



**ANALYSIS OF INSOLVENCY AND  
BANKRUPTCY CODE, 2016 –  
PROCEDURES, JURISPRUDENCE  
AND LATEST AMENDMENT OF 2021**

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**Abstract**

The cases of Insolvency and Bankruptcy are higher than ever as there are more crimes in the financial sector than in any other sector right now. To tackle the increasing NPAs, Parliament has passed IBC, 2016. Before this enactment, the resolution process in India was scattered over several statutory instruments which include SARFAESI Act, 2002, Recovery of Debt Due to Banks and Financial Institution Acts, 1993, The Companies Act, 2013, The Sick Industrial Companies Act, 1985 etc. This made the process of insolvency resolution tremendously ambiguous for the companies. But all that changed in the historic enactment of the Insolvency and Bankruptcy Code, 2016, it amends 11 statutes and brings the laws related to insolvency resolution under one umbrella reducing ambiguity to a great extent. This amendment was long waited especially when India is turning into its own Silicon Valley with an increasing no. of start-ups by the hours' rate. According to the latest definition of MSME, almost 99% of the Indian enterprises are MSMEs. Assets of these entities are more stressed than ever in the unprecedented times of the Covid-19 Pandemic. To tackle this situation, Govt. of India have introduced IBC (Amendment) Ordinance, 2021 which came in force on 4<sup>th</sup> April, 2021, the ordinance prohibited filing against any company for the period of 1 year

starting from 25<sup>th</sup> March, 2020 and also introduced pre-packaged insolvency resolution for insolvent MSMEs, it promises to provide comparatively more efficient and speedy process of insolvency resolution with reasonable asset valuation. Although IBC, 2016 seems promising as it is already showing positive results in many worldwide indexes of commerce and business, it is yet to be seen whether this new amendment can help India to come at par with developed nations in terms of insolvency resolution and reduce the burden of NPAs from the banking sector of the country.

**Keyword**

IBC, Resolution Process, Resolution Professional, Guarantors, Ordinance, 2021, Lacunae

**Introduction**

In 2014, the bankruptcy legislative reforms committee led by T K Viswanathan proposed the Insolvency and bankruptcy code. It aims to lower the burden of Increasing NPAs in the country by providing an easy exit to defaulters without compromising the rights of Creditors. The parliament conclusively passed the bill and enacted it on 28<sup>th</sup> May, 2016 as Insolvency and Bankruptcy Code, 2016 (hereinafter as IBC, 2016/The Code). Enactment of this code marks the repeal of the age-old Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920,<sup>1</sup> along with amendments in 11 statutes including SARFAESI Act, 2002; RDBFI Act, 1993; Indian Partnership Act, 1932; Income Tax Act, 1961; Payment and Settlement Systems Act, 2007; Companies Act, 2013; Central Excise Act, 1944 etc. The Code's objective is to reform the fragmented corporate insolvency framework in India and

<sup>1</sup> Insolvency and Bankruptcy Code, 2016, Sec. 253



allow credit to flow freely in the market by instilling faith in creditors for a speedy resolution of their claims. Earlier in India, it took 4.3 years on an average for insolvency resolution, as opposed to 1 year in UK and 1.5 years in USA<sup>2</sup>. The code's objective is to provide speedy resolution to the applicants to come at par with other world economies. Thus, the Code mandates the resolution of a case registered in a maximum of 330 days inclusive of appeals and procedures. The Code has been performing positive so far as according to Doing Business Report published by World Bank, India stood at 63<sup>rd</sup> rank in ease of doing business in 2020 as compared to 142<sup>nd</sup> position in 2014<sup>3</sup>. Furthermore, data shown in a quarterly newspaper published by IBBI depicts that a total of 4376 cases has been registered for resolution as of March 2021 out of which 2653 cases were closed/resolved by the end of March 2021. The Code has been amended 5 times since its enactment in 2016, it shows the diligence of the govt. to ensure that the code achieves its goals and objectives. The latest amendment to the code was done on 4<sup>th</sup> April, 2021 by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021, it introduced pre-packs as an insolvency resolution mechanism for MSMEs, it was introduced to safeguard MSMEs from unnecessary legal proceedings they might face in this pandemic, the latter part of the paper explains 2021 amendment in detail. The present study further aims to clarify the procedure to be followed by the creditors or debtors for insolvency resolution

under IBC, 2016, it also traces the emerging jurisprudence of the Code through various advancements in the field. It concludes with an open discussion on the challenges and lacunae in the present legislation.

### **Insolvency Resolution Process under IBC, 2016**

Provisions relating to the Corporate Insolvency Resolution process (hereinafter as CIRP) is given under chapter II of part II of IBC, 2016. According to section 6 of the code, if a corporate debtor (CD) commits any default a financial creditor (FC); operational creditor (OC) or corporate debtor himself can initiate the process of insolvency resolution. Default means the non-payment of the debt when whole or any part thereof has become due and is not paid by the corporate debtor.<sup>4</sup> The process can only be initiated when the matter involved is above 1 lakh rupees provided that the central govt. can increase the minimum threshold for the same up to 1cr. by notification in the official gazette. All the cases registered under Part II of the code are adjudicated by National Company Law Tribunal (hereinafter as NCLT/Adjudicating Authority) constituted under section 408 of the Companies Act, 2013. Under Chapter I of Part IV of the code constitution of an Insolvency and Bankruptcy Board of India (hereinafter as IBBI/The Board) has been made obligatory which shall be responsible for making rules and regulations for the resolution process, including registration of resolution agencies, resolution professionals and Information Utilities. CIRP once

<sup>2</sup> 'What is Insolvency and Bankruptcy Code (IBC) 2016?' (The Economic Times, 21 February, 2021) <<https://bfsi.economictimes.indiatimes.com/news/banking/what-is-insolvency-and-bankruptcy-code-ibc-2016/74235436>> accessed 27 July, 2021

<sup>3</sup> World Bank. 2020. Doing Business 2020. Washington, DC: World Bank. DOI:10.1596/978-1-4648-1440-2 <<https://www.doingbusiness.org/en/rankings>> accessed 27 July, 2021

<sup>4</sup> Insolvency and Bankruptcy Code, 2016, Sec. 3(12)



initiated shall be completed within 180 days starting from the admission of application and can be extended for a maximum of 90 days in case of delay.<sup>5</sup> The applicants may also proceed under sections 55-58 for Fast track CIRP, under which the time period to complete the CIRP is only 90 days with an extension of 45 days in case of delay. All other proceedings beside the time period are common for fast track CIRP as well as normal CIRP as provided under chapter II of the code.

