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HYBRID INSOLVENCY RESOLUTION PROCESS

A CREDITOR LED, DEBTOR IN POSSESSION RESOLUTION PROCESS FOR INDIA

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INSOLVENCY LAW ACADEMY IS AN INDIAN INSTITUTE OF EXCELLENCE IN INSOLVENCY. AN INDEPENDENT RESEARCH INSTITUTION, ILA CONTRIBUTES TO ROBUST AND EVIDENCE-BASED POLICY MAKING AND ENHANCEMENT OF PROFESSIONAL AND ETHICAL STANDARDS IN THE INSOLVENCY INDUSTRY THROUGH CUTTING-EDGE RESEARCH, INNOVATION AND DEVELOPMENT OF BEST PRACTICES. ONE OF THE HALLMARKS OF ILA IS TO DEVELOP A COMMUNITY IN PURSUIT OF EDUCATION, RESEARCH AND SCHOLARSHIP IN THE FIELD OF INSOLVENCY.

Corporate distress and firm closure are unavoidable. To a certain extent, it is a desired outcome of strong market economies, a process of self-cleansing and market efficiency that promotes the survival of the most competitive firms. Market forces nudge nonviable firms that remain in business (so-called zombies) to leave the market to make resources available for other firms. Their continued existence can lead to credit misallocation and a drop in economic productivity. Consensus-driven solutions can provide better outcomes for all stakeholders of such enterprises. It can particularly benefit enterprises facing distress due to systematic issues, such as economic downturn, change in regulations, recession, commodity cycle, etc.

The government and Insolvency and Bankruptcy Board of India have demonstrated unprecedented resolve to make the country's insolvency framework fully robust as expected of an economy seeking to become the third-largest economy in the world by 2027, with a GDP of $5 trillion. The government has, however, set a higher goal of becoming a 'developed country' by 2047. To become a developed nation, reforms are required in various areas which have long been hamstringing India. Futuristic and visionary policies will have to be formulated at multiple levels. To support these goals, India needs a robust insolvency system that ranks amongst the best in the world.

Hybrid procedures are amongst most popular choices for resolution of distress. It is imperative that India's insolvency framework includes a robust hybrid procedure within IBC framework.

This research paper proposes a hybrid model customised for the Indian eco-system. The model proposed in this paper is in line with the objectives of IBC and broadly aligned with the Report of IBBI Expert Committee on Creditor Led Resolution Approach. We hasten to add that unlike purely contractual workouts, hybrid procedures require some court involvement. The hybrid procedures will be effective only if the Insolvency and Bankruptcy Code, 2016 is effective. Therefore, institutional framework in IBC should be equipped to complement these procedures. IBC needs to be continued to be strengthened to make hybrid procedures effective, speedier and not susceptible for gaming by unscrupulous promoters.

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1. Introduction

The stressed debt held by the financial institutions is usually a manifestation of anticipated as well as unanticipated risks. At a systemic level, a high level of stressed debt is generally caused by excessive leverage, poor underwriting, lax post disbursement surveillance and other exogenous shocks that may emerge from the real economy. These factors have contributed to high level of stressed debt in various geographies, from time to time. The Indian credit markets are dominated by banks. The deterioration in asset quality of Indian banks, especially that of public sector banks, can be traced to the credit boom of 2006-2011 when bank lending grew at an average rate of over 20%. A huge pile up of stressed assets in the Indian banking sector was witnessed about a decade ago. The number of non-performing loans had grown to ₹ 3,41,641 crores in September 2015, being about 5.08% as a percentage of the total loans.[1] It wouldn't be an exaggeration to say that the public sector banks were on the verge of a crisis. Many factors contributed to the deterioration in asset quality - adverse macro-financial environment; lax credit appraisal and post-sanction monitoring standards; project delays and cost overruns; evergreening of loans, and the absence of an effective insolvency law until May 2016.[2]

High level of stressed debt generates major adverse consequences in the credit system by way of misutilisation of capital, averseness to lending and crowding out of investments. The growing role of financial institutions in facilitating the credit supply demands credible regulatory and statutory regime for protection of investment and thus, calls for a more efficient, faster and transparent insolvency resolution mechanism to be in place.[3] A sound insolvency law provides an avenue for recycling capital locked in inefficient firms, and its deployment in other productive purposes. It promotes entrepreneurship in the economy; provides means for distressed borrowers to renegotiate their debt with the creditors; and enables creditors to exercise their rights over borrowers in default.[4] An effective insolvency regime provides greater coherence in law and facilitates the application of consistent and lucid provisions to different stakeholders affected by business failure or the inability to pay debt.[5]

Until the enactment of the Insolvency and Bankruptcy Code in 2016 (IBC), India did not have a robust insolvency law. Prior to IBC, the government took various incremental measures, over many years, to improve the insolvency system. These steps, although well-intended, did not produce the desired result, and left the market with a highly fragmented and ineffective framework of insolvency law and enforcement of creditors' rights.[6] An effective insolvency law which could contribute to resolving non-performing loans, and improve credit availability by enabling swift and cost-effective resolution of stressed assets, was the dire need of the hour in 2016. When IBC was cleared by the Parliament, the Ministry of Finance, which was then spearheading the insolvency reform, termed it as, "*a historical day for economic reforms in India*".[7] In a very short period of time, IBC has significantly altered the financial landscape as it provides a market mechanism for time-bound insolvency resolution enabling maximisation of value. The new regime is a paradigm shift in which creditors take control of the assets in contrast to the earlier systems in which debtors remained in possession of the assets till its resolution or liquidation, leading to an improvement in the credit culture of the country. Seen from this perspective, the enactment of IBC has been a landmark reform in the economic history of India.[8] IBC is a critical building block of India's progression to a mature market economy. It addresses the growing need for a comprehensive law that would be effective in resolving the insolvency of debtors, maximizing the value of assets available for creditors and easing the closure of unviable businesses.

IBC is the umbrella legislation for insolvency resolution of all entities in India—both corporate and

individuals. The provisions relating to insolvency and liquidation of corporate entities (companies and limited liability partnerships) came into force on December 1, 2016, while those of insolvency resolution and bankruptcy of personal guarantors to corporate debtors came into effect on December 1, 2019. Insolvency and bankruptcy provisions for other category of individuals are yet to be notified (as on the date of this publication). The objective of IBC is resolution of insolvency, maximizing the value of assets of the corporate debtor, and to promote entrepreneurship, availability of credit, and balancing the interests.

IBC contains many new principles and concepts alien to the Indian market on which neither any best practices nor recorded precedents existed at the time of its enactment. For example, IBC introduces a shift from the '*debtor-in-possession*' regime under the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) (since repealed) to a '*creditor-in-control*' system, making it a creditor-friendly legislation. It introduced many new institutions such as, specialised bankruptcy tribunals – National Company Law Tribunal (NCLT) acting as the Adjudicating Authority under the IBC, appellate tribunal where appeals against orders of Adjudicating Authority can be filed - National Company Law Appellate Tribunal (NCLAT), and Insolvency and Bankruptcy Board of India (IBBI), the regulator. IBC makes provisions for a slew of service providers, namely, insolvency professionals, insolvency professional agencies, insolvency professional entities, valuers, and information utilities.[9]

IBC offers a market-directed, time-bound mechanism to resolve insolvency, wherever possible, or exit, where required. The rescue mechanism for a corporate debtor is achieved through the corporate insolvency resolution process (CIRP), while the exit mechanism is dealt with through a liquidation process. IBC enables the creditors and corporate debtor to trigger CIRP of a corporate debtor for resolution of stress when it has committed a threshold amount of default of ten million rupees and more. If an order of commencement of insolvency is passed by Adjudicating Authority, corporate debtor moves from '*debtor-in-possession*' to '*creditor-in-control*' status. Management of corporate debtor and its assets vests with an insolvency professional, who serves as resolution professional (RP), and runs corporate debtor as a going concern and conducts its CIRP.

A committee of creditors (CoC) comprising of financial creditors[10] of corporate debtor is constituted to evaluate options for its resolution and value maximization. The voting shares are then assigned to members of CoC based on the amount of debt owed to them. An alternate provision provides that CoC is formed with operational creditors[11] when corporate debtor has no financial debt or when all its financial creditors are related parties. The CoC has a statutory role. IBC entrusts it with the responsibility of unlocking the valuable assets for their more productive use in the economy. The decisions taken by CoC impact not only the life of corporate debtor and consequently its stakeholders, it has wider ramifications for the country's economy. Even though it is RP who is responsible for the management of the day-to-day affairs of corporate debtor, IBC envisages CoC as the supreme decision-making body during CIRP. Commercial decisions are left to the collective wisdom of CoC. It decides the fate of corporate debtor by approving a plan for resolution of its insolvency (resolution plan) or opting for its liquidation. IBC has vested the CoC with the authority to pick the best feasible resolution plan for a company's long-term survival. Distribution to be made to the creditors under a resolution plan is also decided by CoC taking into consideration the relevant provisions of IBC. The Supreme Court has repeatedly recognized the importance of the CoC and supremacy of its commercial wisdom. This has been critical in establishing IBC as a credible bankruptcy resolution process.[12]

The RP invites feasible and viable resolution plans from eligible and credible resolution applicants for resolution of insolvency of corporate debtor. The resolution plan must be compliant with the mandatory requirements of IBC and related

regulations. If CoC approves a resolution plan within the stipulated time with 66% majority in value, corporate debtor continues as a going concern. All this is required to be done within a period of 180 days, with two extensions of up to 90 and 60 days each, to be sought by RP from Adjudicating Authority, if decided by CoC. If CoC does not approve a resolution plan with the required majority within this period, or resolves to liquidate the corporate debtor, the chopper comes down and the liquidation process of corporate debtor begins. An insolvency professional is appointed as liquidator to conduct liquidation process.

There are two other resolution processes for corporate entities which are available under IBC: Fast-track Corporate Insolvency Resolution Process (Fast-track process)[13], and Pre-packaged Insolvency Resolution Process (PPIRP).[14] However, CIRP represents the primary formal procedure under IBC.[15] The PPIRP, specifically tailored for micro, small, and medium enterprises (MSMEs), is led by corporate debtor and involves the formulation of a base resolution plan in an informal setting, with which external bidders can compete subsequently, through a Swiss Challenge mechanism during the process in circumstances specified in the PPIRP provisions. Fast-track process is not in use, and PPIRP has not taken off due to a number of reasons *(See Section 2)*.

1.1. Outcomes under CIRP

IBC has been hailed as one of the most important economic legislations in recent times, having reformed the much-needed revival as well as exit mechanism for corporate entities. Over the past seven years, the government led the reform from the front demonstrating the highest commitment to the insolvency reform. The enactment of IBC and its implementation have been very swift, probably with no parallel anywhere else in the world. The government moved at an unprecedented pace to operationalise IBC. In less than six months after its enactment, subordinate legislation of IBC was finalized, most new institutions were established and became fully functional, and the major part of corporate insolvency law was made operational before the end of the year 2016.[16] Adjudicating Authority was established on June 1, 2016 with several benches across the country, and IBBI was established on October 1, 2016. On its establishment, IBBI finalised the draft regulations relating to licensing and regulation of service providers such as the insolvency professionals, and for CIRP and liquidation processes and notified them within two months of its establishment. Certificates of registration were issued to first set of insolvency professionals on November, 30, 2016. The provisions relating to CIRP became effective on December 1, 2016. The government, Adjudicating Authority, IBBI and stakeholders worked in unison and took several steps, before and after enactment of IBC, to enable its swift operationalisation. IBC has produced remarkable outcomes in a very short time. A full-fledged insolvency industry has developed from scratch in a matter of no time. There is no parallel precedence in any other part of the world of a wholesome and large insolvency industry being in place and fully function in such a short time.

India did not have any prior experience of an insolvency law that is proactive, incentive-compliant, market-led and time-bound. Many institutions required for implementation of a modern and robust insolvency regime did not exist. IBC and the reform envisaged thereunder was, therefore, in many ways, a leap into the unknown and a leap of faith.[17] Particularly, in this backdrop, the outcomes under IBC have been astounding. As on December 31, 2023, a total number of 7,325 corporate debtors were admitted into CIRP. Out of these, 1,035 applications for initiation of CIRP of corporate debtors were withdrawn under section 12A of IBC and 1,124 applications were closed on appeal, or review, or settled. Out of these remaining 5,166 cases, resolution plan was approved for 891 corporate debtors[18] till December 2023. Out of these, 35 matters which yielded resolution plans have since moved into liquidation. CIRPs have restarted in 23 cases and CIRPs in 4 matters, where liquidation orders were

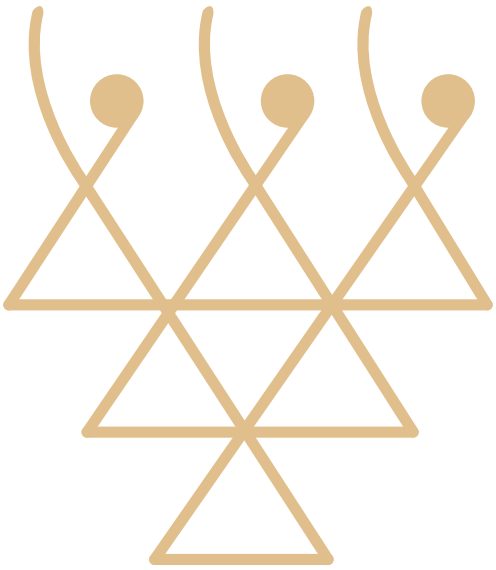
passed earlier, have yielded resolution plans. However, in 891 resolved corporate debtors, 216 applications in respect of avoidance transactions of the tune of ₹ 1.22 lakh crore has been pending before Adjudicating Authority.[19] As per IBBI, till December 31, 2023, the creditors have realised ₹ 3.21 lakh crore under the resolution plans. The fair value and liquidation value of the assets available with these corporate debtors, when they entered the CIRP was estimated at ₹ 2.97 lakh crore and ₹ 1.90 lakh crore, respectively, as against the total claims of the creditors worth ₹ 10.07 lakh crore. The creditors have realised 168.64% of the liquidation value and 86.58% of the fair value (based on 783 cases where fair value has been estimated). The haircut for creditors relative to the fair value of assets was less than 14%, while relative to their admitted claims is around 68%.[20] It may also be noted that various such assets were classified non-performing or were under financial duress even prior to enactment of IBC. Hence, IBC, while might have not yielded values to the creditors, it provided finality to the resolution path for such assets.

After enactment of IBC, non-performing assets fell to a seven-year low of 5.0% in September 2022.[21] Gross Non-Performing Assets (GNPAs) dipped further to 3.2% in September, 2023, reduced by 21.1% y-o-y to ₹ 4.85 lakh crore as of December 31, 2023 due to lower slippages, steady recoveries & upgrades, and some write-offs.[22] At the time of IBC's enactment in 2016, total stressed assets had risen to 11.5%, with public sector banks leading the strain at 14.5% as on March 31, 2016.[23] Such was the surge in bad loans that provisions towards these wiped out the profits of 12 out of the 39 listed banks. Out of the 27 banks that reported a quarterly profit, 6 saw profits plummet more than 70% from a year-ago period. In 2014, Reserve Bank of India (RBI) cracked down on bad loans situation. Many measures, including as asset quality review were initiated. In June 2017, an Independent Advisory Committee (IAC) for RBI decided to focus on large stressed accounts at that time and accordingly took up for consideration the accounts which were classified partly or wholly as non-performing from amongst the top 500 exposures in the banking system. Earlier, the government amended the Banking Regulation Act, 1949 to authorize RBI to issue directions to banks for initiating proceedings under IBC for timely resolution in case of a default. The Banking Regulation (Amendment) Ordinance, 2017 was promulgated on May 4, 2017. IAC came up with an objective, non-discretionary criterion, whereby those accounts were shortlisted whose fund and non-fund based outstanding amount was greater than ₹ 5,000 crore, along with 60% or more classified as non- performing by banks as on March 31, 2016. According to the recommended criteria, IAC identified 12 accounts, 'the Dirty Dozen' totaling about 25% of the current gross non-performing assets of the banking system to be referred to NCLT. This roughly translated to ₹ 2.5 lakh crore of bad loans stuck with these 12 companies.[24] RBI also requested the Adjudicating Authority to accord priority to these cases.[25] RBI subsequently released a second list of 28 companies in August 2017 and had given time to the banks till December 13, 2017 to find a resolution plan in accordance to a formula prescribed by it, or else banks were mandated to initiate CIRP of these companies under IBC. These 28 companies put together, owed roughly ₹ 2 lakh crore to the banks. Later, the banks requested the RBI to extend the December deadline, but RBI refused to do so. The non-performing accounts of 40 companies (12 in the first list and 28 in the second list) referred by RBI for the resolution process came much into limelight as they together accounted for 40-45% of bad loans in the banking system. A list of these 40 cases can be seen here.[26] This step by RBI encouraged the banks, who were watching from side lines, to start using IBC for resolution of their stressed assets, while reaffirming Government's faith in and commitment to the insolvency reform.

The outcome of IBC goes beyond recovery. It has created an environment of better financial organisation and discipline, and has reformed the behaviour of stakeholders. The "*fear of losing control*" over the corporate debtor upon initiation of CIRP has

nudged thousands of debtors to settle their dues even before the initiation of their insolvency proceedings.[27] Till October, 2023, 27,514 applications for initiation of CIRPs of CDs having underlying default of ₹ 9.74 lakh crore were withdrawn before their admission before their admission into CIRP has been attributed to behavioural change.[28] The IBC has triggered a cultural shift in the dynamics between lenders and borrowers, and promoters and creditors by shifting the balance of power from the borrower to the creditor. This metamorphosis is attributable not solely to the statutory framework, but also to IBC's proficient execution.[29] It has instilled a significantly increased sense of fiscal and credit discipline to better preserve economic value.[30] Simplification of regulatory frameworks through reforms such as the IBC has enhanced the ease of doing business.[31] The defaulter's paradise is lost.

However, time taken by financial creditors for initiation of CIRP, and by Adjudicating Authority for admission of insolvency petition, and procedural delays in completion of CIRP and liquidation processes, continue to impact the outcomes under IBC and impede its objectives. These, and other impediments holding back effectiveness of an otherwise robust insolvency regime ushered in by IBC, are discussed in detail in the *Section 2* of this paper. An analysis of time taken for admission and in resolution through CIRP makes a strong case for introducing an alternate insolvency resolution mechanism in the form of a hybrid insolvency resolution process based on global best practices, but customised for India, within IBC framework. This paper proposes key features of such hybrid procedure, which will allow the corporate debtor and its financial creditors to apply the advantage and flexibility of out-of-court restructuring mechanism, while observing the principles and safeguards enshrined in IBC. The suggested framework will also encourage the application and use of negotiation and mediation in insolvency process, an aspiration emphatically expressed by the government and IBBI,[32] and Insolvency Law Academy,[33] to reduce avoidable adversarial litigation and reduce the workload of an overburdened Adjudicating Authority. A hybrid mechanism will be effective only if the framework and processes under IBC continue to be robust.



