process.
- The Code will respect the rights of all creditors equally.
- The Code must ensure that, when the negotiations fail to establish viability, the outcome of bankruptcy must be binding.
- The Code must ensure clarity of priority, and that the rights of all stakeholders are upheld in resolving bankruptcy.

D. Modern Dimension of Corporate Insolvency

The Supreme Court of India had on previous occasions made a reference to the Statement of Objects and Reasons for understanding the background, the antecedent state of affairs, the surrounding circumstances in relation to a statute, and the evil which the statute was sought to remedy.¹⁹⁵ The reports of Commissions or Inquiry Committees, preceding the introduction of a Bill, have also been referred to as an evidence of historical facts or of surrounding circumstances or of mischief or evil intended to be remedied, and at times for interpreting the Act.¹⁹⁶ The Supreme Court, while dealing with one of its first substantive cases under the IBC, i.e., *Innoventive Industries Ltd. v. ICICI Bank*,¹⁹⁷ has resorted to a number of external aids to construction including

¹⁹⁴ BLRC Report (n 18) para 3.4.2.

¹⁹⁵ *British Airways Plc. v. Union of India*, AIR 2002 SC 391: (2002) 2 SCC 95.

¹⁹⁶ G.P. Singh, *Principles of Statutory Interpretation*, 12th Ed, LexisNexis, pp. 243.

¹⁹⁷ *Innoventive Industries Ltd. v. ICICI Bank* (2018) 1 SCC 407 [Coram: R.F. Nariman and Sanjay Kishan Kaul, JJ] decided on 31.08.2017.

the speech of the Finance Minister,¹⁹⁸ BLRC Report, and the Bill, to understand the background and the true intent of the legislature.¹⁹⁹

The Supreme Court provides for important paragraphs contained in the report of the BLRC Report, stating that “these excerpts give us a good insight into why the Code was enacted and the purpose for which it was enacted”. As a key economic reform, the code has shifted the balance of power from debtor to the creditor.²⁰⁰

There are two schools of thought on insolvency.²⁰¹ The prevailing school is that of the ‘proceduralists’, represented in the main by the pioneering work of *Thomas Jackson*.²⁰² The other school is composed of ‘traditionalists’, who at its inception is represented in literature by the work of *Elizabeth Warren*.²⁰³ The former school submits that the purpose of insolvency is primarily to affect the orderly distribution of the debtor’s assets to its creditors, and to avoid the inefficiencies of letting creditors individually collect the unpaid debt from the insolvent company. Proceduralists believe that a collective insolvency procedure is beneficial to all the creditors, considering the savings brought about by cooperation as well as the maintenance of the going-concern value of the debtor, whose assets may be dissipated and dismembered if creditors will not cooperate with one another. The scenario is reminiscent of the famous game theory problem called the ‘prisoner’s dilemma’. To the proceduralists, however, the only fear is that the secured creditors may walk away from the collective enforcement of all claims during liquidation, as they have an option available if resolution fails.²⁰⁴ In contrast, the traditionalists would allow the disregard of an absolute priority rule and consequently “*take into account the interests of weaker or non-adjusting economic parties, such as employees, tort victims, or other stakeholders with no formal legal*

¹⁹⁸ “Shri Arun Jaitley: the object behind SICA was revival of sick companies. But not too many revivals took place. But what happened in the process was that a protective wall was created under SICA that once you enter the BIFR, nobody can recover money from you. So, that non-performing investment became more non-performing because the companies were not being revived and the banks were also unable to pursue any demand as far as those sick companies were concerned, and therefore, SICA runs contrary to this whole concept of exit that if a particular management is not in a position to run a company, then instead of the company closing down under this management, a more liquid and a professional management must come and then save this company. That is the whole object. And if nobody can save it, rather than allowing it to be squandered, the assets must be distributed -- as the Joint Committee has decided -- in accordance with the waterfall mechanism which they have created.” (Emphasis Supplied) [para 15 *Innovative Industries*]

¹⁹⁹ See the Statement of Objects and Reasons of the Code (The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation.) In *Vijay Kumar Jain v. Standard Chartered Bank & Ors.* Civil Appeal No. 8430 of 2018 and Writ Petition (Civil) No. 1266 of 2018, held that “notes on clauses are an important aid to construction of sections of the Code as they show what the drafting committee had in mind when such provisions were drafted.”

²⁰⁰ M.S. Sahoo, *Insolvency Reforms: A Road under Construction, ‘Insolvency and Bankruptcy Regime in India A Narrative’* (2020), Insolvency and Bankruptcy Board of India (“IBBI”), New Delhi.

²⁰¹ Danilo Penetrante Ventajar, ‘Human Rights Perspectives in Insolvency’ Department of Global Political Studies, Spring 2011.

²⁰² Thomas H. Jackson, ‘Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors’ Bargain’ (1982) 91 Yale L.J. 857.

²⁰³ Elizabeth Warren, ‘*Bankruptcy Policymaking in an Imperfect World*’ (1993) 92 Mich. L. Rev. 336-340.

²⁰⁴ Pratik Datta, ‘*Value destruction and wealth transfer under the Insolvency and Bankruptcy Code*’, (2016) NIPFP Working Paper No. 247 <<https://www.nipfp.org.in/publications/working-papers/1842/>>

rights.” The Code adopts the modern thought of proceduralists with clear rules of priority in distribution of assets during liquidation. The IBC also gets inspiration from the UNCITRAL Legislative Guide on Insolvency (“UNCITRAL Guide”),²⁰⁵ as a benchmark.

E. The Good Samaritans

The first commencement notification of the Code came on 19th August, 2016. While the provisions of the Code are yet to be notified fully, in particular Part III of the Code dealing with individual insolvency, the Code has seen one of the fastest transformations in just four years including four Ordinances,²⁰⁶ leading to corresponding amendments to the Code. The success of a new legislative framework depends upon several factors, including but not limited to building the ecosystem of positive compliance and weeding out problems. The modern CIRP regime got requisite attention of all stakeholders. The Government, Ministry of Corporate Affairs (“MCA”) and the Regulator (IBBI) have been prompt in easing out the bottlenecks in the legislation; NCLT, NCLAT and the Supreme Court has been prompt in disposing of cases and laying down jurisprudence of modern corporate insolvency regime.²⁰⁷ The professionals have been quick to adapt to the changes and transform their working style.

Other than the above stakeholders, there has been a genre of professionals, academicians, research organizations, and industry bodies, who have been instrumental in providing support and creating an environment of positivity and required academic research²⁰⁸ and critique, which kept the ecosystems improving further. We call them ‘good Samaritans’.

Policy Research Institutions – To begin with *M/s Vidhi Centre for Legal Policy* officially provided the legal research and writing services to the BLRC.²⁰⁹ The intervening period between the interim and the final report of the BLRC were utilized by the IGIDR Finance Research Group and the NIPFP to conduct the BLRC Conference.²¹⁰ The Indian Institute of Corporate Affairs (“IICA”) also conducted two stakeholder’s consultation on the legal framework of insolvency laws with special reference to MSME and Corporate Sector.²¹¹ The Society of Insolvency Practitioners of India (“SIPI”),²¹² under the *aegis* of INSOL India, provided for ‘draft insolvency best practices’.²¹³ The Insolvency Research Foundation (IRF) has been established by the IICA, in

²⁰⁵ UNCITRAL Legislative Guide on Insolvency 2005, available at <https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf>.

²⁰⁶ Dated 23rd November 2017, 6th June, 2018, and 28th December, 2019, 5th June, 2020.

²⁰⁷ See IBBI (n. 10) Section-wise Jurisprudence on IBC upto 30.09.2020.

²⁰⁸ Aparna Ravi, ‘*Indian Insolvency Regime in Practice: An Analysis of Insolvency and Debt Recovery Proceedings*’, Economic and Political Weekly, 2015.

²⁰⁹ Policy Research is a great emerging area in India wherein the professionals/institutions are working to influence the making of a legislation by publication of various white papers, draft reports and legislations.

²¹⁰ The 1st Bankruptcy Law Reforms Committee Conference, organized in IIC Delhi on 31st July and 1st August 2015

²¹¹ See IICA Annual Report 2014-15, on 27th February and 19th March 2015 respectively.

²¹² SIPI, Best Practices Task Force deliberated extensively on the code of conduct of insolvency professionals (led by Mr. Sumant Batra), INSOL India (2017) <<https://www.insolindia.com/best-practices-task-force-with-sipi.php>>.

²¹³ SIPI, ‘Draft Insolvency Best Practices’ INSOL India (2017) (best practices on Avoidance of Conflict of Interest, Payment of Corporate Insolvency Resolution Process Costs, Payment of Fee and Reimbursement of Out-of-Pocket

partnership with SIPI.²¹⁴ Industry associations, like ASSOCHAM,²¹⁵ also contributed in organising stakeholders' consultation and policy debate around the enforcement dimensions of the modern corporate insolvency regime in India. NLU Delhi came up with the first moot court on Insolvency laws in India.²¹⁶

Insolvency Professionals' Associations, like 'All India Insolvency Professional Association ("AIIPA")'²¹⁷ and 'Insolvency Practitioners Bar Association ("IPBA")', provided a forum to the practitioners to discuss pressing issues, under the Code, and suggest reforms.²¹⁸ The NCLT and the AT Bar Association provided a forum to all practitioners before the Tribunals.²¹⁹

The IBC enforcement has seen a generous support from all quarters including other regulators as well, like RBI, SEBI, CCI, etc. Some of these initiatives are:

- SEBI requires its listed entities to report default under the Listing Regulations.
- RBI's revised framework on stressed assets (Feb 12, 2018) paved way for big accounts being classified as NPA, nine of which have already seen resolution with a good realization value compared to the liquidation value.
- RBI and SEBI have mandated the entities under control to share the information with Information Utilities.
- Faster approvals of combination matters by the CCI.
- Relaxation on Minimum Alternative Tax ("MAT") for companies subject to IBC.

III. THE INSTITUTIONAL PILLARS

Dr. Ambedkar said, "However good a Constitution may be, if those who are implementing it are not good, it will prove to be bad. However bad a Constitution may be, if those implementing it are good, it will prove to be good." This statement is right for every ecosystem. Realizing the need for having a proper ecosystem for the implementation of the Code, the new legislation provides for the establishment of three new institutional structures, whose functioning is critical for the smooth implementation of IBC. These are (i) a new regulator known as IBBI (ii) a new profession of insolvency professionals and (iii) information utilities to collect and store information on debts and defaults. Other than the aforesaid three pillars, the AA functions as the fourth pillar. To provide a comprehensive examination and suggestions to establish these pillars, MCA constituted

Expenses, Confidentiality, and First Two Weeks from the Date of Appointment of Interim Resolution Professional, IP Planning before Day One), <<https://www.insolindia.com/draft-best-practices>>

²¹⁴ IICA, Report of Joint Steering Committee, (January 2019), <<https://iica.nic.in/images/Final%20Report-IRF.pdf>>

²¹⁵ Organized the first National Conference – IBC 2016 – A Game Changer on 25th October 2016.