### Initiation by Financial Creditor

CIRP can be initiated by FC under section 7 of the code. FC is defined under section 5(7) of the code; it means any person to whom a financial debt is owed or legally assigned. FC either by itself or jointly with other FC, may apply for initiating CIRP before NCLT when a default has occurred. Jurisprudence is not clear as to what degree of proof is required to ascertain a default. However, outstanding debt is enough to ascertain a default. As of now, the statute does not make it obligatory to serve notice against the corporate debtor as is required in the case of OC. However, the Supreme Court had made it mandatory to serve a notice even in the case of an FC along with a right to be heard to the debtor in the case of **Innoventive Industries v. IDBI Bank**.<sup>6</sup> SC envisaged it when the constitutionality of section 7 was challenged in the court on the ground of natural and equitable justice. Furthermore, Clearing the ambiguity on the jurisprudence of the term of

Financial Creditor, SC have addressed the concerns of homebuyers and included them within the meaning of FCs.<sup>7</sup> Now they can also initiate the process under section 7 r/w section 21(6A) of the code.<sup>8</sup>

### Initiation by Operational Creditor

Operational Creditor (OC) is defined u/s 5(20) of the Code, it means a person to whom an operational debt is owed and to whom such debt is legally assigned. OC can initiate the CIRP in the same way as an FC but first, he has to serve a demand notice on the debtor u/s 8 in a manner as may be prescribed. In the demand notice, he will ask CD to either report a dispute or repay the amount due to him within a stipulated time. The corporate debtor is obligated to reply to the notice within 10 days and bring to the notice of the OC – (a) existence of a dispute (if any); (b) payment of an unpaid operational debt by sending an attested copy of the proof of payment; failing which OC can initiate a CIRP by applying before NCLT.<sup>9</sup> It is pertinent here to note the definition of the term ‘dispute’ under the code, as the existence of the same might serve as a barrier in the institution of the suit.<sup>10</sup> The term ‘Dispute’ has been given different and conflicting interpretations by various benches. In the case of **Essar Projects India Ltd. v. MCL Global Steel Pvt. Ltd.**<sup>11</sup> the Mumbai Bench gave a strict interpretation to the term and observed that the word ‘includes’ should be read as ‘means’ and consequently, a dispute would mean disputes

<sup>5</sup> Ibid. Sec. 12

<sup>6</sup> Company Appeal (AT) (Insolvency) No. 1 & 2 of 2017

<sup>7</sup> Pioneer Urban Land and Infrastructure Limited vs. Union of India [WP(s)(Civil) No. 43/2019]. See also, Abhilash Pillai and Tarun Agarwal, ‘Home Buyers = Financial Creditors: Supreme Court Reigns’ (Mondaq, 15 August, 2019)

<<https://www.mondaq.com/india/real-estate/837088/home-buyers-financial-creditors-supreme-court-reigns>> accessed 29 July, 2021

<sup>8</sup> The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018

<sup>9</sup> Insolvency and Bankruptcy Code, 2016, Sec. 9

<sup>10</sup> Ibid. Sec.5(6)

<sup>11</sup> 2017 (4) TMI 1156



raised in a court of law or arbitral tribunal before receipt of notice u/s 8 of the code.

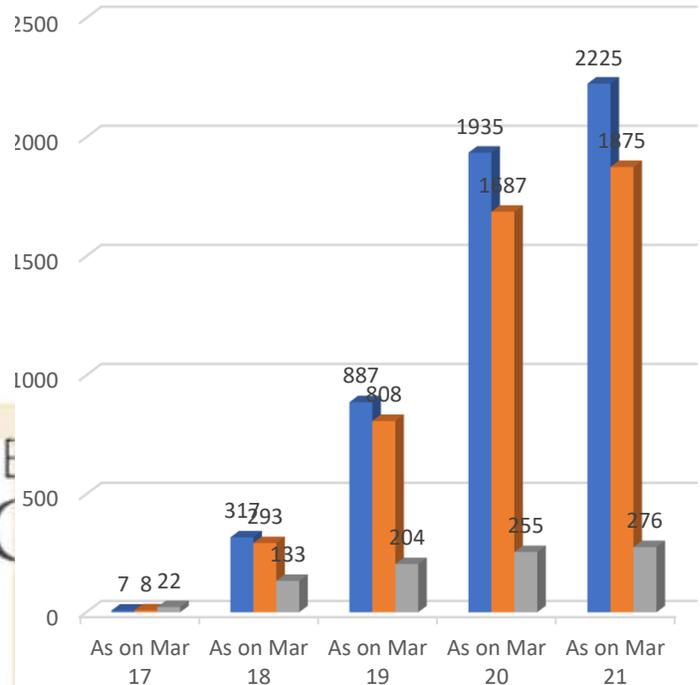
### Initiation by Corporate Applicant

Where a corporate debtor has committed a default, a corporate applicant may apply for initiating CIRP u/s 10 of the code. Along with its application, it shall furnish – (a) the information of books of accounts and other documents as may be prescribed; (b) the information relating to the interim resolution professional to be appointed; (c) special resolution passed by shareholders of the CD or by 2/3<sup>rd</sup> of the total number of partners of the CD approving the filing of the application.

As of March 2021, maximum no. of CIRPs are initiated by operational creditors following financial creditors and corporate debtors, initiate least no. of resolution process under IBC, 2016. Following Fig.1<sup>12</sup> depict the trend of Initiation of CIRPs in India. Surprisingly though, OCs are not included in the Committee of Creditors. They are also not allowed to vote in the process of selecting a resolution plan. The philosophy given by authorities is that if they are given a chance to be on the committee, they would not be willing to take the risk of postponing their payments for better prospects and thus all companies might just end up in liquidation.

<sup>12</sup> Insolvency and Bankruptcy Board of India, 'Insolvency and Bankruptcy News' (January – March 2021) Vol. 18 p. 13 <<https://ibbi.gov.in/publication>> accessed 07 August, 2021; See also, Insolvency and Bankruptcy Board of India, 'Monetary Management

Fig.1: Trends of Initiation of CIRPs



### Procedure after applying for initiation of CIRP

After the applicant has applied, NCLT must within 14 days, ascertain the existence of default based on evidence furnished by the applicant. Upon admission of the application, a moratorium period is declared. A moratorium prohibits the continuation and initiation of all legal proceedings against the debtor till the completion of CIRP. An Interim Resolution Professional (IRP) is also appointed by the NCLT on the insolvency commencement date.<sup>13</sup> IRP is required to take over the management and assets of the company. The officers and managers will

and Financial Intermediation' Ch. 04 <<https://ibbi.gov.in/publication>> accessed 24 July, 2021

<sup>13</sup> Insolvency and Bankruptcy Code, 2016, Sec. 5 (12), 16



now report and cooperate with him in carrying out his rights and duties u/s 19 of the Code.

The first task for IRP is to determine the financial position of the CD by collecting information relating to the assets, finance and operations of the CD. IRP will also collate all the claims submitted by creditors to him. It is pertinent here to note that, according to the amended regulations of IBBI, a fair value, along with the liquidation value of the company, has to be determined by IRP. This amendment seeks to ensure maximisation of the value of assets so that the bids of the resolution applicants do not linger near liquidation price which in most cases is lower than the market value of the assets.<sup>14</sup> This amendment gives a fair chance of recovery to the CD with value maximisation of the assets.

