

The Evolving Landscape of Insolvency Law in India

Contemporary Issues and Policy Perspectives

EDITED BY

Dr. Manoj Kumar Sharma

Mr. Gyan Prakash Kesharwani



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IN ASSOCIATION WITH



*Insolvency and Bankruptcy Law Division
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Preface

The Insolvency and Bankruptcy Code, 2016 marked a significant shift in India's approach to insolvency resolution by seeking to establish a consolidated, time-bound and structured framework for addressing financial distress. Over the years, however, the evolving nature of commercial transactions, financial markets and cross-border business has brought forth new challenges requiring continued academic and practical engagement with the insolvency framework.

It is in this context that the Insolvency and Bankruptcy Law Division (IBLD), Rajiv Gandhi National University of Law, Punjab, organised the Two-Day International Conference on "Insolvency and Bankruptcy Law: Challenges and Opportunities." The conference brought together diverse perspectives on contemporary developments in insolvency and provided a platform for meaningful discussion on the emerging issues shaping the field.

This edited volume presents a selection of the scholarly contributions emerging from the conference. The papers collectively reflect the expanding scope of insolvency scholarship in India, covering both established concerns and emerging areas of inquiry. A significant focus is placed on pre-packaged insolvency resolution, particularly its application to MSMEs, institutional challenges, fraud risks, phoenixing and the broader effectiveness of the evolving pre-pack framework.

The volume also engages extensively with cross-border insolvency and arbitration, examining issues of judicial cooperation, the UNCITRAL Model Law, the Gibbs principle, confidentiality, group insolvency and the interaction between insolvency proceedings and arbitral processes. These contributions highlight the increasing importance of developing a coherent framework capable of addressing insolvency in an increasingly interconnected commercial environment.

Beyond these themes, the collection considers several emerging dimensions of insolvency law, including ESG and sustainable restructuring, mediation, taxation of insolvency recoveries, the role and independence of resolution professionals, netting arrangements, dissenting creditors, private equity and alternative investment funds. The inclusion of research on artificial intelligence and pre-insolvency early-warning mechanisms further demonstrates how technology is beginning to influence the future of insolvency practice.

The contributions in this volume do not seek to present a single perspective on the future of insolvency law. Instead, they identify existing gaps, examine competing considerations and explore possible approaches to reform. Collectively, they demonstrate that the

development of an effective insolvency framework requires continuous engagement between legislation, judicial interpretation, institutional practice and emerging commercial realities.

We hope that this volume will serve as a useful academic resource for students, researchers, academicians, practitioners, insolvency professionals and policymakers, and contribute to further discussion on the challenges and opportunities that lie ahead for insolvency and bankruptcy law in India.

We extend our sincere appreciation to all the contributors and to everyone who supported the organisation of the conference and the preparation of this volume. The publication of these papers is a continuation of the academic dialogue initiated at the conference, and we hope that the discussions contained herein encourage further research and constructive engagement with the evolving insolvency landscape.

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CHAPTER 1

Pre-Packaged Insolvency Resolution in India after the IBC Amendment Act 2026: A Critical Assessment of the Revised MSME Framework

DR. PARINEETA GOSWAMI*

The Insolvency and Bankruptcy Code, 2016, provides a consolidated and time-bound framework for insolvency resolution, liquidation, and bankruptcy, with emphasis on value maximization and continuation of viable businesses. The introduction of the Pre-Packaged Insolvency Resolution Process (PPIRP) in 2021 created a faster and less disruptive mechanism for resolving the financial distress of eligible micro, small, and medium enterprises. The IBC Amendment Act, 2026, has revised several provisions governing PPIRP and has also provided for a new Creditor-Initiated Insolvency Resolution Process (CIIRP). While the PPIRP amendments have substantially come into force, the provisions introducing CIIRP have been enacted but have not yet been operationalised.¹ PPIRP combines pre-initiation negotiations with formal creditor approval and judicial supervision. It seeks to preserve the corporate debtor as a going concern, protect employment, reduce costs, and maximize creditor recovery. However, the process also raises concerns regarding transparency, valuation, promoter control, creditor participation, and conflicts of interest. This paper critically examines the Indian PPIRP framework, its advantages and limitations, and the changes introduced by the IBC Amendment Act, 2026. It argues that PPIRP can serve as an effective instrument of corporate rescue if supported by transparent procedures, independent monitoring, and adequate protection of stakeholder interests.

Keywords: Pre-packaged Insolvency Resolution, Corporate Restructuring, Financial Distress, Creditor Rights, Regulatory Frameworks

1 INTRODUCTION

Corporate insolvency and bankruptcy have been enduring challenges for businesses and economies worldwide. In the face of financial distress, the fate of a distressed company and

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¹ Ministry of Corporate Affairs, Notification S.O. 2625(E) (May 22, 2026), bringing specified provisions of the Insolvency and Bankruptcy Code (Amendment) Act, 2026 into force from 26 May 2026.

its stakeholders hangs in the balance.² Traditionally, the process of resolving insolvency has often been cumbersome, lengthy, and inefficient, leading to value destruction, job losses, and significant economic repercussions. To address these issues, pre-packaged insolvency resolution has emerged as an innovative and proactive strategy aimed at optimizing corporate recovery.

The Insolvency and Bankruptcy Code was born in 2016, with the intention of making the resolution process business-friendly. It is this feature of the Insolvency and Bankruptcy Code that stands in contrast to its predecessor, which seeks to address stressed assets with the help of a market mechanism. The code has been successful in terms of recovery since its launch. Insolvency and Bankruptcy Code is a robust mechanism to deal with insolvency, wherein the corporate debtors are provided an opportunity to resurrect their business. The process is called the Corporate Insolvency Resolution Process (CIRP). The entire process of corporate resolution is formalistic and time-consuming, and MSMEs encounter a lot of issues while adhering to the process. The minimum default limit for launching CIRP under Section 4 increased from ₹1 lakh to ₹1 crore with the notification dated 24 March 2020. As such, the default of an MSME, which is less than ₹1 crore, cannot generally be treated as a default under the CIRP and is only eligible to be treated as a default under the PPIRP if the default is at least ₹10 lakh.³ The rate of NPA in MSMEs is high; it is 9.2%, 10.2% and 16.5% in micro, small and medium enterprises respectively in 2020. So, to address the issues of non-performing assets in the MSMEs sector, there is a need to form an insolvency resolution procedure that assists the MSMEs in resolving insolvency and bad debts. As we know, MSMEs are the backbone of job creation, and the bad debt issue is a threat to the existence of MSMEs. The Central Government introduced the new insolvency resolution method, PPIRP, to make the process of resolution of insolvency appropriate for the MSMEs sector. The scheme of arrangement generally keeps the existing Board of Directors or partners in place to run the corporate debtor during the resolution process, subject to oversight by the Resolution Professional and supervision by the Committee of Creditors. But owners or promoters will not necessarily keep their ownership or control after the resolution plan has been approved, provided the plan is under management during PPIRP.

All countries, including India, suffer from the issue of Non-Performing Assets (NPAs). A study on some selected financial institutions in India, which are the backbone of all economic activities, has revealed that the higher the NPA, the lower the profitability of financial

² *Pre-Packaged Insolvency Resolution Process (PPIRP)*, TAXMANN BLOG (2022), <https://www.taxmann.com/post/blog/pre-packaged-insolvency-resolution-process-ppirp/?amp> (last visited Feb. 8, 2022).

³ Ministry of Corporate Affairs, Notification S.O. 1205(E) (Mar. 24, 2020); Ministry of Corporate Affairs, Notification S.O. 1543(E) (Apr. 9, 2021).

institutions in the economy.⁴ To address the issue of NPAs, among others, the Indian government has enacted the Insolvency & Bankruptcy Code, 2016. This came as a completely new insolvency and bankruptcy regime, which is constantly evolving to this day. In one big step towards this evolution, the government passed the Insolvency & Bankruptcy Code (Amendment) Act, 2021. The 2021 amendment added the time-bound alternative of PPIRP to bring together pre-initiation negotiation with formal creditor consent and court oversight.⁵

The introduction of this concept in the Indian insolvency regime is a timely one. This is because it is designed to help companies in financial trouble to resolve their financial issues, and with the increase of threshold to 10 million INR from the earlier 0.1 million INR on 24th March 2020, it has become difficult to resolve financial issues.⁶ This was done as a result of the COVID-19 pandemic causing businesses to suffer ongoing losses; a lower threshold could have led to an increase in insolvency proceedings and, naturally, more liquidations.⁷ A lot of business closures is not a friend to the economy since it results in loss of credit, loss of business and loss of jobs as well.⁸

The concept of pre-packaged insolvency has been named differently across different jurisdictions.⁹ It is called a pre-arranged insolvency plan and pre-plan sale in the USA, pre-pack in the UK, scheme of arrangement in Singapore, fast-track safeguard proceedings for pre-packs in France and expedited reorganization proceedings for pre-packs by the United Nations Commission on International Trade Law (UNCITRAL).¹⁰ The IMF has two variants of this process.¹¹ Pre-packaged plans, which involve negotiation and plan voting prior to the beginning of the rehabilitation process and obtain court approval as soon as the rehabilitation process begins. Pre-packaged plans, in which negotiations are completed prior to the start of proceedings, and the formal voting is completed after the start of the proceedings.

India follows a hybrid pre-negotiated insolvency model. Before filing the application, the corporate debtor prepares a base resolution plan and obtains the prescribed approval of its unrelated financial creditors for initiating PPIRP. However, the final consideration and

⁴ Ashish Kumar, Srirang Jha & Sahil Grover, *Impact of Non-Performing Assets on Profitability: A Study of Selected Private and Public Sector Banks in India*, EMPIRICAL ECON. LETTERS 129–38 (2021).

⁵ GERARD MCCORMACK, CORPORATE RESCUE LAW – AN ANGLO-AMERICAN PERSPECTIVE (2008).

⁶ Ministry of Corporate Affairs, Notification S.O. 1205(E) (Mar. 24, 2020).

⁷ IBBI *Liquidation Process Regulations, 2016*, IBC LAWS (2022), <https://ibclaw.in/ibbi-liquidation-process-regulations/> (last visited Feb. 8, 2022).

⁸ IBBI, *INSOLVENCY AND BANKRUPTCY NEWS*, vol. 18 (Jan.–Mar. 2021).

⁹ Insolvency and Bankruptcy Code (Amendment) Act, 2021, § 8; REPORT OF THE SUB-COMMITTEE OF THE INSOLVENCY LAW COMMITTEE ON PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS (2020).

¹⁰ Himani Singh, *Pre-Packaged Insolvency in India: Lessons from USA and UK* (Jan. 13, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3518287.

¹¹ Int'l Monetary Fund, *Introduction, in ORDERLY AND EFFECTIVE INSOLVENCY PROCEDURES* ch. 1 (1999).

voting on the resolution plan take place after the commencement of PPIRP through the Committee of Creditors. Therefore, the Indian framework combines pre-initiation negotiations with formal creditor voting and approval under the supervision of the Resolution Professional and the Adjudicating Authority.