²¹⁶ The inaugural edition of the competition was held during 28-29th October 2017. The theme of the 2020 edition is 'Corporate Insolvency Resolution, including issues on Individual Guarantors and Cross-Border Insolvency'. <<https://nludelhi.ac.in/up-event1.aspx?id=35096>>

²¹⁷ All India Insolvency Professional Association, 11 Insolvency Professionals from 7 states came together to form an association and formally obtained certificate of registration as on 15th Nov 2017, see <<https://aiipa.business.site/>>

²¹⁸ There are also others like Corporate, Insolvency and Bankruptcy Laws Bar Association (CIBBA).

²¹⁹ See <<http://www.ncltandatbar.com/aims-objectives.php>>

four working groups²²⁰ in July 2016 and by the end of December 2016 all these pillars were up and going, except IUs, which took some time to start and is still struggling to establish as a primary source for information on loan default. Empirical evidence shows that a conducive institutional environment and an appropriate insolvency regime are key factors in the recovery of stressed assets, apart from loan characteristics.²²¹

A. IBBI – The Board with a difference

The Insolvency and Bankruptcy Board of India (“IBBI” / “The Board”) was set up on 1st October 2016, under the IBC.²²² It is a unique regulator, which regulates a profession as well as transactions. It has regulatory oversight over the IPs, IPAs and IUs.²²³ The IBBI writes and enforces rules for transactions, namely, corporate insolvency resolution, corporate liquidation, individual insolvency resolution and individual bankruptcy under the Code. The BLRC justified the case for the establishment of IBBI resting on four strands of work that are required to be done, i.e., (i) Regulation of IPAs & IPs (ii) Regulation of Information Utilities (iii) Drafting Regulations, and (iv) Statistical Systems Functions.²²⁴ The IBBI is one of the key pillars of the ecosystem responsible for the implementation and the actualising of the objectives, enshrined in the Code.

The regulator has a major role to play in the success of any regulation. It is the leadership of the regulator that creates the ecosystem of compliance, stability and forward-looking pace. Though, the IBBI got notified on October 1st 2016, the parent Ministry of the Code,²²⁵ MCA, began the work on draft regulations even before that, which in fact saw the regulations under the Code being rolled out within two months of existence of the IBBI. No doubt the leadership at the IBBI was swift in its actions on all fronts, i.e., introducing the Limited Insolvency Examination (“LIE”), recognizing IPAs and IPs, working on various regulations, advocacy efforts and networking with allied ministries (Finance, Law and Justice) and regulators (RBI, SEBI, CCI).

The IBBI is one of those regulators that got established in just about 4 months²²⁶ as compared to the constitution of the NCLT, which took several years and also about 7 years for the CCI to come into existence functionally. It is pertinent to note that though the Code provided for a

²²⁰ WG 1: Recommend the design of the IBBI, WG 2: Recommend on the rules and regulations for Insolvency Professionals (IPs) and Insolvency Professional Agencies (IPAs), WG 3: Recommend on the rules and regulations for the insolvency and liquidation process, WG 4: Recommend on the rules and regulations for Information Utilities (IUs).

²²¹ RBI, ‘*Insolvency and Bankruptcy Code and Bank Recapitalization*’, Report Trend and Progress of Banking in India 2016-17.

²²² <<http://www.ibbi.gov.in/about-ibbi.html>>

²²³ Also see Registered Valuers under the Companies Act, 2013.

²²⁴ Para 4.1 BLRC Report (n 18).

²²⁵ Allocation of Business Rules.

²²⁶ IBC got promulgated on 28th May 2016 and IBBI came into existence on 1st October, 2016.

transition mechanism to designate any financial sector regulator²²⁷ until the Board was established, the provision was not required to be used.²²⁸

Organisational Design – The chairman of the working group, which was tasked to recommend the design of the IBBI²²⁹, ultimately went on to implement the recommendations, as a Chairman of IBBI. Experience and commitment of the Chairperson of IBBI was phenomenal in quickly drawing a picture for the regulator in the minds of all stakeholders with a motto, “*we mean business*”. The IBBI focused on transparency in its working and bound itself with the best practices to the extent that for the first time in India, it came up with a ‘regulation to make regulations’.²³⁰ Consciousness towards ‘sound design’ principles²³¹ for high performance is evident in the report of the working group.²³² The IBBI finds its organisational design somewhat inspired by that of SEBI and not CCI. An analysis of the key functioning of the IBBI, demonstrates how it is a Board with a difference.²³³

Governance and Housekeeping: The IBBI functions through its erudite Governing Board,²³⁴ which meets frequently²³⁵ to decide the policy matters, draft regulations and organisational directions. Whole time members take care of the demarcated areas of functioning through Executive Directors and staff.²³⁶ The Board also has two advisory committees on Corporate Insolvency and Liquidation²³⁷ and Service Providers.²³⁸ There is also a technical committee for Information Utilities.²³⁹

²²⁷ To exercise powers and functions of the Board under the Code

²²⁸ Section 195 of IBC 2016. The time period between 28th May, 2016 to 1st October, 2016 was managed by Ministry of Corporate Affairs through its Joint Secretary *Mr. Amardeep Singh Bhatia* who actively led the discussions on different draft regulations and working group deliberations.

²²⁹ *Dr. M.S. Sahoo*, as member Competition Commission of India chaired this working group; got appointed as Chairperson of IBBI while working group was in its deliberation. A learned man with post-graduation degrees in Economics, Law, Management and Company Secretary, *Dr. Sahoo* has experience of working with SEBI, ICSI, NSE and Government of India.

²³⁰ The Insolvency and Bankruptcy Board of India (Mechanism for Issuing Regulations) Regulations, 2018.

²³¹ Strengthen feedback loops, optimal organizational design, separation of powers, transparency and responsiveness

²³² Ministry of Corporate Affairs, Govt. of India , ‘Building the Insolvency and Bankruptcy Board of India’(2016)<<https://www.ibbi.gov.in/Wg-01%20Report.pdf>>

²³³ IBBI can be a great management case-study on functioning of a modern regulator. Its meticulous and quick response to challenges and bottlenecks is worth examining. Within three days of its existence the Board started functioning with its first Board Meeting on 4th October 2016 and is swift in its responses so far.

²³⁴ Chaired by Chairperson IBBI, three whole time members, ex-officio representatives from Ministry of Finance, Ministry of Corporate Affairs, Ministry of Law and Justice and Reserve Bank of India. There are also two part-time members including the Chief Economic Adviser. As on 16.12.2020.

²³⁵ Board met 2 times in 2016, 6 times in 2017, 4 times in 2018, and 4 times in 2019 as per the information available on website of IBBI.

²³⁶ Organizational Structure of IBBI, available at <https://www.ibbi.gov.in/uploads/structure/Organization_Chart.pdf>

²³⁷ Advisory Committee on Corporate Insolvency and Liquidation (24th September, 2020 to 11th June, 2023) (Uday Kotak as Chair) see <<https://www.ibbi.gov.in/about/view-committee/6>>

²³⁸ Advisory Committee on Service Providers (26th May, 2020 to 25th May, 2023) (TV Mohandas Pai as Chair) <<https://www.ibbi.gov.in/about/view-committee/4>>. Advisory Committee on Individual Insolvency and Bankruptcy (Chair Justice BN Srikrishna) completed its term on 15th Sept 2020.

²³⁹ In accordance with Regulation 14 of the IBBI (Information Utilities) Regulations, 2017.

Drafting Regulations: The IBBI has been very quick in drafting regulations and also in updating them with latest changes. As a best practice, the website of the regulator has a section that accepts comments from public on a rolling basis,²⁴⁰ which ensures public participation in the making of the regulations.

Regulating Insolvency Professionals: One of the major functions of the IBBI is to regulate IPs and help create an ecosystem with qualified and trained professionals to further the objectives of the Code. The IBBI conducts the qualifying examination for IPs. On one hand it takes strict action²⁴¹ for violations of code of conduct by IPs, and on the other, it facilitates capacity building through training programs and frequent guidance notes²⁴² for IPs and IPAs. The IBBI's good work got rewarded with additional responsibilities to regulate the 'Registered Valuers', under the Companies Act.²⁴³

Statistics, Research and Advocacy: Record keeping and facilitating *suo motu* complete information on its website shows clarity and transparency in the functioning of the IBBI. Well researched newsletters²⁴⁴ provide a lot of information, including statistical analysis of data, to the stakeholders. The IBBI also promotes research on various themes through its research initiatives,²⁴⁵ advocacy programs, quiz competitions, etc. The IBBI has also established the "*IBBI – Insolvency and Bankruptcy Law Research Chair*" at IICA.²⁴⁶

B. Insolvency Professionals

The BLRC recommended for an ecosystem of regulated professionals to handle the task of monitoring and managing matters of business during the corporate insolvency resolution

²⁴⁰ Invitation of Public Comments: Regulations notified under the Insolvency and Bankruptcy Code, 2016, see <https://ibbi.gov.in/webfront/regulation_comment.php>

²⁴¹ As on 16th December 2020, there are about 47 cases in which IBBI has taken action against IPs

²⁴² See facilitation letters issued by IBBI on different subject matters, <<https://ibbi.gov.in/legal-framework/facilitation>>

²⁴³ IBBI conducts the examination and as on 30th September 2020, there are 3358 Registered Valuers across the three asset classes, i.e., land and building, plant and machinery and securities or financial assets. There are 14 Registered Valuer Organisations (RVOs)

²⁴⁴ Themes of IBBI Quarterly Newsletter – 'Insolvency and Bankruptcy News' - Vol 1 Freedom to Exit: The Insolvency and Bankruptcy Code, 2016 builds the third pillar of economic freedom; Vol 2: The Essence of Time; Vol 3: *Missing from website*; Vol 4: Balancing the Interests of Stakeholders; Vol 4: Resolution: the soul of IBC; Vol 5: Insolvency Profession: An Institution in the Making; Vol 6: COC Dharma; Vol 7: Automating the Wheels of Commerce; Vol 8: Shepherding Valuation Profession; Vol 9: Individual Insolvency: the Next Big Thing; Vol 10: A resolve for resolution; Vol 11: Whose Company Is It Anyway?; Vol 12: IBC: A Code for Corporate Governance; Vol 13: The Art of Value Maximization in CIRP; Vol 14: Insolvency Law in times of COVID 19; and Vol 15: Resolvability: A 'Living Will' for Companies

²⁴⁵ IBBI Research Initiative, 2019 released on July 1, 2019, updated on August 1, 2020 to include new and emerging areas of research in insolvency laws and policy., see <<https://www.ibbi.gov.in/uploads/whatsnew/244e5a00f261e8e918bc68577b074934.pdf>>

²⁴⁶ Vacancy Notification, IBBI Chair Professor, IICA (April 2019) <https://ibbi.gov.in/webadmin/pdf/whatsnew/2019/Apr/Chair-Professor-IBBI-Vacancy_2019-04-22%2023:23:30.pdf>

process.²⁴⁷ The UNCITRAL Guide²⁴⁸ succinctly outlines the role of an IP as follows: “*Insolvency representative plays a central role in the effective and efficient implementation of an insolvency law, with certain powers over debtors and their assets and a duty to protect those assets and their value, as well as the interests of creditors and employees, and to ensure that the law is applied effectively and impartially.*”

Prior to the IBC, the corporate insolvency proceedings were governed and managed by the Official liquidator (“OL”) under the Companies Act and for sick companies under SICA / SARFAESI / RDBFI. OL is the officer of Central Government and is attached to the High Court to oversee the liquidation proceedings.²⁴⁹ The new insolvency regime has brought forward the concept of IPs. IBC seeks to balance the rights of all stakeholders by adopting a ‘professional-in-possession’ model, meaning that the driving force of the insolvency resolution mechanism (including interim management of the debtor) is an independent, regulated but private IP, working under the overall supervision of a committee of creditors. It is a striking and notable shift from the prevailing scenario as the management of liquidation proceedings has shifted from a government functionary to an independent private professional.