#### **Committee of Creditors and Resolution Professional**

After the Collation of all claims and determination of the financial position of CD, IRP is required to constitute a committee of creditors (CoC). Generally, CoC has FCs as its members but they can also appoint a representative or insolvency professional to represent them in the meetings, at their own expense u/s 21(6), (6A) r/w 24(5). The voting share of each member of CoC is determined with respect to the financial debt owed to them. A decision taken by CoC would require approval by at least 51% of the voting share of the FC.<sup>15</sup> However, for certain imperative actions including (i) appointment of the Resolution Professional (RP); (ii) increasing

the original time period of 180 days for CIRP; (iii) approval of the prospective resolution plan, the voting threshold is 66%. This threshold was 75% before the amendment act of 2018<sup>16</sup> came to the effect, but legislators took a pragmatic approach to reduce the conflicts of interest in creditors and reduced this threshold to 66%. This step would also reduce the duration of CIRP by a significant amount as there are less no. of people to get on the same page with the resolution plan and even less to take most of the decisions.

The first meeting of CoC shall be held within seven days of the constitution of the CoC, in this meeting they may resolve to appoint either IRP as RP or they may resolve to appoint a new RP registered with the board. There are 3504 registered Insolvency Professionals and 2532 Insolvency Professionals having Authorisation for Assignment under the records of IBBI.<sup>17</sup>

RP is responsible for conducting meetings of CoC, he notifies not only members of CoC, but also members of suspended BOD or partners, about the meetings. As the BOD are suspended, they may attend the meetings, but shall not have any right to vote in such meetings. A primary objective of the enactment of this code is to aid CD in resolving an insolvency situation without going for liquidation. It is the duty of RP to preserve and protect the assets of the CD, as a going concern. For this purpose he shall u/s 25 of the code undertake the following actions – (a) take immediate custody and control of all the assets of the CD; (b)

<sup>14</sup> Nishith Desai Associates, 'A primer on the Insolvency and Bankruptcy Code, 2016' [2019] 1,5

<sup>15</sup> Insolvency and Bankruptcy Code, 2016, Sec. 21

<sup>16</sup> Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018

<sup>17</sup> Insolvency and Bankruptcy Board of India, 'Insolvency and Bankruptcy News' (January – March 2021) Vol. 18 p. 13 <<https://ibbi.gov.in/publication>> accessed 10 August, 2021



represent and act on behalf of CD; (c) prepare the information memorandum as per section 29, that would assist in the formulation of the resolution plan (d) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of CoC and such other conditions as may be specified by the Board, to submit a resolution plan. (e) present all resolution plans at the meeting of the CoC; etc.

### **Resolution Plan**

As noted above, a primary objective of this code is to help CD with insolvency without resorting to liquidation. For this purpose, it provides for constituting a resolution plan. In an ideal situation, a resolution plan will help CD to repay all debt amount owed to them and help CD to emerge from the debt crisis with a fresh start of business after liabilities are lessened. The resolution plan must be such that it provides for the payment of debts of OCs in such a manner that it shall not be less than the amount to be paid to them should the company be liquidated u/s 53 of the code.<sup>18</sup> Furthermore, it shall determine the manner of repayment of insolvency resolution costs, the implementation and supervision of the strategy, and should comply with the law. A resolution plan could be approved by the CoC if it is asserted by not less than 66% of the voting share of FCs. However, a resolution applicant will not be able to vote in the meeting of CoC unless such applicant is also an FC eligible to propose a resolution plan u/s 29A. After approval by CoC, the resolution professional will submit the plan before NCLT and if it is satisfied that the plan proposed meets all the requirements u/s 30 or any other law as may be prescribed, it will approve the plan. After its approval by NCLT, the resolution plan

will be implemented by the resolution applicant.

On the contrary, if the resolution plan is rejected for any reason mentioned in section 31, NCLT shall pass an order requiring CD to be liquidated<sup>19</sup>. It must also issue a public announcement for the same and send an order of liquidation to the authority with which the CD is registered. A Liquidation order can also be passed when CoC has passed a resolution to that effect with a voting share of not less than 66% in the meeting for that purpose. A CD may also apply for liquidation of the company irrespective of whether a resolution plan was approved or not, and the adjudicating authority may issue an order for liquidation in the same manner as mentioned above.

### **Appeals**

If a person is aggrieved by the order of Adjudicating Authority, he can file an appeal before National Company Law Appellate Tribunal (NCLAT). An appeal against an order approving a resolution plan u/s 31 can be filed on the following grounds: (a) The approved resolution plan is in contravention of the provision of any law for the time being in force; (b) there has been a material irregularity in the exercise of powers by the resolution professional during the CIRP; (c) the debts owed to OCs of the CD have not been provided for in the resolution plan in the manner prescribed; (d) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; (e) the resolution plan does not comply with any other criteria specified by the Board. An appeal before NCLAT can be filed within 30 days of the previous order for the above-mentioned reasons. If the court thinks it fit,

<sup>18</sup> Insolvency and Bankruptcy Code, 2016, Sec. 30

<sup>19</sup> Ibid. Sec. 33



and for the reasons to be recorded this period to file an appeal before NCLAT can be extended for max. of 15 days.<sup>20</sup>

Now, the code does not explicitly mention, but it has an overriding effect over many statutes and the provision contained in them, that creates confusion in the mind of applicants. It is natural as it amends 11 statutes after its enactment in 2016. For instance, it overrides many provisions of the Companies Act, 2013. Thus, Supreme Court and NCLAT have cleared the jurisdiction and interpreted the law contained in the code in the way it was meant through many case laws. In the case of **Radhika Mehra Vs. Vaayu Infrastructure LLP & Ors.**<sup>21</sup> appellant filed a writ petition before HC against the order of NCLT, which was dismissed and withdrawn. Afterwards appellant filed an appeal before the NCLAT, seeking exclusion of time of proceeding spent in HC without jurisdiction under section 14 of Limitation Act, 1963. The NCLAT observed that said section related to the period of limitation for any suit. Relying on section 238 of the Code, it held that section 61 of the code override section 5 of the Limitation Act and the appeal filed before it was dismissed as it was barred by time limit as mentioned u/s 61. Thus, the time limit mentioned in the code overrides any other law for the time being. Further, in the case of **Kundan Care Products Ltd. Vs. Surya Kanta Satapathy & Ors.**<sup>22</sup> The appellant submitted a resolution plan which was rejected by the RP, as it was ranked H6 and as per the regulations laid down by the Board,

only top 3 resolution applicants would be invited to present their plans before CoC. The appellant sought an opportunity to negotiate and enhance its bid, but it was denied. The NCLAT observed that it is settled law that the resolution applicant has no right for re-negotiation or further negotiation. It was further observed that a plan can only be challenged on the grounds u/s 61(3). Further, in the case of **Action Ispat and Power Pvt. Ltd. Vs. Shyam Metalics and Energy Ltd.**<sup>23</sup> Supreme Court upheld transferring of winding up proceeding pending before the HC to the NCLT. On appeal, the SC cleared that where the petition has not been served in terms of rule 26 of the Companies (Court) Rules, 1959, winding up proceeding is compulsorily transferable to the NCLT for resolution under the Code. Even post issue of notice but before admission, the same result would ensue. It is only when the winding-up proceedings have reached an irreversible stage, the HC must proceed with the winding up, instead of transferring to NCLT. Further, it was observed that whether this stage was reached or not would depend upon the facts and circumstances of each case.