Pre-packaged insolvency resolution is rooted in the principles of justice and fairness. PPIRP seeks to balance the interests of different stakeholders, although their levels of participation differ. While the primary voting control is exercised by the Committee of Creditors, the other stakeholders get the safeguards of the Code and the approved resolution plan. For this to happen, transparency and communication play a crucial role in any successful pre-pack. The restructuring plan should be designed in a way that respects the rights of creditors and enables the debtor to be allowed to continue business in a sustainable fashion. Part of the PPIRP process is to involve creditors. Creditors should be given the time to consider and make comments on the proposed plan of restructuring. This will not only increase transparency but also aid in developing a plan that is agreeable to most stakeholders. The Resolution Professional shall establish the Committee of Creditors within seven days after the commencement of the PPIRP based on the list of claims (confirmed). The CoC reviews the base resolution plan, reviews and considers competing plans if necessary, and votes on the resolutions granted by the Code. One of the key elements of pre-pack solutions is to keep the struggling debtor alive. Pre-packs are different from conventional bankruptcy proceedings, which typically result in the company being liquidated. This safeguards employment as well as keeping the business open for the benefit of its clients and customers; in turn, benefiting all concerned.

Pre-pack insolvency under the Act has been the subject of some scepticism. However, the aforementioned decision-making process, according to the arguments, is a promising and progressive process. This is because it has the best of both worlds: the formal judicial process (structured and decisive) and the informal (cheap and collaborative).¹² The type of insolvency regimes in the world reflects many factors, including the viability of different means of insolvency, institutional structures, judicial efficiency, etc., which makes a 'one-size-fits-all' solution neither wise nor feasible. Nevertheless, there should be some international benchmarks that would enable us to determine the effectiveness of an insolvency regime to a certain degree.

The scheme has been designed in a manner to provide a more friendly mechanism of resolution of stressed assets of micro, small, and medium enterprises while ensuring the

¹² Elizabeth Tashjian, Ronald C. Lease & John J. McConnell, *Prepacks: An Empirical Analysis of Prepackaged Bankruptcies*, 40 J. FIN. ECON. 135, 138 (1996).

protection of the interests of creditors.¹³ The Indian PPIRP framework follows a debtor-in-possession and creditor-in-control model. Under Section 54H of the Code, the management of the corporate debtor's ordinary business affairs continues to vest in its Board of Directors or partners. At the same time, the Resolution Professional conducts the PPIRP, monitors the management of the corporate debtor, and informs the Committee of Creditors of any breach of statutory obligations. The Committee of Creditors exercises commercial supervision and takes important decisions concerning the resolution process. Thus, operational management ordinarily remains with the corporate debtor, while creditors retain control over major resolution-related decisions. Section 54D requires the PPIRP to be completed within 120 days from the PPIRP commencement date. Within this overall period, the Resolution Professional must submit the resolution plan approved by the Committee of Creditors to the Adjudicating Authority within 90 days. Section 54L requires the Adjudicating Authority to decide the submitted plan within 30 days of its receipt. The latter period should not be treated as an automatic extension beyond the statutory PPIRP framework.¹⁴ It will help in reducing the costs and litigation involved in the resolution process and providing an effective resolution of corporate insolvency. A PPIRP application can be filed only by the corporate debtor after obtaining the prescribed approval of its financial creditors who are not related parties. Following the IBC Amendment Act, 2026, the approval threshold under Sections 54A(2)(e) and 54A(3) has been reduced from 66 per cent to 51 per cent of the value of the financial debt owed to such creditors. This threshold applies to the approval of the proposed Resolution Professional and the approval for filing the PPIRP application.¹⁵ The Committee of Creditors may, at any time during PPIRP, resolve by a vote of not less than 66 percent of the voting shares to seek the vesting of the corporate debtor's management in the Resolution Professional. The resolution professional must then apply to the adjudicating authority under Section 54J. The Adjudicating Authority may transfer the management to the Resolution Professional only where it is satisfied that the affairs of the corporate debtor have been conducted fraudulently or that there has been gross mismanagement. Therefore, the Committee of Creditors cannot independently remove or dissolve the existing management. The Act provides for strict penalties for fraudulent management of a corporate debtor or providing false information or any material omission in the application or list of claims.

¹³ *Silent Features of Proposed Pre-Packaged Insolvency Resolution Process Under Insolvency and Bankruptcy Code, 2016*, <https://ibclaw.in/silent-features-of-pre-packaged-insolvency-resolution-process-under-insolvency-and-bankruptcy-code-2016-report-of-the-sub-committee-of-the-insolvency-law-committee-on-pre-packaged-insolvency-resolu/>.

¹⁴ Insolvency and Bankruptcy Code, 2016, §§ 54D, 54L.

¹⁵ Insolvency and Bankruptcy Code (Amendment) Act, 2026, § 34(a), amending §§ 54A(2)(e) and 54A(3) of the Insolvency and Bankruptcy Code, 2016.

2 PROCEDURE OF PRE-PACKAGED INSOLVENCY RESOLUTION

The Insolvency and Bankruptcy Code was enacted in 2016, while the statutory PPIRP framework was introduced in April 2021 to make the insolvency proceeding fast, cost-efficient, and effective in resolution with minimum disruption in the business proceedings without deteriorating the value of the business houses.¹⁶ PPIRP is a hybrid statutory resolution process combining informal negotiations before commencement with formal proceedings after admission. The corporate debtor prepares a base resolution plan and obtains the prescribed creditor approval before filing the application. After admission, the process is conducted under the supervision of the Resolution Professional, the Committee of Creditors, and the Adjudicating Authority. It is an innovative corporate rescue method that offers an option to settle the insolvency either in formal (judicial) insolvency proceedings or informal (out-of-court) settlement. Let's understand the procedure of the PPIRP.¹⁷

2.1 Pre-Initiation Stage

The pre-initiation stage starts with seeking approval of creditors to file applications to follow the resolution as per the pre-packaged scheme. Before filing an application for PPIRP, the corporate debtor must seek approval from its financial creditors who are not related parties. The corporate debtor must convene a meeting of such financial creditors in accordance with the prescribed procedure and provide them with the declaration of its directors or partners, the members' or partners' resolution, the base resolution plan, and such other prescribed information. If the corporate debtor has no financial creditors who are not related parties, the proposal and approval must be provided by such persons as may be specified under the applicable regulations.

Under the IBC Amendment Act, 2026, the approval threshold under Sections 54A(2)(e) and 54A(3) has been reduced from 66 per cent to 51 per cent of the value of the financial debt owed to unrelated financial creditors. This reduced threshold applies to the approval of the proposed Resolution Professional and the approval for filing the PPIRP application.

2.2 Application for Initiation

Where a corporate debtor satisfies the eligibility requirements under Section 54A, a corporate applicant may file an application before the Adjudicating Authority for initiation of

¹⁶ *Insolvency and Bankruptcy Code in Economic Survey*, <https://ibclaw.in/insolvency-and-bankruptcy-code-ineconomic-survey/>.

¹⁷ AKHIL GUPTA, SOME SIZES FIT ALL (2020).

PPIRP. The application must be submitted in the prescribed form and manner and must be accompanied by the prescribed fee.¹⁸

Before the 2026 amendment, Section 54C(3) expressly listed the principal declarations, approvals, consents, and information that had to accompany the application. The IBC Amendment Act, 2026, substitutes this detailed statutory list with a general requirement that the corporate applicant furnish “such information as may be specified.”¹⁹ Consequently, the Code no longer permanently fixes the complete list of documents within Section 54C(3). The applicant must comply with the documentary and informational requirements prescribed under the applicable PPIRP regulations and forms.

The applicable regulatory requirements may include the approval of unrelated financial creditors, consent of the proposed resolution professional, declarations of the directors or partners, the members’ or partners’ resolution, details concerning avoidance transactions, proof of MSME status, financial statements, statements of affairs, and other prescribed information. These requirements should be attributed to the applicable regulations and forms rather than described as a fixed list contained in Section 54C(3).

Under Section 54C(4), the Adjudicating Authority must ordinarily admit the application if it is complete or reject it if it is incomplete. Before rejecting an incomplete application, it must allow the applicant seven days from receipt of the notice to rectify the defect. PPIRP commences from the date on which the application is admitted.²⁰

The corporate debtor must be eligible to submit a resolution plan under Section 29A of the Code. In a PPIRP, the corporate debtor may itself submit the base resolution plan, either independently or jointly with another person. However, Section 240A grants qualifying micro, small, and medium enterprises limited exemptions from the disqualifications contained in Sections 29A(c) and 29A(h). Accordingly, a promoter of an eligible MSME is not automatically disqualified merely because of these two clauses, although all the other applicable requirements of Section 29A must continue to be satisfied.

A corporate debtor classified as a micro, small, or medium enterprise under Section 7(1) of the Micro, Small and Medium Enterprises Development Act, 2006, may initiate PPIRP after committing a default of at least the notified minimum amount. It must be eligible to submit a resolution plan under Section 29A, must not be undergoing CIRP, and must not be subject to a liquidation order under Section 33. It must also not have undergone PPIRP or completed CIRP during the three years preceding the initiation date. The 2026

¹⁸ Insolvency and Bankruptcy Code, 2016, §§ 54C(1)–54C(2).

¹⁹ Insolvency and Bankruptcy Code (Amendment) Act, 2026, § 35, substituting § 54C(3) of the Insolvency and Bankruptcy Code, 2016.

²⁰ Insolvency and Bankruptcy Code, 2016, §§ 54C(4)–54C(5).

Amendment Act provides for the future inclusion of CIIRP within these disqualifications; however, the relevant CIIRP-related amendments have not yet been brought into force.

2.3 Post-Initiation Phase

All the action in the pre-packaged insolvency proceedings will have to be done within 120 days of the start of the proceedings. During the whole process of resolution of insolvency, the management of affairs of the company remains in the hands of the Board of Directors/the partners of the corporate debtor; they are allowed to take all such steps that are essential for the benefit of the corporate debtor. The corporate debtor needs to submit the base resolution plan to the resolution professional and an updated list of claims of creditors and their security interests and guarantees in Form No. P10.²¹

The IBC Amendment Act, 2026, has also expanded the obligation to cooperate with the Resolution Professional. The amended Section 54F(5) requires any person who is or has been a member of the personnel of the corporate debtor, its promoter, a person associated with its management, or a person engaged under a contract for service with the corporate debtor to provide the assistance and cooperation required by the Resolution Professional. The amendment therefore extends the duty beyond existing personnel and management to former personnel and contractual service providers who may possess information relevant to the PPIRP.²²

2.4 Consideration and Approval of Resolution Plan

Under Section 54K, the corporate debtor must submit the base resolution plan to the resolution professional within two days of the PPIRP commencement date. The Resolution Professional presents the plan to the Committee of Creditors. The Committee may allow the corporate debtor to revise the base resolution plan before deciding whether to approve it or invite competing plans.