As the Code is largely executed through insolvency professionals, its success hinges on their skills and competence. IPs are licensed professionals authorised by IPAs and the IBBI. Other than the IPs and IPAs, the IBBI has also allowed the formation of Insolvency Professional Entities (IPEs) which are directly registered and recognised by the IBBI. While IPs can come together to form an IPE,²⁵⁰ they cannot act as an IP in their independent capacity.²⁵¹ There have been some issues surrounding the engagement of professionals by RP in a CIRP. The IBBI has released a discussion paper for public comments²⁵².

This significant shift, as expected, has provided for a fast resolution of insolvency, reduced the burden of the overburdened judiciary in India, prevented red-tapism and made the insolvency proceedings and system more liberal and unprejudiced. An IP may hold any of the following roles under the Code: (i) Resolution professional (“RP”) to resolve insolvency for a firm or an individual

²⁴⁷ BLRC Report page 31 (Executive Summary) need to provide details of date of publishing, name of the report

²⁴⁸ United Nations Commission On International Trade Law, ‘*Legislative Guide on Insolvency Law*’ (2005) <https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf>

“Accordingly, it is essential that the insolvency representative be appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the proceedings and but also that there is confidence in the insolvency regime.”

²⁴⁹ Official Liquidators, Ministry of Corporate Affairs (2020) <<http://www.mca.gov.in/MinistryV2/officialliquidators.html>>

²⁵⁰ There are 74 recognized IPEs as on September 30, 2020 (this excludes the 43 derecognized ones)

²⁵¹ See Release by IBBI issued to clarify the position under the Code as to who can render services as IPs. ‘No person to function as an Insolvency Professional without Certificate of Registration’ IBBI Press Release dated 15th June 2017 <<http://ibbi.gov.in/webadmin/pdf/press/2017/Jun/IBBI.pdf>>

²⁵² IBBI, Discussion Paper, ‘Engagement of ‘professionals’ in a Corporate Insolvency Resolution Process’ (December 2020) <<https://www.ibbi.gov.in/uploads/whatsnew/b042b88a757cf4a9b490b9d7ee3f165a.pdf>>

(ii) Bankruptcy Trustee in an individual bankruptcy process; (iii) Liquidator during a liquidation process; (iv) Administrators under SEBI.²⁵³

IPs are also required to have Authorisation for Assignment (AFA)²⁵⁴ to undertake assignments under the Code, and also have to undertake Continuing Professional Education (CPE)²⁵⁵ as per the guidelines. The IBBI has been very strict in terms of discipline and functioning of the Ips.²⁵⁶

Limited Insolvency Examination (“LIE”) – One of the greatest challenges before the IBBI was to institutionalise the profession of IPs, who would not only act as service providers but also become strong pillar of IBC ecosystem.²⁵⁷ To meet the immediate need in 2016, the IBBI allowed the registration of chartered accountants, company secretaries, cost accountants, and advocates in practice for 15 years as IPs. The window for such registration was open for one month²⁵⁸ and such registrations had a validity of six months.²⁵⁹ Later, the IP Regulations introduced the requirement of passing the LIE.²⁶⁰ With a focus on quality and desire to develop a cadre of trained professionals, the IBBI also began with its Graduate Insolvency Program (“GIP”), which is run by the Centre for Insolvency and Bankruptcy at IICA.²⁶¹ The BFSI Skill Council tried to work out a model curriculum for the Insolvency & Bankruptcy Associate, which doesn’t seem to have worked out.²⁶²

Insolvency Professional Agencies (IPAs) – IPAs regulate and govern the working of IPs in India. These are the self-regulatory authorities, under the modern insolvency regime, that governs the working of IPs registered under them. IPs are governed by IPAs, which in turn are administered

²⁵³ SEBI (Appointment of Administrator and Procedure for Refunding to the Investors) Regulations, 2018. There are about 698 such recognised administrators by SEBI across 15 zones in India.

²⁵⁴ Regulation 7A of IP regulations. See disciplinary proceedings on this ground in the case of Mr. Abhay Narayan Manudhane, Insolvency Professional (IP), 15th Dec 2020 <<https://ibbi.gov.in/uploads/order/d5d2b8fdf8e559b55b349d6e40d1dae8.pdf>>

²⁵⁵ IBBI (Continuing Professional Education for Insolvency Professionals) Guidelines, 2019, an IP shall undertake a minimum of 10 credit hours of CPE each calendar year and a minimum of 60 credit hours of CPE in each rolling block of three calendar years

²⁵⁶ Of the 3195 IPs registered till date, registrations of four IPs have been cancelled through disciplinary action, and registrations of two IPs cancelled on failing to fulfill the requirement of fit and proper person status. The Disciplinary Committee (“DC”) has disposed of 37 show cause notices against IPs by September, 2020. See IBBI Newsletter Vol 16.

²⁵⁷ AA in *Asset Reconstruction Company (India) Pvt. Ltd. vs. Shivam Water Treatment Pvt. Ltd.* Citation for case is required has held that an RP is acting as an officer of the court and any hindrance in the working of the CIRP will amount to contempt of court.

²⁵⁸ Till December 31, 2016 – These registrations expired by June 30, 2017

²⁵⁹ IBBI, ‘Report of Working Group on Graduate Insolvency Programme’ (2018) <<https://iica.nic.in/gip/pdf/gip-report.pdf>>

²⁶⁰ Sixth phase of the examinations are announced w.e.f. 1st January 2021. With each of these revisions, syllabus is reviewed to update the latest changes. So far there are about 24,757 exam takers of which 4,509 were successful attempts. <https://ibbi.gov.in/examination/limited-insolvency-examination>.

²⁶¹ <https://iica.nic.in/gip/>. First batch of two-year GIP program kick started with 37 students on 1st July 2019. The second batch has also been rolled out in 2020. need to provide details of publisher, date of publishing, author

²⁶² NSQF Level 5, National Qualifications Register, see <<https://www.nqr.gov.in/qualification-title?nid=3912>>

and supervised by the IBBI.²⁶³ There are three IPAs recognised by the IBBI, each floated by the three professional institutes i.e., ICAI,²⁶⁴ ICSI²⁶⁵ and ICMAI²⁶⁶. Out of the registered 3195 IPs, the maximum is Chartered Accountants, followed by Company Secretaries. There are IPs, who are also the members of the Bar Council,²⁶⁷ but the Bar Council of India or any other body has not chosen to apply for an IPA so far.

C. Adjudicating Authority

The Role of the AA is very important in the success of the modern corporate insolvency regime. Learning from the past experience, it is clear that a highly fragmented framework with different laws and different judicial fora is problematic.²⁶⁸ Further fora entrusted with adjudicating on matters relating to insolvency and bankruptcy may not have the business or financial expertise, information or bandwidth to decide on such matters. This led to delays and extensions in arriving at an outcome, and increased the vulnerability to appeals of the outcome.²⁶⁹ In compliance of the *Madras Bar Association cases*,²⁷⁰ the NCLT and NCLAT were established.²⁷¹ The NCLT has been recognized as an AA, under the Code.²⁷² In the *Swiss Ribbons Case*,²⁷³ while examining the constitutional validity of various provisions of the law, the Supreme Court found the appointment of Judicial/Technical members of NCLT/NCLAT as valid. However, it directed to set up circuit benches of NCLAT²⁷⁴ and also reiterated the requirement of changing the administrative ministry of NCLT/NCLAT from MCA to Ministry of Law and Justice.²⁷⁵

Role of AA: The constitutional validity of NCLT/NCLAT has been upheld by the Supreme Court in *Swiss Ribbons*, however, High Courts still retain the powers of judicial review over administrative

²⁶³ A strong regulatory regime may be inimical to the development of the IP profession. · BLRC believed that a new model of “regulated self-regulation” is optimal for the IP profession and thus suggested two tier structure of regulation which meant that the Board shall not directly govern the IPs (in case of IPs the legal structure binds the IPs). IPs shall be regulating the IPs and the Board shall keep a close vigil on the working and operations of IPAs and IPs.

²⁶⁴ Institute of Chartered Accountants of India having maximum registered IPs – 1971.

²⁶⁵ Institute of Company Secretaries of India having 943 registered IPs.

²⁶⁶ Institute of Cost Accountants of India having 268 registered IPs.

²⁶⁷ These are only 202, less than the IPs recognized basis their managerial experience (502 in number).

²⁶⁸ Kristin van Zwieten, ‘Corporate rescue in India: The influence of courts’(2015) *Journal of Corporate Law Studies* (1).

²⁶⁹ BLRC Report para 3.3.1 (n. 18).

²⁷⁰ *Madras Bar Association* (1) (2010) 11 SCC 1 and *Madras Bar Association* (3) (2015) 8 SCC 583.

²⁷¹ The Ministry of Corporate Affairs *vide* notification dated June 01, 2016 constituted the National Company Law Tribunal (NCLT) and its appellate authority, the National Company Law Appellate Tribunal (NCLAT) under Section 408 of the Companies Act, 2013.

²⁷² Section 5(1) of the Code, provides the definition of ‘Adjudicating Authority’ for the purpose of Insolvency Resolution and Liquidation for Corporate Persons and for that purpose identifies NCLT as such authority.

²⁷³ *Swiss Ribbons Private Limited & Another vs. Union of India and Others* (2019) 4 SCC 17 decided on January 25, 2019

²⁷⁴ Within a period of 6 months. A petition has been filed in Madras High Court to expedite NCLAT Bench in Chennai already. At present NCLAT operates only out of Delhi. However, NCLT has 15 benches – New Delhi, Ahmedabad, Allahabad, Hyderabad, Bengaluru, Chandigarh, Chennai, Cuttack, Guwahati, Hyderabad, Indore, Jaipur, Kochi, Kolkata, Mumbai

²⁷⁵ It may be noted that post retirement of NCLT President, Justice MM Kumar, this position is still to be filled with a permanent occupant and since last one year is being taken care of by the Acting President Mr. BSV Prakash Kumar.

actions, especially in matters relating to public law, which crosses path with the jurisdiction of NCLT/NCLAT.²⁷⁶ The Supreme Court, in *Embassy Property*,²⁷⁷ laid down the boundaries of jurisdiction that are limited to the Code. Further, in *K. Sashidhar*,²⁷⁸ it was held that the NCLT/NCLAT have no jurisdiction and authority to analyse or evaluate the commercial decisions taken by the Committee of Creditors (“CoC”).