#### **Admissibility of Section 29A**

Initially, when the code was enacted, any person could present a resolution plan, without any restrictions or disqualifications but Section 29A of the Code introduced by the amendment act of 2018<sup>24</sup> introduced disqualifications like wilful defaulter, classified as NPAs and related party<sup>25</sup> for any person submitting a resolution plan. There have been many ambiguities regarding the

<sup>20</sup> Ibid. Sec. 61

<sup>21</sup> CA(AT)(Ins) No. 121/2020

<sup>22</sup> CA(AT)(Ins) No. 11 & 75/2020

<sup>23</sup> CA No. 4041/2020 arising out of SLP(C) N0.26415/2019

<sup>24</sup> Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018

<sup>25</sup> Insolvency and Bankruptcy Code, 2016, Sec. 5 (24)



eligibility of this section. The Supreme Court in **Chitra Sharma v. Union of India**<sup>26</sup> while dealing with the question of eligibility of a resolution applicant, held inter alia that the primary purpose behind Section 29A was to ensure that the persons responsible for insolvency do not participate in CIRP, effectuate public interest and ensure effective corporate governance. Therefore, the Section must be applied in a manner that effectuates and furthers this purpose.<sup>27</sup> Further in the case of **Swiss Ribbons v. Union of India**,<sup>28</sup> various challenges were raised against the validity of section 29A. The petitioners argued that a person, cannot be held to be ineligible merely on the ground that he is a relative of an ineligible person. The Court held that “we are of the view that persons who act jointly or in concert with others are connected with the business activity of the resolution applicant. Similarly, all the categories of persons mentioned in Section 5(24A) show that such persons must be “connected” with the resolution applicant within the meaning of Section 29A(j).” Thus, The SC Upheld the validity of Section 29A.<sup>29</sup> In the case of **ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta**<sup>30</sup>, Supreme Court while dealing with the rights and duties of the RP, held that it is not for RP to decide whether a resolution plan is ultra vires of any law in force for the time being. An RP is only required to examine each plan with due diligence and confirm that it conforms to the parameters of section 30(2) of the code. If an

RP believes that the prospective plan contravenes any provisions of the law, including section 29A, he is only expected to present an opinion of the same before CoC and not render a decision regarding the validity of the resolution plan.

### **Liability of Guarantors Under IBC, 2016**

A new provision has been added to the IBC, 2016 through amendment in 2020,<sup>31</sup> according to which once the resolution plan is accepted by the CoC and the same is then approved by NCLT as per section 31 of the code, the debt which was owed by the CD is settled. No proceedings against the CD can be initiated in relation to the debt that has been settled. One thing is pertinent to note here, CIRP is not a recovery process, the main object of it is to maximise the valuation of assets of CD. So, once the CIRP is approved all the claims stand settled and liabilities of CD comes to an end.<sup>32</sup> However, there is no specific provision barring a proceeding against a guarantor claiming the remaining debt from him. It is settled law that the liabilities of guarantors are co-extensive with the borrower. Thus, if CD is unable to clear the debt, a creditor can claim its amount from a guarantor.

The guarantors can take the defence of section 134 of the Indian Contract Act, 1872. As per the said provision, a guarantor is discharged of its liability towards the creditor if the creditor in its instance discharges the

<sup>26</sup> Writ Petition(s)(Civil) No(s).744/2017

<sup>27</sup> Vidhi Centre for Legal Policy, ‘Understanding the Insolvency and Bankruptcy Code, 2016 Analysing developments in jurisprudence’ IBBI [2019] 42

<sup>28</sup> Writ Petition (Civil) No. 99 of 2018

<sup>29</sup> Vidhi Centre for Legal Policy, ‘Understanding the Insolvency and Bankruptcy Code, 2016 Analysing developments in jurisprudence’ IBBI [2019] 43; See also, Diganth Raj Sehgal, ‘Challenges of

Interpretation of Insolvency and Bankruptcy Code, 2016’ (ipleaders, 7 February, 2021) <<https://blog.ipleaders.in/challenges-interpretation-insolvency-bankruptcy-code-2016>> accessed 3 August, 2021

<sup>30</sup> C.A. Nos. 9402-9405 of 2017

<sup>31</sup> Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020

<sup>32</sup> Insolvency and Bankruptcy Code, 2016, Sec. 32A



Principal Debtor. The main essence of this section is discharged through the voluntary act of creditor and not due to the operation of law. Court through various orders has made it clear that the position under IBC, 2016 is different. The CD under IBC is discharged on the approval of the resolution plan, that is approved by the Adjudicating Authority. It is a clear law that any scheme or plan that is approved by a court or tribunal becomes a statutory scheme and is, therefore, an act of operation of law. Therefore, under the IBC, the CD is discharged by the operation of law. Thus, the guarantor cannot be said to be discharged of its liability towards the creditor on the approval of the resolution plan.<sup>33</sup> Jurists have placed strong reliance on section 31 of the IBC while deciding matters in this regard. The SC in the case of **SBI v. V. Ramakrishnan**<sup>34</sup> held that once the resolution plan is approved it will be binding on all the stakeholders including the guarantors. On this basis, it held that the guarantor cannot be relieved from making payment u/s 133 of the contract act as the resolution plan is binding of the guarantor as well. The Bombay HC took a different view in **Sicom Investments and Finance Limited v. Rajesh Kumar Drolia**<sup>35</sup> and held that the provision and benefits of the Code apply to the party who applies for CIRP and not to the third party. It is clear from the Code that there is no automatic protection against the guarantor, benefit under the code will be

available to the guarantor subject to the suit instituted against him and other provisions of the code. Furthermore, it was recommended that section 14 should be amended to exclude guarantors from the moratorium period. It was advised to stop them to take undue advantage of the provisions under this Code and file frivolous applications before the adjudicating authority that might waste the time of the court.<sup>36</sup>

### **Pre-Packaged Insolvency Resolution – IBC (AMENDMENT) Ordinance, 2021**

Covid-19 has impacted businesses, enterprises and economies of the global leaders and India is no different manner. Covid-19 have immensely impacted the companies of India and many are facing financial distress. This financial distress is all the more fatal for Micro Small Medium Enterprises (MSMEs), because of their small capital pool and simpler corporate structure. MSMEs are responsible for the sizeable GDP growth of the country and employing many people and like any other sector, Covid-19 Pandemic have hit it immensely. It exposed many MSMEs to financial distress to the extent of insolvency and bankruptcy. Govt. has therefore taken several measures to mitigate the distress caused by the pandemic, including increasing the minimum amount of default for initiation of CIRP to 1 crore rupees, and suspending filing of any application for resolution in respect of

<sup>33</sup> Apoorv Sarvaria and Manas Shukla, 'Liability Of Guarantors After Approval Of Resolution Plan Under The Insolvency And Bankruptcy Code, 2016' (Mondaq, 08 August, 2019) <<https://www.mondaq.com/india/insolvencybankruptcy/834608/liability-of-guarantors-after-approval-of-resolution-plan-under-the-insolvency-and-bankruptcy-code-2016>> accessed 05 August, 2021

<sup>34</sup> Company Appeal (AT) (Insolvency) No. 213 of 2017. See also State Bank of India v. D.S. Rajendra

Kumar, Company Appeal (AT) (Insolvency) Nos. 87, 88, 89, 90 and 91 of 2018.