The Committee of Creditors may approve the base resolution plan directly where it does not impair the claims of operational creditors. A claim is considered impaired when the plan does not provide for full payment of the confirmed claim appearing in the updated list of claims.

The Resolution Professional must invite prospective resolution applicants to submit competing resolution plans where the Committee of Creditors does not approve the base resolution plan or where the base resolution plan impairs the claims of operational creditors.

²¹ Insolvency and Bankruptcy Code, 2016, § 54G(1); Insolvency and Bankruptcy Board of India (Pre-Packaged Insolvency Resolution Process) Regulations, 2021, reg. 20.

²² Insolvency and Bankruptcy Code (Amendment) Act, 2026, § 36, substituting § 54F(5) of the Insolvency and Bankruptcy Code, 2016.

The competing plans are evaluated in accordance with the criteria approved by the Committee of Creditors. Where a competing plan is significantly better than the base resolution plan, it may be selected for approval.

If not, the plan selected to compete is the competing plan and the base resolution plan goes into competition using the improvement mechanism prescribed. The resolution plan finally chosen should be approved by the Committee of Creditors with a 66 percent majority of the votes. The Committee's duties when casting votes shall include determining the feasibility, viability and proposed distribution of the plan between creditors, including the priority of the plan under Section 53 and the value of the creditors' secured security interests. The Resolution Professional shall file the resolution plan before the Adjudicating Authority under Section 54K(15) once the resolution plan is accepted by the Committee of Creditors with a 66 per cent voting share. The Committee of Creditors can approve the plan, but it will not automatically become a legally binding plan. The Adjudicating Authority considers the plan under Section 54L and may approve it if it satisfies the requirements of the Code and contains adequate provisions for its effective implementation. After approval by the Adjudicating Authority, the plan is implemented and supervised in accordance with the arrangements contained in the approved plan. The Resolution Professional may be involved in supervision, but implementation is not necessarily undertaken exclusively by the Resolution Professional.

The 2026 amendment makes two important changes to Section 54L. First, before rejecting a resolution plan for non-compliance, the Adjudicating Authority may allow the Committee of Creditors to rectify defects in the plan. This curative opportunity can prevent termination or liquidation merely because of remediable defects.²³ Secondly, the legal consequences contained in Sections 31(5) and 31(6) have been extended to a resolution plan approved under PPIRP. Accordingly, specified licenses, permits, registrations, quotas, concessions, clearances, and similar governmental or regulatory rights connected with the approved plan cannot ordinarily be suspended or terminated during their remaining period if the continuing obligations attached to them are fulfilled. Further, unless the approved plan provides otherwise, claims against the corporate debtor and its assets relating to the period before approval of the plan are extinguished, and proceedings based on those claims cannot be instituted or continued against the corporate debtor or its assets.²⁴ These consequences do not automatically extinguish the separate liabilities of promoters, guarantors, or persons jointly liable with the corporate debtor.

²³ Insolvency and Bankruptcy Code (Amendment) Act, 2026, § 37(b), inserting a proviso into § 54L(3) of the Insolvency and Bankruptcy Code, 2016.

²⁴ Insolvency and Bankruptcy Code (Amendment) Act, 2026, §§ 19(e), 37(a), inserting §§ 31(5)–31(6) and extending their application to PPIRP through § 54L(2).

The 2026 amendment also modifies the consequences where PPIRP culminates in liquidation. The references in Sections 54L(4)(b) and 54N(4)(a) have been expanded to include the additional consequences contained in Section 33(1)(b)(iv) and Section 33(1)(b)(v). Where such a resolution plan was rejected, or the PPIRP was terminated as provided in the Code in the circumstances, the Adjudicating Authority shall declare the moratorium under this section and appoint a liquidator as provided in section 34. The amendment provides a more transparent process for moving from an unsuccessful PPIRP to liquidation.²⁵

3 PROPOSED RELATIONSHIP BETWEEN PPIRP AND CIIRP

The IBC Amendment Act, 2026, provides for the introduction of a creditor-initiated insolvency resolution process through Chapter IV-A of Part II of the Code. Under the enacted framework, CIIRP may be initiated by a financial creditor belonging to a notified class of financial institutions in respect of specified categories of corporate debtors.²⁶ Unlike PPIRP, which is initiated by an eligible MSME corporate debtor, CIIRP is designed as a creditor-initiated process.

However, Section 40 of the 2026 Amendment Act, which inserts Chapter IV-A, has not yet been brought into force. Similarly, the amendments adding CIIRP to the eligibility restrictions under Sections 54A(2)(a) and 54A(2)(b) have not commenced. CIIRP should therefore be discussed as an enacted but not yet operational mechanism, rather than as an existing alternative currently operating alongside PPIRP.²⁷

Once brought into force, the CIIRP framework will prevent simultaneous or repetitive use of PPIRP, CIRP and CIIRP within the periods prescribed by the Code. Its practical relationship with PPIRP will depend upon the commencement notification, identification of eligible corporate debtors and creditors, and the rules and regulations issued under Chapter IV-A.

4 SIGNIFICANCE OF PRE-PACKAGED INSOLVENCY RESOLUTION

The advantages of pre-packaged insolvency resolution are numerous and can be grouped into several key areas, making them a valuable tool in managing financial distress.²⁸ The

²⁵ Insolvency and Bankruptcy Code (Amendment) Act, 2026, §§ 20(a)(ii), 37(c), 38, amending §§ 33(1)(b), 54L(4)(b) and 54N(4)(a) of the Insolvency and Bankruptcy Code, 2016.

²⁶ Insolvency and Bankruptcy Code (Amendment) Act, 2026, § 40, inserting Chapter IV-A and §§ 58A–58M.

²⁷ Ministry of Corporate Affairs, Notification S.O. 2625(E) (May 22, 2026). The notification did not bring s 40 or s 34(a)(i)–(ii) into force.

²⁸ Gazette Notification No. S.O. 1543(E) (Apr. 9, 2021), the minimum amount of default for a PPIRP process is ₹ 10.00 Lacs. This Notification has been issued under proviso to Section 4 of the IBC.

benefits include aspects of value preservation, job security, speed, confidentiality, and special considerations for the MSMEs sector.²⁹

The major advantage of pre-pack insolvency resolution is that it has the ability to preserve the value of an ailing company to a great extent. Pre-packs help to prevent erosion of value because they will resolve financial issues before they become full-blown insolvency proceedings.³⁰ This is essential for protecting the interests of creditors because a going concern is likely to recover more than liquidation.

Pre-packaged insolvency resolutions have a positive impact on employment by safeguarding jobs. In traditional insolvency processes, job losses are widespread, as companies are often compelled to downsize or close their doors entirely.³¹ Pre-packs, on the other hand, allow distressed entities to continue their operations, thereby protecting the livelihoods of their employees.

As substantial negotiations and preparation of the base resolution plan take place before the formal commencement of PPIRP, an approved plan may be implemented more efficiently than a plan developed entirely during a conventional insolvency proceeding. However, PPIRP does not necessarily result in the sale of the corporate debtor to an outside buyer. Depending on its terms, the resolution plan may provide for restructuring of debt, alteration of payment obligations, infusion of capital, dilution of promoter shareholding, change in management, sale of assets, or a combination of these measures. The way of implementation would depend on the resolution plan sanctioned by the Committee of Creditors and the Adjudicating Authority. PPIRP allows the corporate debtor and financial creditors to engage in preliminary negotiations and prepare the base resolution plan prior to the formal beginning of the process. This pre-initiation phase offers a certain level of confidentiality that could mitigate reputation loss and help maintain the going-concern value of the business. But there is no confidentiality for the entire PPIRP. After admission, the Adjudicating Authority declares a moratorium, appoints the Resolution Professional and makes a public announcement that the PPIRP is commencing. This is then only gained at the pre-initiation negotiation stage, which is relatively informal. The pre-pack or resolution plan is much quicker than a formal resolution process. In the U.S., for example, a corporate debtor engages in negotiations over a Chapter 11 restructuring plan and seeks votes on the plan prior to the filing of the plan and court approvals. Pre-packaged insolvency resolutions are unique in offering faster and more economical resolutions in today's time-crunched

²⁹ JOSE M. GARRIDO, *OUT-OF-COURT DEBT RESTRUCTURING* ¶ 101 (World Bank Study 2012).

³⁰ S. FRISBY, *A PRELIMINARY ANALYSIS OF PRE-PACKAGED ADMINISTRATIONS* (REPORT TO THE ASSOCIATION OF BUSINESS RECOVERY PROFESSIONALS) (2007). See K. VAN ZWIETEN, *GOODE ON PRINCIPLES OF CORPORATE INSOLVENCY LAW* 494 (5th ed. 2018).

³¹ S. FRISBY, *A PRELIMINARY ANALYSIS OF PRE-PACKAGED ADMINISTRATIONS* (REPORT TO THE ASSOCIATION OF BUSINESS RECOVERY PROFESSIONALS) (2007).

environment. This speed is particularly beneficial in times of economic instability when quick response can make all the difference between recovery and irreparable damage. The pre-pack insolvency procedure has been designed keeping in mind the specific needs of the MSMEs (Micro, Small and Medium Enterprises) sector and the minimum threshold of default standing at Rs. 10 lakhs. This approach considers the different circumstances and problems smaller businesses encounter. The corporate debtor is required to fulfil several pre-conditions before applying. They involve securing a special resolution of its members, a resolution by at least three-fourths of its partners, a resolution, subject to approval by most of the financial creditors who are not related to the resolution process, or approval of the proposed Resolution Professional.³²

PPIRP may be initiated only through an application made by the corporate applicant in respect of an eligible corporate debtor. A “corporate applicant” includes the corporate debtor, an authorized member or partner, or an individual who manages the operations and resources of the corporate debtor.³³

The CoC may allow the corporate debtor to revise the base resolution plan before deciding whether to approve it or invite competing plans. However, the corporate debtor does not have unilateral control over the final plan. The plan must satisfy the statutory requirements and obtain approval from at least 66 per cent of the CoC’s voting share before being submitted to the Adjudicating Authority.

PPIRP is to be completed within 120 days of the date of the commencement of PPIRP by Section 54D. The Resolution Professional shall then file the resolution plan which has been approved by the Committee of Creditors with the Adjudicating Authority within 90 days of this overall period. In case the resolution plan is not approved within that time, the resolution professional will apply to withdraw the PPIRP. Section 54L also stipulates that the Adjudicating Authority must approve or reject the resolution plan submitted within 30 days from the date it is received. These timelines are to be considered as part of the overall time-bound framework of the PPIRP and are not an automatic extension beyond statutory time limits.³⁴ The advantages of using PPIRP are related to its ability to preserve the value of distressed businesses, keep the jobs intact, offer relative confidentiality while still in the pre-initiation phase, speed up the resolution process and customize solutions for the needs

³² Insolvency and Bankruptcy Code (Amendment) Act, 2026, § 34(a), amending §§ 54A(2)(e) and 54A(3) of the Insolvency and Bankruptcy Code, 2016.