D. Information Utilities

The working Group on IUs²⁷⁹ recognized them as the first pillar of the institutional infrastructure under the IBC.²⁸⁰ IUs are at the core of the institutional innovation of the IBC. The immediate triggering of the IBC resolution process on default by the corporate debtor, its time-bound completion either in a resolution plan or liquidation order and if necessary, an efficient liquidation of the corporate debtor; are all heavily premised on a sound, well-functioning IU industry. The IBBI registered²⁸¹ the first and the only IU on 25th September 2017 by the name National E-Governance Services Limited (NeSL).²⁸² The BLRC envisaged a private competitive market²⁸³ for IUs, rather than a centralized depository with the State.

Resistance to Change – The path for the IU has been filled up with many challenges. Though conceptualized as the sole authority to certify default in IBC cases, the Supreme Court in *Swiss Ribbons* held that ‘the evidence by way of loan default contained in records of such utility is only a *prima facie* evidence of default, rebuttable by the corporate debtor.’²⁸⁴ Further, the Registrar NCLT had to change the requirement from ‘mandatory’ to ‘wherever available with IU’ in a notice, requiring all concerned parties to file the default from an IU in all new and pending cases of CIRP at the intervention of Kolkata High Court.²⁸⁵ Further, the IBBI has allowed IUs to access MCA-21 and the Central Registry of Securitisation Asset Reconstruction and Security Interest of India (“CERSAI”) data to help default authentication of a debtor’s default.²⁸⁶

²⁷⁶ *Anthony Raphael Kallarakkal v. National Company Law Tribunal*, Mumbai Bench & Ors., 2018 SCC OnLine Bom 13865, *Kamal K Singh v. Union of India and Ors.*, 2019 SCC OnLine Bom 5609

²⁷⁷ *M/s Embassy Property Developments Pvt. Ltd. v. State of Karnataka & Ors.*, 2019 SCC OnLine SC 1542 “a decision taken by the government or statutory or quasi-judicial authorities in relation to a matter which is in the realm of public law cannot be treated as one “arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor” under Section 60(5) of IBC and the same can be corrected only by way of judicial review of administrative action”.

²⁷⁸ *K. Sashidhar v. Indian Overseas Bank & Ors.*, [2019] 2 IBJ (JP) 161

²⁷⁹ Working Group 4 to recommend the rules and regulations for Information Utilities, K V R Murty, Joint Secretary (e-Governance), Ministry of Corporate Affairs, who is the Convenor. Report dated January 10, 2017, <<http://www.ibbi.gov.in/wg-04report.pdf>>

²⁸⁰ Section 215 of Insolvency and Bankruptcy Code (IBC), 2016

²⁸¹ Press Release, National E-Governance Services Limited (NeSL) registered as IU, Sept 2017, <[https://ibbi.gov.in/IU_Registration_Press_Release_\(CP\).pdf](https://ibbi.gov.in/IU_Registration_Press_Release_(CP).pdf)>

²⁸² To know more about National E-Governance Services Limited (NeSL) see <<https://nesl.co.in/welcome-to-nesl/>>

²⁸³ Section 214(h) of the Insolvency and Bankruptcy Code (IBC) mandated that private IUs have to be interoperable.

²⁸⁴ *Swiss Ribbons*, para 85-87, 53, and 54 citation needs to be provided

²⁸⁵ Understanding the IBC (n. 2), pp. 26

²⁸⁶ IBBI circular dated 7th September 2019 - No. IBBI/IU/025/2019.

IV. CORPORATE INSOLVENCY – NUTS AND BOLTS

As on September 30, 2020, a total of 4008 CIRPs have commenced²⁸⁷ covering almost all major sectors like manufacturing, real estate, construction, transport, electricity, hotels, etc. Surprisingly, the first ones who approached to use the CIRP process were corporate debtors, followed by operational creditors. Over the years, jurisprudence is now clear that the CIRP process is not another ‘loan recovery mechanism’,²⁸⁸ but the foremost objective of the Code is resolution; so that the firm is protected as a going concern.²⁸⁹

The CIRP process, under the Code, is time-bound with specific timelines in each of its step with an overall window to complete it within 330 days.²⁹⁰ While this timeline has been held not to be mandatory,²⁹¹ the Supreme Court has said, “it is of utmost importance for all authorities concerned to follow this model timeline as closely as possible.”²⁹² The CIRP process commences from the date the application is admitted by the AA and an Interim Resolution Professional (“IRP”) is appointed. This is followed by process of claim collection and validation to form a COC, which is the next stage when the IRP is either formally confirmed as the Resolution Professional (“RP”) or another IP is brought in²⁹³ as the RP. Then comes the stage of Resolution Plan, which either succeeds or the matter goes into liquidation. It can be seen here that the IP wears different hats during the whole CIRP process, i.e., as an IRP before the CoC comes into picture (responsible to NCLT), RP until finalization of a resolution plan (responsible to the CoC), and if the resolution plan fails, the IP discharges the role of a liquidator (responsible to NCLT again). While it is difficult to cover all jurisprudential issues in this article, some major questions decided by Supreme Court have been dealt with. These decisions have addressed some major areas of jurisprudential conflict, including majority of the cases in which there have been divergent views between NCLT and NCLAT. A quick ruling on these ‘law points’ by the Supreme Court, have provided the required stability to the ecosystem.

²⁸⁷ IBBI Newsletter Vol 16. Of these, 473 have been closed on appeal or review or settled; 291 have been withdrawn; 1025 have ended in orders for liquidation and 277 have ended in approval of resolution plans.

²⁸⁸ *Mobilox Innovations (P) Ltd. v. Kirusa Software (P) Ltd.* (2018) 1 SCC 353.

²⁸⁹ *Swiss Ribbons*. Citation needs to be provided Also see In *Binani Industries Ltd Vs. Bank of Baroda & Another* [CA (AT) (Ins) 82/2018 & Others] “the first order objective of the IBC is resolution, the second order objective is maximization of the value of assets of the firm, and the third order objectives are promoting entrepreneurship, availability of credit, and balancing the interests of stakeholders. This order of objectives is sacrosanct.

²⁹⁰ 180 days as per Section 12(1) of IBC plus 90 days extension under Section 12(2) and 60 additional days due to amendment in section 12(3) mandating its completion within 330 days.

²⁹¹ *CoC of Essar Steel India Limited vs. Satish Kumar Gupta* [(2019) SCC Online SC 1478.

²⁹² *Arcelor Mittal India Private Limited Vs. Satish Kumar Gupta and Others* [2018 (13) SCALE].

²⁹³ As on Sept 30, 2020, out of 3199 cases wherein RP has been appointed in about 884 cases RP is different from an IRP.

A. The Default and the Financial Creditor

For initiating a CIRP under the IBC, the primary condition is that a default should have occurred.²⁹⁴ An application for resolution can be made by any one of the following: (i) Financial Creditor (“FC”), (ii) operational creditor (“OC”),²⁹⁵ (iii) corporate debtor (“CD”). The initial phase of jurisprudential development under the Code revolved around the discussions on the concept of default, the meaning of FC, and the requirement of notice by FC to CD, as is the case with OC. One of the interesting matters which came up was in relation to home buyers, who claimed to be FC of the builders under the Code.²⁹⁶ The Code was amended to provide clarity that home buyers were FC,²⁹⁷ under the Code, and hence can trigger the CIRP Process. This has also been found constitutionally valid in the *Pioneer Urban Case*.²⁹⁸ However, the 2020 Amendment to the Code, increased the CIRP trigger amount from Rs. 1 Lakh to Rs. 1 Crore, which would essentially exclude many small home buyers to be classified as FC under the Code.²⁹⁹

Withdrawal of CIRP: Once triggered whether the CIRP process could be stalled by way of settlement between the FC and CD was a pertinent question. In the matter of *Impex Ferro Tech Limited vs. Agarwal Coal Corporation Pvt. Ltd.*,³⁰⁰ the Supreme Court invoked Article 142 of the Constitution³⁰¹ to allow a settlement. Again, in *Uttara Foods and Feeds Private Limited vs. Mona Pharmachem*,³⁰² the SC invoked Article 142, observing that Government should amend the provision regarding inherent power of NCLT and NCLAT to allow withdrawal of petitions filed under the Code in case the matter is settled by the parties. Accordingly, Section 12A got

²⁹⁴ Default is non-payment of debts when they become due and payable. An amount not less than Rs. 1 lakh in Section 4 of the Code has now been increased to Rs. 1 Crore w.e.f. 24th March 2020. This was done as a COVID response to save MSMEs going under the IBC hammer.

²⁹⁵ OCs have triggered 50.32% of the CIRPs, followed by about 43.16% by FCs and remaining by the CDs.

²⁹⁶ Supreme Court dealt with this matter initially in absence of a clear provision in the Code; however, did not allow interim pro rata disbursements beyond the provisions of the Code. Later the Code was amended to recognize home buyers as FC. See *Chitra Sharma & Ors. Vs. Union of India and Ors.* (2018) 18 SCC 575.

²⁹⁷ Section 5(8)(f) - the amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing.

²⁹⁸ *Pioneer Urban Land and Infrastructure Limited and Another Vs. Union of India & Others* (2019) 8 SCC 416.

²⁹⁹ As of September 2019, of the 10,860 IBC cases pending with NCLT, 1,821 cases (17%) have been filed by homebuyers. Swain and Dandiya, ‘Coronavirus outbreak: Relaxed IBC timelines may be a face-saver for Indian corporates’ (April 9, 2020) <<https://www.businesstoday.in/opinion>>.

³⁰⁰ 2017 SCC Online SC 1976, SLP No. 33687-2017 (11th December 2017) [Coram: R.F. Nariman and Navin Sinha, JJ].

³⁰¹ Which allows the Supreme Court to “pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it.”

³⁰² (Civil Appeal NO. 18520 OF 2017) order dated 13th November, 2017.

incorporated in the Code.³⁰³ Supreme Court in *Arun Kumar Jagatramka Case (2021)*³⁰⁴ has further explained the scope of Section 12A in the following words:

An application for withdrawal under Section 12A is not intended to be a culmination of the resolution process. This, as the statutory scheme would indicate, is at the inception of the process... The withdrawal leads to a *status quo ante* in respect of the liabilities of the corporate debtor. A withdrawal under Section 12A is in the nature of settlement, which has to be distinguished both from a resolution plan which is approved under Section 31 and a scheme which is sanctioned under Section 230 of the Act of 2013. The scheme of compromise or arrangement under Section 230 of the Act of 2013 cannot certainly be equated with a withdrawal simpliciter of an application, as is contemplated under Section 12-A of the IBC³⁰⁵.