<sup>35</sup> Commercial Suit No. 44 of 2010. Decision date-09.07.2018

<sup>36</sup> Ministry of Corporate Affairs, 'Report of The Insolvency Law Committee' (2018) <<https://ibbi.gov.in/publication>> accessed 03 August, 2021



defaults arising during the period of one year beginning from 25<sup>th</sup> March, 2020. It is clear to the legislators that there is a need to address the specific requirements of MSMEs relating to the resolution of their insolvency. Thus, to address the above-mentioned problem GOI has introduced pre-packs or pre-packaged insolvency schemes. Pre-packs were introduced by IBC (Amendment) Ordinance, 2021 (hereinafter as Ordinance, 2021). It aims to provide a quicker, alternative and cost-effective resolution procedure for MSMEs and to provide value maximising results for all stakeholders, in the least disruptive manner.<sup>37</sup> Now, Pre-pack is not defined in IBC but the term is not foreign to the financial world as the same is recognized in many jurisdictions including US and UK. A Pre-pack generally means a resolution plan that is agreed upon between a debtor and its creditors before initiating a formal legal proceeding or filing an application.<sup>38</sup> This is a main feature of the introduced ordinance, 2021 and is recognised as base resolution plan u/s 54A.<sup>39</sup> Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 has been introduced in Lok Sabha on July 16, 2021. The latest bill will repeal the same promulgated ordinance, 2021 which came in force on 4<sup>th</sup> April, 2021 under the power conferred on President U/A 123 of the Indian Constitution.<sup>40</sup> This amendment promises to provide an efficient alternative insolvency resolution process for MSMEs, ensuring quicker, cost-effective and value maximising

outcomes for all the stakeholders, in the least disruptive manner.<sup>41</sup> The main highlights of the new ordinance are listed hereinafter:

1. **Eligibility:** The amendment is aimed towards providing relief to the MSMEs that are facing financial distress in the Covid - 19 pandemic. Thus, all enterprises that come within the meaning of MSME under the MSME Development Act, 2006 are eligible to make an application of PIRP u/s 54A. According to the latest definition, nearly 99% of the entities fall under the category of MSME.<sup>42</sup> Under the new definition, entities having a turnover of up to 250 cr. will be considered as MSME. Furthermore, a CD can apply for PIRP only when he has not undergone a PIRP or CIRP before and when he is not at the time undergoing CIRP. He shall also be eligible u/s 29A to submit a resolution plan. However, a CD can apply to convert PIRP to CIRP at any time before approval of resolution plan, provided that CoC has approved such conversion with 66% of the voting share of FCs.
2. **Minimum Default:** IBC, 2016 gives power to the central govt. to increase the lower limit of filing a default to a higher value of up to 1cr. u/s 4 of the code. Thus, to mitigate the distress caused by the pandemic, govt. has increased the minimum default amount to 1 cr. to initiate CIRP or PIRP. Govt. at any time can change this default value to any amount between one lakh to one crore.

<sup>37</sup> Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021

<sup>38</sup> Dr S.K. Gupta, 'Unpacking the Pre-Pack Insolvency Resolution Process' (LawStreetIndia, 27 May, 2021) <<http://www.lawstreetindia.com/experts/column?sid=568>> accessed 25 August, 2021

<sup>39</sup> Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Sidhartha, '99% businesses in India now in MSME category' (The Times of India, 08 July, 2020) <<https://timesofindia.indiatimes.com/business/india-business/99-businesses-in-india-now-in-msme-category/articleshow/76844933.cms>> accessed 07 August, 2021



**3. Management to Remain with Corporate Debtor:** One main characteristic of the ordinance, 2021 is that unlike in CIRP, where the responsibility of the management of the company gets transferred to RP, in PIRP, management of the enterprise does not change, it continues to vest in the Board of Directors or the partners, as the case may be.<sup>43</sup> However, this management can be changed any time after the PIRP commencement date, by CoC, with a vote of not less than 66% of the voting shares.<sup>44</sup> The management could be changed if there has been any mismanagement or fraudulent activity on the part of current management or for any other reason that CoC may deem fit in the interest of the company.

**4. Resolution Period:** To initiate PIRP, CD needs to receive consent from a minimum of 66 per cent of creditors and once the application has been admitted in NCLT, the process shall be completed within 120 days.<sup>45</sup> The RP is required to submit the resolution plan within 90 days from the PIRP commencement date u/s 54D. Once the resolution plan is approved by CoC u/s 54K, RP shall present it before NCLT, which shall within 30 days of such presentation, approve or reject the resolution plan. Thus, the entire process will be finished within 120 days. If no resolution plan is presented within 90 days, RP shall make an application before NCLT to terminate PIRP.

**5. Initiation of PIRP:** To initiate the process of PIRP, the CD shall receive the consent of the financial creditors, not being a related party, with a minimum of 66% of the total voting

share. Before receiving consent, the CD shall furnish a declaration that he has completed all the requirements u/s 54A and shall give a base resolution plan to the financial creditors to make it easy for them to make a decision.<sup>46</sup> After receiving consent, the CD can apply before NCLT to initiate the process of PIRP. Once the application is filed before NCLT, it shall admit or reject the application within 14 days of such filing. In case it has been admitted, PIRP has been initiated and it shall be completed within 120 days of admission. In case, it has been rejected, for some defects which can be rectified, NCLT shall give the applicant a 7 days' notice to rectify the defects and re-file the application before it.

**6. Approval of Resolution Plan:** The debtor will submit the base resolution plan within 2 days of the PIRP commencement date. A CoC will be constituted within 7 days of commencement, which will consider the base resolution plan for approval. The CoC may either approve the base resolution plan for submission before NCLT or in case the base resolution plan is not approved, they may invite prospective resolution applicants. A resolution plan submitted by a resolution applicant must be approved by the CoC with a vote of at least 66% of total voting shares. Furthermore, the resolution plan must be approved within 90 days starting from the commencement date. The resolution plan approved by the CoC will be presented before NCLT and it will examine the resolution plan so presented on the grounds laid down u/s 54k – 54L. If NCLT does not approve the resolution plan presented before it, it must order the termination of PIRP which will

<sup>43</sup> Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021, Sec. 54H

<sup>44</sup> Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021, Sec. 54J

<sup>45</sup> Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021, Sec. 54D

<sup>46</sup> Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021, Sec. 54C



result in the liquidation of the Company u/s 33 of the Code, 2016.