³³ S. FRISBY, A PRELIMINARY ANALYSIS OF PRE-PACKAGED ADMINISTRATIONS (REPORT TO THE ASSOCIATION OF BUSINESS RECOVERY PROFESSIONALS) (2007).

³⁴ MINISTRY OF CORP. AFF., GOV’T OF INDIA, MONTHLY NEWSLETTER, vol. 13Z (Nov. 2018); the Ministry of Corporate Affairs has also sought public comments on, inter alia, pre-packaged insolvency resolution process under the Code. See MCA Notice (Apr. 16, 2019).

of the MSMEs sector. These advantages collectively make pre-packs a valuable tool in managing financial distress and insolvency proceedings.³⁵

5 CHALLENGES OF PRE-PACKAGED INSOLVENCY RESOLUTION

Pre-packaged insolvency resolution seeks to combine the speed and flexibility of an informal restructuring with the legal certainty and safeguards of a formal insolvency proceeding. However, the challenges associated with the Indian Pre-Packaged Insolvency Resolution Process (PPIRP) must be distinguished from those arising under foreign pre-pack administration or pre-pack sale models. In jurisdictions such as the United Kingdom, a pre-pack may involve the negotiation and sale of the business before or immediately after the commencement of formal administration. By contrast, the Indian PPIRP is a statutory resolution process involving admission by the National Company Law Tribunal (NCLT), declaration of a moratorium, appointment of a resolution professional, constitution of a Committee of Creditors (CoC), public announcement, and judicial approval of the resolution plan.³⁶ Nevertheless, the Indian framework continues to raise concerns regarding transparency, promoter influence, valuation, creditor participation, and potential conflicts of interest.

5.1 Limited Transparency during the Pre-Initiation Stage

One of the main issues with pre-pack liquidation is the lack of transparency in the discussions that take place prior to the official process. The international experience shows that a private negotiation between the debtor, secured creditors and a prospective purchaser can cause questions about the fairness of the transaction and the value received.³⁷ In line with the Indian mechanism, the base resolution plan is prepared by the corporate debtor and then discussed with the financial creditors who are unrelated to the debtor before the application for the commencement of the PPIRP is filed.³⁸ This confidentiality could preserve the popularity and going concern importance of the business. But there may be a lack of information regarding these preliminary negotiations for operational creditors, employees, minority shareholders and other stakeholders. In fact, the concern is not that there is no transparency during PPIRP, but that some stakeholders are not well represented at the pre-initiation phase of PPIRP. Formal Admission to PPIRP makes the process subject to

³⁵ *Role of MSMEs Crucial for India to Become a \$5-Trillion Economy, Says Kant*, ECON. TIMES (2022), <https://economictimes.indiatimes.com/small-biz/sme-sector/role-of-msmescrucial-for-india-to-become-a-5-trillion-economy-says-kant/articleshow/88605491.cms?from=mdr> (last visited Feb. 8, 2022).

³⁶ Insolvency and Bankruptcy Code, 2016, §§ 54C–54L.

³⁷ TERESA GRAHAM, GRAHAM REVIEW INTO PRE-PACK ADMINISTRATION: REPORT TO THE RT HON VINCE CABLE MP ¶¶ 7.64–7.65 (2014).

³⁸ Insolvency and Bankruptcy Code, 2016, §§ 54A(2)–54A(4).

statutory disclosure and supervision. The NCLT declares moratorium, appoints the Resolution Professional and makes a public announcement. Thus, confidentiality is not a part of the process but rather a limited part of the pre-initiation negotiations.³⁹

5.2 Limited Participation of Operational and Unsecured Creditors

The corporate debtor and its financial creditors not related to it are the main actors in initiating PPIRP. Operational creditors can file claims and enjoy the same protection as financial creditors under the resolution plans; however, they are not involved in the same way as financial creditors in approving the PPIRP and in choosing the resolution professional. It is possible to approve a base resolution plan directly if it doesn't affect the claims of operational creditors.⁴⁰ If it affects such claims or the CoC does not approve of the base resolution plan, the Resolution Professional shall solicit competing resolution plans. In this case, a claim will be considered impaired if the plan does not include full payment of the confirmed claim in the updated list of claims.⁴¹ Such safeguards do not preclude the ability of operational creditors or unsecured creditors, in certain cases, to have some influence on the process of formulating the base resolution plan. The only real protection they have is that of the statutory rules affecting payment, competing plans, and judicial review, and not direct control of the initial negotiations.⁴²

5.3 Creditor Disputes and Litigation

There could be conflicts on issues related to admission and valuation of claims, composition of the CoC, allocation of voting rights, treatment of operational creditors, eligibility of resolution applicants and comparison between the base resolution plan and alternatives. Creditors can also raise objections to a plan if they believe the distribution is unfair and/or the value offered is less than the value they might have received under CIRP or liquidation. While PPIRP aims to minimise litigation by pre-emptively negotiating and seeking creditor consent, issues that do crop up post-commencement can compromise its key benefits of speed and cost-effectiveness. Appeals and collateral litigation could become more relevant in cases involving various classes of creditors that contest valuation and distribution or the market viability of the chosen resolution plan.

³⁹ *Id.* § 54E.

⁴⁰ *Id.* §§ 54A, 54-I.

⁴¹ *Id.* §§ 54K(4)–54K(5).

⁴² *Id.* § 54K, Explanation II.

5.4 Limitations of the Competitive Plan Mechanism

Indian PPIRP is not a process that automatically entails a sale to a specific pre-determined buyer. The Code offers a framework for competition as per Section 54K. The resolution plan can be submitted directly without doing any harm to the rights of operational creditors where it does not affect the creditors' committee. If the CoC does not approve the base resolution plan, or if the plan makes it difficult for the operational creditors' claims to be satisfied, the Resolution Professional must solicit competing plans from prospective resolution applicants.⁴³

However, it does rely on significant market participation. Prospective applicants might have little time to assess the corporate debtor, to conduct due diligence and to come up with a feasible resolution plan. The information available and its accuracy, the eligibility requirements set for applicants, and the way the base plan is compared to competing plans can impact the competitiveness of the process. If the market doesn't react, the base resolution plan might still be the only viable commercial solution, and this will reduce meaningful price discovery.

5.5 Valuation Difficulties

The valuation of a financially distressed enterprise is inherently complex. Its assets may have substantially different values depending on whether they are valued individually, on a liquidation basis or as part of a going concern. Information asymmetry, market uncertainty, contingent liabilities, and the absence of comparable transactions may further complicate the valuation exercise.⁴⁴

International studies of pre-pack administrations have also identified concerns regarding the independence and accuracy of valuations, particularly where the sale or restructuring benefits persons connected with the existing management.⁴⁵ Similar concerns may arise in the Indian context, where the corporate debtor or its promoters prepare the base resolution plan while continuing to manage the enterprise.

An inaccurate valuation may affect the comparison between the base plan and competing plans, the treatment of secured and unsecured creditors, and the determination of whether the resolution maximizes the value of the corporate debtor. Independent valuation, adequate disclosure of assumptions, and meaningful scrutiny by creditors are therefore essential to the legitimacy of PPIRP.

⁴³ *Id.* §§ 54K(5)–54K(12).

⁴⁴ TERESA GRAHAM, GRAHAM REVIEW INTO PRE-PACK ADMINISTRATION: REPORT TO THE RT HON VINCE CABLE MP ¶ 7.46 (2014).

⁴⁵ VANESSA FINCH, CORPORATE INSOLVENCY LAW: PERSPECTIVES AND PRINCIPLES 74 (2d ed. 2009).

5.6 Conflicts of Interest and Perceived Unfairness

PPIRP is in a debtor-in-possession and creditor in control format. The Board of Directors/partners normally remain responsible for the affairs of the corporate debtor under Section 54H. Meanwhile, the Resolution Professional manages and oversees the process, and the CoC has control over key commercial decisions.⁴⁶

This will maintain the management skills and minimize disruption in business. It can also create conflicts of interest between the promoters who caused the financial difficulties and the entities that have to run the business, which will be involved in the base resolution plan. They may not always align with those of the creditors, employees or minority shareholders. Issues can be especially acute if a resolution plan would include related parties, promoter-affiliated entities or transactions that would leave the current management in control of the company following a liability reduction or restructuring. Comparative insolvency scholarship has also noted that the coalescing of creditor and managerial control may lead to conflicts over distribution, control, and the ultimate ownership of a troubled business.⁴⁷

5.7 Limited Participation of Minority Shareholders

Minority shareholders may exercise limited influence over the preparation and approval of the base resolution plan, particularly where the promoter group controls the voting power of the corporate debtor. Although the members must approve the filing of a PPIRP application through a special resolution, this requirement may not provide effective protection where the promoters hold the necessary voting majority.⁴⁸

A resolution plan may provide for alteration of share capital, dilution of existing shareholding, transfer of control, or other corporate restructuring measures. Minority shareholders may consequently suffer a substantial reduction in the value of their interests. While insolvency law necessarily prioritizes revival of the corporate debtor and satisfaction of creditor claims, adequate disclosure and compliance with applicable legal safeguards remain important for protecting minority interests.

⁴⁶ Insolvency and Bankruptcy Code, 2016, §§ 54F, 54H, 54-I.

⁴⁷ Andrea Polo, *Secured Creditor Control in Bankruptcy: Costs and Conflict* (Working Paper, 2012); K. VAN ZWIETEN, GOODE ON PRINCIPLES OF CORPORATE INSOLVENCY LAW 495 (5th ed. 2018); John Armour, Brian R. Cheffins & David A. Skeel, Jr., *Corporate Ownership Structure and the Evolution of Bankruptcy Law: Lessons from the United Kingdom*, 55 VAND. L. REV. 1699 (2003).

⁴⁸ Insolvency and Bankruptcy Code, 2016, § 54A(2)(g); Bala N. Balasubramanian & R. Anand, *Ownership Trends in Corporate India 2001–2011: Evidence and Implications* (IIM Bangalore Research Paper No. 419, 2013).

5.8 Employee Concerns

The principal objective of PPIRP is to preserve the corporate debtor as a going concern, which may protect employment more effectively than liquidation. Nevertheless, a resolution plan may provide for business reorganization, closure of unviable units, modification of employment arrangements, or workforce reduction. Employees may have little direct participation in the pre-initiation negotiations and may become aware of the proposed restructuring only after commencement of the formal process.

International studies of pre-pack administrations have identified similar concerns regarding job security, consultation, and the treatment of employee claims.⁴⁹ However, the Indian PPIRP should not be equated with a pre-pack sale in which employees are automatically transferred to a purchaser. The effect on employment depends upon the terms of the resolution plan ultimately approved by the CoC and the NCLT.