Application of Limitation Act – Clarity in this regard was provided by the way of inclusion of section 238A³⁰⁶ in the Code.³⁰⁷ With regards to the internal deadlines under the Code, some flexibility has been provided.³⁰⁸

B. The Interim Resolution

In administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which include adhering to procedure of law, as well as, accounting and finance related functions. The latter includes the identification and control of the assets and liabilities of the defaulting debtor, its management during the insolvency proceedings. In performing these tasks, an IP acts as an agent of the adjudicator. In a way the adjudicator depends on the specialized skills and expertise of the IPs to carry out these tasks in an efficient and professional manner.³⁰⁹ An insolvency professional appointed by the AA, i.e., NCLT, during the initiation of the CIRP is known as an IRP. The term of the appointment of the IRP is only for a period of 30 days from date

³⁰³ Any application admitted under sections 7, 9, or 10 of the IBC can be undertaken only with approval of the CoC with a 90 percent voting share. Before admission it can be withdrawn anytime. Often this is done if the applicant and CD reach a settlement while the proceedings are pending. This is more common with applications filed by OCs. In *Uttara Foods*, Supreme Court said:

“We are of the view that instead of all such orders coming to the Supreme Court as only the Supreme Court may utilize its powers under Article 142 of the Constitution of India, the relevant Rules be amended by the competent authority to include such inherent powers. This will obviate unnecessary appeals being filed before this Court in matters where such agreement has been reached.”

³⁰⁴ *Arun Kumar Jagatramka. Vs. Jindal Steel and Power Ltd. & Anr.* [Civil Appeal No. 9664 of 2019 and other appeals] decided on 15th March 2021

³⁰⁵ Summary of the Decision by IBBI, see <
<https://www.ibbi.gov.in/uploads/legalframework/4693a13e80846ec467eae52311923a64.pdf>>

³⁰⁶ Insolvency and Bankruptcy Code (Second Amendment) Act, 2018.

³⁰⁷ *B.K. Educational Services Private Limited Vs. Parag Gupta and Associates* (2019) 11 SCC 633, *Babulal Vardharji Gurjar Vs. Veer Gurjar Aluminium Industries Private Limited & Another* Civil Appeal No. 6347 of 2019.

³⁰⁸ *M/s. Surendra Trading Company Vs. M/s. Juggilal Kambat Jute Mills Company Ltd. and Others* (2017) 16 SCC 143.

³⁰⁹ *Committee of Creditors of Essar Steel India Limited through Authorised Signatory vs. Satish Kumar Gupta & Ors.* (2019) SCC OnLine SC 1478.

of her appointment. The interim RP discharges crucial responsibilities of the collection of claims, the collection of information about the entity from the debtor in the case of a creditor triggered IRP, the creation of the COC and taking over the management of the operations and monitoring the assets of the entity in IRP.³¹⁰ One of the major challenges faced by the IRP is to run the company as a going concern and arrange for interim finance.³¹¹ Interim finance is recognized as the ‘insolvency resolution process cost’ and hence gets the highest priority in the resolution plan or liquidation.

C. The Moratorium

It is a ‘calm period’ during which the creditor’s interest are preserved without affecting the operation of the CD’s business as a going concern. There is a temporary prohibition on all recovery actions against the CD during this period, which allows the RP to undertake its duties under the Code without any intervention.³¹² There have been several cases brought to test the strength of this provision,³¹³ which fortunately for the Code have been favorable. The IBC has prevailed, except the Constitutional Provisions,³¹⁴ and has laid down a great stability in the operation of the Code.

D. The Committee of Creditors

Creditor participation in insolvency proceedings has been widely seen as an essential feature of any well-developed insolvency administration system. This notion has been expressed in different ways in national systems of insolvency law, ranging from principles such as the *pari passu* rule, to the holding of creditor meetings to decide matters of importance in the insolvency proceedings, to the role of insolvency representatives in such proceedings.³¹⁵ Unless creditors are involved in the insolvency process, the law will seem irrelevant.³¹⁶ The CoC is constituted by the IRP after collating and verifying all the claims against the CD received within the notice period. The CoC consists of all the FCs and non-FCs and their voting rights are determined on the basis of share of

³¹⁰ BLRC Report (n 18) Para 5.3.1.

³¹¹ Megha Mittal, ‘Interim Finance becomes Effective and Attractive’ Vinod Kothari <<http://vinodkothari.com/wp-content/uploads/2019/06/Interim-Finance-Becomes-Effective-Attractive.pdf>>

³¹² Section 14 of the Code.

³¹³ *Alchemist Asset Reconstruction Company Limited vs. Hotel Gaudavan Private Limited* (2018) 16 SCC 94 *Anand Rao Korada Vs. M/s Varsha Fabrics (P) Limited and Others* 2019 SCC Online SC 1508 *Duncans Industries Limited Vs. A.J. Agrochem* (2019) 9 SCC 725.

³¹⁴ In *Canara Bank Vs. Deccan Chronicle Holdings Limited* [Company Appeal (AT) (Insolvency) No. 147 of 2017], the NCLAT held that the moratorium will not affect any proceedings initiated or pending before the Supreme Court under Article 32 of the Constitution of India or where an order is passed under Article 136. Further, it will not affect the powers of any High Court under Article 226 of the Constitution.

³¹⁵ Roman Tomasic, ‘Creditor Participation in Insolvency Proceedings’, OECD Meeting held on 27-28 April 2006, part of the publication ‘Legal & Institutional Reforms of Asian Insolvency Systems’, <<https://www.oecd.org/australia/38182698.pdf>>

³¹⁶ Asian Development Bank, ‘Insolvency Law Reforms in the Asian and Pacific Region: Report of the Office of the General Counsel on TA 5795-Reg: Insolvency Law Reforms’ (April 2000) Law and Policy Reform at the Asian Development Bank, Vol. 1 pp. 10-86. (R.W. Harmer prepared the report).

their financial debt. The extant board of the company gets suspended³¹⁷ from the time the CoC is appointed until the resolution plan is accepted or the company goes into liquidation. The commercial wisdom of the CoC is paramount. The Resolution Professionals undertake their duties, as per the instructions of the CoC, subject to the ground rules set under the Code/Regulations/Guidelines.

E. The Resolution Plan

Getting a sound Resolution Plan is the ultimate objective of the CoC. So that the company under insolvency may be revived as a going concern. In this regard, the preparation of Information Memorandum (“IM”)³¹⁸ is one of the most significant tasks of the RP. There is also a requirement to appoint a ‘Registered Valuer’ for determining the ‘fair value’ and ‘liquidation value’ of the assets of the CD.³¹⁹ A successful resolution must have a good recovery rate,³²⁰ which is calculated based on the time, cost and outcome of insolvency proceedings in each economy.³²¹

Who could be the Resolution Applicant? Per se not a difficult question, became a bone of contention when the original promoter/director of the corporate debtor started submitting the resolution plan. This necessitated the introduction of Section 29A to the Code,³²² which provided for disqualifications of a resolution applicant. People find their way out through the cracks in the law and that is what happened with this provision, which has seen a couple of amendments by now.³²³ The Supreme Court in *Arcelor Mittal*³²⁴ laid down the ground rules for the interpretation of Section 29A and its constitutionality was further upheld in *Swiss Ribbons*.

While the approval/rejection of the resolution plan lies at the hands of the CoC, exercising their commercial wisdom,³²⁵ finality comes only after concurrence of the AA, which ensures that the resolution plan is in line with the requirements of Section 30 of the Code.³²⁶ From the date of the

³¹⁷ However, in *Vijay Kumar Jain Vs. Standard Chartered Bank & Others* (2019) SCC Online SC 103 the Supreme Court held that resolution plans need to be provided to members of the suspended board of directors of the CD, as they have a right to participate in the meetings of the CoC.

³¹⁸ The IM is a document containing relevant information about the corporate debtor as is necessary for formulating a resolution plan by a potential resolution applicant, subject to maintenance of confidentiality.

³¹⁹ The value appointed must be registered with the IBBI under the Companies (Registered Valuers and Valuation) Rules, 2017. Also see *Maharashtra Seamless Limited Vs. Padmanabhan Venkatesh and Others* Civil Appeal No. 4242 of 2019, 2020 SCC Online SC 67.

³²⁰ Recovery rate is a function of the time, cost and outcome of insolvency proceedings against a local company.

³²¹ Methodology for Doing Business, Doing Business Report, World Bank (2020), see <<http://www.doingbusiness.org/methodology/resolving-insolvency>>.

³²² Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 issued on November 23, 2018.

³²³ Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 promulgated on June 6, 2018, Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, promulgated on December 28, 2019 – Amendment Act of 2020.

³²⁴ *Arcelormittal India Private Limited Vs. Satish Kumar Gupta & Others* (2019) 2 SCC 1.

³²⁵ *K. Sashidhar Vs. Indian Overseas Bank & Others* 2019 SCC Online SC 257, *Maharashtra Seamless Limited Vs. Padmanabhan Venkatesh and Others* Civil Appeal No. 4242 of 2019, 2020 SCC Online SC 67.

³²⁶ In, *Municipal Corporation of Greater Mumbai (MCGM) Vs. Abhilash Lal and Others* [2019 SCC Online SC 1479] held that the AA could not have approved the plan, which implicates the assets of MCGM, especially when the CD had not fulfilled its obligations under the contract. Hence, role of AA is important and not merely ticking the checkbox under this provision.

resolution plan, the CD gets an immunity from prosecution of offences committed prior to the commencement of the CIRP.³²⁷

F. The Liquidation

Liquidation (Winding Up)³²⁸ is a means by which the dissolution of a company is brought about and its assets realized and applied in the payment of its debts, and after the satisfaction of debts, the balance, if any, is paid back to the members in proportion to their contributions made by them to the capital of the company.³²⁹ Liquidation is the last resort and involves the destruction of the organisational capital of the firm.³³⁰ Where neither creditors nor debtors can find a commonly agreeable solution to keep the entity as a going concern, the entity enters into liquidation under the supervision of an IP. The role of CoC ceases to exist. The threat of loss in realizable value due to delays and movement into liquidation acts as a hanging sword and pushes all concerned towards a resolution plan. Liquidation is led by a regulated IP referred to in this case as the liquidator. The liquidator holds the assets of the company in trust. The rights of secured creditors are respected, they have the choice of taking their collateral and opt out of the liquidation process.³³¹ The recoveries that are obtained are paid out to the various claimants through a well-defined waterfall.³³² A company may also undergo a voluntary liquidation under the Code.³³³

It may be noted that while there is no specific guidance as to the fees charged by the IP in cases of resolution,³³⁴ the *Liquidation Process Regulations* provides for a regulation on the Liquidator's fees.³³⁵

V. THE UNFINISHED AGENDA

The Indian economy in the 21st century carries the legacy of economic policy-making focused on removing barriers to entry but it has already been replaced by the need for providing clear solutions to exit problems. There are fiscal, economic and political costs of impeded exit. In India, the exit problem arises because of three I's, i.e., interests, institutions and ideas/ideology. A review of the working of the Code in last four years, demonstrates that a lot has been achieved, however, the

³²⁷ As per Section 32A of the Code The Insolvency and Bankruptcy Code (Amendment) Act, 2020.