**Key Differences between IBC (Amendment) Ordinance, 2021 and IBC, 2016**

Many provisions from the principal act apply mutatis mutandis, in the ordinance, 2021, but there are many key points that make it different from the principal act. Following table 1 shows the key differences b/w ordinance, 2021 and Principal Act, 2016:

Serial No.	IBC (Amendment) Ordinance, 2021	IBC, 2016
1.	PIRP can be initiated by the MSME within the meaning given to them u/s 7(1) of the MSME Development Act, 2006	CIRP can be initiated by any company that commits default u/s 4 of the Code, 2016.
2.	PIRP can only be initiated by the debtor, having a base resolution plan.	CIRP can be initiated by the financial creditors, operational creditors and corporate debtor of the company.
3.	PIRP can only be initiated by companies and Limited Liability Partnerships.	CIRP can be initiated by any sole proprietorship, partnerships, Hindu Undivided Family, companies that come under the ambit of MSMEs.

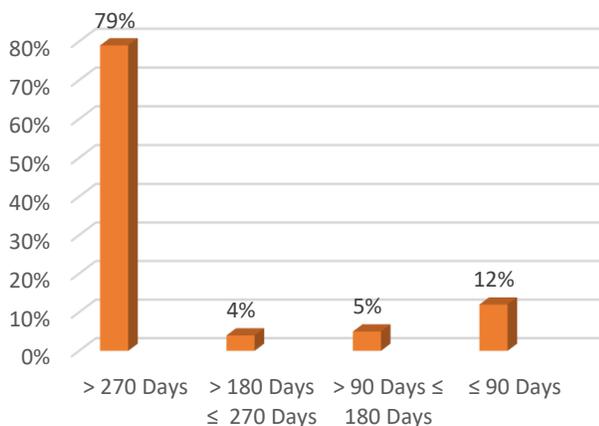
4.	A base resolution plan must be provided by the debtor before initiating PIRP.	Resolution plans are presented by applicants before CoC after initiation of CIRP.
5.	Resolution Professional is appointed by CoC and the duties of Resolution Professional so appointed starts before initiation of PIRP.	Resolution Professional is appointed by the NCLT and the duties of resolution professional start after initiation of CIRP.
6.	Management of the company stays with the debtor, even after PIRP has been initiated.	Management of the company is taken over by the resolution professional during the course of CIRP.
7.	PIRP must be completed within 120 days starting from the commencement of the resolution process.	CIRP must be completed within 180 days starting from the commencement of the resolution process.
8.	A resolution process can be terminated, at any time after commencement but before approval of the resolution plan, with a vote of at least 66% of the voting share of FCs.	A resolution process can be terminated only by a resolution passed by at least 90% of the voting share of FCs.



### Lacunae in the present Legislation

1. **Insolvency time period:** Maximum time period to complete CIRP and PIRP is 180 days with an extension of up to 270 days and 120 days respectively. These time limits were set with a vision to provide speedy resolution to the applicants and to disrupt the sluggish and usually long legal procedures in the Indian Legal System. Now, although the data is insufficient to criticize the time period set for PIRP, we can factually comment on the time period set for CIRP. According to the quarterly newsletter published by IBBI<sup>47</sup> only 5% of cases registered concludes in the time frame of 180 days; 79% of the registered cases are still pending after an extended time period of 270 days. Following fig.2 shows the timeline of registered cases of CIRPs as of March 2021.

Fig.2: Timeline of Registered Cases of CIRPs



The data shown above depicts that the time limit set to complete CIRP is very low for most of the cases. Many Judicial officers are not acquainted with the field of finance so it generally takes more time to decide upon a case. There have been cases where a judge could not even decide whether to admit or reject any application for more than 1 year.<sup>48</sup> The original limit to decide on an application is 14 days. This low time limit for completion also fires the gun of liquidation for the companies as they couldn't come up with a resolution plan within the legitimate time period.<sup>49</sup> More than 60% of the companies undergoing any kind of resolution process ends up in liquidation<sup>50</sup> which defeats the object of the code to provide for a resolution mechanism to the financially distressed enterprises. Thus, Govt. needs to revisit its policy regarding the time limit and find out the possible reasons for such delays. An expert committee has even recommended some operational changes in the mechanism

<sup>47</sup> Insolvency and Bankruptcy Board of India, 'Insolvency and Bankruptcy News' (January – March 2021) Vol. 18 p. 14 <<https://ibbi.gov.in/publication>> accessed 23 August, 2021

<sup>48</sup> SCC Online, 'Matter getting protracted, defeating the purpose of IBC' (SCC Online, 23 August 2021)

<<https://www.scconline.com/blog/post/2021/08/23/ibc/>> accessed 24 August, 2021

<sup>49</sup> Insolvency and Bankruptcy Code 2016, Sec. 33

<sup>50</sup> Insolvency and Bankruptcy Board of India, 'Insolvency and Bankruptcy News' (January – March 2021) Vol. 18 p. 14 <<https://ibbi.gov.in/publication>> accessed 23 August, 2021

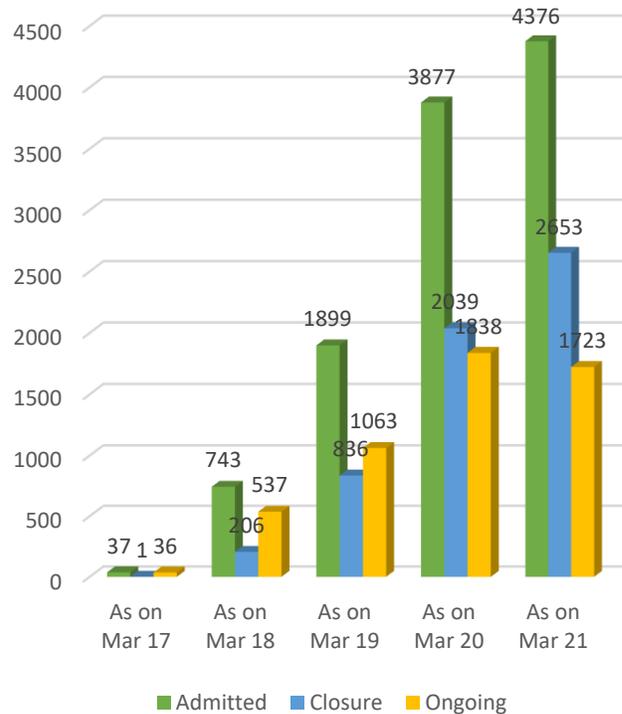


to promote speedy resolution.<sup>51</sup> Recommendations include extended use of virtual platforms to carry out the functions of resolution like meetings of CoC, virtual hearing of the cases etc. This would reduce the time and energy lost in travelling in normal circumstances. Govt. shall make its committee to find out more reasons and possible solutions for delayed resolution.