2. Compelling case for hybrid resolution mechanism

The poor outcome of the pre-IBC insolvency regime is attributed to several factors. The insolvency framework was fragmented and lacked robustness. More specifically, there were factors, such as, managerial delaying tactics; requirement of court approvals and the discretion available with the courts to intervene at every stage; lack of institutional capacity in terms of resources, number of judges and well-trained officials; complicated priority regime for distribution in liquidation; abuse by the debtors of the moratorium on debt enforcement during rescue; pro-rehabilitation approach of the courts and adjudicatory bodies, even in case of unviable businesses; delayed decision-making by state-owned creditors; and multiplicity of legal actions on the same cause of action and related conflicts.[34] In 2014, Bankruptcy Law Reforms Committee (BLRC) was appointed by government to recommend reform in insolvency law that brings about legal certainty and speed. While making announcement in Indian Parliament, the then Minister of Finance stated that the government will bring a comprehensive Bankruptcy Code that will meet global standards and provide necessary judicial capacity.[35] In its report,[36] BLRC proposed a new insolvency and bankruptcy resolution framework which (a) facilitates the assessment of viability of the enterprise at a very early stage; (b) enables symmetry of information between creditors and debtors; (c) ensures a time-bound process to preserve economic value; (d) uses a collective process; (e) respects the rights of all creditors equally; (f) ensures that, when the negotiations fail to establish viability, the outcome of bankruptcy must be binding; and (g) provides clarity of priority, and that the rights of all stakeholders are upheld in resolving bankruptcy.[37] Based on recommendations of BLRC, IBC was enacted.

While IBC has successfully addressed many shortcomings of the erstwhile regime, many impediments, similar to pre-IBC regime, continue to stand in the way of accomplishing the objectives of IBC despite massive efforts (on-going) by government and IBBI to address these issues, primarily due to delays in resolution of debt at various levels of its life cycle, and in the more recent years, by an ambiguity caused by judicial pronouncements, including on inter-se rights of creditors. These causes are discussed and analysed in some detail in this section of the paper.

2.1. Delays in initiation of insolvency resolution

IBC entitles the stakeholders to initiate CIRP only in the event of default in payment of debt,[38] and not if corporate debtor is likely to default or its insolvency is imminent. Not only its creditor, even the corporate debtor has to wait till the default in payment of debt occurs.[39] Moreover, although a financial creditor has the right to initiate a proceeding under IBC after a default of the threshold amount has been committed, it is not obliged to do so at the first available opportunity. It may defer the initiation of proceeding indefinitely. Delay in initiating insolvency allows ballooning of default to unresolvable proportions.[40]

It is a generally accepted principle of insolvency law that collective action is more efficient in maximizing the assets available to creditors than a system that leaves creditors free to pursue their individual remedies and that it requires all like creditors to receive the same treatment.[41] Insolvency law recognizes the pre-insolvency rights of the stakeholders as well as transactions concluded by debtor prior to the commencement of insolvency. If an insolvency proceeding commences long after a debtor first becomes aware that such an outcome cannot be avoided, there may be significant opportunities in the intervening period for the debtor to attempt to hide assets from creditors, incur artificial liabilities, make donations or gifts to relatives and friends or pay certain creditors to the exclusion of others. There may also be opportunities for creditors to initiate strategic action to place themselves in an advantageous position.[42] This is because, when a firm has enough assets to meet its payments, most creditors are nothing more than contractual counterparties,[43] however, when a firm

defaults in payments, its creditors become entitled to seize and sell the company's assets. In other words, the event of default triggers the creditors' ability to become real owners of the firm's assets.[44] Individual creditor enforcement actions may also destroy the going-concern value of an economically viable business just facing financial trouble. Insolvency law allows ex post alignment of incentives between insolvent debtors and their creditors, since the latter become the residual claimants of the insolvent enterprise but they did not have any control over the debtor's assets while the enterprise was not yet subject to a formal bankruptcy procedure.[45]

The enterprise value is typically higher than the liquidation value at the time when the red flags of stress in corporate debtor may be visible, but the actual default may not have occurred. The value remains high even in the early days of default. However, it continues to erode, and its erosion may be accelerated in many cases due to disruption caused by transfer of management to resolution professional after commencement of CIRP, or due to inability of resolution professional to stabilise the business of corporate debtor, or continue it as a going concern *inter alia* for non-availability of interim finance, non-cooperation by erstwhile promoters, key managerial resources leaving the corporate debtor due to uncertainty and unpredictability involved in outcome, lack of resources and capacity of resolution professional, and more often, due to time taken at various stages in conclusion of CIRP particularly, because of adversarial applications brought before Adjudicating Authority by many parties.

A *bonafide* corporate debtor, seeking a genuine resolution of stress in business and financial situation, would be keen for an early resolution of problem, by informal or formal insolvency mechanism, with the cooperation of its creditors and other stakeholders. The informal mechanisms available within and without IBC, have their weaknesses as discussed later in this section. For making use of IBC, the corporate debtor must wait for the default to occur before it can initiate CIRP. Admission of application by Adjudicating Authority takes time due to procedures to be followed for admission, and the state of Adjudicating Authority's institutional capacity at the given time.[46] These causes of delay are elaborated, with reference to data, in later parts of this section.

There is a merit in considering change in IBC by allowing trigger of CIRP on the likelihood of default, that is when insolvency of corporate debtor is imminent, without waiting for default to occur. In many jurisdictions, the test for default is not whether at the date of the alleged insolvency, it is probable that the debtor will be unable to pay the debt when it arises; rather, at the date of the alleged insolvency, the debtor must already be in a state of inability to pay those debts when they fall due. That is the distinction between a debtor that is likely to become insolvent in the future and one that is already insolvent. The more time before a debt falls due, the greater the potential for events to occur impacting the debtor's liability to pay. Consequently, that debt will present a less convincing argument for insolvency the further it is in the future. A high degree of probability is required to establish that a debtor would be unable to repay debts as they became due. Even if the debtor's balance sheet shows that it has more liabilities than assets, it may be necessary to consider whether the company will be able to generate enough profit or liquidate assets to pay long-term debts. Conversely, if the company's balance sheet shows more assets than liabilities, that will usually support a case for solvency.[47] That is why many jurisdictions around the world allow commencement of insolvency of debtor where default is imminent, and not when only when it has actually occurred *(See Section 3)*. Whether a debt default is 'imminent' can be determined based on an objective assessment criterion, by the financial creditors.

However, such change in IBC will require policy decision, which may take time, if the policy makers decide to adopt this approach. In the meantime, a hybrid procedure, as proposed by IBBI Expert Committee, combined with suggestions made in this paper, can step in to address this gap, and help in providing an expedited resolution process and maximise value of assets of corporate debtor. One of the core features of a hybrid procedure is the remediation of the deteriorating financial condition of the debtor before it commits default. They are restructuring proceedings that corporate debtors can

access before they become insolvent with the aim of avoiding insolvency. It entails a surgical debt restructuring and an early intervention at the first signs of distress, concentrating on financial creditors rather than creditors of the operating business, permitting no, or limited, court involvement, avoiding stigma and reputational damage. A hybrid procedure, when introduced in IBC, will allow early intervention to take suitable corrective and remedial measures to preserve enterprise value, maintain asset quality and provide oversight on corporate debtor's business by an independent mechanism. It can prevent loss of value caused by disruption from change in management. It will allow debtor to remain in possession while providing adequate safeguards, and empower creditors' suitably, including by retaining control on corporate debtor's assets and management, to ensure the promoters and management do not abuse the trust, and where they do, commence formal insolvency process. This will help speed up resolution, while preserving enterprise value.

2.2. Procedural delays in CIRP

One of the primary functions of IBC is to maximise the value of assets of the corporate debtor in a time bound manner. It requires a CIRP to be completed initially within 180 days, which can be extended to 270 days and eventually till 330 days including any extension of time as well as any exclusion of time on account of legal proceedings.[48] In fact, timeline is the essence of IBC, thereby enabling a faster recovery process which can be completed within stipulated timelines.[49]

However, procedural delays continue to undermine this key objective of IBC. This is particularly evident in the admission process, where it often takes over a year for admission of insolvency petition to commence the CIRP in certain instances.[50] The government, Adjudicating Authority, and IBBI have taken many pro-active measures to eliminate the bottlenecks and make the system more robust. Many legislative interventions have been made since its enactment to strengthen the processes and further IBC's objectives, in sync with the emerging market realities. There have also been dozens of amendments to the regulatory framework to smoothen the implementation of processes. Despite its transformative potential, delays continue to mar the process even today. This deficiency has limited the effectiveness of IBC.

When the company is not in pink of its health, prolonged uncertainty about its ownership and control may make the possibility of resolution remote, impinging on economic growth. As discussed earlier, financial creditors do not initiate insolvency process, promptly.[51] Often, it is initiated months after the default has occurred. This delay in initiation, coupled with delay in admission of insolvency petition can result in erosion of value of corporate debtor, defeating the objective of maximizing the value in a time bound manner. After a slowdown in the pandemic period of FY21 and FY22, the number of insolvency cases referred to Adjudicating Authority has increased by 19% y-o-y in Q2FY24. However, despite the increase, the number of cases admitted to the insolvency process by Adjudicating Authority continued to be lower compared to earlier quarters in FY20.

Not just admission timelines, the process for completion of CIRP is also marred with delays. The distribution of cases across sectors continues to remain broadly similar, compared to earlier periods, given the extended resolution timelines.[52] However, the status of the cases has largely remained constant compared with the previous period. Of the total 7,325 cases admitted into CIRP at the end of December 2023, only ~12% have ended in approval of resolution plans, while 25.9% remain in the resolution process vs. 31.3% as of the end of March 2023. 2,376 have ended in liquidation (32.4% of the total cases admitted). Meanwhile, 77% of such cases were either BIFR cases and/or defunct. Around 15.3% (1,124 CIRPs) have been closed on appeal /review /settled, while 14.1% have been withdrawn under Section 12A.[53] The primary reason for withdrawal has been either the full settlement with the applicant (425 cases) or other settlement with creditors (304 cases).[54] The overall recovery rate till Q1FY24 was 31.62% implying a haircut of approximately 68%. The cumulative recovery rate has been on a downtrend, decreasing from 43% in Q1FY20 and 32.9% in Q4FY22 as larger resolutions have already been

executed and a significant number of liquidated cases were either cases transferred from SICA to IBC and/or defunct with high-resolution time. Further, the average time taken for resolution or liquidation continued to increase during the June 2023 quarter.[55]

A distressed asset has a life cycle. Its value gradually declines with time if distress is not addressed in a timely manner. Most companies are rescued at these stages. Only a few companies, who fail to address the distress in any of the earlier stages, pass through the entire resolution process. At this stage, the value of the company is substantially eroded, and hence some of them are rescued, while others liquidated. The recovery may be low at this stage, but recovery in early stages of distress is much higher, and it is primarily because of IBC.[56] As per data shared by IBBI, only 15% of total cases that yielded any resolution plan, did so within the maximum time frame under the provision of law. The delays associated with the CIRP and liquidation have adversely affected the outcome of resolution and liquidation process, resulting in value depletion and diminished stakeholder confidence in the system.[57]

The delays for CIRP closure are higher compared to liquidation across various categories of stakeholders.[58] Of the over 1,900 ongoing CIRPs, there has been a delay of more than 270 days for the completion of the process of 68% of ongoing CIRPs in December 2023 as compared to 73% in December 2021 and 64% in December 2022. The share has remained broadly the same on a sequential quarter basis. Further, we can observe that the 'more than 90 days but less than 180 days' segment is the second largest indicating that new cases have commenced in the last quarter, while a lower number of cases have started in the current quarter.[59] RBI has expressed concern on lack of timely resolution, a crucial goal of the IBC.[60]

Clearly, there are delays, and such delays are impacting the effectiveness of IBC. The delays not only prolong resolution process, and adversely impact its outcomes, it shakes the confidence of stakeholders in the law and institutions managing it. It adds to cost of resolution. The delays also result in unpredictability and uncertainty which in turn, disincentivise investors and prospective resolution applicants from participating in the resolution process, in particular due to time taken by Adjudicating Authority to approve resolution plan, although the situation has seen some improvement in last six months with Adjudicating Authority functioning with 54 judicial and technical members, for the first time since 2016.

A hybrid procedure minimizes the cases filed for admission of insolvency process, and reduces the need for intervention of the Adjudicating Authority allowing quick market determined resolution of insolvency. If the workload of Adjudicating Authority is reduced due to there being lesser applications for admission, and lesser applications filed before it (owing to financial creditors opting for hybrid resolution procedures), it will be able to devote quality time for approval of resolution plans. The members of National Company Law Tribunal, deputed to exercise jurisdiction as Adjudicating Authority under IBC, can then also spare time to decide other cases under their jurisdiction under Companies Act, 2013.

2.3. Liquidation as last resort

A sound insolvency system must promote ease of exit, wherever required. It should enable optimum utilisation of resources, all the time, either by ensuring efficient resource use within the company through resolution of insolvency; or releasing unutilised or under-utilised resources for efficient uses through closure of the company.[61] Therefore, it should allow the creditors to liquidate the enterprises at the earliest if its resolution is not feasible. IBC permits financial creditors of corporate debtor to take this decision at any stage of insolvency process.[62] However, the Supreme Court has interpreted IBC objectives as that of resolution; liquidation being the last resort, and all efforts to resolve the corporate debtor's insolvency should be explored before the debtor is put to corporate death.[63] Due to this view taken by Supreme Court, insolvency process for a corporate debtor under IBC proceeds in two phases—in the first phase, an attempt is made to resolve corporate debtor's default through a CIRP; only if no resolution is reached, the corporate debtor is liquidated in the second phase.

As a result, even in cases where it is apparent to RP and CoC that liquidation is the only inevitable fate of corporate debtor to maximise the value of assets, they often run the entire resolution process including process of inviting plans before the liquidation of corporate debtor eventually starts. This kicking of the can of decision down the lane, erodes the value of the corporate debtor further, particularly when corporate debtor is not a going concern. It incurs avoidable cost during an unproductive CIRP. For a market economy to function efficiently, the process of creative destruction should drive out failing, unviable companies at the earliest. An early exit should be available for companies destined to be liquidated from the *'chakravyuha'*[64] of unsustainable business or with idle assets and no business. Where an enterprise is not viable, the main thrust of the law should be swift and efficient liquidation to maximize recoveries for the benefit of creditors. Liquidations can include the preservation and sale of the business, as distinct from the legal entity. On the other hand, where an enterprise is viable, meaning that it can be rehabilitated, its assets are often more valuable if retained in a rehabilitated business than if sold in a liquidation.[65]

A hybrid process allows an assessment by financial creditors and corporate debtor about the viability and feasibility of corporate debtor, and determination of its future such that the value of assets of corporate debtor is maximized. If the financial creditor(s) are convinced, objectively, that no useful purpose will be served by exploring resolution options, enforcement of security interest will be preferred choice. If an operational creditor or another financial creditor (which dissents or is not part of decision making on recourse to hybrid process or CIRP), Adjudicating Authority can be suitably apprised at the time of admission, and if the petition of insolvency commencement is admitted, the CoC would be able to take a decision to opt for liquidation, as its commercial decision. The test of Supreme Court judgment in *Swiss Ribbons* of exploring resolution would also be satisfied.

The Adjudicating Authority, NCLAT and the Supreme Court have been in the forefront of insolvency reform. They have delivered numerous landmark decisions to explain several conceptual issues, settle contentious questions of law, and resolve grey areas with alacrity. These orders have imparted clarity to the roles of various stakeholders in the resolution process and as to what is permissible and what is not, thereby streamlining the process for future. The Indian insolvency regime now boasts of a very large body of case laws, including on cross border insolvency[66], and group enterprise insolvency[67], even though these do not form part of IBC's legislative framework. However, the Adjudicating Authority faces many resource constraints impacting the speed of their outcome.

The NCLT was notified as the Adjudicating Authority under IBC, and made operational with effect from June 1, 2016. NCLT has a total strength of 62 (including judicial and technical members). In the first phase, eleven benches of Adjudicating Authority were established, one Principal Bench at New Delhi and ten other Benches at New Delhi, Ahmedabad, Allahabad, Bengaluru, Chandigarh, Chennai, Guwahati, Hyderabad, Kolkata and Mumbai. These Benches were headed by the President, sixteen Judicial Members and nine Technical Members at different locations. Subsequently, more Benches at Cuttack, Jaipur, Kochi, Amravati, and Indore have been setup and new members joined. As on the date of publication of this paper, there are 53[68] members (including judicial and technical members, but not President) of NCLT. Adjudicating Authority has sought a major expansion of its capacity to further speed up the admission of bankruptcy petitions and clear the backlog of cases.

Concerns have also been raised by RBI about the infrastructure, staffing, and overall capacity of the NCLT and the NCLAT, impacting the effectiveness of the resolution mechanism under IBC.[69] These are valid concerns which constraints the functioning of NCLT and NCLAT at optimum levels. There is a pressing need on the part of the government and the judiciary to invest in building capacities for NCLT and NCLAT to handle the increasing case load. The government is considering to raise the strength of NCLT from its sanctioned strength.[70] The Companies Act, 2013 provides for establishment of NCLAT comprising of 12 members including the Chairperson,

as an appellate tribunal to hear appeals from orders of NCLT. IBC provides for NCLAT to also serve as the appellate tribunal for hearing appeals against the orders passed by Adjudicating Authority under IBC, with effect from December 1, 2016. While the Principal Bench of NCLAT is in New Delhi, a Chennai Bench of NCLAT was established in March, 2020. Apart from IBC, NCLT also decides cases under the Companies Act, 2013 while the NCLAT is vested with the jurisdiction to hear appeals under IBC, Companies Act, 2013 and the Competition Act, 2002.

Alternate insolvency resolution proceedings, including hybrid procedure, can reduce the cost and use of judicial resources.[71] The courts usually have limited infrastructural capacity and can perform its obligations within its limits. The process also allows for reduction of judicial intervention, thus freeing up valuable time of the judiciary. A hybrid process has the potential to reduce litigation, due to its informal and consensual nature, and if adequate safeguards are adopted to address the concerns of all stakeholders, process is transparent, and best practices and standards are observed. A hybrid process does not require involvement of the court in the phase of the process where resolution is considered and approved by CoC. Hence, it reduces litigation cost and delays and helps to decongest the overburdened courts. It is necessary to have a functional hybrid restructuring process, so that the vast majority of cases are restructured out of formal insolvency, with Adjudicating Authority acting to approve the resolution plan or as a court of last resort if no agreement is possible.[72]

2.4. Treatment of operational creditors' dues

IBC has faced criticism for being lop sided in favour of financial creditors, and ignoring the interest of operational creditors (referred as trade creditors in many jurisdictions). Operational creditors under IBC include trade creditors or employees who have provided goods or services to the corporate debtor or government and its instrumentalities that are owed debt for payment of dues arising under law.[73] An operational creditor can file a petition for insolvency against a corporate debtor, and has a right to file its claim with RP during the process. Operational creditor does not have right to become a member of CoC as it comprises of financial creditors only. Operational creditor is represented in meeting of CoC (through a representative), only if total dues of operational creditors are 10% or more of the total aggregate debt of corporate debtor. It can only participate, not vote in CoC.[74]

A resolution applicant is legally bound to pay to operational creditors, only a minimum value which is linked to value payable to them in liquidation as per the priority of payment in distribution prescribed in section 53 of IBC,[75] and make such payment before any payments are made to financial creditors.[76] Subject to payment of minimum value to operational creditors, distribution of payment under resolution plans can be decided by CoC. The CoC may approve a resolution plan by a vote of not less than 66% of voting share, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority (waterfall) amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor. In the waterfall under section 53, unsecured operational creditors stand way behind in the queue as compared to financial creditors. Invariably, the payment of their debt as per section 53 is Nil. As a result, most unsecured operational creditors do not get paid anything in a resolution process. Because of pursuation by Adjudicating Authority and statutory protection of dues such as provident fund and gratuity, at least employees and workmen of corporate debtors are being offered some payment by resolution applicants, if not full, even if the value of their debt is Nil. While the above approach is consistent with the waterfall under section 53, nothing stops the resolution applicant or financial creditors from sparing reasonable sums for operational creditors. However, experience shows that most financial creditors tend to consider recovery to them and hence prefer to keep majority of amounts proposed under plans for themselves leaving little or nothing for operational creditors.