5.9 Possibility of Abuse by Promoters and Management

The debtor-in-possession structure may be misused where promoters withhold material information, manipulate valuations, favor related parties, or use the process to retain control while obtaining an excessive reduction of liabilities. There is also a risk that transactions prejudicial to creditors may be completed before commencement of PPIRP.

The Code provides safeguards against such abuse. The Resolution Professional is required to examine and, where appropriate, file applications relating to avoidance transactions and fraudulent or wrongful trading. Under Section 54G, promoters, directors, partners, and persons who authorize the submission of the list of claims or preliminary information memorandum may be liable to compensate persons who suffer loss because of material omissions or misleading information, subject to the statutory defenses. Separate penalties may also arise under Section 77A.⁵⁰

Furthermore, under Section 54J, the CoC may, by a vote of at least 66 percent, resolve to seek vesting of the management in the Resolution Professional. The resolution professional must then apply to the NCLT, which may transfer management where it finds that the affairs of the corporate debtor were conducted fraudulently or that there was gross mismanagement. These safeguards are important, but their effectiveness depends upon timely access to accurate financial information and active supervision by the Resolution Professional and the CoC.

⁴⁹ TERESA GRAHAM, GRAHAM REVIEW INTO PRE-PACK ADMINISTRATION: REPORT TO THE RT HON VINCE CABLE MP ¶¶ 7.64–7.65, 7.78–7.81 (2014).

⁵⁰ Insolvency and Bankruptcy Code, 2016, §§ 54F(2)(h), 54G(2), 66, 67A, 77A.

5.10 Effectiveness of Judicial Oversight

Unlike certain foreign pre-pack models, the Indian PPIRP is not conducted without judicial supervision. The NCLT admits or rejects the application, declares the moratorium, appoints the Resolution Professional, considers applications for vesting management, and approves or rejects the resolution plan.⁵¹ It may also terminate PPIRP or order liquidation in circumstances prescribed by the Code.

The principal concern is therefore not the absence of judicial oversight but the ability of the NCLT to exercise its functions within the statutory timelines. Delays caused by a high caseload, procedural objections, defective applications, or disputes among stakeholders may undermine the objective of completing PPIRP expeditiously. The 2026 amendment seeks to reduce avoidable rejections by permitting the NCLT to allow the CoC to rectify defects in a resolution plan before rejecting it.⁵²

5.11 Regulatory Uncertainty and Limited Jurisprudential Development

PPIRP remains comparatively less tested than CIRP. Consequently, limited judicial interpretation is available on several important issues, including the treatment of disputed claims, the degree of scrutiny applicable to a base resolution plan, the operation of the competitive plan mechanism, and the circumstances justifying the transfer of management to the resolution professional.

Several PPIRP-related provisions of the 2026 Amendment Act came into force on 26 May 2026. These include the reduction of the pre-initiation approval threshold from 66 per cent to 51 per cent, modification of the information required with an application, expansion of cooperation obligations and changes concerning approval and implementation of resolution plans. However, the provisions introducing CIIRP and the corresponding CIIRP-related restrictions under Section 54A have not yet commenced. The paper must therefore distinguish between amendments that are presently operative and provisions that have merely been enacted.

5.12 Lack of Uniformity Across Jurisdictions

Pre-packaged insolvency does not have a uniform legal design across jurisdictions. The United Kingdom largely employs pre-packaged sales within administration, while the United States recognizes pre-packaged or pre-negotiated plans under Chapter 11. Other

⁵¹ *Id.* §§ 54C, 54E, 54J, 54L, 54N.

⁵² Insolvency and Bankruptcy Code (Amendment) Act, 2026, § 37(b), inserting a proviso into § 54L(3) of the Insolvency and Bankruptcy Code, 2016.

jurisdictions follow different combinations of informal negotiation, creditor voting, and judicial confirmation.

These differences make direct comparison difficult. Criticisms derived from a private pre-pack sale cannot automatically be applied to Indian PPIRP, which is a statutory resolution-plan process. Nevertheless, comparative experience remains valuable for examining recurring concerns such as transparency, connected-party transactions, valuation, creditor participation, and judicial scrutiny.⁵³

The principal challenge for Indian PPIRP is to preserve the speed and flexibility of pre-initiation negotiation without compromising transparency, value maximization, and stakeholder protection. The statutory involvement of the Resolution Professional, CoC, and NCLT distinguishes Indian PPIRP from purely private pre-pack sales and provides important safeguards against abuse. However, concerns relating to information asymmetry, promoter influence, valuation, limited participation of operational creditors, minority-shareholder protection, and institutional delays continue to require attention.

Effective implementation requires independent valuation, accurate disclosure, active monitoring by the Resolution Professional, reasoned decision-making by the CoC, and timely judicial scrutiny. The reforms introduced through the IBC Amendment Act, 2026, may facilitate access to PPIRP and strengthen the legal effect of approved plans. Their practical success, however, will depend upon the applicable regulations, commencement notifications, and the way the amended provisions are interpreted and implemented.

6 CONCLUSION AND WAY FORWARD

The Indian PPIRP framework offers a structured alternative to CIRP for resolving the financial distress of eligible MSME corporate debtors. Its debtor-in-possession and creditor-in-control design seeks to preserve business continuity while subjecting the resolution plan to creditor approval and judicial supervision. The 2026 amendments strengthen this framework by reducing the pre-initiation approval threshold to 51 per cent, simplifying the statutory filing requirements, expanding cooperation obligations, permitting rectification of defective plans and clarifying the consequences of plan approval and liquidation.

Nevertheless, PPIRP continues to face challenges relating to limited stakeholder participation during pre-initiation negotiations, information asymmetry, valuation, promoter influence and institutional delays. The effectiveness of the process will depend upon accurate

⁵³ S. FRISBY, A PRELIMINARY ANALYSIS OF PRE-PACKAGED ADMINISTRATIONS: REPORT TO THE ASSOCIATION OF BUSINESS RECOVERY PROFESSIONALS (2007); TERESA GRAHAM, GRAHAM REVIEW INTO PRE-PACK ADMINISTRATION: REPORT TO THE RT HON VINCE CABLE MP (2014).

disclosure, independent professional supervision, commercially reasoned decisions by the CoC and timely adjudication by the NCLT.

The 2026 Amendment Act has also enacted a separate CIIRP framework. However, because Chapter IV-A has not yet commenced, CIIRP should presently be treated as a future statutory mechanism rather than an operational alternative. Further empirical study of PPIRP cases and careful implementation of the amended provisions will be necessary to determine whether the framework can achieve its objectives of speed, value maximisation and business rescue.

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CHAPTER 2

Navigating the Intersection of Insolvency and Arbitration: Understanding Jurisprudential Fissure and Tensions

ABHAY SHROTIYA* AND KESHAV KULSHRESHTHA**

The interplay between insolvency and arbitration mechanisms remains a significant topic for jurisprudential discussion and scholarship. The coexistence of both laws is best described by the US Court as a ‘Conflict of two near-polar extremes’. This variance is premised upon the contrasting and contradictory objectives of both laws. Insolvency resolution is aimed at a centralized and unified mechanism, where all the claims concerning the corporate debtor are consolidated and dealt with to provide a fresh start to a corporate debtor. Contrastingly, arbitration is a dispute resolution mechanism that is based on the principle of party autonomy, where judicial intervention is expected from nil to zero. However, complexities and confusion arise when parallel proceedings are initiated under both frameworks to govern the same entity, i.e., the corporate debtor. The conflict lies in the governing authority and nature of the law, that is, which law will prevail over the other. Through this paper, an attempt has been made by the authors to understand the complexities arising from the intersection of the two legislations. The authors’ main objective is not only to deal with these issues from a legal perspective but also to touch upon the practical challenges faced by the stakeholders. For this purpose, the paper provides an extensive analysis of the legislative schemes, judicial pronouncement, and global approaches. To have an overall understanding, the authors also underpinned the plausible implications of adopting international frameworks and concluded by emphasising the need for legislative reform. By highlighting these issues, the authors aim to bring attention to the legislative gaps that exacerbate these conflicts and make a call for clearer, more coherent solutions.

Keywords: Arbitration, Insolvency, Moratorium, Corporate Debtor, Resolution Professional.

1 INTRODUCTION

With the advent of globalization, India has witnessed significant development and an influx in foreign direct investment. To respond to such economic advancement effectively, there

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remains an underlying need to provide for a robust legal mechanism. Against this backdrop, two key legislations which have turned out to restructure and improve the ease of doing business in India are the Insolvency and Bankruptcy Code and the Arbitration Act.

Insolvency code is aimed at a centralised and unified mechanism, where all the claims concerning the corporate debtor are consolidated and dealt with to provide a fresh start to a corporate debtor. Contrastingly, arbitration is a dispute resolution mechanism that is based on the principle of party autonomy, where judicial intervention is expected from nil to zero.

Though the said legislations aim to pursue different objectives, they have indeed contributed to and turned the markets for good, as can easily be seen from the improvement in the ease of doing business in the country.¹ Despite the benefits that arose from the enactment of the said legislations, it remains unanswered how the legislations would meet their respective objectives, given a situation in which they were to interact with each other. Unfortunately, neither the Code nor the Act outlines exactly the procedure or approach that has to be followed when the said legislations are enforced simultaneously.

The conflict between Insolvency and Arbitration regimes lies in the underlying objective of the frameworks. Insolvency law aims to cater relief to the majority of stakeholders by utilising the best potential of the assets in such a way that it provides optimum returns to all the stakeholders.² This value maximisation process requires individual stakeholders to dissuade their claims against the corporate debtor³ not only for the sake of sanity in the process but also to preserve the interest of the stakeholders lowest in the hierarchy.⁴

Contrastingly, arbitration is rooted in the principle of party autonomy and minimal judicial intervention. It empowers the contracting party to autonomously decide the forum for resolving their disputes.⁵ So, essentially, the underlying policy is that if the dispute falls under the scope of the arbitration agreement, then it must only be referred to the arbitral tribunal.⁶

However, this party-driven principle is in direct conflict with the principle of consolidation of claims under the insolvency framework. Continuation of proceedings under the insolvency framework would mean that every other proceeding or case would be barred during the insolvency process due to the imposition of a moratorium. The moratorium is

¹ WORLD BANK GROUP, <https://archive.doingbusiness.org/en/rankings> (last visited Dec. 13, 2024).

² Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717–89 (1991).

³ The Insolvency and Bankruptcy Code, 2016, § 14.

⁴ INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, INSOLVENCY AND BANKRUPTCY REGIME IN INDIA: A NARRATIVE (2020), <https://ibbi.gov.in/uploads/whatsnew/2020-10-01-210733-43cms-9224c9b668aac0d6149a5d866bfb4c79.pdf> (last visited Dec. 13, 2024).

⁵ Christian Buhring-Uhle, *A Survey on Arbitration and Settlement in International Business Disputes*, in TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 25 (Christopher R. Drahozal & Richard W. Naimark eds., 2005).