**2. Number of Judicial Benches:** NCLT is the adjudicating authority for the cases registered under IBC and is responsible for giving final assent to the resolution plan of an insolvent entity. To ensure speedy redressal there needs to be an adequate number of adjudicating authorities across the country. It would also ensure a low amount of pendency before tribunals. In India, there is a deficiency of judicial benches to handle cases relating to insolvency and bankruptcy, there are currently 16 judicial benches across the country and 27 judges to adjudicate upon them. According to a study, it is at least 25 judges less than what is required.<sup>52</sup> The number of cases registered is also a factor in the pendency of cases, if the number of cases registered every year outweighs the number of judges to adjudicate upon those cases, then the pendency would increase. Following fig.3 shows the no. of cases registered each year under IBC, 2016.<sup>53</sup> It reveals that there are a total of 4376 cases that have been registered as of March 2021 of these 2653 have been closed, of which 1277 are closed by the order of liquidation. The number of cases pending although less than what are closed, are still a

significant number considering that more than 75% of the cases go beyond the extended time period of 270 days. If the cases keep on increasing at this pace, India would soon have more pending cases than ever, which will strain the judicial system even further. Thus, there is a need for an adequate no. of judges to adjudicate upon cases efficiently.

Fig.3: Trends of cases registered under IBC



The Insolvency Law Committee in its report of 2020 has given several recommendations

(Business Standard, 23 August 2021 06:18 IST) <<https://wap-business--standard-com>> accessed 24 August, 2021

<sup>53</sup> Insolvency and Bankruptcy Board of India, 'Insolvency and Bankruptcy News' (January – March 2021) Vol. 18 p. 13 <<https://ibbi.gov.in/publication>> accessed 23 August, 2021

<sup>51</sup> Saikat Das, 'Govt considers operational changes in IBC following expert panel recommendations' (The Economic Times, 23 August, 2021 12:59 PM IST) <<https://m-economictimes-com.cdn.ampproject.org>> Accessed 24 August, 2021

<sup>52</sup> Andy Mukherjee, 'Get more judges: Bankruptcy logjams make India no country for dying firms'



to solve the issue of pendency. The committee has recommended increasing the minimum threshold for default to a higher value of 50 lakhs instead of 1 lakh. According to them due to low the threshold, a large number of applications are being filed for initiation of CIRP. This has led to an increased burden on the already stressed adjudicating authorities. Thus, this threshold must be increased. Furthermore, the committee opined that to actually support the idea of speedy redressal, the formal proceedings must be supplemented with informal proceedings. Thus, it was recommended that the authorities should take steps to develop infrastructure that aid debtors to solve the issue out of the court through mechanisms like debt settlement, mediation and debt counselling. It was also noted that a single creditor can initiate the process of CIRP following a minor dispute that is also a reason for the increased number of cases. Therefore, it was recommended that there shall be a threshold on a minimum number of creditors that can initiate the proceedings under IBC, 2016.<sup>54</sup>

**3. Law governing Resolution Professionals:**

Resolution Professionals play a critical role in carrying out the resolution process. To complete the process on time RPs must be acquainted with the necessary knowledge and experience. Currently, the law governing RPs is over-regulated, they have to comply with so many procedures that they end up giving more time in compliance fulfilment than carrying out their duties as RP. Thus, the

regulatory body governing RPs should encourage pragmatism and business risk-taking.<sup>55</sup> It should train RPs on the operational functions of stressed entities and should incentivize ethical working instead of increasing regulatory compliance. It should increase the eligibility criteria to become an RP so that individuals with a pragmatic approach and better work ethics could be hired. Currently one only needs a bachelor’s degree to become RP, it shall be increased to at least a master’s degree to make sure that an RP is of required intellect.

As of March 2021, there is 1723 number of pending cases in the courts. There must be at least an equal number of RPs to carry out the resolution process in an efficient manner. Following Table 2 shows the total number of registered RPs in the country as of March 2021.<sup>56</sup>

**Table 2: Number of registered Resolution professionals in India**

City/Region	Registered IPs				IPs having Authorisation for Assignment			
	II	I	I	T	III	I	IP	To
	P	C	P	o	PI	C	A	tal
	I	S	A	t		S	of	
	I	I	I	a		I	IC	
		II	C	l		II	M	
		P	A			P	A	
			I				I	

<sup>54</sup> Ministry of Corporate Affairs, ‘Report of The Insolvency Law Committee’ (20 February, 2020) Vol. 3 P. 5-8

<[https://www.mca.gov.in/Ministry/pdf/ICLReport\\_05032020.pdf](https://www.mca.gov.in/Ministry/pdf/ICLReport_05032020.pdf)> accessed 23 August, 2021

<sup>55</sup> Diwanji, Shikha, ‘Bankruptcy code reforms must be handled with special caution’ (Livemint, 12 August,

2021) <<https://www-livemint-com.cdn.ampproject.org.html>> accessed 21 August 2021

<sup>56</sup> Insolvency and Bankruptcy Board of India, ‘Insolvency and Bankruptcy News’ (January – March 2021) Vol. 18 p. 20 <<https://ibbi.gov.in/publication>> accessed 23 August, 2021



New Delhi	404	233	752	732	306	193	59	558
Rest of Northern Region	396	188	593	643	291	149	38	478
Mumbai	375	138	347	547	263	99	26	388
Rest of Western Region	266	105	389	409	192	78	26	296
Chennai	128	832	1223	223	78	613	7	146
Rest of Southern Region	349	195	615	605	236	133	50	419
Kolkata	199	359	215	255	145	255	17	187
Rest of Eastern Region	60	23	70	90	36	18	6	60
Total Registered	2177	1020	3070	3504	1547	756	229	2532

Now, there is 3504 total registered RPs across the country. If we consider the number of pending CIRPs these numbers of RPs should be adequate to handle these CIRPs but we have seen that most of the resolution process extends even after 270 days. Thus, it is not quantity that needs to be fixed rather it is quality that needs special consideration and

<sup>57</sup> Shreeja Singh, 'Why most MSMEs are not eligible for the pre-packed insolvency resolution process' (Money Control, 12 April, 2021) <[https://www.moneycontrol.com/news/trends/why-](https://www.moneycontrol.com/news/trends/why-most-msmes-are-not-eligible-for-the-pre-packed-insolvency-resolution-process-6758611.html)

needs. There is a need for quality resolution professionals who are educated in the field from a young age and are equipped with all bells and whistles to carry out the resolution process efficiently.

**4. Eligibility Criteria for Pre-packaged**

**Insolvency:** As per the amendment ordinance promulgated on 4<sup>th</sup> April 2021, financially distressed MSMEs can apply for pre-packaged insolvency resolution. Now, as per the ordinance, MSMEs applying for PIRP u/s 54A must also be registered under MSMEs Development Act, 2006. This little requirement largely undercuts the number of MSMEs that were eligible according to the wider definition of the MSMEs u/s 7(1) of MSMEs Development Act, 2006. According to the National survey 73<sup>rd</sup> Round (2015-2016), there are 6.3 crore MSMEs that exist in India. However, according to the data available with the Udyam Registration website only 26.42 lakh MSMEs have registered till date.<sup>57</sup> Therefore, only a negligible number of MSMEs can take recourse under the pre-packaged regime for insolvency resolution. Furthermore, only Limited Liability Partnerships and companies can apply for pre-packs, making the eligibility criteria even thinner. Thus, it appears that the scope of the pre-packaged insolvency regime is very limited and needs to be widened to cover more MSMEs undergoing financial distress in these unprecedented times.