IBC envisages and enshrines a fiduciary responsibility on CoC to consider and safeguard interest of all stake

holders. However, a summary study of data depicts that even though recovery of total claims averaged around 32%, with a median of 24%, median recovery for operational creditors has remained as low as 6%. When considering the cases with some of the largest approved plan value (greater than ₹ 2,500 Cr), the average recovery of 34% (with median of 29%) to financial creditors does witness an uptick to average recovery of 46% (with median of 42%). But the median recovery for operational creditors follows a similar trend (at 5%). This has created resentment amongst the operational creditors.

Operational creditors often may not possess the resources or a sufficient economic stake to hire their own advisors or fight for their dues. The priority of treatment of creditors is fundamental to bankruptcy liquidations, but strict application of the principle in some cases creates the risk of actually undermining the reorganization. Thus, from its earliest days in the 19th century, the bankruptcy reorganization practice has recognized that certain creditors are "more important" than others in the sense that, if such creditors are not paid, they could hurt the reorganization process itself.[77]

The need and benefit of paying certain unsecured creditors (including trade creditors and employees) in a case and not others have been a facet of the reorganization practice for a long time. In US, trade creditors are treated as unsecured creditors. Unlike under IBC, they have right to participate in a bankruptcy case through official committees of unsecured creditors, which represent the interests of all unsecured creditors. After the enactment of US Bankruptcy Code, the concept of paying critical vendors has become increasingly common in Chapter 11 cases, as, for a debtor trying to reorganize, the concept is quite logical. Parties increasingly began to recognize that a Chapter 11 debtor's ability to obtain trade terms from key vendors often is critical to the survival and success of a struggling business in Chapter 11. From this perspective, one may deem critical vendor dollars as money well spent. This may remain true even from the perspective of an official committee of unsecured creditors, which has the responsibility of representing the interests of the debtor's unsecured creditors' body as a whole Once the concept of being able to pay critical vendors became relatively mainstream, the concept itself began to broaden.[78] One of the original concepts was that a debtor needed to pay certain vendors who were the "sole source" of a key good or service.[79] If the payment were not made, such vendor, if it were sufficiently dependent on the debtor, might actually go out of business. Alternatively, absent payment, the key vendor might instead simply refuse to do business with the debtor. In either case, the debtor would be without a vital product or service needed for its business. If the vendor is a MSME, it only aggravates the problem for such vendor. As discussed later in this section, Indian MSMEs contribute more than 29% to country's GDP. They are responsible for 50% of country's total exports. They employ more than 11 crore (110 million) people.[80] The sector contributes significantly to the economic and social development of the country by fostering entrepreneurship and generating large employment opportunities at comparatively lower capital cost, next only to agriculture. MSMEs are complementary to large industries as ancillary units and this sector contributes significantly in the inclusive industrial development of the country. They form the foundation of the Indian economy.[81] Their distress can cause a cascading effect on economy.

The main purpose of a prepackaged Chapter 11 plan is to affect the business of a debtor as minimally as possible by entering Chapter 11 with an understanding that a debtor has the plan votes to exit quickly with a restructuring solution and therefore minimizing the length of a debtor's Chapter 11 case. One of the main reasons that trade creditors are faring better today in Chapter 11 reorganizations is the advent of "prepackaged" plans of reorganization where the debtor solicits votes on its plan of reorganization before it files for Chapter 11.[82]

Operational creditors are also hit particularly hard by the moratorium on the initiation of IBC proceedings. Although a loss caused to operational creditor due to moratorium is compensated by treating it as CIRP costs, often the liquidity availability with corporate debtor is inadequate to meet CIRP costs during the process, and operational creditors have to wait till after the resolution plan is approved or corporate

debtor is liquidated, as the case may be, to receive their dues relating to CIRP period.

The hybrid procedure proposed in this paper creates an obligation on corporate debtor to pay the dues of operational creditors in full, or compete with resolution plans invited from market if any discount on their payment is provided in the resolution plan. As hybrid process provides little visibility over the initial process to operational creditors until the commencement of process and little engagement after that and till an application, if any for approval of resolution plan is filed, there is justification in providing for their full dues (as provided under PPIRP) or an assured percentage of recovery which should not be less than what is payable to financial creditors (based on a competitive and transparent process). This will also counter the apprehension of lack of transparency in hybrid procedure. It will ensure smooth approval of resolution plan by Adjudicating Authority. It will also provide a big respite to MSMEs.

2.5. Lack of use of PPIRP under IBC

The covid-19 pandemic resulted in significant distress to Indian businesses, particularly to MSME. A procedure was introduced by the government on April 4, 2021 in the form of pre-packaged insolvency resolution process to allow MSMEs to resolve stress early with speed, efficiency and efficacy, provides certainty of outcome and give them both a chance to improve value for all stakeholders.[83] A corporate debtor which is an MSME[84] may initiate such procedure (PPRIP) if it has defaulted in payment of at least ₹ 10 lakh (1 million rupees), and if it is not ineligible under section 29A of IBC. Before filing application with Adjudicating Authority, such MSME must obtain consent to initiate the process from at least 66% of its unrelated financial creditors. The corporate debtor must furnish a base resolution plan to financial creditors to seek such approval.[85] The shareholders of corporate debtor also have to pass a special resolution resolving to initiate PPIRP.[86] PPRIP envisages debtor to stay in possession while creditor remains in control. Unrelated financial creditors with a 66% majority can propose the name of an insolvency professional to be appointed as RP.

Upon approval of the application for initiation of PPIRP by Adjudicating Authority, a moratorium comes into effect, having the same effect as one under CIRP. RP is appointed who is tasked with monitoring the management of corporate debtor, constitute CoC, collate creditors' claims, prepare memorandum of information of corporate debtor, and perform other duties prescribed under IBC and regulations.[87] The control of the corporate debtor may be transferred to RP by CoC if it so decides with a 66% majority votes, and with approval of Adjudicating Authority, on grounds such as, provision of false information, mismanagement of the affairs, etc. The corporate debtor is required to submit a resolution plan to RP after commencement of PPIRP, which is presented to CoC which may approve it by the requisite majority of 66% as long as it does not impair any claims owed to the operational creditors.[88] If CoC decides, it can direct RP to invite prospective resolution applicants to submit plans to compete with the resolution plan submitted by the corporate debtor.[89] The plans submitted by prospective resolution applicants, which are in conformity with IBC are presented to CoC which will vote on all but select any one from among them.[90] If, based on predetermined criteria, the selected resolution plan is significantly better than the resolution plan of promoters/ corporate debtor, then it can be approved by CoC.[91] If the selected resolution plan is not significantly better, or CoC does not approve it, then a competitive process is initiated where resolution applicant and corporate debtor have to compete with other plans received. The resolution plan of successful bidder from the Swiss Challenge is approved by CoC with a vote of 66%, which is submitted to Adjudicating Authority for approval. IBC requires PPIRP to be completed within 120 days of the commencement of process.[92]

PRIRP has failed to catch the imagination of the Indian market. Since its introduction, only fourteen applications have been admitted till May 31, 2024. Of the fourteen admitted, two were withdrawn before resolution. Of the remaining cases, five cases have seen resolution under PPIRP. Currently seven cases remain pending as on May 31, 2024 (Refer Table 1).[93]

There are many reasons for lack of traction by PPIRP.

Table 1: Overview of PPIRP applications filed before Adjudicating Authority

Name	Industry	Date of Admission	Date of Resolution	Time taken	O/s Debt	No of FC
RESOLVED						
Amrit India (NCLT New Delhi)	Trading and Consultancy	28-11-2022	03-05-2023	156 days	12 Lakh (FC) 25 Lakh (OC)	1
ADMITTED AND PENDING						
GCCL Infrastructure and Projects (NCLT Ahmedabad)	Construction/ Real Estate	14-09-2021	05-09-2023	721 days	56 Lakh (FC) 55 Lakh (OC)	NA
Enn Tee International Limited (NCLT New Delhi)	Manufacture of apparel & supply of yarn	10-10-2022	19-10-2023	374 days	12 Cr (FC) 4 Cr (OC)	1
Shree Rajasthan Syntex Limited (NCLT Jaipur)	Manufacture of yarn	19-04-2023	22-08-2023	125 days	100 Cr (FC)	3
Sudal Industries Limited (NCLT Mumbai)	Manufacture of aluminium extrusions and base alloys	20-04-2023	10-08-2023	112 days	151 Cr (FC) 6 Cr (OC)	10
ADMITTED AND PENDING RESOLUTION						
Mudraa Lifespaces Private Limited (NCLT Mumbai)	Real Estate	06-12-2023	NA	NA	1 Cr (OC)	NA
Kethos Tiles Private Limited	Manufacture of Tiles	04-01-2024	NA	NA	94 Cr (FC)	14
Shreemati Fashions Private Limited (NCLT Kolkata)	Apparel	05-01-2024	NA	NA	3 Cr (FC)	3
Kratos Energy & Infrastructure Limited	Real Estate	01-02-2024	NA	NA	1.6 Cr (FC) 20 Lakhs (OC)	2
RG Residency Pvt Ltd	Real Estate	20-02-2024	NA	NA	310 Cr (FC) 11 Cr (OC)	1
KVIR Towers Pvt Ltd	Real Estate	20-02-2024	NA	NA	255 Cr (FC)	1
Garodia Chemicals Limited (NCLT Mumbai)	Chemicals	16-04-2024	NA	NA	4 Cr (FC) 1 Lakh (OC)	4

WITHDRAWN						
Loon Land Developers Limited (NCLT New Delhi)	Real Estate	29-11-2021	NA	NA	NA	NA
Krrish Realtech (NCLT New Delhi)	Real Estate	21-10-2021	NA	NA	NA	NA
DISMISSED/REJECTED						
Name	**Industry**	**Date of Rejection**	**Date of Resolution**	**Time taken**	**O/s Debt**	**No of FC**
CHD Developers Limited (NCLT New Delhi)	Real Estate	05-09-2022	NA	NA	NA	NA

Although touted as a hybrid procedure, it is not a combination of an out-of-court resolution, and a formal process, but nearly a formal process micromanaged by rules and regulations, throughout.[94] The key elements of prepacks, that is, cost and time efficiency, is lost in the rigors of procedure required to be followed for initiation of the process and approval of plan in PPIRP. Cumbersome procedures can be costly and burdensome for MSME. In PPIRP, corporate debtor is required to obtain a three-fold approval for initiation of PPIRP, namely shareholders, unrelated financial creditors, and Adjudicating Authority. Even after making this effort, particularly of obtaining consent of 66% unrelated financial creditors, there is no assurance that the proposed resolution plan would be approved by these very financial creditors while sitting in CoC. It has to compete with resolution plans invited from the market. This uncertainty disincentives MSMEs to opt for PPIRP. If an MSME has to compete with the market, no value is added by getting a base plan approved before commencement of PPIRP. An MSME is not ineligible under section 29A[95] and (h)[96] to submit a resolution plan even in CIRP, so it can submit resolution plan directly in CIRP and compete with other eligible resolution applicants.[97]

PPIRP has ended up being a court driven process exposing it to procedural delays similar to CIRP. Adjudicating Authority is involved at each step,[98] causing unnecessary delay and interference, defeating the purpose of introducing PPIRP as an alternative to CIRP. The timeline for the completion of the entire process is set at 120 days[99] from the admission of the PPIRP application by Adjudicating Authority, however, it has taken much longer in PRIRP cases initiated in last three years. IBC also requires that in case of PPIRP, the directors of the corporate debtor should furnish a declaration regarding the existence of any avoidance transactions, *inter-alia*, preferential, undervalued and extortionate transactions and fraudulent and wrongful trading transactions.[100] RP must form an opinion about existence of such transactions within 30 days, and if so determined, file an application before the Adjudicating Authority for appropriate relief.[101] The window of 30 days for identification of avoidance and other such transactions does not seem to be sufficient or practical since the identification of such transactions warrants an in-depth scrutiny of the financials, transactions entered into, other books and papers. Failure to report such transactions would result in breach of duties of the RP.[102] The current status of the pending PPIRP cases highlights the difficulty in meeting the prescribed timeline.[103]

PPIRP was introduced by the government to resolve stress early with speed, efficiency and efficacy, provide certainty of outcome and gives both debtors and creditors a chance to improve value for all stakeholders. It is clear that because of critical gaps, this model of hybrid procedure has made no progress at all. A sub-committee constituted by Insolvency Law Committee - the committee tasked for recommending the key contours of this framework (ILC Sub-Committee) has suggested PPIRP to be

available for other companies.[104] However, given the inherent flaws in PPIRP framework, and its non-availability to partnership and proprietorship firms, the authors are of the view that no useful purpose would be served by extending it to other corporate persons. A case is made out to explore an alternate hybrid insolvency resolution procedure for all corporate persons including MSMEs, as suggested by IBBI Expert Committee, and proposed in this paper.

2.6. Limited benefit of PPIRP to MSMEs

PPIRP is available only to MSMEs incorporated as companies or limited liability partnerships. In India, by definition, MSMEs are small in size and scale. They operate informally. For a variety of reasons, the promoters of MSMEs forgo formal incorporation or registration of their enterprise and operate without limited liability, a practice particularly common in developing economies. It is estimated that during the period 2015-16, there were 633.88 lakh unincorporated and non- agriculture MSMEs in the country engaged in different economic activities in India, excluding those MSMEs registered under Sections 2(m)(i) and 2(m)(ii) of the Factories Act, 1948; Companies Act, 1956; and construction activities falling under Section F of National Industrial Classification (NIC) 2008. Out of these 633.88 lakh MSMEs, 608.41 lakh (95.98%) were proprietary concerns while others are unregistered partnerships or other informal entities.[105] Only a handful of MSMEs are incorporated as a company or limited liability partnership. In other words, an Indian MSME is nothing but an individual in another avatar. Part III of IBC deals with the insolvency resolution and bankruptcy of: (a) individuals who are personal guarantors to corporate debtors'; (b) partnership and proprietorship firms; and (c) individuals other than (a) and (b). The government has thus far operationised the provisions of IBC in so far as they relate to personal guarantors to corporate debtors, and not for partnership and proprietorship firms. Therefore, a large number of MSMEs, in fact, the substantial MSMEs in need of resolution, are excluded from PPIRP.

MSMEs operate differently from larger businesses, and accordingly, the challenges and obstacles they face are unique. They lack the sophistication or knowledge to properly address complex processes with limited resources. They often have less capital, a lower market share in their respective markets, a smaller workforce, and fewer resources overall as compared to large enterprises. They have constrained access to credit and acute difficulty weathering macroeconomic and financial shocks. The role of owners, directors, employees, and debt providers may significantly overlap. There may be no clearly established ownership of key commercial assets between the promoters and the MSME since the promoters may have purchased commercial assets with their own money. The promoter may also use personal monies to fund or support the business without necessarily documenting such expenditures as a loan to the business or in any other way. The above is particularly the case in India, where micro sector with 630.52 lakh firms accounts for more than 99% of total estimated MSMEs and small sector and medium sector accounted for 0.52% and 0.01% of total estimated MSMEs, respectively.[106] 196.65 lakh MSMEs were engaged in manufacturing, 0.03 lakh in non-captive electricity generation and transmission, 230.35 lakh in trade and 206.85 lakh in other services. Lenders treat an MSME akin to an individual, requiring personal guarantees of promoters and their assets as collaterals to secure loans. As a result, the advantage of a limited liability corporate structure is significantly reduced for MSME promoters. Therefore, while the partnerships and proprietorship too carry out economic activities, their treatment in insolvency has to be different from the corporate persons and debtors, and in many ways, also from the personal guarantors to corporate debtors.

Of particular concern is the complexity and length of typical insolvency processes. In India, out of 633.88 estimated number of MSMEs, 324.88 lakh MSMEs (51.25%) are in the rural area and 309 lakh MSMEs (48.75%) are in the urban areas. For proprietary MSMEs as a whole, 20.37% are owned by women. The socially backward groups owned almost 66.27 of MSMEs. In rural areas, almost 73.67% of MSMEs were owned by socially backward groups.[107] Many

smaller MSMEs may lack funds to cover the expenses of an insolvency process or fail to generate an expectation for unsecured creditors to receive any returns.[108] In view of their unique attributes and peculiar challenges that make them fundamentally different from large enterprises, insolvency of MSMEs demands a process that is easily accessible, simpler, and cost-effective.[109]

MSMEs need policy and financial support to stay solvent. The government has adopted a number of measures to provide MSMEs respite from the impact of Covid-19. Formal filing of insolvency petition can be perceived by MSMEs as stigmatic. Solvency support should be complemented by an effective set of insolvency and debt restructuring tools, including dedicated out-of-court restructuring mechanisms, hybrid restructuring, and simplified reorganization for smaller firms, to raise the system's capacity.[110] A hybrid out-of-court restructuring with limited judicial intervention can prevent creditors from taking action against MSMEs covered by IBC. This is the approach supported by many jurisdictions, as discussed in this paper. Hybrid procedure can also reduce the anxiety of stigma as most of the procedures are held in an informal environment. Reduction in judicial intervention saves scarce judicial resources and increases efficiency. A similar procedure can be considered for MSMEs that would fall in the purview of Part III of IBC, with appropriate tweaks. This will allow making operational remaining provisions of Part III of IBC relating to partnerships and proprietorships.

2.7. Weaknesses of RBI's prudential framework for resolution of stressed assets

A company in stress often resolves stress on its own by improving its competitiveness at marketplace. It may not, however, always succeed. It may sit across a table with its stakeholders, either individually or collectively, to work out a plan to resolve stress. Or, it may resort to a formal framework which provides a guided path for resolution and defines the role of stakeholders in the framework for resolution of stress. There are two out-of-court options in India, namely, (a) RBI's prudential framework for resolution of stressed assets (RBI's Resolution Framework);[111] and (b) informal understanding between a debtor and creditor, with /without help of a mediator. The debtor and creditors may address the stress by engaging informally without resorting to CIRP or PPIRP under IBC or RBI's Resolution Framework.

It will be fair to claim that India has had a fairly sophisticated framework for out-of-court restructuring since 2001.[112] However, as an antecedent to the IBC, a need was felt to put in place a robust “out-of-court” restructuring mechanism with much more focus on early recognition and resolution of the stressed assets. To address this need, RBI issued RBI (Prudential Framework for Resolution of Stressed Assets) Directions, 2019[113] on June 7, 2019 (RBI's Resolution Framework). This framework discontinued all then existing RBI schemes on the resolution of stressed assets.[114]

RBI's Resolution Framework is in the form of prudential directions to banks and specified financial institutions regulated by the RBI and is aimed at providing early recognition of stressed assets and lay down the inter-creditors' rights and obligations along with the broad contours governing the restructuring packages and pre-qualifications for implementing the effective resolution of the stressed assets. Lenders are required to put in place board approved policies for early resolution of stressed assets, including resolution timelines and parameters for determining financial difficulty. RBI may examine the 'robustness' of these policies and the outcomes as part of its supervisory oversight. In case of default by any of the borrowers, the lenders are required to undertake a review of the borrower's account within the review period, which is 30 (thirty) days from such default. The definition of default has been borrowed from IBC.[115] During the review period, lenders may decide on the resolution strategy including the nature and implementation of a resolution plan, which may involve sale of exposure, change in ownership, or restructuring; may provide for treatment of lenders with differential security interest; and must provide for liquidation value to be paid to dissenting lenders. The lenders may also choose to initiate legal proceedings for insolvency or recovery.