⁶ ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (2004).

described as a period wherein no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, or termination of essential contracts can be instituted or continued against the Corporate Debtor.⁷ It is imposed so that a specialised and centralised authority could adjudicate upon the dispute.⁸

This raises an important question: What happens to an arbitration agreement when the matter has to be dealt with under the insolvency framework? Whether the party to an arbitration agreement, which specifically decided to refer the dispute to arbitration, would be compelled to submit their claim before the insolvency court, frustrating its very objective?

2 BREAKING THE COMPLEXITY: MAKING SENSE OF CONFLICTING SITUATIONS

2.1 Conflict between Arbitration Agreements and Insolvency Proceedings

To better understand the gravity of the matter, assume that Party A and Party B enter into a contract worth \$50 million. Considering the high stakes involved in the matter, the parties decided to refer any dispute that arises during the course of the contract to the arbitration. However, the conflict arises when B has the same contract with 20 other parties, and one of them files an insolvency petition to initiate a corporate insolvency process. Once the insolvency proceeding begins, A is not allowed to pursue his remedy through the agreed terms but through the insolvency procedure. Now a question arises: whether this overpowering of the insolvency proceeding over arbitration or to put it simply, this transition from *in-personam* (against the individual) to *in-rem* (against the world) proceeding, is legitimate within the context of both legal systems?

2.2 Competence of Insolvency Courts in Complex Disputes

The intention of referring the dispute to arbitration is not only to have a quick but an effective remedy as well. The parties, while referring the dispute to arbitration, have a specific intention in their mind that the person who is presiding to adjudicate the issue is well versed with the subject matter of the dispute, meaning thereby he would have particular expertise of the matter involved in the dispute.⁹ When the insolvency proceeding begins, the insolvency court, specifically the Resolution Professional (RP), would have the power to admit or reject the claim.¹⁰ Now, this discretion of RP to determine the validity of the claim is

⁷ BRYAN A. GARNER, BLACK'S LAW DICTIONARY (Thomson Reuters 2015) (1891); INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, <https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf> (last visited Dec. 13, 2024).

⁸ Larsen Oil & Gas Ltd. v. Petroprod Ltd., [2011] SGCA 21.

⁹ Vidya Drolia v. Durga Trading Corp., (2021) 2 SCC 1.

¹⁰ The Insolvency and Bankruptcy Code, 2016, § 25.

dependent on his ability to interpret the terms of the contract correctly, which may involve long and complex ledger accounts, timeline of events and various other things. Therefore, the question arises: whether the insolvency court is the right forum to decide these disputes. Further, this also raises questions over the powers of the resolution professional.

2.3 Cross-Border Challenges in Arbitration and Insolvency

This situation becomes more complex when Party B has some assets in a foreign jurisdiction and they form the subject matter of arbitration as well. In this scenario, the jurisdiction of the insolvency court is limited to the territorial boundaries of the nation and does not extend to foreign assets.¹¹ Now the question arises: whether the arbitral tribunal can proceed with those assets, and if so, does that frustrate the objective of insolvency proceedings? These questions require extensive analysis of the existing jurisprudence in reference to the philosophies and objectives of the law vis-à-vis the actual effect of the law.

3 INTRODUCTION TO IBC: A CHANGE IN APPROACH

In India, the Insolvency framework is regulated by the Insolvency and Bankruptcy Code, 2016 (IBC).¹² IBC came after the failure of previous laws that failed to govern the insolvency regime adequately. The IBC represents a more carefully crafted and outward-looking approach, incorporating the universally recognized parameters for efficiently resolving insolvency matters. The success of the code is evident in India's improved ranking in the World Bank - Ease of Doing Business Index.¹³ However, before exploring the achievements of the IBC, it is essential to first understand the background and the evolution of the Code.

3.1 Failure of Pre-Existing Laws

Before the introduction of IBC, India's insolvency framework was affected by inordinate delays resulting in undesirable outcomes. The earlier framework was scattered across multiple laws governing insolvency disputes, which ultimately led to failure to meet the key parameters of insolvency such as time, cost, outcome, and recovery rate.¹⁴

It is for the first time, on the recommendation of the Tiwari Committee, that the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) was introduced,¹⁵ which dealt

¹¹ Divyanshu Kumar, *Cross Border Insolvency Regime in India: Draft Part-Z Vis-à-vis the UNCITRAL Model Law*, 1 HPNLU JLBE 104 (2022).

¹² The Insolvency and Bankruptcy Code, 2016.

¹³ WORLD BANK GROUP, <https://archive.doingbusiness.org/en/rankings> (last visited Dec. 13, 2024).

¹⁴ Rajeswari Sengupta et al., *Evolution of the Insolvency Framework for Non-Financial Firms in India* (Indira Gandhi Institute of Development Research), <http://www.igidr.ac.in/pdf/publication/WP-2016-018.pdf> (last visited Dec. 13, 2024).

¹⁵ Sick Industrial Companies (Special Provisions) Act, 1985.

with the insolvency of corporates. Unfortunately, SICA didn't survive long as, firstly, it allowed the debtor to take charge of a company and declare sick; secondly, it tried to revive the sick companies in all situations, including where it was not possible; and lastly, the tribunal that was set up under it was not efficient in dealing with the increased number of cases.¹⁶

To address this void created by the failure of SICA, the government enacted the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBFI)¹⁷, and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI)¹⁸ on the recommendation of the Narasimham Committee I¹⁹ and II,²⁰ respectively. However, these laws further added a layer of complexities by creating multiple legislation and forums to deal with interrelated aspects of insolvency,²¹ consequently leading to further delays in resolving insolvency disputes.

Finally, on the recommendation of the Report of the Bankruptcy Law Reform Committee (BLRC Report)²², the current Insolvency and Bankruptcy Code was framed, which is now working as an established code to deal with all aspects of Insolvency.

3.2 IBC in Focus: Achievements So Far

The newly enacted IBC is a comprehensive, self-contained code that aims to align India with the globally recognised insolvency standards by adopting certain internationally accepted parameters, which can be seen below:

3.2.1 Time

It is a crucial factor in insolvency proceedings as delays can lead to the erosion of debtor's assets and reduce the chances of business revival. According to World Bank data from 2016²³, the average time taken for resolving insolvency under the previous mechanism was 4.3 years, while as per the latest IBBI report, this time has been reduced to an average of

¹⁶ *Madras Petrochem Ltd. v. Bd. for Indus. & Fin. Reconstruction*, (2016) 4 SCC 1.

¹⁷ The Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

¹⁸ The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

¹⁹ INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, <https://ibbi.gov.in/uploads/resources/Narasimham%20Committee%20I-min.pdf> (last visited Dec. 13, 2024).

²⁰ COMM. ON BANKING SECTOR REFORMS, REPORT OF THE COMMITTEE ON BANKING SECTOR REFORMS (1998), <https://the1991project.com/sites/default/files/2023-07/1998%20Banking%20Sector%20Reforms%20Report%20-%20Narasimham%20II.pdf> (last visited Dec. 13, 2024).

²¹ *ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta*, (2019) 2 SCC 1.

²² INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, https://ibbi.gov.in/BLRCReportVol1_04112015.pdf (last visited Dec. 13, 2024).

²³ BISHWAJIT DUBEY ET AL., CROSSROADS OF INSOLVENCY LAW AND ARBITRATION 143–94 (2022).

1.6 years.²⁴ This shows the effectiveness of the reforms and an overall improvement in India's financial resolution framework.

3.2.2 Cost

Minimizing the cost of insolvency is vital for maintaining the debtor's financial health.²⁵ The data by IBBI suggest a notable decline in the average cost of the resolution, which is now standing at 0.73% of the resolution value and 1.23% in cases of liquidation.²⁶ This lower insolvency cost would encourage the business to opt for insolvency proceedings over liquidation.

3.2.3 Outcome

The ultimate outcome of any insolvency framework should be to revive and reorganise the companies facing financial catastrophe. As per the data, since the inception of IBC 2016, 67% of the total CIRP has been successfully closed. A successful resolution not only aids in recovering the distressed business but also protects jobs, preserves assets, and ultimately benefits the overall economy.²⁷

3.2.4 Recovery Rate

It reflects the quantum of successful repayment of debt to creditors and the effective preservation of the debtor's assets value. The data indicates that the on-average recovery rate is around 32 per cent of admitted claims and 168 per cent of the liquidation value is resolved under IBC.²⁸ High recovery rates indicate a well-functioning insolvency system, balancing creditor interests and debtor rehabilitation.

²⁴ Neeti Shikha & Urvashi Shahi, *Assessment of Corporate Insolvency and Resolution Timeline*, INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (Feb. 2021), <https://ibbi.gov.in/uploads/publication/2021-02-12-154823-p3xwo-8b78d9548a60a756e4c71d49368def03.pdf>; MS Sahoo, *Moving Up in 'Ease of Resolving Insolvency'*, INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (Mar. 2020), <https://ibbi.gov.in/uploads/whatsnew/faf3af70524e6c7ccf0b6762ab70216c.pdf>.

²⁵ Jason Allen & Kiana Basiri, *The Impact of Bankruptcy Reform on Insolvency Choice and Consumer Credit*, BANK OF CANADA (May 2016), <https://www.bankofcanada.ca/wp-content/uploads/2016/05/swp2016-26.pdf>.

²⁶ INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, <https://ibbi.gov.in/uploads/publication/b4ce3516920836e9ff9b1e816137bf97.pdf> (last visited Dec. 13, 2024).

²⁷ Medha Shekar & Anuradha Guru, *Theoretical Framework of Insolvency Law*, in INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, INSOLVENCY AND BANKRUPTCY REGIME IN INDIA: A NARRATIVE 45 (2020), <https://ibbi.gov.in/uploads/resources/158497d3735f154918648288e56dfecb.pdf>.

²⁸ M.P. Ram Mohan & Balagopal Gopalakrishnan, *Report of Study on Effectiveness of the Resolution Process: Firm Outcomes in the Post-IBC Period*, INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (Aug. 2023), <https://ibbi.gov.in/uploads/whatsnew/59f737b213b4700cc16428aefd62869a.pdf>.

4 MORATORIUM AND ITS APPLICABILITY IN DIFFERENT STAGES OF ARBITRATION

The moratorium under the IBC is defined as a period during which no judicial proceedings for recovery, enforcement of security interests, sale or transfer of assets, or termination of essential contracts may be initiated or continued against the Corporate Debtor.²⁹ Its origin can be traced back to Section 446(1) of the Companies Act, 1956³⁰ which provided that no person can initiate any legal proceedings against the company after the winding-up process has been initiated or an official liquidator is appointed.