³²⁸ *Forech India Ltd. Vs. Edelweiss Assets Reconstruction Co. Ltd.* (2019) SCC Online SC 87.

³²⁹ A. Ramaiya, 'Guide to the Companies Act, 2013' 18th Edition Vol. 3, LexisNexis, pp. 4460

³³⁰ BLRC Report (n 18) Executive Summary.

³³¹ Section 52 of the Code, *ICICI Bank Limited Vs. SIDCO Leathers Limited* (2006) 10 SCC 452.

³³² Section 53 of the Code. Also see Section 33 of the Code read with *Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016*.

³³³ The provisions relating to *Voluntary Winding Up* for a company were there in Companies Act, 2013 which has now been omitted by virtue of Section 255 of the Insolvency and Bankruptcy Code 2016 ("Code") read with Schedule XI of the Code w.e.f. 15.11.2016. The Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 ("VL Regulations") provides for a detailed procedure in this regard.

³³⁴ However, in a Disciplinary Case IBBI has laid down the test of reasonableness of fees - No. IBBI/DC/04/2018 3rd May, 2018 – Case of Ms. Ruia.

³³⁵ Regulation 4 of the *Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016*.

much is left to be desired in furtherance of providing accessible exit option. Some of these unfinished agenda may be discussed under the following heads.

A. Bankruptcy of Individuals

*Sullivan, Warren and Westbrook*³³⁶ make many references to the notion that the current rate of bankruptcy is a symptom of some larger “social pathology” or “social problem.”³³⁷ They emphasize this by drawing an analogy between bankruptcy law and medical care:

The purpose of bankruptcy law, properly used rather than abused, is to serve as a financial hospital for people sick with debt. If hospital admissions rise dramatically, there are at least two explanations for the increase, it may be that doctors have started admitting patients who are not seriously ill and who could be treated as outpatients. Or the crowded hospital wards may simply reflect a breakdown of health in the community.

In India, lending and then recovery of debt have not only been associated with legal and economic issues, but largely social issues.³³⁸ Historically, the debtors were always depicted as poor people including small entrepreneurs and lenders were well-to-do people. There have been comparisons of corporates being provided with exit opportunities while individual lenders like farmers not.³³⁹ Wider social acceptability for exit is important. While the Individual Insolvency³⁴⁰ awaits a robust institutional infrastructure to kick in,³⁴¹ insolvency with reference to personal guarantors to corporate debtors have been brought into force.³⁴² It is important to bring the

³³⁶ Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, ‘*As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America*’, Oxford University Press (1989).

³³⁷ *Farmers defaulting loans and loan waivers was considered to be not a good trend by bankers and economists, is it setting up a culture of loan default?? “Waivers undermine an honest credit culture... It leads to crowding-out of private borrowers as high government borrowing tend to (impose) an increasing cost of borrowing for others,” Patel said after Thursday’s monetary policy announcement. “I think we need to create a consensus such that loan waiver promises, otherwise sub-sovereign fiscal challenges in this context could eventually affect national balance sheet.”* Urijit Patel, RBI Governor *Livemint* <<http://www.livemint.com/Politics/FLWzWep1Jdv8riZhMINbtL/RBI-governor-Urjit-Patel-criticises-farm-loan-waiver-schemes.html>> also see report of Advisory Group on Bankruptcy Laws by NL Mitra (2001) <<https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/20811.pdf>>

³³⁸ IBBI had set up an Advisory Panel under Justice B N Srikrishna to take the process forward on bankruptcy regimes for individuals. “*The composition of the advisory committee shows the recognition in the government that this is a sociological issue and not merely a subject involving default in payment of loans or other dues to creditors. The issue has become even more challenging, following a spate of recent insolvency cases involving real estate companies such as Jaypee and Amrapali Group*” – Times of India Sept 18, 2017, available at <<http://timesofindia.indiatimes.com/business/india-business/govt-sets-up-personal-bankruptcy-panel/articleshow/60724960.cms>>

³³⁹ Mayank Jain, ‘*Farm loan waivers are not the same as corporate NPAs – and it’s tough to say which is worse*’, *Scroll* (23 June 2017) <<https://scroll.in/article/841436>>

³⁴⁰ The Insolvency & Bankruptcy Code, 2016, (IBC) classifies individuals into three classes, namely, personal guarantors to CDs, partnership firms and proprietorship firms, and other individuals, to enable implementation of individual insolvency in a phased manner.

³⁴¹ IBBI, ‘Report of the Working Group on Individual Insolvency’ (October 2018) <https://ibbi.gov.in/uploads/resources/Final_report_of_WG_on_Individual_insolvency-Oct18.pdf>

³⁴² The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 and IBBI (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019.

necessary infrastructure in place as soon as possible, so that the individual bankruptcy provisions may kick in.

B. Cross-Border Insolvency

The BLRC was of the view that cross-border issues may be taken up in the next stage of deliberations as domestic reforms in insolvency regime required the focus.³⁴³ This was quipped as a half-hearted effort.³⁴⁴ The Joint Committee of Parliament was of the view that not incorporating cross border insolvency provisions in the Code may lead to an ‘incomplete Code’.³⁴⁵ Accordingly, Sections 233 and Section 234 were included in the Code, which provided for an enabling mechanism for ‘*agreements with foreign countries*’ and ‘*letter of request to a country outside India in certain cases*’. The UNCITRAL Model Law (“Model Law”) on Cross-Border Insolvency, adopted in 1997,³⁴⁶ was designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address instances of cross-border insolvency more effectively.³⁴⁷ Singapore became the 42nd Country³⁴⁸ to enact a legislation based on the Model Law.³⁴⁹ The Insolvency Law Committee (“ILC”) submitted a detailed separate report³⁵⁰ on adoption of the Cross Border Insolvency framework in India. Though, a comprehensive framework, as recommended by ILC, is still awaiting adoption. In the meanwhile, the NCLAT

³⁴³ Similar views were echoed by the Department of Economic Affairs (DEA) in the written replies submitted to the Parliamentary Committee.

Cross Border Insolvency is a complicated issue where internationally there is no uniformity in procedure. Post Global economic crisis, Institutions such as G-20 and Financial Stability Board (FSB) are working on this matter. It has also been stated by the Ministry that the Government at an appropriate time will come out with a framework for Cross Border Insolvency.

³⁴⁴ Cyril Amarchand Mangaldas, ‘*Indian Insolvency Regime without Cross-border Recognition – A Task Half Done?*’ (16 May 2017) <<https://www.legallyindia.com/views/entry/indian-insolvency-regime-without-cross-border-recognition-a-task-half-done>>; Aparna Ravi, ‘*Filling in the gaps in the insolvency and bankruptcy code - cross border insolvency*’ (17 May 2016) IndiaCorp Law at <<http://indiacorplaw.blogspot.in/2016/05/filling-in-gaps-in-insolvency-and.html>>

³⁴⁵ Para 62, Lok Sabha Report of the Joint Committee on the Insolvency and Bankruptcy Code, 2015, Sixteenth Lok Sabha (April, 2016).

³⁴⁶ The Model Law was drafted by UNCITRAL's Working Group on Insolvency Law, approved and adopted by the Commission in May 1997 and endorsed by the United Nations General Assembly in December 1997.

³⁴⁷ Sudhaker Shukla and Kokila Jayaram, *Cross Border Insolvency A Case to Cross the Border Beyond the UNCITRAL*, pp 207.

³⁴⁸ W.e.f. 23.05.2017, Prior to enactment of the Companies (Amendment) Act in Singapore, legislation based on the Model Law had been adopted in many jurisdictions like: Australia (2008); Canada (2005); Great Britain (2006); Greece (2010); Japan (2000); the United States (2005) etc.

³⁴⁹ With its adoption of the Companies (Amendment) Act (sections 354A, 354B, 354C and Fourteenth Schedule) on 10 March 2017.

³⁵⁰ Ministry of Corporate Affairs GOI, *Report of Insolvency Law Committee on Cross Border Insolvency* (Chaired by Injeti Srinivas) (October 2018), <https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2018/Oct/Report%20on%20Cross%20Border%20Insolvency_2018-10-22%2018.55:11.pdf>.

was harmonious while dealing with ‘cross-border insolvency protocol’ agreement between the RP in India and the administrator in Netherlands³⁵¹.

C. The Pre-Packs

A pre-packaged or a pre-arranged insolvency resolution process (“pre-packs”/“PPIRP”) is such a mechanism where the resolution plan is formulated and finalised prior to the commencement of formal proceedings.³⁵² It is said that a pre-pack can maximize enterprise value by “combining the efficiency, speed, cost, and flexibility of workouts with the binding effect and structure of formal insolvency proceedings.”³⁵³ Providing legal recognition to out-of-court settlement is the key in a PPIRP. Some headway has been done by way of introduction of provisions relating to withdrawal of CIRP application. However, to examine the issue comprehensively, a Committee has been constituted by MCA.³⁵⁴ On the other hand, initiatives like project *Sashakt* have allowed banks to decide the resolution strategy, outside the IBC, through Inter-Creditor Agreements (ICAs).³⁵⁵

D. The Group Insolvency

A group of companies is an economic entity formed of a set of companies which are either companies controlled by the same company, or the controlling company itself (Insee). This relationship between companies, in legal terms, is governed by the ‘holding’ and ‘subsidiary’ provisions.³⁵⁶ The Code, however, does not envisage a framework to either synchronise insolvency proceedings of different companies in a group or to resolve their insolvencies together.³⁵⁷ During the insolvency resolution of some corporate debtors,³⁵⁸ for e.g., in the case of *Videocon*,³⁵⁹ the AA

³⁵¹ *Jet Airways (India) Ltd. v. State Bank of India*, CA (AT) (Insolvency) No. 707 of 2019, before the National Company Law Appellate Tribunal (2019, 26 September) cited in Ishita Das, *The Need for Implementing a Cross-Border Insolvency Regime within the Insolvency and Bankruptcy Code, 2016*, Vikalpa: The Journal for Decision Makers 45(2) 104–114, 2020.