The resolution process is invoked with an agreement between the borrower and the lending institution, in cases involving single lending institution, and between the borrowers and the lenders representing 75% by value and 60% by number, in cases involving multiple lending institutions. The RBI's Resolution Framework requires the lenders to enter into an inter-creditor agreement (ICA)[116] during the review period in cases where the resolution plan is to be implemented. The resolution plan needs to be implemented within 180 days from the end of the review period. The conditions that must be met for a resolution plan to be 'implemented' are also specified. Where a resolution plan is proposed to be implemented and the aggregate exposure is at least INR 100 crore (approx. USD 14 million), independent credit evaluation of residual debt is required. Where a viable resolution plan in respect of a borrower is not implemented within the specified timelines, the lenders are required to make additional provisions as percentage of total outstanding.[117] In case of change in ownership of borrower, the account can be continued or upgraded as 'standard asset' after change in ownership is implemented, subject to specified conditions. The Framework also incentivises the lenders to provide additional finance under resolution plan (including resolution plan under IBC) by allowing them to treat such finance as 'standard asset' during monitoring period under approved resolution plan subject to satisfactory performance. Similarly, interim finance to corporate debtors undergoing CIRP under IBC can also be treated as 'standard asset' during CIRP.

RBI's Resolution Framework was modified in 2020[118] to provide a special window to resolve pandemic induced stress, without change of ownership, within the said prudential framework. This envisages lenders to implement resolution plans of eligible borrowers, having stress on account of COVID-19, without change in ownership, while classifying such exposures as 'standard', subject to specified conditions.[119] This framework applies to both personal loans and corporate exposures.

RBI's Resolution Framework, *inter alia,* envisages constitution of an expert committee by RBI to make recommendations on the required financial parameters to be factored in the resolution plans, with sector specific benchmark ranges for such parameters.

RBI's Resolution Framework, however, is beset with certain challenges.[120] It is available in respect of stress of corporate debtor which has RBI regulated creditors. It hinges on ICA to provide that any decision by lenders representing 75% by value of total outstanding credit facilities and 60% of lenders by number shall be binding upon all the lenders. This has been difficult to obtain, particularly from creditors that are not regulated by RBI and may have significant exposure to the corporate debtor, like insurance companies, mutual funds, debenture holders, real estate allottees, offshore creditors, etc., who are outside RBI's domain. Further, in most cases it has been witnessed that in absence of broad contours of resolution plan, lenders have exhibited reluctance towards entering into a standstill period of 6 months. Further, the framework also mandates additional provisioning norms in case stakeholders are unable to close the process within stipulated timelines, which deters banks from taking a proactive approach towards restructuring or entering into ICA. Such creditors may invoke the formal insolvency resolution process under IBC thereby jeopardising consideration and implementation of resolution under the RBI's Resolution Framework. Being an out-of-court mechanism, the framework does not provide for breathing space in the form of a statutory force of moratorium on suits, proceedings, and recovery actions against the corporate debtor during the restructuring. A resolution plan approved under RBI's Resolution Framework binds only those creditors that are signatories to the ICA. Further, absence of requirement to undertake any statutory or judicial scrutiny in a way forces lenders to assume quasi-judicial authority while accessing if the defaults were on account of systematic economic issues or management failure. It does not also bind operational creditors, including government and its authorities, as in the case of a resolution plan approved under section 31 of IBC. This limits the scope of the plan by primarily focussing on financial restructuring and does not necessarily address other aspects of stress within a corporate debtor. This may not be sufficient to resolve the overall stress faced by the debtor, as operational and other non-financial issues may remain unaddressed.

But for some shortcomings, RBI's Resolution Framework is a sound resolution framework for out-of-court restructuring. If its strengths are applied, and shortcomings overcome, it can be termed as a nearly perfect mechanism. Like IBBI Expert Committee, the authors also firmly believe that a unique hybrid procedure can be constructed by combining the strengths of IBC and RBI's Resolution Framework, which will address the shortcomings in IBC, and RBI's Resolution Framework analysed in this paper.

2.8. Incentivising Behaviour Change

While IBC seeks to resolve financial stress where it could not be prevented, it has also served as a credible threat of taking away control from the hands of current promoters / management, most likely, even in future. This potent threat has a deterring effect on the management and promoters of companies from operating below the optimum level of efficiency, and motivates them to make the best efforts to avoid default. It encourages them to settle default with the creditor(s) at the earliest, preferably outside IBC. There have been thousands of instances where debtors have settled their debts voluntarily or settled after an application for CIRP is filed with Adjudicating Authority but before its admission. As stated earlier, till October, 2023, disposal of 27,514 applications for initiation of CIRPs of corporate debtors having underlying default of ₹ 9.74 lakh crore rupees ($116.63 billion) before their admission into CIRP has been attributed to behavioural change.[121] Because the first signs of distress now serve as early warnings for management to take corrective actions to avoid defaults, it is safe to posit that IBC is emerging as a behavioural law aiming to draw various stakeholders of the entity in distress to work together, in a non-adversarial manner, towards laid down objectives of the law.[122] This behavioural change is also because of the effect of section 29A inserted in IBC in 2017.[123] Surely, IBC has triggered a cultural shift in the dynamics between lenders and borrowers, and promoters and creditors. As a key economic reform, IBC has shifted the balance of power from the debtor/borrower to the creditor. The positive ramifications engendered by IBC have revolutionized the dynamics of debtor-creditor relationships in India, a metamorphosis attributable not solely to the statutory framework, but also to its proficient execution.[124] It has instilled a significantly increased sense of fiscal and credit discipline to better preserve economic value.[125] Unfortunately, IBC does not create any distinction between a *bonafide* debtor who may have defaulted for reasons beyond its control, and a dishonest promoter who may have pushed the debtor into insolvency and has no intention to pay its creditors despite ability to pay. Both would suffer the same legal consequences in the event of default. Inability to pay debt invites the same consequence as the unwillingness to pay.

It is time to take benefit of this behavioural change and make hybrid resolution process, based on a 'debtor-in-possession', but 'creditor-in-control' model (as suggested in this paper), available for *bonafide* debtors which have not lost the confidence of the creditors, or where the trust deficit between the debtor and creditors can be bridged by debtor taking corrective measures. This building on the behaviour change experienced in last six years will be a formidable sign of a maturing free market economy. The then Minister of Finance and Corporate Affairs advocated that going forward, once an honest creditor-debtor relationship was restored on account of IBC, there would be a need to marry the insolvency framework with out-of-court settlement schemes.[126]

2.9. Taking benefit of growing demand for use of mediation in insolvency

Mediation offers parties the opportunity to reach mutually agreeable commercial solutions to business disputes without the intervention of the courts.[127] The use of mediation for the resolution of disputes is no longer a future trend, it is widely used as an effective and efficient alternative dispute resolution process. Mediation is the new norm in insolvency. Mediation offers many benefits. The mediation process is usually flexible, private and confidential. The nature of this process promotes the preservation of relationships between the parties. In many instances, mediation is more cost and time-efficient than other dispute resolution processes, such as litigation and

arbitration.[128] It provides strong incentives for both parties to engage in fast and efficient dispute resolution and look for a common business solution.[129]

The United States has been an early adopter of mediation and has used it to resolve many high-profile disputes. The courts in the United Kingdom have advocated the use of mediation in suitable situations.[130] The European Union has placed great emphasis on mediation in restructuring procedures with the intent of promoting the comprehensive recovery of industries.[131] The Singapore High Court has acknowledged the benefits of plan mediation.[132] In 2016, the Committee to Strengthen Singapore as an International Centre for Debt Restructuring noted in a study that mediation might be used successfully in restructuring proceedings in a variety of situations.[133] In France, the goal of the established practices of out-of-court restructuring proceedings, the ad hoc mandate, and conciliation is to facilitate negotiations between the debtor and its principal financial creditors to reach a mutual restructuring agreement and avoid the initiation of regular collective insolvency proceedings. Italy has also established a particular mediation process for financial, banking, and commercial disputes. Many other countries are making use of mediation in one way or another.

Insolvency resolution under IBC is not an adversarial process, yet implementation-wise, it has become litigious in India. The predominant cause of delay has been the filing of a plethora of interlocutory applications at each stage of the process, eventually unnecessarily burdening the limited capacity of Adjudicating Authority and causing uncertainty in outcomes. This creates several systemic bottlenecks and leads to cascading delays in the resolution process and increasing pendency. While the applicability of mediation in insolvency has gradually increased around the globe, mediation has still not been used extensively in insolvency proceedings in India. To reduce the judicial overload, mediation should get due attention. IBBI constituted an expert committee to examine the use of mediation in insolvency. In its report,[134] the committee has recommended that mediation in insolvency is not only necessary for reducing the conflict but also for providing a better solution to the problem. It is likely to help overcome some of the inherent shortcomings of adjudication (e.g., cost, publicity, lack of flexibility) in insolvency disputes. This is valuable because the debtor's assets are not wasted on litigation and other costs.

The government recently enacted Mediation Act, 2023 (Mediation Act) to promote use of mediation for resolution of disputes. However, Mediation Act is based on a 'one-size-fits-all' approach and the process envisaged under the Mediation Act would not be suitable for the insolvency resolution processes under IBC. The timeline for the completion of the mediation procedure of 120 days (along with an extension of 60 days) currently envisaged under Mediation Act is not aligned with the primary object of IBC, time-bound revival of stressed enterprises and maximizing the value of the debtor. Unscrupulous parties may invoke mediation to derail the insolvency process. Institutions under IBC would have less control over the delay caused by the parties. Entry 13 of the First Schedule to the Mediation Act allows the government to exclude by notification the subject matter of dispute that may be kept out of the purview of the Mediation Act. IBBI's expert committee and other stakeholders have recommended exclusion of IBC from the Mediation Act and for a comprehensive mediation framework within IBC.[135]

Mediation has emerged as an effective tool of dispute resolution in insolvency processes across many jurisdictions and has attained the status of 'Appropriate Dispute Resolution' mechanism in insolvency systems. Mediation is also widely used in pre-insolvency and out-of-court insolvency processes particularly, including in hybrid procedures that have developed in recent times. The hybrid procedure proposed in this paper envisages use of mediation. This will add to the efficiency of resolution under the proposed hybrid procedure.

2.10. Global trend in hybrid procedures

The global events in the last few years have had significant and lasting impacts on business. Ever since the fall of Lehman Brothers in 2008, and the

financial crisis that followed, and more recently, the Coronavirus pandemic (Covid-19), the policy makers have been compelled to re-invent insolvency systems. The world has witnessed a proliferation of various 'light touch' financial restructuring techniques in the form of pre-insolvency proceedings. Four primary trends have been observed in the international insolvency community: (i) the adoption of simplified insolvency frameworks for MSMEs; (ii) the implementation of hybrid procedures; (iii) the promotion of out-of-court restructuring; and (iv) the facilitation of an effective discharge of debts for individual entrepreneurs.[136]

A hybrid procedure may include many restructuring mechanisms,[137] however, at their core, most such procedures inhabit a space on the spectrum somewhere between a pure contractual workout and a formal insolvency or rehabilitation proceeding. It is often accessible before the debtor becomes insolvent with the aim of avoiding insolvency. It entails an early intervention at the first signs of distress, allowing a surgical debt restructuring concentrating on financial creditors rather than creditors of the operating business, permitting no, or limited, court involvement. A hybrid procedure generally provides debtors some of the advantages associated with informal workouts (especially in terms of flexibility, confidentiality, low stigma and minimal court involvement) while offering some of the tools traditionally existing in formal reorganization procedures such as a moratorium or a majority rule.[138] Such mechanism may preserve value better than later-stage intervention through formal insolvency proceedings. It can prevent loss of value caused by disruption from change in management. It allows debtor to remain in possession while providing adequate safeguards, and empower creditors' suitably to ensure that the promoters and management do not abuse the trust, and where they do, to commence formal insolvency process.

The use of pre-packs as a restructuring tool has been traditionally popular in countries like the United Kingdom and the United States. In recent years, however, several jurisdictions around the world have adopted various forms of pre-packs. The adoption of Directive (EU) 2019 / 1023 on preventive restructuring frameworks, discharge of debt and disqualifications probably represents the most important steps for the consolidation of hybrid procedures in the international insolvency community. As a response to the COVID-19 crisis and the need to provide an efficient solution to deal with viable businesses facing financial trouble, some EU countries, such as Belgium and Spain, have taken steps to facilitate pre-packs.[139] As part of their strategy to move from hibernation to recovery, Germany and Netherlands have also accelerated the implementation of the EU Directive on preventive restructuring. A draft amendment of the Commercial Act has been introduced to transpose the EU Directive on restructuring and insolvency 2019 / 1023 of 20 June 2019 (the Restructuring and Insolvency Directive) and to increase the effectiveness of restructuring and insolvency proceedings in Bulgaria.[140] Many European and South American countries have adopted hybrid procedures.[141]

The rise of hybrid procedures can also be observed in certain jurisdictions, including Singapore, United Kingdom, India (in the form of PPIRP), Colombia and Australia. Singapore modernized its scheme of arrangement. The scheme of arrangement mechanism, amended several times to bring it closer in concept to Chapter 11 of the US Bankruptcy Code, allows the management of the company to propose a scheme of arrangement in anticipation of or in response to formal insolvency proceedings against a company. In the early stages of the COVID-19 crisis, the United Kingdom adopted a restructuring plan that resembled the hybrid procedure introduced in Singapore. As a response to the COVID-19, Colombia has adopted a temporary pre insolvency framework that facilitates out-of-court negotiations that can be subject to court approval with the majorities provided by the insolvency legislation. More recently, Australia launched a consultation process seeking to assess the possibility of improving the attractiveness of its restructuring framework by introducing a moratorium and other restructuring tools in the scheme of arrangement.[142] Many of these procedures around the world were considered in detail by IBBI Expert Committee and feature in World Bank toolkit for out of court restructuring.[143]

Based on his study of the concept and types of pre-packs generally found around the world, as well as the risks and advantages of pre-packs, Dr. Aurelio

Gurrea Martinez[144] states that the term "pre-pack" is used for at least four different types of restructuring mechanisms: (i) pre-packaged administrations leading to a going concern sale popularized in the United Kingdom and recently adopted in other jurisdictions such as Spain; (ii) pre-packaged reorganizations leading to a debt restructuring, which is the type of pre-pack generally observed in the United States and partially replicated in countries like Singapore and the Philippines; (iii) "fast-track" procedures, such as those existing in South Korea and Japan; (iv) some forms of workouts that, if approved by certain majorities and sanctioned by the court, can be binding on dissenting (or some dissenting) creditors, as observed in various procedures (some of them abolished) adopted in Europe after the 2008 financial crisis and can currently be found in several Latin American countries such as Argentina, Brazil, Chile and Uruguay.[145] According to him, even though the third and fourth type of restructuring tools mentioned above are often classified as "pre-packs", these procedures should be distinguished from the type of pre-packs existing in countries like the United States and the United Kingdom. For instance, in the "fast-track" procedures existing in jurisdictions such as South Korea and Japan, the procedure can still be lengthy given that the debtor is subject to most of the formalities and procedural requirements existing in an ordinary reorganization procedure. Similarly, the workouts approved by courts found in various Latin American countries should also be distinguished from the concept of pre-packs existing in the United Kingdom and the United States.[146] He has also distinguished pre-negotiated reorganizations from "pre-packs".

Clearly, this current vogue for pre- insolvency proceedings is the latest phase of a global effort to fashion a comprehensive range of debt resolution tools for use at various stages of the corporate life cycle. It is expected that more countries will follow this trend often to overcome the weaknesses or inefficiencies in their system.[147] Indeed, while only available to MSMEs, India has adopted a pre-packaged insolvency resolution process in the form of PPIRP, as discussed above. Adoption of a hybrid procedure, as suggested in this paper, can be a more desirable strategy in India where due to dependence on court, the process takes longer. It can also serve as a powerful tool to prevent insolvency, not just out of "fear of losing control" over the corporate debtor upon initiation of CIRP, but as a genuine and honest effort by bonafide debtors desirous to settle their dues even before the initiation of insolvency proceedings.[148]

2.11. Post-COVID needs of hybrid procedure

As the pandemic has subsided and economic activity resumed, an effective debt resolution framework is essential to resolve debt overhang and support growth. The effect of interim measures taken by the government has already ended or end shortly. This does not mean that the risk of a wave of insolvencies has been fully averted. Studies from the World Bank Group and other sources report that global financial vulnerabilities have risen since the start of the pandemic, partly because firms have borrowed to tackle liquidity shortfalls experienced during the crisis. In addition, shifts in consumer preferences brought about or accelerated by the crisis may mean that the business models of certain firms will become unsustainable after the pandemic subsides.[149] There has been, and remains, a markedly increased risk to MSMEs. There is a need to include alternate restructuring measures to "flatten the curve" of insolvencies and minimize the permanent damage to the economy.[150] During this phase, insolvency activity needs to be maintained, as it is crucial to uphold payment discipline and to incentivize debt restructuring. Special plans to strengthen the court system may be necessary, although their effects will normally be appreciated only in the medium term. The ordinary operation of the insolvency system should overlap with this framework. However, the stakeholders should first look at out-of-court resolution of stress and should use CIRP as the last resort.[151]

2.12. A nascent secondary market for stressed assets market

Investment is discouraged by the lack of well-defined

and predictable risk allocation rules and by the inconsistent application of written laws. Investors often demand uncertainty risk premiums which can be onerous. Some investors may even avoid markets due to uncertainties. Rational lenders demand risk premiums to compensate for systemic uncertainty in making, managing, and collecting investments. Often, this has a direct impact on cost of credit.

India's stressed assets market is estimated at $115 billion.[152] The enactment of IBC has created an efficient market for resolution of distressed assets. A massive amount of capital is needed among the intermediaries in the resolution process of stressed assets. A secondary market for distressed assets can reduce the debt collection burden on banks and free up resources and capital to support new lending. It can also enhance bank's risk management strategy by providing another instrument to manage credit and market risks. Unlike in a developed economy, market participants are more reliant on loans from banks to finance their projects in India. The stressed assets funds and investors are looking for opportunities to invest in India. There is a genuine interest amongst global investors in the distressed assets investment markets with their inherent 'buy low-sell high' potential.

Unpredictable time taken in IBC creates uncertainties for creditors, corporate debtor and resolution applicant. They are hesitant to take the leap of faith in the absence of an ecosystem that enables quick acquisition, provides an early closure of transactions, leaves no uncertainty from litigations challenging the resolution plans approved by Adjudicating Authority. There is a need to make the insolvency system more robust to attract distressed assets investors to India. A hybrid procedure, with less intervention of courts, and greater autonomy to corporate debtor and its financial creditors will address delays, bring certainty, increase price discovery, reduce cost of process, and thus, offer greater incentives to investors to offer competing resolution plans. A hybrid procedure can address this concern significantly as the commencement will invariably be consensual, and stakeholders have many incentives to make process the efficient, and expedite the process, as discussed in this section.

2.13. International best practices

A corporate workout requires supporting environment that encourages participants to restore an enterprise to financial viability. These workouts are negotiated in the “shadow of the law.” The World Bank Group recommends that the enabling environment must include, clear laws and procedures that require disclosure of or access to timely and accurate financial information on the distressed enterprise; encourage lending to, investment in, or recapitalization of viable distressed enterprises; support a broad range of restructuring activities, such as debt write-offs, rescheduling, restructuring, and debt-equity conversions; and provide favorable or neutral tax treatment for restructurings. Where an enterprise is not viable, the main thrust of the law should be swift and efficient liquidation to maximize recoveries for the benefit of creditors. Liquidations can include the preservation and sale of the business, as distinct from the legal entity. On the other hand, where an enterprise is viable, meaning that it can be rehabilitated, its assets are often more valuable if retained in a rehabilitated business than if sold in a liquidation.[153]

According to World Bank Group, hybrid workout procedures have generally arisen by market practice rather than by legislation and in ways designed to address the particular context and the specific objectives sought (for example, to deal with a financial crisis) as court involvement is less extensive in a hybrid workout than in a reorganization. It lists the following advantages that hybrid workouts tend to provide are particularly notable:[154]

Relative lack of expense from court process: The relatively limited involvement of a court mitigates the expense associated with court filings and attending court hearings.