**5. Large Haircuts and High rates of**

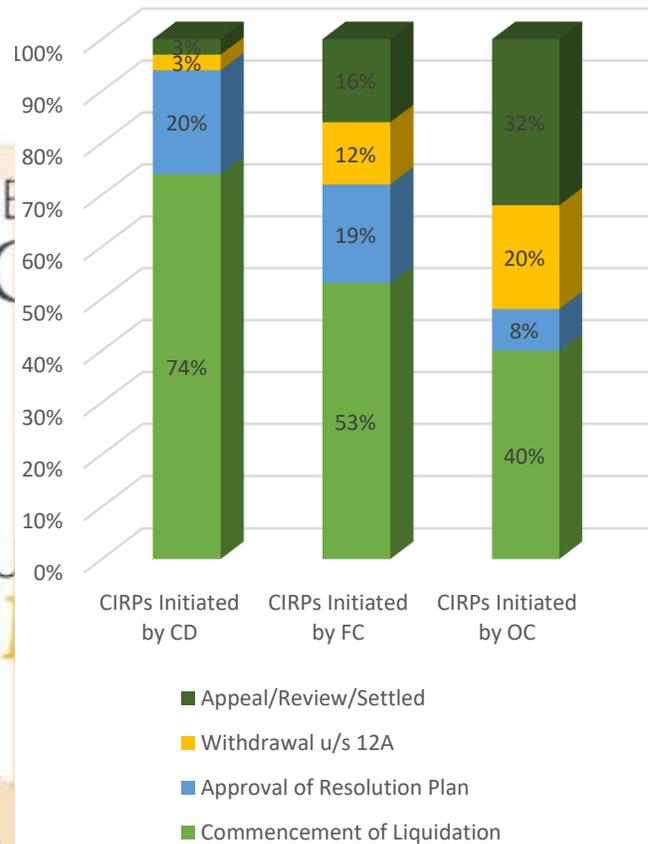
**Liquidation:** The Objective of IBC, 2016 was to provide a pathway to the companies

most-msmes-are-not-eligible-for-the-pre-packed-insolvency-resolution-process-6758611.html> accessed 21 August 2021



facing financial distress to exit the insolvency stage, through a viable resolution plan. It was intended to provide value maximisation of assets to the companies in case of liquidation. It is pertinent to note here that IBC was never meant for debt recovery, its main goal was to provide value maximisation to the assets. It is very much successful in that manner as Jyoti structures and Essar Steel India both were able to realise a very high percentage of their liquidation value at 387% & 267% respectively.<sup>58</sup> What is alarming is the high rate of liquidation companies go after they resort to IBC. According to the newsletter published by IBBI 74% of the CIRPs initiated by CD end up in liquidation while only 20% of them are closed by approval of the resolution plan. Following fig. 4 shows the distribution of closed CIRPs.<sup>59</sup> What comes as shock is that most of these liquidations are ordered by the CoC. Following fig.5 shows the different reasons for liquidation of the companies.<sup>60</sup>

Fig.4: Distribution of Closed CIRPs



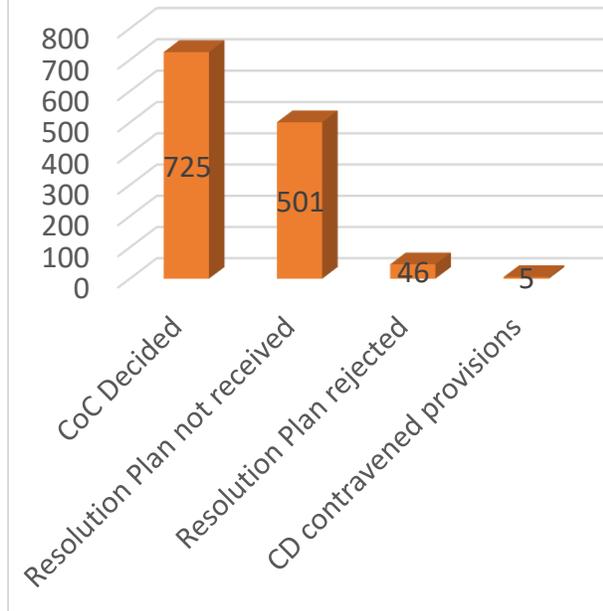
<sup>58</sup> Insolvency and Bankruptcy Board of India, ‘Insolvency and Bankruptcy News’ (January – March 2021) Vol. 18 p. 17 <<https://ibbi.gov.in/publication>> accessed 23 August, 2021

<sup>59</sup> Ibid 13,14

<sup>60</sup> Ibid 16



Fig.5: Reason for Closure of CIRPs



Although the realised value of most of these companies is more than their liquidation value, it is still less than 5% of the outstanding debt amount. These kinds of haircuts in the value of assets are common in IBC. This is not to say that IBC is responsible for these haircuts, because it is the market forces that decide the haircut creditors must take on their dues. One view is that govt. should fix a benchmark for these haircuts. On the other hand, these haircuts might discourage prospective bids for assets thus, pushing these companies further towards liquidation. Furthermore, this may incentivize the banks to pass riskier loans as they would be assured to get their dues back. Thus, there is a need to handle these debt recovery reforms with caution. It is pertinent to strike a balance between large haircuts and high rates of liquidation.

### **Conclusion and Recommendations**

Since its enactment, the Insolvency and Bankruptcy Code, 2016 has gone under many

amendments; Ordinance 2021 alone introduced 34 amendments in the principal code. It is evident that govt. of India does not want to skip any opportunity to make India a global player in the field of commerce and business. The results are already in line with the motive of the govt. as India jumps to 63<sup>rd</sup> position from 142<sup>nd</sup> in ease of doing business. Any apparent loopholes in the law are being plugged at the earliest through the latest amendments and judicial activism. The legislature, RBI, SEBI, and the judicial officers all have shown a unified front on this matter. As a result, India has already secured respectable positions in various international indices of business and commerce.

This study highlighted the resolution process under IBC, 2016 amended up to 4<sup>th</sup> April 2021 and shed light on the jurisprudence of the jargon used in the act to make it easy to grab the concepts of the resolution process and aims of lawmakers while passing this insolvency regime. This study showcases a comparative analysis of the IBC (Amendment) ordinance, 2021 with the principal act. In the end, it tries to find out the lacunae in the present legislation with possible solutions for the problems that the current code left unanswered. Although the IBC regime is very promising, it still needs to revise its policies regarding the resolution period and pendency of the cases as there are more than 75% of cases that are pending beyond 270 days envisaged by the law. Thus, further studies need to be done to find out the reason behind the delay in most of the cases and lacunae in the present legislature.

There is no doubt that Insolvency resolution is far better now as compared to the past resolution mechanism in the country. Total recovery rate has also increased drastically in



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the past 5 years, it was 20% under SARFAESI Act, 2002 as compared to 40% under IBC, 2016. However, what remains to be seen is that whether these measures can be used to reduce the burden of NPAs from the banking system and whether India can develop its resolution mechanism so far as to come at par with other developed nations.

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