Further, according to the Hon'ble Supreme Court³¹ and the BLRC report, the fundamental intention behind imposing a moratorium is to provide a “calm period or breathing spell” in order to create a plan for maximizing the value of the corporate debtor.³²

A moratorium protects the corporate debtor from any fresh suits or proceedings that are pending in any other forum. However, the term ‘proceedings’ mentioned under Section 14 does not bar all proceedings against the corporate debtor. This has been reiterated many times by the Supreme Court and, more specifically, by the Hon'ble Delhi High Court in *Power Grid Corporation of India v. Jyoti Structure Ltd.* The court, in the latter, departed from the general view that all proceedings are barred, holding that Section 14(1)(a) does not indicate a blanket prohibition on all proceedings as the word proceeding is not preceded by the term all.³³

4.1 Understanding the General Effect of the Moratorium in Different Stages of Arbitration

4.1.1 Pre-Insolvency

The arbitration proceedings that have no impact on the assets of the corporate debtor may continue as they may lead to the maximization of the assets of the corporate debtor³⁴. In cases where a counterclaim is initiated and filed by the corporate debtor, such disputes can also be arbitrated, even after the moratorium is imposed, subject to the award being in favour of the corporate debtor.³⁵ This demonstrates that arbitration proceedings are permitted

²⁹ BRYAN A. GARNER, BLACK'S LAW DICTIONARY (Thomson Reuters 2015) (1891); INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, <https://ibbi.gov.in/uploads/whatsnew/e42fdce80e99d28b683a7e21c81110e.pdf> (last visited Dec. 13, 2024).

³⁰ The Companies Act, 1956, § 446(1).

³¹ *Innoventive Indus. Ltd. v. ICICI Bank*, (2018) 1 SCC 407.

³² INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, https://ibbi.gov.in/BLRCReportVol1_04112015.pdf (last visited Dec. 13, 2024).

³³ *Power Grid Corp. of India v. Jyoti Structure Ltd.*, 2017 SCC OnLine Del 12189.

³⁴ *SSMP Indus. Ltd. v. Perkan Food Processors Pvt. Ltd.*, 2019 SCC OnLine Del 9339.

³⁵ *Id.*

when they are beneficial to the corporate debtor. If the outcome of these proceedings is unfavourable to the corporate debtor, such an award will fall within the teeth of the moratorium.

4.1.2 *After the Commencement of Insolvency*

The fate of the arbitration award hinges on whether it is in favour of the corporate debtor or the opposite party. In the *Power Grid case*,³⁶ the court held that if an award is not against the basic principles that a moratorium seeks to uphold, then such proceedings may be continued. Furthermore, an award can also be challenged under Sections 34³⁷ and 37 of the Arbitration & Conciliation Act³⁸, provided such a challenge is in favour of the corporate debtor, and the continuation of the proceeding does not result in harm to the corporate debtor.

4.2 Moratorium Mandate: Judicial Interpretation and Its Conflicting Effects on Arbitration Proceedings

The courts have carved out exceptions to the general moratorium rule, allowing proceedings that either benefit the corporate debtor or are *in-personam* in nature to be initiated or continued.³⁹

In *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. & Ors.*⁴⁰, the Supreme Court of India questioned the arbitrability of insolvency disputes. The court held that those matters that are essentially *in-rem* are excluded from adjudication by a private forum i.e. Arbitral tribunal. However, in the case of *Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund & Ors.*⁴¹ the Court clarified its stance and held that when a case is in transition from an *in-personam* proceeding to an *in-rem* proceeding, a case can be filed against the company that is yet to become insolvent as a mere pendency of the application for the initiation of insolvency cannot be construed as *in-rem proceedings*. This stance was also accepted by the Supreme Court in the *Swiss Ribbons v. Union of India*⁴² where the court held that until claims of the creditors are received and a COC is constituted, the proceedings will remain an *in-personam* proceedings.

³⁶ *Power Grid Corp. of India v. Jyoti Structure Ltd.*, 2017 SCC OnLine Del 12189.

³⁷ The Arbitration and Conciliation Act, 1996, § 34.

³⁸ *Id.* § 37.

³⁹ BISHWAJIT DUBEY ET AL., CROSSROADS OF INSOLVENCY LAW AND ARBITRATION 143–94 (2022).

⁴⁰ *Booz Allen & Hamilton Inc. v. SBI Home Fin. Ltd.*, (2011) 5 SCC 532.

⁴¹ *Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund*, (2021) 6 SCC 436.

⁴² *Swiss Ribbons v. Union of India*, (2019) 4 SCC 17.

Further, the Supreme Court of India in *Vidya Drolia & Ors. v. Durga Trading Corporation*,⁴³ laid down the fourfold test for the arbitrability of a dispute in India. It held that those disputes that arise from *in-rem* proceedings could not be arbitrated. However, it has also been clarified that disputes of *in-personam* nature, arising from *in-rem* disputes can be arbitrated. In other words, to connect this with insolvency proceedings, it can be comprehended that those disputes and concerns that are *in-personam* in nature or those *in-personam* matters that arise from *in-rem* proceedings can be arbitrated.

Furthermore, the court in the case of *Jharkhand Bijli Vitran Nigam Ltd. v. IVRCL Ltd & Anr.*⁴⁴ introduced another exception to the general moratorium mandate under the IBC. Departing from the ruling in the *Alchemist Asset Reconstruction Company Ltd. case*⁴⁵, which held that arbitration could not continue during a CIRP, the court allowed the continuation of arbitration proceedings that commenced after the initiation of CIRP. To arrive at such a conclusion, the court analysed the scope and purpose of the moratorium and determined that the moratorium doesn't bar the continuation of those arbitration proceedings where claim and counterclaim have been filed, subject to an award being passed in favour of the corporate debtor and requiring payment to the corporate debtor. In contrast, if the award mandates payment to the opposite party, it will not be enforceable. In such a scenario, the opposite party must file the claim before a resolution professional.

Conclusively, it is clear from the above judgments that there is no strict applicability of the mandate as defined under Section 14 of IBC on arbitration proceedings. The judiciary has, time and again, carved out the exceptions where it has allowed arbitration to continue even after the company was undergoing CIRP and held that those proceedings that benefit the corporate debtor, maximise the value of corporate debtor assets, and do not harm the corporate debtor are allowed to continue.⁴⁶

4.3 Dual Nature of Moratorium: Conflicting Effects on Arbitration

The dual nature of the moratorium becomes evident during the enforcement of the arbitration award. Consider a scenario where an arbitration proceeding is ongoing between parties A and B, and during the process, Company B enters into insolvency. Now, if the result of the arbitration proceedings is in favour of Party A, then the award cannot be enforced due to the moratorium. However, if the said award is in favour of B, i.e. the corporate debtor, it can be enforced against A as this would maximize the value of the corporate debtor's assets.

⁴³ *Vidya Drolia v. Durga Trading Corp.*, (2021) 2 SCC 1.

⁴⁴ *Jharkhand Bijli Vitran Nigam Ltd. v. IVRCL Ltd.*, 2018 SCC OnLine NCLAT 891.

⁴⁵ *Alchemist Asset Reconstruction Co. v. M/s Hotel Gaudvan Pvt. Ltd.*, (2018) 16 SCC 94.

⁴⁶ *Power Grid Corp. of India v. Jyoti Structure Ltd.*, 2017 SCC OnLine Del 12189.

This makes the entire arbitration proceeding futile and ineffective for A, as even if an award is passed in its favour, no efforts can be made to enforce it due to the imposition of a moratorium. This problem is further aggravated in cases where A is an international party to the said agreement. While the moratorium is designed to protect the corporate debtor and ensure asset maximisation, it inadvertently undermines the rights of other parties who may invest considerable time and effort in legal proceedings only to find their efforts nullified by the moratorium. This imbalance poses a significant risk to international commercial relations and impacts the credibility of the arbitration agreements involving insolvent Indian parties.

5 ADMISSION OR ADJUDICATION OF THE CLAIM?

In the preceding paragraphs, a substantial discussion has already been undertaken on the impact of the moratorium on arbitration proceedings. Once the CIRP proceeding is initiated, a public announcement shall be made under Section 15 of the Insolvency and Bankruptcy Code,⁴⁷ requiring every potential creditor to submit their claims before RP under Section 18,⁴⁸ who in turn will assess the validity of every claim.⁴⁹ However, this power to determine the validity of the claim has been a major ground of contestation across various forums where it has been repeatedly held that the RP possesses administrative, not adjudicatory, power.

In the combined appeal filed before the Appellate Tribunal in the matter of *SREI Infrastructure Finance Ltd. vs. Kannan Tiruvengandam*⁵⁰ and *M/s. Prasad Gempex vs. Star Agro Marine Exports Pvt. Ltd. & Ors.*⁵¹, the issue was raised regarding whether the 'RP' has the power to adjudicate the creditor's claim.

By referring to the landmark case of *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.*⁵² (Swiss Ribbons), the Supreme Court thoroughly examined these issues and held that the RP's duty is only limited to vetting and verifying the claims and does not include adjudicatory authority. To arrive at such a conclusion, the court compared the power of the RP to a liquidator and held that, unlike a liquidator, the RP could not act without the approval of the Committee of Creditors (COC). Thus, the RP serves merely as a facilitator in CIRP,

⁴⁷ The Insolvency and Bankruptcy Code, 2016, § 25.

⁴⁸ *Id.* § 18.

⁴⁹ BRYAN A. GARNER, BLACK'S LAW DICTIONARY (Thomson Reuters 2015) (1891); INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, <https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf> (last visited Dec. 13, 2024).

⁵⁰ *SREI Infrastructure Fin. Ltd. v. Kannan Tiruvengandam*, Company Appeal (AT) (Insolvency) No. 591 of 2018 (NCLAT Feb. 1, 2019).

⁵¹ *M/s Prasad Gempex v. Star Agro Marine Exports Pvt. Ltd.*, 2019 SCC OnLine NCLAT 368.

⁵² *Swiss Ribbons v. Union of India*, (2019) 4 SCC 17.

whose administrative function will be overseen by the COC and can be replaced by the COC.

Further, in *Grasim Industries Limited and Edelweiss Asset Reconstruction Company Limited v. Tecpro Systems Limited*,⁵³ the NCLT, Principal Bench, New Delhi, held that ‘a perusal of Regulation 13 of the CIRP Regulation makes it clear that RP is under a statutory duty to verify each and every claim and maintain the list of creditors containing their names and amount claimed.’⁵⁴

However, what has been overlooked by the Court here is that the approval of COC is only required in certain matters specified in section 28 of the IBC.⁵⁵ The RP does not need any authorisation to make a precise estimate of the amount to be claimed. Since, there lies a significant leeway for the RP to exercise its discretion while investigating, inquiring and verifying any claim made by the creditor, therefore making the power adjudicatory in nature and essence.

Even the contention that RP can be replaced by COC does not hold any ground because such a replacement can only be triggered when, in the opinion of COC, such acceptance or rejection of the claim is against the interest of the COC.⁵⁶ Such an exercise of reviewing the actions of the RP is not undertaken by the COC on a continuous and routine basis but rather only when the necessary circumstances arise. Thus, this power of administration by the COC does not really maintain any check on RP whether it accepts or rejects the genuine claim of the creditors.