Confidentiality: It is often possible or legally required for the content of negotiations to be kept confidential, at least prior to the court proceeding. This can assist in limiting reputational damage to the debtor and in turn a loss of value in its business.

Cramdown of the agreement on nonconsenting stakeholders: If the agreement is implemented by an

insolvency representative or sanctioned by a court, it can often be made binding on minority creditors and other stakeholders (such as shareholders) that did not approve the agreement. Such an attribute makes a hybrid workout procedure a powerful tool of persuasion that may facilitate a workout.

Fairness: The insolvency representative or court is (or at least should be) independent and objective. In certain procedures it will assess the restructuring terms or the process for compliance with legal requirements. This can assist in ensuring that the agreement that was reached is fair and seen to be fair.

2.14. Preserving jobs

Since a pre-pack may commence at the earliest sign of distress, it facilitates continuity of its operations without any job loss. It ensures a company keeps going, in contrast to a more protracted formal insolvency process which risks losing customers and employees.

2.15. Group enterprises

In the absence of any mechanism to effectively deal with insolvency of a group of companies in most jurisdictions, informal resolution processes can prove to be very helpful in dealing with issues that transgress into other enterprises of corporate debtor due to common management, or business and financial dependence. Research indicates that the pre-pack sale of the enterprise group to a single purchaser has resulted in a successful resolution in around 72% of the cases.[155] India does not have a group enterprise insolvency law. The toolkit of a hybrid procedure can provide flexibility to deal with issues without having to deal with complex legal issues that may arise in a formal procedure.

2.16. Access to capital

A debtor that has already a high level of debt and is unable to repay its existing dues would find it difficult to find new lenders to provide additional finance to run its operations. To overcome this, IBC provides the highest priority of repayment to any 'interim finance' that is availed during a CIRP. As a hybrid procedure is a quasi-legal proceeding, the provision of interim finance can be made available to it as well in order to facilitate a pre-packaged resolution of insolvency.

There are several advantages of a hybrid procedure, as discussed in the previous section of this paper. Perhaps the most apparent benefit is that it shortens and simplifies the restructuring process for the debtor. While its advantages are significant, there are a few noteworthy risks associated with these cases as well. First, prepacks present a risk that creditors may take unfair advantage of the debtor or otherwise take aggressive positions on pre-petition collections. Second, there is an inherent risk that creditors may attempt to thwart the process by refusing to cooperate in pre-petition negotiations. Third, even after filing the case, there is a risk that creditors or other parties-in-interest will attempt to bust the prepack post-petition. Fourth, prepacks present a chance of insufficient negotiating time due to the debtor's limited liquidity or other issues, such as high interest payments and accelerated debt.[156] While the risks should not be ignored, the benefits to prepacks generally outweigh them, especially given the advantage of a quick turnaround time and better price discovery. These risks have been taken into account while proposing a broad framework for Creditor Led Resolution Process (CLRP) in this paper.

Government is considering an alternate mode of resolution of stressed firms comprising of combination of an 'out-of-court initiated' workout procedure along with a strong formal insolvency procedure, to make insolvency system more robust. The Ministry of Corporate Affairs has also taken up the issue in the discussion paper issued by it in January 2023. To recommend a framework for quicker and more efficient 'out-of-court initiated' process that has minimal involvement of the Adjudicating Authority, an Expert Committee was constituted by IBBI in February 2023 under the Chairpersonship of its Whole Time Member, Mr. Sudhaker Shukla. The Expert Committee submitted its report in May, 2023.[157] The IBBI Expert Committee has recommended a hybrid insolvency procedure by combining RBI's Resolution Framework and IBC.[158]

3. Hybrid Model for India: A creditor in control, debtor in possession model

An analysis made in the previous section makes a persuasive case for introduction of a new hybrid insolvency resolution mechanism within IBC. India is a unique country. The success of IBC which has many distinct features tailored for Indian market, has established that global best practices, customized to local conditions work more effectively in emerging markets and developing countries. Therefore, this paper proposes a homegrown model of hybrid insolvency resolution mechanism that suits the indigenous business environment, existing judicial infrastructure, and market conditions. While the model is broadly similar to the framework proposed by IBBI Expert Committee, additional features and suggestions are proposed to complement the recommendations made in their report. The framework proposed by us combines the strengths of '*debtor in possession*' and '*creditor in control*' models of insolvency resolution, to address the delays and optimise value of assets of the debtor for the benefit of its stakeholders. It seeks to reap-in the benefits of a debtor-in-possession insolvency framework, while retaining the effective checks and balances available in creditor-in-control insolvency framework as enshrined under IBC. The proposed framework aims to seek statutory sanctity and judicial enforceability for an 'out-of-court' resolution process negotiated between relevant stakeholders, while safeguarding the interest of stakeholders not involved in the process or decision making. Like the IBBI Expert Committee, it draws heavily from RBI's Resolution Framework, and IBC.

This paper recommends that PPIRP and fast-track process under IBC make way for hybrid procedure proposed by IBBI Expert Committee[159], with some additional features and suggestions. The framework proposed in this paper is also referred as CLRP, the terminology used by IBBI Expert Committee. The broad contours are discussed in this section of the paper.

3.1. Three-stage process

A hybrid procedure will be a three-stage process. The first stage is the preparatory stage. This stage will precede the 'shadow of law' and formal stages, which form the ground on which the process plays out, guided by legal provisions and limited rules. In the first stage, application of best practices can prepare the foreground for an effective, efficient and timely resolution in the stages to follow.

The second stage will start with commencement of CLRP, without requiring an order of adjudication on admission of insolvency application by Adjudicating Authority. Unrelated financial creditors of corporate debtor having 51% voting share in value of total debt, can decide to initiate CLRP if the prescribed conditions are met. They will also appoint an insolvency professional as RP. If conditions for initiation are met, the RP will file an application for commencement of CLRP with Adjudicating Authority. Along with the filing of CLRP, a statutory moratorium will commence. During this stage, a CoC constituted by RP will consider the resolution plan of corporate debtor and/or its promoters, which will be tested against market pricing by inviting competing resolution plans, through a Swiss challenge mechanism, if not found viable or where dues of operational creditors are not proposed to be paid fully. The CoC may approve a resolution plan by financial creditors holding 66% of total debt in value. All core elements and steps of CIRP for finalisation and approval of the resolution plan by CoC will also be undertaken during the CLRP, albeit within a compressed timeline, and in the shadow of IBC, that is in accordance with the procedure and conditions that must be complied with while completing the process in the second stage. This stage will comprise of a maximum of 90 days (which can be extended by 30 days by Adjudicating Authority). The jurisdiction of Adjudicating Authority in the second stage would be limited to specific prescribed cases, for instance application by a creditor regarding fraudulent or

malicious initiation of CLRP, modification of moratorium, application by RP (and the CoC) dealing with non-cooperation by the existing management of corporate debtor, if required, etc.

The third stage will start with the filing an application before Adjudicating Authority for approval of a compliant resolution plan. The role of Adjudicating Authority will be to consider and approve the resolution plan under section 31 of IBC. The process in third stage is proposed to be a 30 day process. The total timeline proposed is 120 days with room for an extension of 30 days in second stage.

3.2. Who may initiate CLRP?

Under IBC, CIRP can be commenced on an application made by a financial creditor, operational creditor, or corporate debtor itself. Prior to filing of application, an operational creditor is required to give a statutory notice of demand if there is a default in payment of debt by corporate debtor. There is no such prerequisite for a financial creditor. Once an application is filed, the Adjudicating Authority adjudicates the application and shall admit the application if the ingredients of the relevant provisions of IBC are met or reject the application, in case the ingredients are not met.[160] The CIRP commences by way of an order of the Adjudicating Authority admitting the application for commencement of CIRP.

IBC prohibits filing of application for initiation of CIRP "fraudulently or with malicious intent" for any purpose other than for the purpose of insolvency resolution or liquidation.[161] Stringent action is possible against a person who initiates the CIRP with such fraudulent or malicious intent. Penalty imposed for such offences may extend to a fine of up to INR 10 million.[162] Adjudicating Authority is expected to exercise discretion carefully to prevent and protect corporate debtor from being dragged into the CIRP in cases where application is filed with *malafide* intentions or for any purpose other than the resolution of insolvency or liquidation.[163] Thus, the Adjudicating Authority may reject an application for initiation of CIRP, even if all requisite ingredients are met, if it finds that the application is filed with such intention. Further, Adjudicating Authority can reject the application if it finds that the debt itself (on the basis of which an application is filed) is fraudulent or collusive.[164] The government (Ministry of Corporate Affairs), has suggested that Adjudicating Authority should also have the power to impose a penalty where it believes that a person has filed frivolous or vexatious applications under other applicable provisions of IBC.[165] Adjudicating Authority is also empowered to accept assistance from the appropriate authorities when formulating a prima facie opinion.[166] It may order an investigation into the affairs of a company under section 210(2) of the Companies Act 2013, pursuant to prima facie satisfaction upon finding of fraudulent or malicious initiation of proceedings.[167]

In CLRP, no adjudication of application for admission of insolvency application by Adjudicating Authority or an order by Adjudicating Authority commencing CLRP is proposed. An alternate mechanism of making an application by the RP, informing the Adjudicating Authority of commencement of CLRP by financial creditors of corporate debtor is proposed, which would have the effect of commencement of insolvency resolution process akin to a CIRP commencement, as discussed later in this section. This requires adequate safeguards to be built into the process for CLRP commencement. Such safeguards can ensure that CLRP is not initiated with "fraudulent or malicious intent" for purposes other than insolvency resolution of corporate debtor.

However, if every financial creditor is made eligible to initiate CLRP, it may pose many challenges.[168] Some filtration would be justified. One obvious filtration would be exclusion of related party financial creditors as even in CIRP, financial creditors that are related party to corporate debtor are excluded from the CoC.[169]

As discussed earlier, RBI's Resolution Framework is available only to banks and specified categories of financial institutions regulated by the RBI. Taking into account the implementational learnings from the

RBI's Resolution Framework, IBBI Expert Committee has recommended that initially only scheduled commercial banks and other specified financial creditors may be notified as being eligible for initiation of CLRP, especially to lend credibility to the process.[170] It has proposed that such initiation be made by such class of financial creditors holding 51% in value of total debt of corporate debtor. As the CLRP draws heavily from RBI Resolution Framework, it would be fair to initially limit the decision making for initiation of CLRP to this class, subject to building adequate safeguards and providing a transparent process to protect the interest of other creditors, including financial creditors who may not be able to initiate the insolvency process while taking decision. However, the CoC constituted in CLRP must comprise of all unrelated financial creditors.

To avail CLRP, corporate debtor should not have undergone CLRP or CIRP or PPIRP, as the case may be, during the period of three years preceding date of filing of application for initiation of the CLRP. It should not be undergoing liquidation under IBC, either. The board of directors of corporate debtor should provide consent for initiation of CLRP in the manner as may be prescribed in the rules and regulations by the government and IBBI, as the case may be, and additionally, a declaration should be provided by its board of directors that CLRP is not proposed to be initiated with "fraudulent and malicious intent", or for a purpose other than insolvency resolution of corporate debtor. Later, if the resolution plan of corporate debtor proposes to alter the shareholding of any person other than the promoters, it should be tested on the principles of fairness.

3.3. Threshold for initiation – imminent default

As discussed in earlier section of this paper, one of the core features of pre-insolvency proceedings is the remediation of the deteriorating financial condition of the debtor before it commits default. Early intervention allows suitable corrective and remedial measures to be taken to preserve enterprise value, maintain asset quality and provide oversight on corporate debtor's business by an independent mechanism. It can prevent loss of value caused by disruption from change in management. It allows debtor to remain in possession while providing adequate safeguards, and empowers creditors' suitably to ensure that the promoters and management do not abuse the trust, and where they do, formal insolvency process may commence.

Many jurisdictions treat default to include likelihood of default, or balance sheet test. In Singapore, the cash flow test is the primary test for insolvency. This means insolvency is determined by the company's ability to pay all its debts as they fall due within the next 12 months.[171] Chapter 11 of US Bankruptcy Code allows either the debtor (voluntary filing) or creditors (involuntary filing) to initiate proceedings based on insolvency, which can be determined by either a balance sheet test (liabilities exceeding assets) or a cash flow test (inability to pay debts as they fall due).[172] Similar to the US and Singapore, the UK also uses cash flow and balance sheet tests to determine insolvency. In Australia, the creditor can petition a court if it is owed more than A$10,000, applications by directors can also trigger proceedings, and insolvency is determined using cash flow and balance sheet tests.[173] Germany's approach is centred on the concept of *"Zahlungsunfähigkeit"* (payment inability) and courts assess the company's overall financial situation to determine insolvency as outlined in the insolvency law. This essentially means a company is seen as insolvent if it cannot pay its debts when they are due. Interestingly, both debtors and creditors have a legal duty to file for insolvency proceedings if *Zahlungsunfähigkeit* is present.[174] Canada's Bankruptcy and Insolvency Act (BIA)[175] employs a unique approach. Specific acts of bankruptcy, such as ceasing to meet obligations generally or admitting insolvency, trigger proceedings under the BIA.

Such approach of early initiation, if introduced in IBC, would allow the honest but unfortunate promoters to participate in CLRP before they attract disqualification under section 29A of the IBC. IBC

requires eligibility of resolution applicant to be determined at the time of submission of resolution plan.[176] If the account of the corporate debtor is a non-performing asset[177] (as on date of submission of resolution plan) and at least a period of one year has lapsed from the date of such classification till the date of commencement of the CIRP of the corporate debtor, the promoters of the corporate debtor are rendered ineligible to submit a resolution plan in CIRP.[178] Invariably, if promoters are likely to attract such disqualification at the time of consideration or approval of their resolution plan, the CoC would not consider or approve its plan on account of disability under Section 29A of IBC. If the insolvency petition has been filed much after the account of corporate debtor is classified as non-performing asset and/or the admission of petition by Adjudicating Authority is delayed for any reason, a bonafide promoter would attract ineligibility under Section 29A of IBC for no fault of its. Incentives for early initiation of insolvency can address this inequitable situation for honest but unfortunate promoters.

Section 29A is one of the most controversial provisions of IBC. When IBC was first enacted in 2016, there was no bar on who could propose a resolution plan for resolving the corporate debtor. Section 29A was introduced through an amendment made to the IBC in 2017[179] and lists out the disqualifications for submitting a resolution plan. The ineligibilities under section 29A also decide the persons to whom a corporate debtor's assets may be sold in liquidation proceedings.[180] The ineligibility under section 29A(1)(c) has no requirement of intentionality. IBC does not create any distinction between a *bonafide* debtor who may have defaulted for reasons beyond its control and is unable to service its debt to the creditors, or a dishonest promoter who may have pushed the debtor into insolvency and has no intention to pay to its creditors despite ability to pay. Both suffer the same legal consequences under section 29A in the event of default. A person holding a non-performing account does not need to be a wilful defaulter.[181] Being a wilful defaulter is a separate disqualification under section 29A(b). As a contrast to this, section 29A(c) is an ineligibility that can simply arise from not paying dues for one year and ninety days from commencement of CIRP. In the context of modern insolvency law, this prohibition seems harsh since corporations that need the IBC the most are likely to have non-performing accounts.[182] We are not making any recommendation on section 29A as this paper is not focused on section 29A. M. P. Ram Mohan's paper throws adequate light on that issue.[183] Allowing CLRP to be commenced at the earliest stage will allow honest but unfortunate debtors to explore insolvency resolution through hybrid process, without relaxing section 29A.

Initiation of CLRP should be possible where default is imminent, but may not have occurred. The financial creditors should prepare a transparent and objective methodology for determining if the corporate debtor is likely to default in payment of interest or principal of financial debt of Rs. 10 million or above when it is due for payment. Theoretically, a company (or debtor) is determined to be solvent when the fair value of assets is greater than its debts. However, in practical scenarios, there are cases where companies (or debtors) which may be solvent on paper are unable to pay their debts because assets may include nonliquid assets, assets with unlocked potential or absence/interest of buyers due to macroeconomic situations. Hence, it is imperative to perform cash flow test (i.e. cashflow scenario based analysis of probability of default) and adequate capital test (i.e. scenario based analysis considering asset volatility, viability of credit etc.) in addition to abovementioned balance sheet test while determining the imminence of default and its quantum.

This is consistent with suggestion of ILA Sub-committee that only if balance sheet test is used as a trigger for initiating pre-pack, it would not only grant more autonomy to the debtors to initiate such a process but would also ensure that a remedy is available to remedy the over leveraged balance sheet of the corporate debtor, before it actually commits default.[184]

3.4. Voluntary code of conduct

Financial creditors should observe highest standards in their decision making and actions through all the three stages of CLRP, by following Insolvency Law Academy's Standards in Conduct and Performance of Committee of Creditors.[185] Members of CoC must maintain professional integrity and independence while voting on CoC agendas so that all decisions are made in the collective interest of stakeholders without any bias, favour, fear, coercion, undue influence or conflict of interest and without adopting any illegal or improper means. Members of CoC must not indulge in any unethical behaviour or activity which could undermine the objectives of IBC. They must not interfere with or influence the RP in performance of his roles and responsibilities as per provisions of IBC.

3.5. First Stage: Preparation for initiation of CLRP

As stated, the first stage comprises of the stage prior to commencement of CLRP where specified number of non-related financial creditors, with approval of or at the request of the corporate debtor, in-principle decide to initiate CLRP. To take such a decision, issues of applicability of CLRP, eligibility and process for initiation, and some other aspects will arise for consideration. These would be tested by an insolvency professional before convening first formal meeting of the financial creditors for considering initiation of CIRP. The process to be followed in the first stage (pre-commencement) should not be regulated. It should be left to the stakeholders, primarily, corporate debtor and specified financial creditors to negotiate. Mediation will play a key role during this stage, for corporate debtor and financial creditors to explore if CLRP can commence for corporate debtor, to agree on broad terms of resolution plan, and corrective remedial measures required for resolving insolvency. It should be left to the parties to follow the process and procedure to arrive at the first stage. In any case, the resolution plan will be tested during the second stage, if the process reaches that stage. The parties would indeed need to be aware about the provisions of applicability, initiation, and eligibility for CLRP.

3.5.1. Material Information

A **bonafide** corporate debtor seeking resolution, or promoters/management of corporate debtor in respect of where specified financial creditors are contemplating initiation of CLRP, should make best use of the time before commencement of formal process to gather and collate all the relevant information about corporate debtor, including but not limited to its assets and liabilities, security interest over its assets, guarantees, status of assets, etc. This information can be provided to the financial creditors, and to the insolvency professional proposed to be appointed as RP so that information memorandum of corporate debtor can be prepared and is available at the earliest time after commencement of CLRP. Corporate debtor should initiate populating a virtual data room for Swiss Challenge (as may be required at later stage). It must also prepare a detailed list of its creditors, including but not limited to financial creditors, operational creditors, employees, workmen and statutory authorities along with and debt owed to them. Corporate debtor must keep insolvency professional and financial creditors duly informed and seek their feedback on abovementioned tasks. It should initiate discussion with its financial creditors on contours of preliminary resolution plan. It should prepare a preliminary resolution plan which meets the requirements of IBC and contains a detailed strategy for operational revival including but not limited to detailed reasons of past defaults and how corporate debtor envisages ratification of the same; identified sources of promoter contribution, if envisaged in the plan; sources of additional capital, as required under the plan; implementation and monitoring strategy to safeguard interest of all stakeholders. The said implementation and monitoring strategy may include provision for trust and retention account; monitoring agency as per requirement of CoC; and nomination of representatives of the creditor on board of corporate debtor. Corporate debtor must provide a list of assets

and liabilities of corporate debtor and provide a balance confirmation regarding the outstanding amount of claim from each of its non-related financial creditor.