³⁵² Vidhi Center for Legal Policy, ‘*Designing a Framework for Pre-Packaged Insolvency Resolution in India: Some Ideas for Reform Report*’ (February 2020) <<https://vidhilegalpolicy.in/wp-content/uploads/2020/02/Report-on-Pre-Packaged-Insolvency-Resolution.pdf>>

³⁵³ Dr SK Gupta and Jay Kothari, ‘Broad contours of the proposed structure of pre-packs scheme in India’ (December 2020) <<https://insolvencytracker.in/2020/12/19/pre-packs-in-india-broad-contours-of-the-proposed-structure/>>

³⁵⁴ MCA. Constitution of sub-committee of Insolvency Law Committee to propose a detailed scheme for implementing prepack and prearranged insolvency resolution process (Chair – Dr. MS Sahoo), 24th June 2020, <http://www.mca.gov.in/Ministry/pdf/ACT_24062020.pdf>

³⁵⁵ As recommended by Sunil Mehta Committee (2018) a five-pronged strategy to resolve bad loans, with the larger ones going to an asset management company (AMC) or an alternative investment fund (AIF). See Shryam Kagwar, *Project Sashakt*, (Oct 2018) <<https://www.bankingfinance.in/project-sashakt-2.html>>

³⁵⁶ Section 2(87) of the Companies Act, 2013, Regulation 2(1)(zm) of LODR.

³⁵⁷ IBBI, ‘Report of the Working Group on ‘Group Insolvency’ (September 2019) <<https://ibbi.gov.in/uploads/whatsnew/2019-10-12-004043-ep0vq-d2b41342411e65d9558a8c0d8bb6c666.pdf>>

³⁵⁸ *Era infrastructure, Lanco, Educomp, Amtek, Adel, Jaypee and Aircel*. See Vardaan Ahluwalia and Varsha Yogish, ‘Staggered Lifting of the Corporate Veil: A Case for Group Insolvency Norms’, *Insolvency and Bankruptcy Blog*, Cyril Amarchand, (Oct 2019) <<https://corporate.cyrilamarchandblogs.com/2019/10/group-insolvency-norms/>>

³⁵⁹ *State Bank of India Vs Videocon Industries Limited (VIL) & Ors* (MA/2385/2019 in C.P.(IB)-02/MB/2018 dated 12.02.2020 of NCLT, Mumbai Bench), Also see *Sanghvi Motors Limited & Ors Vs M/s Albanna Engineering (India) Pvt Ltd*. MA/25/KOB/2020 in IBA/38/KOB/2019, cited in Raghuram Manchi, ‘A New Case Law relating to Group

allowed consolidation of 13 of the 15 Videocon group companies. The Working Group recommendations³⁶⁰ have addressed the problem in three dimensions –

“first, elements that enable communication, coordination and cooperation among stakeholders in the insolvency proceedings of companies in a group (i.e., procedural coordination), second, elements that enable the assets of companies in a group to be consolidated in limited circumstances (i.e., substantive consolidation), third, rules to deal with the perverse behaviour of companies in a group, and fourth, interconnection among the companies that would make them part of a group.”

There is a need to have statutory clarity between the ‘*separate legal personality*’ and the matters of ‘*lifting of corporate veil*’.³⁶¹

E. Tackling Fraudulent Transactions

The IBC provides for wrongful/fraudulent transactions³⁶² that have been entered 1 year preceding the commencement of the CIRP (2 year in case of related party transactions). While we are yet to see many cases coming up under this category. The Supreme Court in *Anuj Jain’s Case*,³⁶³ laid down the seven-step process to be followed by the resolution professional while dealing with matters under Section 43 of the Code. Further, the importance of differentiating between the ‘preferential transactions’ and ‘wrongful/fraudulent transactions’ was pointed out. Hence, it is important that well trained IPs are available, who can detect the fraudulent transactions,³⁶⁴ but at the same time, the IP is not expected to be extraordinarily thorough in this detection. The AA in a case, directly ordered the Serious Fraud Investigation Office (“SFIO”) to investigate into the siphoning of funds, which got challenged before NCLAT. It was held that the AA cannot direct

Insolvency’, (May 2020) <<https://ibclaw.in/a-new-case-law-relating-to-group-insolvency-by-raghuram-manchi-insolvency-professional/>>

³⁶⁰ IBBI (n. 199).

³⁶¹ *Arcelormittal India Private Limited Vs. Satish Kumar Gupta & Others* (2019) 2 SCC 1.

“...where a statute itself lifts the corporate veil, or where protection of public interest is of paramount importance, or where a company has been formed to evade obligations imposed by the Law, the court will disregard the corporate veil. Further, this principle is applied even to group companies, so that one is able to look at the economic entity of the group as a whole....the Court may pierce the corporate veil for the purpose and only for the purpose of depriving company or its controller of the advantage that they would otherwise have obtained by company’s separate legal personality”.

³⁶² Sections 43, 45, 49, 50 and 66 under the Code deal with transactions that can be avoided or set aside by the IRP and the Liquidator. These transactions are of five categories: (i) Preferential transactions (ii) Undervalued transactions (iii) Undervalued transactions defrauding the creditors (iv) Extortionate credit transactions (v) Fraudulent trading or wrongful trading. See <<https://lawanthology.com/2020/07/24/fraudulent-transactions-what-to-keep-in-mind-while-ring-fencing-your-assets/>>

³⁶³ *Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited vs. Axis Bank Limited and Others*(2020) 8 SCC 401.

³⁶⁴ Western India Regional Council of the Institute of Chartered Accountants of India, ‘Forensic Audit/Transaction Audit under IBC’ (undated) <<https://www.wirc-icai.org/images/publication/final-press-forensic.pdf>>.

the SFIO directly to investigate into a matter, rather it should send the inputs to the Central Government for necessary action.³⁶⁵

F. The Pandemic Effect

Unprecedented times require unprecedented measures. COVID-19 has created a havoc in the lives of the entrepreneurs, causing defaults in their loan payments. To ameliorate the conditions of corporate debtors, occasioned due to the pandemic, the GOI came up with several regulatory relaxation measures³⁶⁶ and also the *Aatmanirbhar package*.³⁶⁷ The CIRP trigger threshold has been raised to Rs. 1 Crore from Rs. 1 Lakh.³⁶⁸ Further, the inclusion of Section 10A to the Code, exempts the period of six months w.e.f. March 25th, 2020 for initiating any CIRP for a default occurring during this period.³⁶⁹ While there are critiques³⁷⁰ to this suspension, the IBBI considers it as a “*valuable breathing space while the companies as well as the authorities can put in place a comprehensive strategy to wade the economy through the pandemic.*”³⁷¹ The Supreme Court remarked in a case³⁷² that “the doors of justice cannot be closed and the NCLAT should find a way for online hearing.”

G. Impact Assessment

The IBC and its enforcement, so far, have provided a hope for having a mechanism in India which continuously monitors the performance of laws and the institutions and measures the impact.³⁷³ There is a great need to encourage research and provide information at ease for the researchers, which at present is missing. Information on various cases is not readily available in a searchable

³⁶⁵ *Union of India, Through Serious Fraud Investigation Office (SFIO) vs. Maharashtra Tourism Development Corporation & Anr*, Company Appeal (AT) (Insolvency) No. 964 of 2019 decided on 02.12.2019.

³⁶⁶ Press Release, Announcement of relief measures relating to Statutory and Regulatory compliance matters across sectors in view of COVID 19 outbreak, Press Information Bureau Govt. of India (24 March 2020) <<https://ibbi.gov.in/uploads/press/50277513bcc7d94092ce4ee2b6591aad.pdf>>.

³⁶⁷ More about Aatmanirbhar Bharat see <<https://aatmanirbharbharat.mygov.in/>>.

³⁶⁸ MCA Notification No. S.O. 1205(E) dated 24th March 2020.

³⁶⁹ Shall not apply to any default committed under the said sections before 25th March, 2020. This period has further been extended until March 25, 2021 – <<https://www.ibbi.gov.in/uploads/legalframework/df55d4f612f270d6c637ee4b3c8131c8.pdf>> IBBI amended the CIRP Regulations to insert regulation 40C and regulation 47A to the Liquidation Process Regulations, which states “that subject to provisions of the IBC, the period of lockdown imposed by the Central Government in the wake of the COVID-19 outbreak shall not be counted in the timeline ... that could not be completed due to the lockdown”.

³⁷⁰ Aparna Iyer, ‘Five things that make IBC suspension a bad idea’ Mint (22 Dec 2020). Former RBI Deputy Governor Viral Acharya has also expressed similar opinion in Times of India (July 29, 2020) <<https://timesofindia.indiatimes.com/business/india-business/suspending-ibc-for-a-year-bad-idea-restart-bankruptcy-courts-in-2-3-months-viral-acharya/articleshow/77248303.cms>>.

³⁷¹ IBBI Newsletter, From Chairperson’s Desk, ‘Insolvency Law in Times of COVID-19’, Vol. 15, April – June 2020.

³⁷² An employee at NCLAT detected COVID positive and due to which NCLAT was closed. See *Marathe Hospitality vs. Mahesh Surekha* SLP 8139 of 2020 decided on 10.07.2020.

³⁷³ See Vagda Galhotra, ‘A Case for Legislative Impact Assessment’, 54 (26) EPW.

“Lawmaking in India is fraught with inadequacy of pre-legislative thought, consultation and deliberation, along with insufficient analysis of the impact of the laws. The result, thus, is that there are too many laws and negligible data on their achievements.”

format.³⁷⁴ Open access database on all orders/judgments of the NCLT, NCLAT and Supreme Court would facilitate this. The Standing Committee on Finance has recognized the need for removing bottlenecks and streamline the CIRP further,³⁷⁵ and hence it is a ‘work in progress’. Economy-specific research has shown that insolvency reforms which encourage debt restructuring and reorganization reduce both failure rates among small and medium-size enterprises and the liquidation of profitable businesses.³⁷⁶ COVID-19 has put a spanner in the wheel of reforms under the Code, and any impact assessment of the Code may not provide a true picture at this point in time. Going forward, the measuring matrix for impact assessment of the Code shall be its preamble which provides for “*reorganization and insolvency resolution ... in a time bound manner for maximization of value of assets..., to promote entrepreneurship, availability of credit and balance the interests of all stakeholders...*”

VI. CONCLUSION

“Bankruptcy is a gloomy and depressing subject.