Before a corporate debtor enters negotiations with financial creditors, it must prepare for these negotiations. It may retain advisors from a variety of disciplines, such as corporate finance, law, and accounting, to provide support in relation to the matters discussed in this section and the following sections. Financial creditors commonly undertake (or instruct advisors to undertake on their behalf) an examination *(due diligence)* of the debtor's state of affairs and financial condition. The aim is, in particular, to determine the causes of the debtor's financial difficulties, assess its financial condition, and evaluate possible solutions. In many cases, information may be more readily available to a debtor than to stakeholders. In this case, financial creditors (or their advisors) will often request the relevant information from the corporate debtor.

3.5.2. Dispute resolution

Insolvency process is not adversarial. Yet disputes arise during the process. Litigation can prolong the process, create uncertainty and add to cost. The parties must endeavour to resolve any bi-later or multi-lateral disputes including inter-se creditor disputes, amicably through negotiations. Mediation can be used to arrive at resolution if direct negotiations do not bear fruit.[186] Consensual resolutions succeed when there is open dialogue and good-faith negotiation between the debtor and its creditors. At times, these elements may be missing. Alternative dispute resolution (ADR) neutrals (more specifically, mediators and conciliators) can be a means of support to facilitate negotiations. They can be used in a variety of restructuring procedures, and they are particularly beneficial in workouts. Mediators and conciliators, for example, assist the parties by operating like intermediaries or referees, in that they facilitate an agreement between disputing parties. However, they are not authorized to make binding decisions for the parties. Instead, the goal is to guide the disputing parties to reach their own resolution (through a variety of techniques for which they must be specially trained). They are independent and objective third parties, and frequently have vast experience in facilitating agreements, as well as substantive knowledge of the relevant topic. In addition, they may be aware of market-standard approaches to resolving issues that arise in workouts in a particular jurisdiction, and may be familiar with common approaches to handling certain issues in a reorganization. These approaches may serve as useful benchmarks for the parties when negotiating a workout. It can be particularly useful for mediators with specialized knowledge to facilitate negotiations involving small businesses, which may not have the knowledge and capacity to successfully negotiate agreements with creditors to relieve financial difficulties.[187] Ultimately, mediators and conciliators may help avoid recourse to litigation. Mediation should be encouraged in both first and second stage.

3.6. Second Stage: Commencement of CLRP

In this stage of CLRP, the insolvency professional, whose name is proposed by specified financial creditors, will convene a formal meeting of the specified financial creditors of corporate debtor. In such meeting, the prescribed category of financial creditors may initiate CLRP, by not less than 51% in value of financial debt of corporate debtor, if default in payment of debt is imminent or default has occurred. Amongst the agenda of the meeting would be confirming the insolvency professional as RP, by not less than 51% in value of financial debt of corporate debtor, or replacing him/her with another insolvency professional to serve as RP, by 51% voting share. Appointment of RP will ensure that the due process is maintained and the mandatory requirements under law are complied with.

3.6.1. Threshold for approval for initiation of CLRP by specified financial creditors

Initiation of CLRP may be approved by the prescribed category of financial creditors in a meeting of such financial creditors, by not less than 51% of total

financial debt of corporate debtor. A lower threshold is necessary to ensure that initiation of process does not become cumbersome due to requirement of higher threshold. Since CLRP is premised on continuation of debtor-in-possession and co-operation from the promoters and management, such initiation should be made only in cases where corporate debtor has made the request for initiation of CLRP or provided consent for initiation (in the manner as may be prescribed in IBC or its regulations), and where prescribed category of financial creditors holding more than 51% of the total financial debt of corporate debtor (individually or collectively) have agreed to initiate the process.

A concern may arise on decision making by financial creditors based on claim of 51% of total financial debt in value, when such claims will be verified by IRP/RP only after commencement of CLRP. There are some measures that can be considered to address the concern. Firstly, the insolvency professional who will chair the first meeting of the financial creditors should confirm that the debt of 51% was calculated on basis of books of corporate debtor. A similar confirmation can be sought from the corporate debtor. Besides, since creditors with more than 51% of financial debt would have already come together by an agreement for initiating the CLRP, there is little chance of any dispute being raised by at least specified financial creditors constituting 51% or more regarding their claims. Since, these creditors form the most significant portion of the decision-making voting of 66% of CoC, the chances that any wrong consideration or non-consideration of claim may invalidate the decision of CoC is remote. IBBI Expert Committee also considered this issue and suggested that the creditors may be permitted to raise objections before Adjudicating Authority regarding the admission or rejection of claims at any stage, which should only be considered after the application is filed for approval of the resolution plan except in cases where the process may be vitiated on account of non-hearing of such objections. [188]

3.6.2. Appointment of resolution professional

The interest of stakeholders would be best served if an independent insolvency professional regulated by IBBI is appointed to conduct CLRP. This would reduce the scope for objections on the basis of 'self-interest' of the financial creditors and foster trust of other stakeholders.[189] Procedurally too, it will help in making the process more transparent as insolvency professional would be accountable to IBBI for her conduct. As the management of corporate debtor will remain with corporate debtor, insolvency professional will ensure oversight and keep a close watch on corporate debtor's affairs to check abuse and ensure value preservation. IBBI Expert Committee noted that distinct from the inter-creditor or debtor-creditor negotiations driven processes akin to the process under RBI Resolution Framework, CLRP shall be a collective insolvency process. Insolvency professional whose name is proposed by unrelated specified financial creditor, will convene a meeting of unrelated specified financial creditors to consider initiation of CLRP by 51% of voting share.

At the time of deciding initiation of CLRP, the financial creditors should also, by 51% voting share, approve appointment of such insolvency professional as the RP. The CoC constituted after commencement of CLRP will have the right to replace the RP with another insolvency professional at any stage of the process by 66% voting share.

Standards of appointment of insolvency professional

Selection of an insolvency professional for appointment as interim resolution professional or replacing a resolution professional should be made keeping in mind the specific skill set and capacity required to manage the CLRP. The CoC must approve a reasonable fee for the resolution professional in accordance with IBC and its regulations commensurate with the quantum and scope of work involved.[190]

3.6.3. Application to Adjudicating Authority

Upon resolution passed by prescribed category of financial creditors to initiate CLRP, by not less than 51% of financial debt of corporate debtor, the RP will

file an application before Adjudicating Authority in prescribed form, together with a certificate of compliance of the prescribed terms of initiation. She will also inform Adjudicating Authority, and IBBI of her appointment as the RP in prescribed form.

3.6.4. Commencement of CLRP

The CLRP would be deemed to have commenced on filing of complete application of intimation by RP before Adjudicating Authority. CLRP will be deemed to have commenced from the date of filing application, for all purposes, including for timelines for various stages. The corporate debtor will not oppose such commencement of CLRP before Adjudicating Authority as it would have provided consent in prescribed form.

3.6.5. Moratorium

Modern forms of corporate rehabilitation impose a freeze on right of creditors to proceed against the debtor on initiation of a formal insolvency process. Essential objectives of an effective insolvency law are to protect the value of the insolvency estate against diminution by the actions of the various parties to insolvency proceedings and facilitate administration of those proceedings in a fair and orderly manner. The parties from whom the estate needs the greatest protection are the debtor and its creditors.[191] Suspension of existing actions and a moratorium on commencement of new actions against corporate debtor in respect of which insolvency proceedings are commenced is a mechanism to protect the value of the insolvency estate. With regard to creditors, one of the fundamental principles of insolvency law is that insolvency proceedings are collective proceedings, which require the interests of all creditors to be protected against individual action by one of them. A stay of action by all creditors ensures that the sanctity of collective proceedings is preserved. The disturbance of creditor rights is temporary. The rights are merely delayed and are reinstated if the rescue is successful so that the creditors, it is said, lose nothing.[192] In reorganisation proceedings, the stay facilitates the continued operation of the business and allows the debtor a breathing space to organise its affairs, time for preparation and approval of a reorganisation plan and for other steps such as shedding unprofitable activities and onerous contracts, where appropriate. A moratorium provides companies with an opportunity to consider the best approach for rescuing the business whilst free from enforcement and legal action by creditors. Proceedings by creditors can distract the debtors or insolvency practitioner (where the debtor is divested of control) from its task of administering the estate and divert resources away by becoming involved in ongoing cases.[193] A moratorium offers companies in need of restructuring of debts, the option of a period of protection during which a restructuring deal can be negotiated and implemented, whilst providing safeguards for creditors through the appointment of a supervisor to oversee the moratorium and the provision of right to seek court intervention in case of any illegality or abuse of process.

IBC provides that after admission of the application for initiation of CIRP, Adjudicating Authority shall pass an order declaring a moratorium.[194] In CLRP, on commencement of CLRP (i.e. on filing of application by the RP), an automatic moratorium (as envisaged in IBC for CIRP),[195] should be deemed to have taken effect, automatically, by operation of law, without requiring any order of the Adjudicating Authority. Automatic moratorium is not uncommon to the insolvency systems. In US, the filing of the bankruptcy application operates as an unlimited automatic stay unless revoked by court on application of an aggrieved party. In Singapore, there is an established process of an automatic moratorium for a period of 30 days, in a scheme of arrangement, on application of stay by a corporate debtor provided company has not in the last 12 months made an earlier application where automatic moratorium applied. The World Bank Group has emphasized that in hybrid workout procedures, and in preventative workout procedures, a formal stay to prevent enforcement actions by creditors may be imposed by the court or come into effect automatically.[196] Even in CIRP under IBC, although the power of declaration of moratorium is

vested with the Adjudicating Authority, the order of moratorium comes into effect as good as an operation of law. There is no discretion with Adjudicating Authority to refuse to grant moratorium if CIRP is ordered to be commenced.

In CLRP, moratorium should be automatic for 90 days. However, the Adjudicating Authority should be given the jurisdiction to extend or modify the moratorium based on application by the eligible and unrelated financial creditors initiating the process or any application to modify the moratorium by any creditor. Pendency of such application before Adjudicating Authority should not affect the moratorium until the application is adjudicated.[197]

3.6.6. Management of corporate debtor

Like in PPIRP, the management of corporate debtor in CLRP will remain with debtor under the oversight of RP, who will act in accordance with the applicable provisions of IBC and regulations. RP will perform other prescribed duties and functions. The continuation of management and possession of assets by corporate debtor can be balanced by providing CoC an effective control over its assets and management. This debtor-in-possession model would be better suited for CLRP, for the reasons as already discussed in the previous section of this paper. RP will manage the process but not replace the business or run it. This will save time in dealing with the friction and/ or erosion in value/ cash flow that change of control may create. This will also minimise friction between the parties to CLRP, if any on account of control. To ensure transparency and informational efficiency, RP would be responsible for overseeing the proceedings of corporate debtor during CLRP.[198]

In case there has been gross mismanagement of the affairs of corporate debtor or if the business has been conducted in fraudulent manner, RP, upon coming to knowledge of the same and with the approval of 66% of the CoC, in value of debt, may file an application before Adjudicating Authority requesting for an order of converting CLRP into CIRP, and for vesting the management of corporate debtor with the RP. In case of such vesting of management, the role and functions of the RP will be similar to the CIRP.[199]

3.6.7. Duties of resolution professional

The RP will be responsible for conducting CLRP. Her role with respect to affairs and management of corporate debtor would be supervisory, and she will serve as eyes and ears of CoC. She will collate and prepare the information memorandum for invitation of resolution plans. She will also be responsible for identifying avoidance, fraudulent and wrongful trading transactions and seeking an appropriate remedy from Adjudicating Authority. RP should be empowered to amongst others (a) access all books of account, records and information available with the CD; (b) access the electronic records of the corporate debtor from IU having financial information of corporate debtor; and (c) seek information and relevant documents of corporate debtor available with government authorities.

3.6.8. Committee of creditors

Shortly after filing of application initiating the CLRP, the RP should constitute a CoC comprising of unrelated financial creditors based on the financial statements and books of accounts of the corporate debtor. Each member of CoC will have a proportionate voting right corresponding to its share by value amongst the members of the committee. The CoC shall consider the resolution plan of corporate debtor and its promoters (if eligible) or other resolution applicants, if the plan of corporate debtor and its promoters is not found viable and feasible or if the corporate debtor or its promoters lose the confidence and trust of CoC for their acts or omission. The CoC should be able to recommend dissolution of CLRP, convert the process to CIRP, or order liquidation of corporate debtor if no viable and feasible resolution plan is approved. The CoC should be able to decide to convert CLRP if any material avoidance transaction or fraudulent or wrongful trading by corporate debtor is reported by the RP, which corporate debtor failed to disclose;

misrepresentation by corporate debtor; reporting of gross mismanagement or fraudulent behaviour of management of corporate debtor; instances of non-cooperation by management of corporate debtor.

Endeavour should be made by financial creditors to nominate sector experts from creditor groups as non-voting participants to CoC to enable better decision making at CoC with respect to operational aspects. CoC should also consider having operational sector experts advise them on operational as well as resolution matters. Member of CoC should stay aware of the state of country's economy and developments in the sector in which the corporate debtor operates. They must be fully aware of the roles and responsibility of CoC. CoC members should be fully informed of corporate debtor's financial, business and operational history and the reasons for distress and stay up to date with affairs and operations of the corporate debtor during the insolvency process to be able to take fully informed decisions. Regular comprehensive updates should be sought from RP. These should be carefully studied and actively discussed in CoC meetings.[200]

3.6.9. Interim finance

A corporate debtor may not be able to remain in business through a restructuring without additional financing, which would commonly be in the form of interim financing. Such financing may be needed for operational purposes or (to keep restructuring negotiations to a readily manageable number of parties) to satisfy the claims of smaller creditors. If interim financing is unavailable, the debtor may experience liquidity problems (beyond any it is already experiencing). Given this, additional financing is often an important prerequisite of a successful and efficient restructuring. The prospects of rescue for a financially distressed enterprise may be highly uncertain. The provision of new debt to such an enterprise, without some special protection being granted to that debt, would entail a level of counterparty risk that a potential debt financing provider may be unwilling to assume – either for a feasible interest rate (or other compensation) or at all. This is especially the case if corporate debtor's financial condition is deteriorating rapidly, such that the time available for due diligence of its affairs is very limited.

The existing lenders of corporate debtor are the beneficiaries to the higher chances of resolution and higher resolution amount. So, their interest in the outcome runs much deeper than an independent financier. They should be supportive of proposal for interim finance and take prompt decision for its approval. Members of CoC should be aware of the benefits of raising interim finance for saving insolvent companies from liquidation. Interim finance is not only a requisite to meet the cost of insolvency resolution process, but also crucial for making regular payments to avail critical input supplies. Interim finance raised during the CLRP could help a company remain a going concern, making an easier case for revival. Interim finance is treated as insolvency resolution process costs and has the status of super priority in distribution in resolution and liquidation processes. Interim finance can often be critical for continuation of corporate debtor as a going concern. Access to interim finance assumes greater importance where the debtor hardly has any cash flows or deposits available, but has operational capacity to generate revenue and stand on its feet. Member must extend full cooperation and support to the resolution professional to obtain interim finance in such cases.[201]

3.6.10. Verification of claims

The PPIRP provides a fair process of verification of claims of creditors. RP prepares a list of creditors and claims on the basis of information provided by corporate debtor, which she is required to verify from the records of corporate debtor. A public announcement is made informing of the list of creditors, their claims and security interest held. This is put up on corporate debtor's website. Any creditor who has any objection to the list, can submit a claim submitted by documents. RP verifies such claim in accordance with the prescribed regulations. This procedure is efficient and saves time and cost of verification of claims of creditors, particularly when the corporate debtor is cooperating as it seeks to

resolve the insolvency with support from creditors. A similar process for verification of claims can be followed in CLRP.

3.6.11. Information Memorandum

IBC casts a duty on RP to prepare a document containing all relevant details of the corporate debtor (e.g., assets, liabilities, ongoing litigations, etc.) in order to assist resolution applicants in making resolution plan. This information is out together in the form of an information memorandum,[202] the form of which is prescribed by IBBI in regulations.[203] RP is required to submit the information memorandum to each member of the CoC, on or before ninety-fifth day from the insolvency commencement date, in view of strict timeline and to provide ample time is provided to CoC as well as the resolution applicant for assessing the viability of the business of corporate debtor and thereafter submit a resolution plan.

As the timelines in CLRP are proposed to be shorter, corporate debtor should make all efforts to organise all material information before commencement of CLRP, and hand it over to financial creditors and insolvency professional, as a best practice *(See Section 2)*. RP should be duty-bound to prepare the information memorandum in prescribed form, within 30 days of commencement of CLRP and should have the right to seek any additional information from corporate debtor and creditors. To disincentivise omission of any material information or inclusion of any misleading information in the draft information memorandum or information to form information memorandum by corporate debtor, supply of false or misleading information, or any non-cooperation in this regard should be a ground to convert CLRP into CIRP by CoC by passing a resolution by a majority of 66% in value. Any person who has sustained any loss or damage as a consequence of misleading information or deliberate omission of material information may approach Adjudicating Authority to seek appropriate remedy against corporate debtor's personnel, which should be vested with jurisdiction to order payment of compensation by corporate debtor to every person who has sustained such loss or damage.[204]

Although it is the duty of RP to prepare the memorandum, the members of CoC, and other stakeholders must proactively share all the relevant information available with them to help RP in preparing a complete and high quality information memorandum. Member must diligently analyse and examine the information memorandum prepared by RP and provide inputs.[205]

3.6.12. Valuation of corporate debtor

Asset valuation plays a paramount role in the CIRP. IBC mandates the appointment of two registered valuers by the RP within seven days of their appointment, and not beyond 47 days from the date of insolvency commencement, to assess the fair and liquidation value of the CD.[206] The regulations mandate the valuers to assess value of the CD *'computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor'*.[207] The Institute of Chartered Accountants of India has issued valuation standards to set up concepts, principles and procedures which are generally accepted internationally having regard to legal framework and practices prevalent in India. The two worldwide followed standards are International Valuation Standards issued by the International Valuation Standards Council and the Royal Institution of Chartered Surveyors Red Book. Notably, no definite standard has been prescribed under IBC to conduct the valuations.

Valuation is disclosed to CoC by RP only after resolution plans are received, for guidance in evaluation of resolution plans received.[208] RP is obliged to facilitate a meeting between the registered valuers and the CoC to explain the methodology being adopted to arrive at valuation before computation of estimates.[209] Information memorandum to be shared with the prospective resolution applicants shall include the fair value of the corporate debtor.[210] It has been held by the Supreme Court that Adjudicating Authority cannot go

into the valuation except where process for assessing valuation prescribed in regulations has not been followed.[211] This further underscores the importance of integrity and credibility of valuation process and assessment. In CLRP, RP should undertake fresh valuation (similar to CIRP) by following highest standards of valuation. However, the valuation should be expeditiously conducted. The corporate debtor should extend full cooperation to valuers, RP and CoC in the valuation process.

3.6.13. Resolution plan

Resolution applicants should be free to propose a viable and feasible resolution plan, which does not contravene laws in force in India, similar to what is provided in IBC for CIRP. Right to recompense refer to right of a stakeholder to reclaim its "sacrifice" under resolution plan in case the beneficiary of the "sacrifice" is revived. For financial creditors, this may entail seeking written off amount, loss on account on lowering of returns etc. Concept of recompense may be explored under a resolution plan to ensure that the fruits of revival are shared amongst the participating stakeholders.