The law of bankruptcy is dry and discouraging topic.”³⁷⁷

A review of the modern CIRP regulations and its implementation so far reflects otherwise. In fact, on one hand there have been curious cases like *Ruchi Soya*, in which the regulators had to intervene³⁷⁸ to stop the rally in its share prices.³⁷⁹ On another spectrum, cases like *Era Infrastructure* have become inconveniencing due to their inordinate delays, which also mock the success of the Code.³⁸⁰ *Dr. M.S. Sahoo* describes the IBC as ‘a road under construction’.³⁸¹ There are intermittent course corrections required keeping in view the changing conditions of business, markets and economy. The ultimate goal is “*when India celebrates honest business failures.*”³⁸²

³⁷⁴ Sreyan Chatterjee & Gausia Shaikh & Bhargavi Zaveri, ‘Watching India’s Insolvency Reforms: A New Dataset of Insolvency Cases’ Working Paper 2017-012 IGIDR (2017)

³⁷⁵ 6th Report of the Standing Committee on Finance on The IBC (Second Amendment) Bill 2019, 17th Lok Sabha (March 2020)

³⁷⁶ Dewaelheyns, Nico, and Cynthia Van Hulle, ‘Legal Reform and Aggregate Small and Micro Business Bankruptcy Rates: Evidence from the 1997 Belgian Bankruptcy Code.’ (2006) 31(4) Small Business Economics 409–24; Rodano, Giacomo, Nicolas Andre Benigno Serrano-Velarde and Emanuele Tarantino ‘The Causal Effect of Bankruptcy Law on the Cost of Finance’ (2011) <<https://ssrn.com/abstract=1967485>>; Giné, Xavier, and Inessa Love, ‘Do Reorganization Costs Matter for Efficiency? Evidence from a Bankruptcy Reform in Colombia’ (2006) Policy Research Working Paper 3970, World Bank, Washington, DC

³⁷⁷ C. Waren, Bankruptcy in United States History 3 (1935), cited in McIntyre, Lisa J. (1989) ‘A Sociological Perspective on Bankruptcy’ (1989) 65 (1) (6) Indiana Law Journal: <<http://www.repository.law.indiana.edu/ilj/vol65/iss1/6>>

³⁷⁸ SEBI’s Consultation Paper on ‘Recalibration of threshold for Minimum Public Shareholding norms, enhanced disclosures in Corporate Insolvency Resolution Process (CIRP) cases’ (August 2020)

³⁷⁹ Rahul Oberoi, ‘After 8,818% rally in 103 days, Ruchi Soya faces red flag; analysts want a SEBI probe’ *Economic Times* (1 July 2020) <<https://economictimes.indiatimes.com/markets/stocks/news/after-8818-rally-in-103-days-ruchi-soya-faces-red-flag-analysts-want-a-sebi-probe/articleshow/76683745.cms>>.

³⁸⁰ Dipak Mondal, ‘Pending Resolution’, *Business Today – Cover Story Corporate Distress* (18 October 2020) pp. 58. “There are 29 winding up cases pending against Era Infra in different High Courts. This case sees no immediate closure even after three years, as litigation and procedural delays slow down the insolvency process.”

³⁸¹ MS Sahoo (n. 42).

³⁸² *Ibid.*

Another goal is to create a culture which discourages “lenders from issuing high-risk loans, and managers and shareholders from taking imprudent loans and making other reckless financial decisions.”³⁸³

As India is turning more global and open with schemes like Make in India, Digital India, and Startup India, which have been implemented to achieve popularity and to transform India into a favoured investment destination, completing the unfinished agenda will make the insolvency laws in line with the international legislations and will provide a single door solution to all insolvencies. Imposing confidence on maverick professionals will make the insolvency proceedings more time bound and swift.

All the wheels of the insolvency ecosystem have to remain well-oiled with regular updates and shed the resistance to change. The magic of ‘reform, perform and transform’ can only happen when each stakeholder understands the basic philosophy of the Code and its noble objectives of resolution, which is not against anyone but for a greater good.

It is heartening to note that the Supreme Court in *Swiss Ribbons* provided for an *epilogue*, outlining the impact of the Code in terms of numbers observing “*these figures show that the experiment conducted in enacting the Code is proving to be largely successful. The defaulter’s paradise is lost. In its place, the economy’s rightful position has been regained*”.

POST-SCRIPT: While I review this article in the last week of March 2021 to address the editorial comments/suggestions, I am overwhelmed by the amount of jurisprudence being created since I submitted the first version of this Article. This calls for writing a short post-script on the major developments from February 2021 to March 2021. While IBBI quarterly Newsletter for the quarter October – December 2020 is awaited, its website provides us with the developments.

Home Buyers and Construction Projects: In *Manish Kumar v. Union of India*,³⁸⁴ Supreme Court settled the challenge made to the IBC amendment requiring the allottees under a real estate project to meet certain additional requirement to qualify as Financial Creditor. Individual home buyers now cannot bring action under IBC as financial creditor. In the process of deciding this case and agreeing to the justification for frequent amendments in IBC, Supreme Court again revisited the scope and objectives of IBC observing that “*The working of a statute may produce further issues, all of which may not be fully perceived or wholly foreseen by the law giver. The freedom to experiment must be conceded to the legislature, particularly, in economic laws. If problems emerge in the working of a law, which requires legislative intervention, the court cannot be*

³⁸³ Djankov, Simeon, Oliver Hart, Caralee McLiesh and Andrei Shleifer ‘Debt Enforcement around the World’ (2008) 116 (6) Journal of Political Economy 1105–49.

³⁸⁴ *Manish Kumar vs. Union of India and another* [WP(C) No. 26 of 2020 with 40 other writ petitions], decided on 19th January 2021.

oblivious to the power of the legislative to respond by stepping in with necessary amendment".³⁸⁵ Ruling out any 'malice' by legislature, Supreme Court approved the logic for restrictions imposed on individual home buyers to bring action as Financial Creditors under the Code. It was necessary for home buyers to have a critical mass to "ensure that a reasonable number of persons similarly circumstanced, form the view that despite the remedies available under the RERA or the Consumer Protection Act or a civil suit, the invoking of the Code is the only way out, in a particular case." In another case,³⁸⁶ Supreme Court declined to entertain a petition under Article 32 filed by a home buyer, distinguishing its intervention in the cases of *Amrapali*³⁸⁷ and *Unitech*.³⁸⁸ Supreme Court in this case said "the Court has no reason to doubt the genuineness of the grievance which has been espoused by the petitioner. However, the issue is whether his recourse to Article 32 is the correct remedy when alternative modalities are available and particularly since the engagement of the Court in a petition of this nature would involve a supervision which does not lie within the province of judicial review. Real estate projects across the country may be facing difficulties. The intervention of the Court cannot be confined to one or a few selected projects. Judicial time is a precious resource which needs to be zealously guarded. We have to always be mindful of the opportunity cost involved in exercising our discretion to admit a petition and to intervene, in terms of diversion of time and resources away from other matters where our intervention would be more apposite and necessary." From the aforesaid decisions, it is clear that Supreme Court has now balanced the requirements of 'judicial activism' vis-a-vis 'calibrated exercise of judicial discretion' and also highlighted the need for measuring the value of judicial time (opportunity cost).

Powers of NCLT/NCLAT: In *Gujarat Urja case*,³⁸⁹ Supreme Court reiterated the wide powers of Adjudicating Authority under the Code, however, said that "NCLT has jurisdiction to adjudicate disputes, which arise solely from or which relate to the insolvency of the CD. However, in doing so, the NCLT and NCLAT must ensure that they do not usurp the legitimate jurisdiction of other courts and tribunals when the dispute is one which does not arise solely from or relate to the insolvency of the CD. The nexus with the insolvency of the CD must exist." In this case also, Supreme Court reiterated the objectives of the Code by stating "The enactment of the Code is in significant senses a break from the past. While interpreting the provisions of the Code, care must be taken to ensure that the regime which Parliament found deficient and which was the basic reason for the enactment of the new legislation is not brought in through the backdoor by a process of disingenuous legal interpretation."

³⁸⁵ See Summary of the decision given by IBBI, <<https://www.ibbi.gov.in/uploads/legalframework/f6ec338d24e31bba2a43b173c1634414.pdf>>.

³⁸⁶ *Upendra Choudhury vs. Bulandshahar Development Authority & Ors.*, Writ Petition (Civil) No 150 of 2021 decided on February 11, 2021. Supreme Court followed its earlier view taken in the case of *Shelly Lal v Union of India*, Writ Petition (Civil) No 1390 of 2020 decided on 7 January 2021.

³⁸⁷ *Bikram Chatterji v Union of India*, Writ Petition (C) No 940 of 2017.

³⁸⁸ *Bhupinder Singh v Unitech Ltd.*, Civil Appeal No 10856 of 2016.

³⁸⁹ *Gujarat Urja Vikas Nigam Limited vs. Mr. Amit Gupta & Ors.* [Civil Appeal No. 9241 of 2019] decided on 8th March 2021

Supreme Court has declined to interfere with the decisions of the NCLAT in a number of cases since January 2021, however, on the other hand, in the case of *Arun Kumar Jagatramka*,³⁹⁰ Supreme Court went ahead to state “The IBC was introduced in order to overhaul the insolvency and bankruptcy regime in India. As such, it is a carefully considered and well thought out piece of legislation which sought to shed away the practices of the past. The legislature has also been working hard to ensure that the efficacy of this legislation remains robust by constantly amending it based on its experience. Consequently, *the need for judicial intervention or innovation from the NCLT and NCLAT should be kept at its bare minimum and should not disturb the foundational principles of the IBC.*”

IBBI continues to work for providing clarifications and guidance on different aspects of smooth functioning of the Code:

- Public comments were called on Pre-packaged Insolvency Resolution Process under Insolvency and Bankruptcy Code, 2016 based upon the report submitted by the sub-committee of Insolvency Law Committee (ILC).³⁹¹
- Guidance on retention of records relating to the Corporate Insolvency Resolution Process.³⁹²
- Release of Handbook on Ethics for Insolvency Professional: Ethical and Regulatory Framework.³⁹³
- IBBI continues to maintain its vigilance on the news media regarding statements attributed to IBBI and its officials, which is evident from a recent letter to the Editor of Business Standard newspaper³⁹⁴.

³⁹⁰ *Arun Kumar Jagatramka. vs. Jindal Steel and Power Ltd. & Anr.* [Civil Appeal No. 9664 of 2019 and other appeals] decided on 15th March 2021. This case involved a confusion as to applicability of the provisions of IBC in relation to Section 29A of the Code in the matter involving section 230 of the Companies Act, 2013. It has already been noted above that role of NCLT/NCLAT under the Code and Companies Act are different.

³⁹¹ Invitation of comments from public on Pre-packaged Insolvency Resolution Process under Insolvency and Bankruptcy Code, 2016, dated 8th January 2021, <<https://www.ibbi.gov.in/uploads/whatsnew/34f5c5b6fb00a97dc4ab752a798d9ce3.pdf>>.

³⁹² Circular, Retention of records relating to Corporate Insolvency Resolution Process, (4th January 2021) <<https://www.ibbi.gov.in/uploads/legalframework/5bb3be107809847f06cf2059f54ff3c8.pdf>>.

³⁹³ Handbook on Ethics for Insolvency Professional: Ethical and Regulatory Framework, IBBI, (19th March 2021) <<https://www.ibbi.gov.in/uploads/whatsnew/0ab3ccba77975afcd9eb7ac679154de8.pdf>>. This handbook was produced in association with British High Commission and is based on inputs on the best practices followed by the Insolvency Practitioners in the United Kingdom.

³⁹⁴ News item - “Normalcy restored, says Sahoo, as India resumes Insolvency proceedings”, in the Business Standard dated 26th March 2021. Letter to the Editor of Business Standard from IBBI (26th March 2021) <<https://ibbi.gov.in/uploads/press/2021-03-26-140239-ueroz-4949cd7ef3be23f7ebea7faae91a8d0e.pdf>>.