3.6.14. Treatment of operational creditors

As discussed in the previous section, operational creditors feel short-changed by IBC. An operational creditor has a right to file its claim with RP during the process, but does not have right to become a member of CoC as it comprises only of financial creditors. An operational creditor is invited to meeting of CoC only if total dues of operational creditors are 10% or more of the total aggregate debt of corporate debtor. It can only participate, not vote in CoC.[212] A resolution applicant is legally bound to pay to operational creditors, only a minimum value which is linked to value payable to them in liquidation as per the waterfall prescribed in section 53 of IBC[213] which is invariably Nil. Subject to such payment, distribution of payment under resolution plans can be decided by CoC. CoC tends to focus on its own recovery and as a result, most unsecured operational creditors get paid nothing (See Section 2). This has created resentment amongst operational creditors. Operational creditors are also hit particularly hard by the moratorium on the initiation of IBC proceedings. Although a loss caused to operational creditor due to moratorium is compensated by treating it as CIRP costs, often the liquidity available with corporate debtor is inadequate to meet CIRP costs during the process, and operational creditors have to wait till after the resolution plan is approved or corporate debtor is liquidated, as the case may be, to even receive their dues for the moratorium period.

The hybrid procedure proposed in this paper creates an obligation on corporate debtor to pay the dues of operational creditors in full in case the corporate debtor wishes to avoid the risk of resolution plan of another resolution applicant being approved. The base plan of corporate debtor must compete with resolution plans invited from market if any discount on their payment is provided in the resolution plan. As hybrid process provides little visibility over the initial process to operational creditors until the commencement of process and little engagement after that and till an application, if any for approval of resolution plan is filed, there is justification in providing for their full dues (as provided under PPIRP) or an assured percentage of recovery which should not be less than what is payable to financial creditors (based on a competitive and transparent process). This will also counter the apprehension of lack of transparency in hybrid procedure. It will ensure smooth approval of resolution plan by Adjudicating Authority. It will also provide a big respite to MSMEs.

3.6.15. Resolution plan approval process

CLRP should be kept as simple and as flexible as possible, with only core principles enshrined in IBC through substantive provisions. Unlike PPIRP, regulations for CLRP should be kept simple, leaving scope of application of best practices, and avoiding encroachment in commercial domain of CoC. CoC should consider the resolution plan to be submitted by corporate debtor strictly within the timelines prescribed CLRP. If the plan is viable and feasible; and is otherwise compliant of law, CoC may approve the resolution plan in the manner provided in section

30(4) of IBC for CIRP. Where resolution plan envisages, resolution/adjustment of debt owed to creditors other than financial creditors and debtor's related parties, such plan must pass the test of market price. In such plans, CoC must instruct RP to invite resolution plans from the market, like in CIRP. The RP will shall present to CoC all resolution plans received that are compliant of law. CoC shall give the corporate debtor an opportunity to improve its resolution plan. For selection of best plan, CoC may adopt Swiss challenge method based on regulatory structure that may be prescribed by regulations.

3.6.16. Duties of corporate director, its board and promoters

Debtor-creditor cooperation is a core element of any out-of-court or informal framework. Corporate debtor should be consistent in cooperating from start and throughout the CLRP. Where the cooperation ends, CLRP must end too. CLRP process envisages corporate debtor in control process. The corporate debtor should make every endeavour to protect and preserve the value of the property of the corporate debtor and manage its operations as a going concern. It should exercise and discharge their contractual or statutory rights and obligations in relation to the corporate debtor, subject to the provisions of IBC and other conditions and restrictions as may be prescribe.

3.6.17. Approval of resolution plan by CoC

The resolution plan, which is compliant of IBC, should require consent of at least 66% of the members of CoC in value, same as that in CIRP for consistency of approach.

3.6.18. Rights of shareholders

In CIRP, the resolution plan can provide for cancellation of existing shares of shareholders of the corporate debtor and issuance of new shares to the resolution applicant and its nominees. Such extinguishment of rights of shareholders of corporate debtor does not require any consent of the shareholders.[214] In other words, the change of shareholding and management can be effected in CIRP through a resolution plan. This is possible even where the company has non promoter or public shareholders. Further, there are various exemptions provided under Companies Act, 2013 and by Securities and Exchange Board of India (SEBI) under its regulations which allow curtailment of rights of non-promoter and public shareholders in a resolution plan. For instance, a resolution applicant is not required to comply with the requirement of making an open offer to public shareholders under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Takeover Code) while acquiring substantial shareholding of a listed corporate debtor under the resolution plan. Similarly, the shares of the public shareholders can be acquired or cancelled and the listed corporate debtor be delisted under the resolution plan without their approval and without following the requirements of applicable SEBI regulations. Further issuance of shares and disposal of substantial undertaking does not require shareholder approval under SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

In CLRP, where the resolution plan of the corporate debtor or its promoters contemplates any measures for curtailing or extinguishing the rights of non-promoter or public shareholders, the corporate debtor should be required to take approval of such non-promoter shareholders. This will prevent any abuse of the CLRP by the promoters for curtailing or extinguishing the rights of non-promoter or public shareholders. Further, this will also ensure that CLRP is not being used for circumventing the regulations for investor protection. The approval can be taken before approval of resolution plan by the CoC. The threshold for shareholder approval can be majority of shareholders in value. The applicability of other exemptions under SEBI regulations, such as under the Takeover Code should also be carefully considered. Shareholders' approval in such cases should be a pre-requisite for approval of plan by Adjudicating Authority.

3.6.19. Avoidance Transactions

It would be prudent for the financial creditors to

procure a transaction and forensic audit of corporate debtor before commencing CLRP to satisfy that there is no questionable transaction made which would constitute as preferential, undervalued, extortionist, fraudulent or wrongful trading within the meaning of the IBC. If during CLRP, RP discovers any such transaction, she may take action by filing an application under the said provisions before the Adjudicating Authority. The CoC may, for such reason, resolve to convert the CLRA to CIRP. In any event, the continuance of these applications shall be independent of the application filed for approval of the resolution plan (similar to section 26 of the IBC). The relevant date for determining the look back period for such transactions should be the date of filing of application with Adjudicating Authority by the RP for commencement of CLRP.

3.6.20 Timeline

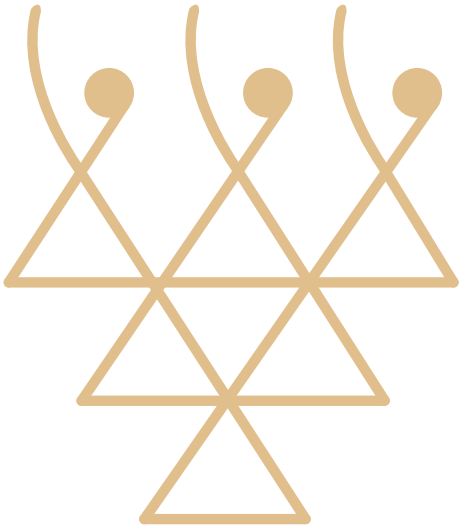
The timeline for the second stage should be 90 days extendable only once by 30 days.

3.7. Third Stage: Approval of resolution plan by Adjudicating Authority

Once a resolution plan is approved by CoC by requisite majority and an application for its approval is filed before Adjudicating Authority. Process of approval of resolution plan will be similar to CIRP. Where resolution plan is the approved and implemented, the successful resolution applicant (if not the promoter) would take over the corporate debtor on clean slate basis as in case of CIRP. The scope of Adjudicating Authority's jurisdiction will be limited to checking whether, amongst others the procedural requirements related to the conduct of the process as laid down in IBC and the underlying applicable rules and regulations are fulfilled, and the resolution plan complies with the mandatory requirements of IBC. Where Adjudicating authority is satisfied that the resolution plan satisfies all the requirements, it must approve it, which approval shall be binding on all stakeholders. The effect of approval of the resolution plan under CLRP will be like that of an approval under CIRP. As a safeguard, in case the promoter's resolution plan approved by Adjudicating Authority is contravened by the concerned corporate debtor or its promoters, any person whose interests are prejudicially affected by such contravention may make an application to Adjudicating Authority for initiation of CIRP.

3.7.1 Timeline

The timeline for approval of the resolution plan should be 30 days so that the purpose of CLRA is not defeated by delay in approval of the resolution plan.



Endnotes

[1] *See, Dinesh Unnikrishnan and Kishor Kadam, "How Indian banks' big NPA problem evolved over year".*

[2] *Insolvency and Bankruptcy Code was passed by Indian Parliament (Lok Sabha on April 28, 2016, and Rajya Sabha on May 11, 2016). It was notified by the President of India on May 28, 2016.*

[3] *See, Framework Report on Creditor Led Resolution Approach in Fast-track Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016, IBBI Expert Committee, May 2023, available at https://ibbi.gov.in/uploads/resources/ede9252b24c28166ea95602ca3c214b1.pdf*

[4] *See, Shaktikanta Das, Governor of the Reserve Bank of India, keynote address at the conference on Resolution of Stressed Assets and IBC – Future Road Map, organised by the Centre for Advanced Financial Research and Learning (CAFRAL), Mumbai, 11 January 2024, available at https://rbidocs.rbi.org.in/rdocs/Speeches/PDFs/ADDRESSBYGOVERNORCAFRALIBC0E26AB4786BE46CCBE95515563021E2FADDRESSBYGOVERNORCAFRALIBC0E26AB4786BE46CCBE95515563021E2F.PDF*

[5] *Understanding the IBC, Key Jurisprudence and Practical Considerations, A Handbook, International Finance Corporation, and Insolvency and Bankruptcy Board of India.*

[6] *See, Sumant Batra, Corporate Insolvency, Law and Practice, Part 1, Chapter 1, Eastern Book Company, 2017.*

[7] *See, Press release dated May 11, 2016 issued by Ministry of Finance, Government of India.*

[8] *See, Shaktikanta Das, Governor of the Reserve Bank of India, Keynote address at the conference on Resolution of Stressed Assets and IBC – Future Road Map, organised by the Centre for Advanced Financial Research and Learning (CAFRAL), Mumbai, 11 January 2024.*

[9] *See, Sumant Batra, Corporate Insolvency, Law and Practice, Part 11, Eastern Book Company, 2017.*

[10] *IBC, S5(7). A 'financial creditor' is defined as any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to. A 'financial debt' is a debt along with interest that is disbursed against the consideration for the time value of money and includes money borrowed against the payment of interest, amount raised as under any acceptance credit facility, purchase facility, etc., as mentioned under S, 5(8) of IBC.*

[11] *IBC, S 5 (20), An "operational creditor" is defined as any person to whom an operational debt is owed, including any person to whom such debt has been legally assigned or transferred". S5 (21) defines operational debt is a claim for the provision of goods or services, including employment, or a debt for the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government, or a local authority.*

[12] *See, 1. Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta, (2020) 8 SCC 5311.2. Maharashtra Seamless Limited v. Padmanabhan Venkatesh & Ors., (2020) 11 SCC 467 3. Jaypee Kensington Boulevard Apartments Welfare Association & Ors. v. NBCC (India) Ltd. & Ors., (2021) 5 SCC 12.*

[13] *See, IBC, Part II Chapter IV, S. 55 to 58.*

[14] *See, IBC Part II Chapter III-A S.54A to 54P.*

[15] *See, Supra note 3.*

[16] *See, Sumant Batra, Corporate Insolvency, Law and Practice, Eastern Book Company, 2017.*

[17] *IBBI Annual Report, 2016-2017.*

[18] *IBBI Quarterly Newsletter, October-December, 2023, Report on Trends and Progress of Banking in India 2022- 23 .*

[19] *Ibid*

[20] *Ibid*

[21] *IBBI Annual Report, 2022-2023, RBI's Report on Trends and Progress of Banking in India.*

[22] *CARE Ratings Report March 2024, available at https://www.careratings.com/uploads/newsfiles/1709544594_Analysis%20of%20Asset%20Quality%20in%20Q3FY24.pdf*

[23] *Keynote address by Mr N S Vishwanathan, Deputy Governor of the Reserve Bank of India, at the National Conference of the Associated Chambers of Commerce and Industry of India (ASSOCHAM) on "Risk Management: Key to Asset Quality", available at https://www.bis.org/review/r160909d.htm*

[24] *RBI's dirty dozen list: Legal wrangle at NCLT cost banks Rs 25,000 crore, says report - Business Today -June 18, 2018 available at https://www.businesstoday.in/current/economy-*

politics/rbi-dirty-dozen-list-legalwrangle-nclt-cost-banks-rs-25000-crore/story/279266.html

[25] RBI identifies Accounts for Reference by Banks under the Insolvency and Bankruptcy Code (IBC) - Reserve Bank of India - June 13, 2017, avaialble at https://rbi.org.in/scripts/BS_PressReleaseDisplay.aspx?prid=40743

[26] Insolvency and Bankruptcy Code (IBC): Whose Loss, Whose Gain? A Critical Analysis of Performance of Two Years of IBC, CFA, May 2019

[27] Economic Survey for 2022-2023, Ministry of Finance, Government of India.

[28] Annual Report, 2022-2023, RBI's Report on Trends and Progress of Banking in India & IBBI Quarterly Newsletter October -December 2023

[29] See, Supra note 3.

[30] Understanding the IBC, Key Jurisprudence and Practical Considerations, A Handbook, International Finance Corporation, and Insolvency and Bankruptcy Board of India.

[31] See, Supra note 26.

[32] Framework for Use of Mediation under the Insolvency and Bankruptcy Code, 2016, Report of Expert Committee, IBBI, January, 2024.

[33] Synthesis Note, Insolvency Law Academy, IIULER, INSOL India, Goa Roundtable on Mediation in Insolvency, February, 2024, available at https://insolvencylawacademy.com/wp-content/uploads/2024/04/ila-illuer-insol.pdf

[34] See, Supra note 18.

[35] See, Indian Finance Minister's Budget speech for the year 2015-16 made on February 28, 2015.

[36] The report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, available at https://ibbi.gov.in/BLRCReportVol1_04112015.pdf

[37] See, Supra note 18.

[38] S. 7 of IBC allows a financial creditor to initiate, by himself or jointly with other financial creditors corporate insolvency resolution process against corporate debtor, where there is default in payment of financial debt; 'financial debt' has an inclusive definition given under S. 5(8), which defines it as a debt along with interest, if any, which is disbursed against the consideration for the time value of money. S. 3(12) of IBC defines default as "non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be".

[39] Ibid. S. 3(12) of IBC defines default as "non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be".

[40] See, Report of the Working Group on Tracking Outcomes under the Insolvency and Bankruptcy Code, 2016, IBBI, November 10, 2021.

[41] UNCITRAL Legislative Guide, Recommendation 87-89, p.135-155, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf

[42] See, Supra note 4.

[43] John Armour et al, Transactions with Creditors, in REINIER KRAAKMAN ET AL, THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 109, 115 (3d ed. 2009).

[44] See, George G. Triantis, The Interplay Between Liquidation and Reorganization in Bankruptcy: The Role of Screens, Gatekeepers, and Guillotines, 16 INT'L. REV. L. & ECON. 101, 103 (1996); Douglas G. Baird & Robert K. Rasmussen, Control Rights, Priority Rights, and the Conceptual Foundations of Corporate Reorganizations, 87 VA. L. REV. 921, 922 (2001); Robert K. Rasmussen, Secured Credit, Control Rights and Options, 25 CARDOZO L. REV. 1935 (2004); RIZWAAN JAMEEL MOKAL, CORPORATE INSOLVENCY LAW: THEANDO APRPLIYCATI ON 306-07 (2005).

[45] Gurrea-Martinez, Aurelio. The avoidance of pre-bankruptcy transactions: An economic and comparative approach. (2018). Chicago Kent Law Review. 93, (3), 711-750. Available at: https://ink.library.smu.edu.sg/sol_research/2970

[46] Until recently, Adjudicating Authority has rarely functioned at its full capacity due to time taken in filling the vacancies of judicial and technical and members.

[47] Anchorage Capital Master Offshore Ltd v Sparkes [2023] NSWCA 88, available at https://ironbridgelegal.com.au/insolvency-debts/

[48] The Supreme Court of India in Committee of Creditors of Essar Steel India Limited Through Authorized Signatory v Satish Kumar Gupta and Others, 2019 SCC Online SC 1478 has held that, while the general rule is that 330 days is the outer limit within which resolution of corporate debtor must take place, however, in exceptional cases, the period of CIRP of a corporate debtor can be extended even beyond 330

days, if it can be shown that it is in the interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation.

[49] *IBC, S.12.*

[50] *See, Supra note 3.*

[51] *See, Report of the Working Group on Tracking Outcomes under the Insolvency and Bankruptcy Code, 2016, IBBI, November, 10, 2021.*

[52] *See, Supra note 24.*

[53] *S. 12A was inserted in IBC by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 w.e.f. 06.06.2018. It allows withdrawal of an insolvency petition after its admission. It is well known that the section was inserted after the Supreme Court ruling in Lokhandwala Kataria Construction Private Limited v. Nisus Finance and Investment Managers LLP, where the Apex Court had to use its plenary powers under Article 142 of the Constitution of India to permit withdrawal after admission of resolution process. The Supreme Court subsequently eased out the process of withdrawal by its ruling in Brilliant Alloys Private Limited v. Mr. S. Rajagopal & Ors. Post this ruling, and insertion of S. 12A, there has been a spate of withdrawals under Section 12A.*

[54] *See, Supra note 24.*

[55] *Ibid*

[56] *IBBI, Annual Report, 2022-2023.*

[57] *IBBI Report on Corporate Insolvency Resolution Processes Yielding Resolution Plans: as on 31st December, 2023*

[58] *See, Supra note 24.*

[59] *Ibid*

[60] *Resolution of Stressed Assets and IBC – the Future Road Map, (Speech by Shri Swaminathan J, Deputy Governor, Reserve Bank of India - January 10, 2024, at the Conference on Resolution of Stressed Assets, and IBC organised by CAFRAL in Mumbai), available at https://www.rbi.org.in/scripts/FS_Speeches.aspx?Id=1404&fn=2*

[61] *Report of the Working Group on Tracking Outcomes under the Insolvency and Bankruptcy Code, 2016, IBBI, November, 10, 2021.*

[62] *IBC, S. 33(2) allows the committee of creditors to, at any time during the corporate insolvency resolution process, but before confirmation of resolution plan, to decide, by not less than 66% of the voting share, to liquidate the corporate debtor, and inform the Adjudicating Authority which shall pass a liquidation order.*

[62] *Swiss Ribbons Pvt. Ltd. vs Union of India, 2019 (4) SCC 17*

[64] *Chakravyūha (Sanskrit: चक्रव्यूह) military formation used to surround enemies, depicted in the Hindu epic Mahabharata. It resembles a labyrinth of multiple defensive walls. knowledge of how to penetrate it was limited to only a handful of warriors on the Pandavas' side, namely: Abhimanyu, Arjuna, Krishna and Pradyumna, of whom only Abhimanyu was present when the Kauravas used it on the battlefield.*

[65] *Principles For Effective Insolvency and Creditor/Debtor Regimes, World Bank Group, 2021.*

[66] *Jet Airways (India) Ltd. v. SBI, 2019 SCC OnLine NCLAT 385.*

[67] *1. SBI v. Videocon Industries Ltd., 2018 SCC OnLine NCLT 13182*

2. Axis Bank Ltd & Ors v. Lavasa Corp Ltd, MA 3664/2019

3. Edelweiss Asset Reconstruction Co Ltd v. Sachet Infrastructure Pvt Ltd & Ors. 2019 SCC OnLine NCLAT 592

4. Bikram Chatterji & Ors. v. Union of India 2019 SCC OnLine SC 901

[68] *Profile of Hon'ble President and Sitting Members | National Company Law Tribunal (nclt.gov.in)*

[69] *Resolution of Stressed Assets and IBC – the Future Road Map, (Speech by Shri Swaminathan J, Deputy Governor, Reserve Bank of India - January 10, 2024 - at the Conference on Resolution of Stressed Assets, and IBC organised by CAFRAL in Mumbai), available at https://www.rbi.org.in/scripts/FS_Speeches.aspx?Id=1404&fn=2*

[70] *Proposal a foot to expand NCLAT strength to 20 publishd by The Economic Times, available at https://economictimes.indiatimes.com/news/economy/policy/govt-mulls-substantially-expanding-nclat-strength-to-speed-up-insolvency-ma-appeals/articleshow/105733717.cms*

[71] *Private Debt Resolution Measures in the Wake of the Pandemic, Yan Liu, José Garrido, and Chanda DeLong, May 27, 2020.*

[72] *Ministry of Corporate Affairs, Government of India (2018), Monthly Newsletter, November, 2018.*

[73] *See, Supra note 10.*

[74] *IBC, S.21.*

[75] *IBC, S. 30(2).*

[76] *R. 38 of CIRP Regulations.*

[77] *The Triumph of the Trade Creditor in Chapter 11 Reorganizations, Brad B. Erens and Timoth y W. Hoffmann, Pratt's journal of bankruptcy Law, January, 2013*

[78] *Ibid*

[79] *In re CoServ, LLC, 273 B.R. 487, 498-501 (Bankr. N.D. Tex. 2002) (analyzing various arguments for the payment of prepetition claims of certain vendors, including that certain vendors would be unable to continue business absent payment and other vendors were sole source suppliers).*

[80] *Annual Report 2022-2023, Ministry of MSME.*

[81] *As per the National Sample Survey (NSS) 73rd round, conducted by National Sample Survey Office, Ministry of Statistics & Programme Implementation during the period 2015-16, there were 633.88 lakh unincorporated non agriculture MSMEs in the country engaged in different economic activities (196.65 lakh in Manufacturing, 0.03 lakh in Non-captive Electricity Generation and Transmission1, 230.35 lakh in Trade and 206.85 lakh in Other Services) excluding those MSMEs registered under (a) Sections 2m(i) and 2m(ii) of the Factories Act, 1948, (b) Companies Act, 1956 and (c) construction activities falling under Section F of National Industrial Classification (NIC) 2008.*

[82] *US Bankruptcy Code, S. 1126(b).*

[83] *The Insolvency and Bankruptcy Code (Amendment) Ordinance 2021. This was later assented to by the Indian legislature through the passing of the Insolvency and Bankruptcy Code (Amendment) Act 2021.*

[84] *In accordance with the provision of Micro, Small & Medium Enterprises Development Act, 2006, the MSME are classified as (i) a micro enterprise, where the investment in plant and machinery or equipment does not exceed one crore rupees and turnover does not exceed five crore rupees; (ii) a small enterprise, where the investment in plant and machinery or equipment does not exceed ten crore rupees and turnover does not exceed fifty crore rupees; and (iii) a medium enterprise, where the investment in plant and machinery or equipment does not exceed fifty crore rupees and turnover does not exceed two hundred and fifty crore rupees. The new classification has come into effect from 1st July, 2020. The earlier criterion of classification of MSMEs under MSMED Act, 2006 was based on investment in plant and machinery / equipment. It was different for manufacturing and services units. It was also very low in terms of financial limits.*

[85] *IBC, S. 54A(4).*

[86] *IBC, S. 54A(2).*

[87] *IBC, S. 54F(2).*

[88] *IBC, S. 54K(4).*

[89] *IBC, S. 54K(5).*

[90] *IBC, S. 54K(9).*

[91] *IBC, S. 54K(10).*

[92] *IBC, S. 54D.*

[93] *M. P. Ram Mohan and Sriram prasad, lessons from pre-packaged insolvency cases in India: a long road ahead, 10 March 2023, Page177, available at https://www.iima.ac.in/sites/default/files/2023-10/Pre-Packs_IBBI_Annual%20Publication_2023.pdf*

[94] *Insolvency and Bankruptcy Board of India (Pre-packaged Insolvency Resolution Process) Regulations, 2021 and Insolvency and Bankruptcy (pre-packaged insolvency resolution process) Rules, 2021.*

[95] *Section 29A (c) disqualifies a resolution applicant that at the time of submission of the resolution plan has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset and at least a period of one year has lapsed from the date of such classification till the date of commencement of CIRP of the corporate debtor.*

[96] *Section 29A (h) disqualifies a resolution applicant that has executed a guarantee in favour of a creditor in respect of a corporate debtor against which an application for insolvency resolution made by such creditor has been admitted under this Code and such guarantee has been invoked by the creditor and remains unpaid in full or part.*

[97] *S. 240A of IBC & Hari Babu Thota v. X, 2023 SCC OnLine SC 1642 SC judgment*

[98] *IBC, S. 54A-54L*

[99] *IBC, S. 54D.*

[100] *IBC, S. 54C (3) ©; S.43, S,45, S, 49, S,50 and S. 66.*

[101] *Reg. 41 of IBBI (Pre-Packaged Insolvency Resolution Process) Regulations, 2021.*

[102] *See, Supra note 92.*

[103] *Ibid*

[104] *Report of Sub-Committee of the Insolvency Law Committee on Pre-packaged Insolvency Resolution Process, Ministry of Corporate Affairs, October, 2020.*

[105] *Ministry of Micro, Small and Medium Enterprises, Annual Report, 2020-21.*

[106] *Ministry of Micro, Small and Medium Enterprises, Annual Report, 2020-21.*

[107] *Ibid*

[108] *Report on the Treatment of MSME Insolvency (supra).*

[109] *IBBI Paper on IBC Idea, Impressions and Implementation - Making India A Developed Country in 25 Years: Importance of Robust Insolvency Ecosystem & Efficient Contract Enforcement by Sumant Batra*

[110] *Refer to Sumant Batra's paper in IBBI, available at https://ibbi.gov.in/uploads/whatsnew/b5fba368fbd5c5817333f95fbb0d48bb.pdf*

[111] *RBI/2018-19/ 203 dated June 7, 2019 titled the Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions 2019; RBI (2019), RBI/2018-19/203 DBR.No.BP.BC.45/21.04.048/2018-19, June 7.*

[112] *Sumant Batra, Corporate Insolvency, Law and Practice, Part 1, Eastern Book Company, 2017.*

[113] *RBI/2018-19/ 203 dated June 7, 2019 titled the Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions 2019; RBI (2019), RBI/2018-19/203 DBR.No.BP.BC.45/21.04.048/2018-19, June 7.*

[114] *See, Supra note 3.*

[115] *IBC, S.3(12).*

[116] *In cases involving multiple lending institutions, where resolution process is invoked all lending institutions are required to sign the ICA within 30 days. It is open to lenders not covered by the framework also to sign ICA if they so desire. If lending institutions representing minimum of threshold do not sign the ICA, the process ends, and it cannot be invoked again under the framework. The framework also incentivises the lenders to sign ICA, by prescribing different norms of additional provisioning and reversal of such provisioning in respect of non-signatories to ICA.*

[117] *The RBI Framework introduces certain incentives once resolution is pursued under IBC. It provides that half of the additional provisions would be reversed on filing of insolvency application and the remaining upon admission into CIRP.*

[118] *See, RBI (2020), RBI/2020-21/16 DOR.No.BP.BC/3/21.04.048/2020-21 dated August 6.*

[119] *This is in departure to the norms whereunder a resolution plan involving any concession to the borrower requires an asset classification downgrade, except when it is accompanied by a change in ownership.*

[120] *Insolvency Law Committee Sub-Committee.*

[121] *IBBI, Annual Report, 2022-2023., IBBI Quarterly Newsletter, October-December, 2023*

[122] *The Code: A Behavioural Perspective, Anuradha Guru.*

[123] *The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 promulgated on 23 November, 2017*

[124] *See, Supra note 3.*

[125] *Understanding the IBC, Key Jurisprudence and Practical Considerations, A Handbook, International Finance Corporation, and Insolvency and Bankruptcy Board of India.*

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[144] *Dr. Aurelio Gurrea Martinez is a full-time Faculty at the Singapore Management University; he is Chair of Insolvency Law Academy Task Force on Insolvency Laws in Emerging Markets and Developing Countries.*

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[159] See, Supra note 3.

[160] The ingredients for admission of application by financial creditor are set out in Section 7 of the IBC while the ingredients for admission of application by operational creditor are set out in Section 9 of the IBC and by corporate debtor in Section 10 of the IBC.

[161] IBC, S.65.

[162] Ibid

[163] Hytone Merchants Private Limited v. Satabadi Investment Consultants, Company Appeal (AT) (Insolvency) No. 258 of 2021

[164] Hindalco Industries Ltd. & Others v. Hirakud Industrial Works Ltd. & Others, Company Appeal (AT) (Insolvency) No. 42 of 2022

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[166] M/s James Hotels Ltd v Punjab National Bank 2017 SCC OnLine NCLAT 256.

[167] Rakesh Taneja and Ors v Wave Megacity Centre, NCLT New Delhi, Principal Bench, IA 2026/2021, available at https://nclt.gov.in/gen_pdf.php?filepath=/Efile_Document/ncltdoc/casedoc/0710102037882021/04/Order-Challenge/04_order-Challange_004_165468841423986248162a08a9e7d616.pdf

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[175] Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3) available at https://laws-lois.justice.gc.ca/eng/acts/b-3/

[176] IBC, S.30(1).

[177] The definition of an NPA refers to any loan where payment is overdue for a period that exceeds 90 days.

[178] IBC, S.29(1) (C).

[179] The Insolvency and Bankruptcy Code (Amendment) Ordinance, No. 7, of 2017.

[180] Insolvency and Bankruptcy Code (Amendment) Act, No. 8, Acts of Parliament, 2018. The 2018 amendment to the IBC that inserted section 29A also amended section 35 of the IBC which, inter alia, gives the liquidator the power to sell the corporate debtor's movable and immovable assets during liquidation.

[181] According to the RBI, a willful default does not simply refer to the non-payment of dues. For a default to be classified as a "willful default" it needs to be accompanied by the siphoning of funds for a purpose not sanctioned by the creditor, disposal of assets given as security to the creditor, or a default despite having the capacity to honor obligations towards the creditor. In addition to these conditions, a default needs to be intentional and deliberate in order to be willful in nature.

[182] Section 29 of India's Insolvency and Bankruptcy Code: An Instance of Hard Cases Making Bad Law?, M.P. Ram Mohan and Vishakha Raj, IIM, July, 2021.

[183] *Ibid*

[184] *Policy Inputs on Report of Subcommittee on Prepacks, Centre for Insolvency & Bankruptcy, Indian Institute of Corporate Affairs, Dr. Neeti Shikha & Urvashi Shahi, IICA*

[185] *ILA's The Statement of Standards in Conduct and Performance for the Committee of Creditors Cite website, available at https://insolvencylawacademy.com/the-statement-of-standards-in-conduct-and-performance-for-the-committee-of-creditors/*

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[188] *See, Supra note 3.*

[189] *Ibid*

[190] *See, Supra note 184.*

[191] *UNCITRAL Legislative Guide, p. 83, para. 25, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf*

[192] *Philip R. Wood, "Principles of International Insolvency" [Part II] (2013) International Insolvency Review.*

[193] *See, Sumant Batra, Corporate Insolvency, Law and Practice, Part 2, Chapter 15, Eastern Book Company, 2017.*

[194] *IBC, S. 13, S.14.*

[195] *IBC, S.14 Moratorium.*

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation – For the purposes of this sub- section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations or such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be Specified.

(3) The provisions of sub-section (1) shall not apply to-

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have

effect from the date of such approval or liquidation order, as the case may be.

[196] *A Toolkit for Corporate Workouts, World Bank Group, January 2022.*

[197] *Framework Report on Creditor Led Resolution Approach in Fast-track Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016, IBBI Expert Committee, May 2023.*

[198] *Ibid*

[199] *Ibid*

[200] *Ibid*

[201] *Ibid*

[202] *IBC, S. 25(2)(g), S. 9.*

[203] *R.36, Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.*

[204] *Framework Report on Creditor Led Resolution Approach in Fast-track Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016, IBBI Expert Committee, May 2023.*

[205] *See, Supra note 184.*

[206] *R.27, IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.*

[207] *R.35, Ibid.*

[208] *Maharashtra Seamless Limited v Padmanabhan Venkatesh (2020) 11 SCC 467*

[209] *R. 35 (1) (a), CIRP Regulations.*

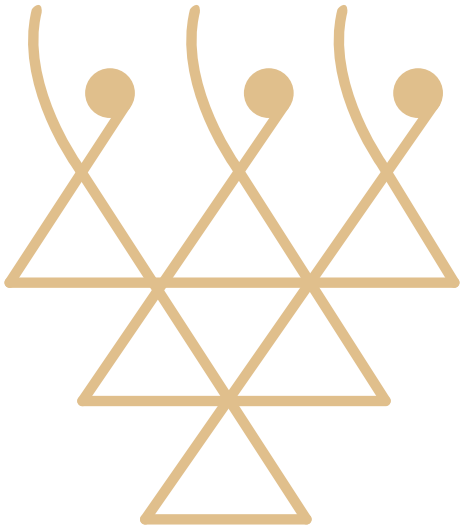
[210] *R. 36 (2) (ka), CIRP Regulations.*

[211] *Ramkrishna Forgings Limited v Ravindra Loonkar, RP of ACIL Limited (2024) 2 Supreme Court Cases 122: 2023 SCC OnLine SC 1490*

[212] *IBC, S.21.*

[213] *IBC, S. 30(2).*

[214] *Explanation, S 30 (2), IBC*



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The Insolvency Law Academy has established a Chair of Pre-Insolvency Resolution ('Chair') to support work in the area of pre-insolvency resolution and preventive insolvency proceedings.

- **Undertake research and other activities in Pre-Insolvency resolution (pre-pack, fast track and other forms of Pre-Insolvency processes) and related areas for the benefit of insolvency ecosystem in India and beyond**
- **Promote preventive insolvency practices.**
- **Develop best practices for Pre-Insolvency resolution and preventive insolvency**
- **Collaborate with other ILA Chairs**
- **Complement and support the work of ILA Insolvency Scholars Forums**
- **Encourage development of young scholars in collaboration with ILA Emerging Scholars Forum.**
- **Undertake work ancillary to above objectives**

CHAIR FOR PREVENTATIVE & PRE-INSOLVENCY RESOLUTION

The Support Pledge Document for the establishment of ILA Chair for Preventative & Pre-Insolvency Resolution (Chair), was signed on Wednesday, 27th September 2023.

PATRONS

E&Y India LLP and Chandhiok & Mahajan have agreed to extend support the Chair for a period of 2 years (Term) and will serve as Patrons of the Chair.

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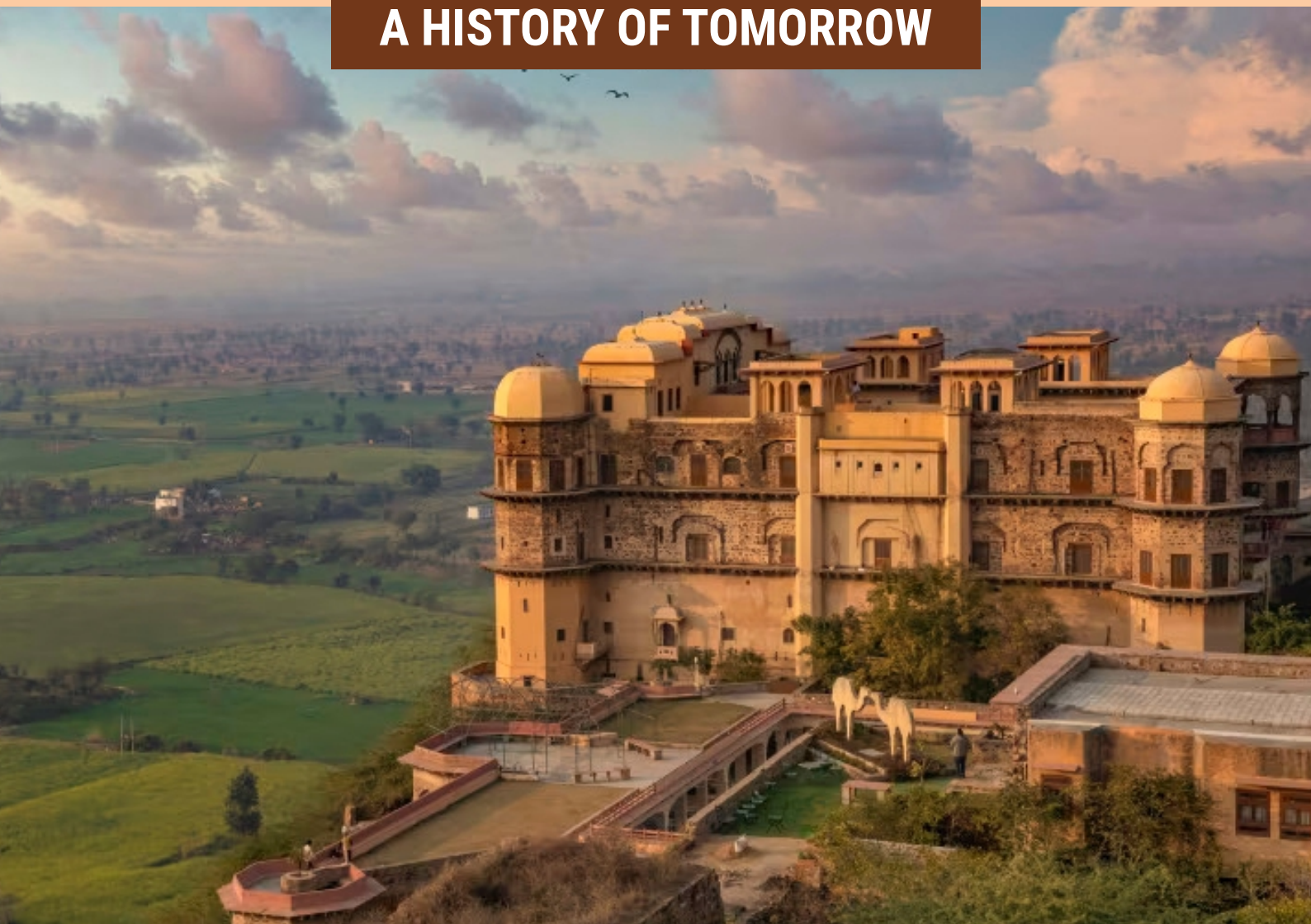
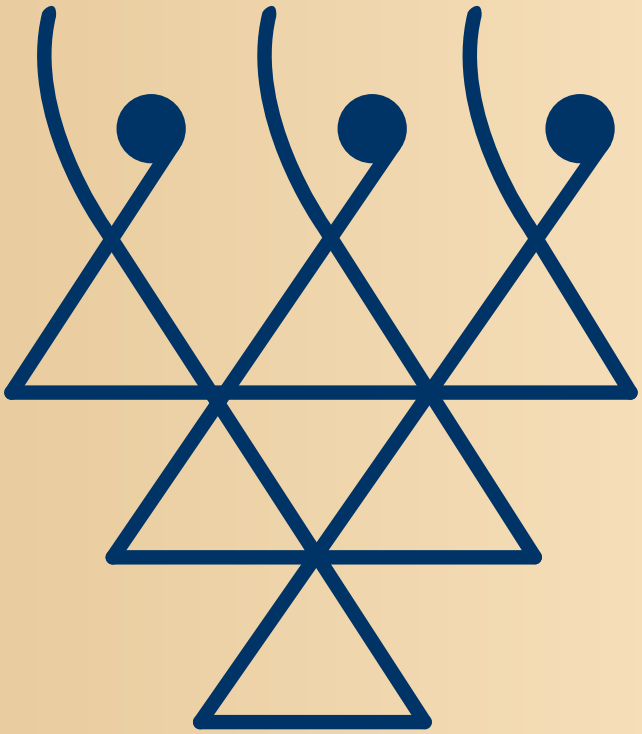
INSOLVENCY REGIMES: A HISTORY OF TOMORROW





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