Further, going back to the example discussed in 2.1, when the moratorium hits the arbitration proceeding, Party A would then be required to submit its claims before the RP. The RP, to ascertain the amount claimed, would first need to determine whether there has been a breach of the underlying contract, and only then would the RP decide on the quantum of the claim. In this process, while deciding on the breach of the contract, the RP, not de jure but de facto, becomes an arbitrator. The issue here is that the RP may or may not have the particular expertise to decide upon the dispute. Deciding on the breach requires extensive analysis and interpretation of the terms of the contract, which essentially falls into the domain of the arbitrator’s expertise rather than RP’s. Therefore, this de facto power of RP to decide on the claim is ultra vires to the IBC and goes against the legislative intent. The IBC does not envisage the RP acting in a quasi-judicial or Arbitral capacity, and allowing such authority to do so will contradict the framework and purpose of the code.

⁵³ *Grasim Indus. Ltd. v. Tecpro Sys. Ltd.*, CA-19 (PB)/2018 in (IB)-197(PB)/2017.

⁵⁴ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, reg. 13, No. 004, 2016, <https://ibbi.gov.in/uploads/legalframework/2020-08-17-234040-pjor6-59a1b2699bbf87423a8afb5f5c2a0a85.pdf>.

⁵⁵ The Insolvency and Bankruptcy Code, 2016, § 28.

⁵⁶ *Id.* § 21.

Probably what could be a better option, in the opinion of the authors, is to allow the simultaneous proceeding of arbitration during CIRP to the extent of deciding the breach. It is not the suggestion of the authors to allow the arbitrator to decide the amount of debt, but rather the presence of the debt. Once the existence of the debt is established, determining the quantum of the debt would then rightfully come under the ambit of RP. In this way, the objective of both laws could be upheld, and the desired outcome would be achieved without unnecessarily encroaching on the jurisdiction of the other authority. By this approach, a balance could be struck between both the legislations, thereby giving effect to the legislative intent and upholding the objective of the laws.

6 CHALLENGES OF FOREIGN-SEATED ARBITRATION UNDER INDIAN INSOLVENCY LAW

As discussed under the first heading, there exists an inherent conflict between the insolvency and arbitration proceedings. This conflict is further escalated in cross-border disputes, especially where the pool of creditors involves both Indian and foreign parties or where the corporate debtor has an international presence. In foreign seated arbitration, the moratorium can only be applicable if the respective governments have a reciprocal agreement with each other.⁵⁷ However, as of date, India has not signed such a reciprocal agreement with any foreign country.⁵⁸

With this background, an issue arises regarding the applicability of the moratorium under Section 14 of the IBC on foreign assets,⁵⁹ as Section 1 of the IBC⁶⁰ restricts the applicability of the code within India's territory. While Section 238 of IBC,⁶¹ with its overriding effect on other proceedings, clarifies that the moratorium would be applicable to the arbitration proceedings conducted in India, there remains a significant void when it comes to foreign seated arbitration in a cross-border dispute.

In a foreign seated arbitration, the whole purpose of the moratorium vitiates due to the territorial restrictions and limitations in the scope of the code. However, the courts have carved out an exception to this, particularly when a connection exists between the arbitral award and the Indian laws, such as the enforcement of an award or involvement of Indian

⁵⁷ *Id.* § 234.

⁵⁸ Alipak Banerjee, *IBA Toolkit on Insolvency and Arbitration Questionnaire National Report of India*, INTERNATIONAL BAR ASSOCIATION (2021), <https://www.ibanet.org/MediaHandler?id=7875944E-D52D-48D1-92F5-BD33E84753E2>.

⁵⁹ The Insolvency and Bankruptcy Code, 2016, § 14.

⁶⁰ *Id.* § 1.

⁶¹ *Id.* § 238.

assets. In such case, Section 14 of the IBC can be invoked, irrespective of the absence of the reciprocal agreement.⁶²

This stance was affirmed in the case of *Videocon Industries Limited vs Union of India*,⁶³ where the court held that a moratorium cannot be applied to foreign seated arbitration in cases where there exists no connection between the award and its enforcement with the Indian law or assets.

Despite these judicial exceptions, the void continues to exist as the multinational companies contracting with Indian companies strategically choose to opt for foreign seated arbitration to avoid the applicability of the moratorium. This situation will put the corporate debtor in a situation where its fate will be dependent upon the chosen seat of arbitration vitiating the very purpose of the moratorium and IBC, 2016.

This situation further places the Indian creditors on an unequal footing with the international parties since if the award is passed against the corporate debtor, any recovery made against assets located outside India will deplete the overall value of the assets of the corporate debtor. For instance, consider an agreement between A and B, where B is a foreign entity. As per the terms of the contract, B is duty-bound to supply raw materials to A (a party in India). The said agreement also contained an arbitration clause according to which the seat of arbitration was decided to be the Netherlands. Assume that a contractual dispute arises between A and B, subsequently leading to the formation of an arbitral tribunal and parallelly, A goes into bankruptcy in India, and a moratorium is imposed. Since the scope of IBC is limited to territories of India, the moratorium in this instance will not be applicable to B, and he can very well continue with the Arbitration.⁶⁴ Such a hypothetical situation is similar to the controversy that arose during the Jet Airways insolvency.⁶⁵

Further, for the enforcement of the award, the arbitral tribunal can also create a charge against the assets of the corporate debtor lying in foreign territories, ultimately leading to unequal treatment between B as an International creditor and the other domestic creditors.

To address this void, the authors suggest here that the government take the initiative in entering into reciprocal agreements like those of Double Taxation Avoidance Agreements with the countries having key business relations with India. Such initiatives can further strengthen economic ties between the two nations and facilitate the ease of doing business. This would also mitigate the uncertainties and complexities faced by international companies and would ensure more equitable treatment to all creditors.

⁶² Vitol SA v. Asian Natural Resources (India) Ltd., (2018) 145 SCL 30.

⁶³ Videocon Indus. Ltd. v. Union of India, (2011) 6 SCC 161.

⁶⁴ Ashapura Minechem Ltd. v. Armada (Singapore) Pvt. Ltd., 2016 SCC OnLine Bom 5326.

⁶⁵ Jet Airways (India) Ltd. v. State Bank of India, 2019 SCC OnLine NCLAT 1216.

7 GLOBAL APPROACHES TO RESOLVING ARBITRATION AND INSOLVENCY CONFLICTS

The conflict between Arbitration and Insolvency legislation is not unique to India, and countries across the globe face a similar issue. However, some jurisdictions, including the USA and the UK, have so far been successful in addressing this issue.⁶⁶ The solution is based on the idea of segregating the disputes between two segments: where one set falls within the exclusive domain of the Insolvency Courts, while the other can still continue to be adjudicated by the relevant forum during the insolvency proceeding.⁶⁷ This method effectively minimises the scope of the collision between two legal frameworks.

Moreover, the exact approach to segregate the issues may vary from country-to-country basis, but each method ultimately upholds the basic idea of providing clarity on the jurisdictional boundaries between both legislations. These approaches can broadly be classified as:

7.1 Creating a Distinction between Core and Non-Core Matters

This approach advocates for creating a distinction between core and non-core matters where core matters are directly related to the insolvency proceedings and corporate debtor debt-paying ability. On the other hand, non-core matters are those that do not have any bearing on the corporate debtor's estate or his ability to discharge his financial liabilities.

Moving on similar lines, the USA has adopted a test called the McMahon test⁶⁸ to determine the arbitrability of insolvency matters. The test stipulates that when an issue does not stem from the initiation of insolvency proceedings but arises from an agreement made prior to insolvency and would have occurred independently of the insolvency, then it is eligible for arbitration. Applying the same test in *Northwestern Corporation v. National Union Fire Insurance Company of Pittsburgh, P.A.*⁶⁹ the U.S. Bankruptcy Court held that bankruptcy courts do not have the discretion to decline to stay noncore proceedings in favour of arbitration.

⁶⁶ BISHWAJIT DUBEY ET AL., CROSSROADS OF INSOLVENCY LAW AND ARBITRATION 143–94 (2022).

⁶⁷ Bahram N. Vakil et al., *To Adjudicate or Not Adjudicate: Conflict of Jurisdiction Between NCLT and Civil Courts*, AZB & PARTNERS (June 22, 2022), https://www.azbpartners.com/bank/to-adjudicate-or-not-adjudicate-conflict-of-jurisdiction-between-nclt-and-civil-courts/#_edn3.

⁶⁸ *Shearson Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987).

⁶⁹ Bahram N. Vakil et al., *To Adjudicate or Not Adjudicate: Conflict of Jurisdiction Between NCLT and Civil Courts*, AZB & PARTNERS (June 22, 2022), https://www.azbpartners.com/bank/to-adjudicate-or-not-adjudicate-conflict-of-jurisdiction-between-nclt-and-civil-courts/#_edn3.

7.2 Adjudicating the Dispute Based on In Rem and In Personam Nature

Under this approach, the segregation is required to be done based on the nature of the claims. If the claim is only against the corporate debtor and not in any way can affect the interest of the third party, then such a claim must be allowed to proceed under the respective forums. In the Insolvency context, essentially, till the time, a proceeding determining the liability of the corporate debtor is an *in personam* proceeding.⁷⁰ However, the moment the proceeding for enforcing such liability begins, it becomes an *in rem* proceeding since it stands to impact all the other creditors. This approach also fits well with the principle of *Erga Omnes*, i.e. disputes affecting third parties are not arbitrable.⁷¹

7.3 Adjudicating the Dispute Based on Its Impact on the Corporate Debtor

As per this approach, only those disputes that are prejudicial to the corporate debtor or could affect the dissipation of the assets to the detriment of the creditors must not be allowed to proceed. However, if the dispute includes claims that, if resolved in favour of the corporate debtor, could positively enhance the financial health of the corporate debtor, then such dispute must be allowed to proceed within an originally designated forum. The same rationale applies at the stage of enforcement of the claim, where such enforcement should only be allowed if it is in favour of a corporate debtor.

None of the above approaches has been statutorily incorporated in the recently enacted IBC. However, the judiciary has made efforts to give effect to these principles by giving a purposive interpretation to the statute. The Indian Courts, time and again, held in several cases that proceedings which do not adversely impact the estate of the debtor or harm the interests of the creditors can continue during CIRP.

The Supreme Court, in the case of *Gujarat Urja Vikas Nigam Limited v. Amit Gupta & Ors.*,⁷² to some extent, acknowledges the difference between core and non-core matters. It was held that:

“... to the insolvency of the Corporate Debtor. However, in doing so, we issue a note of caution to the NCLT and NCLAT to ensure that they do not usurp the legitimate jurisdiction of other courts, tribunals and fora when the dispute is one which does not arise solely from or relating to the insolvency of the Corporate Debtor. The nexus with the insolvency of the Corporate Debtor must exist.”

⁷⁰ Shearson Am. Express Inc. v. McMahon, 482 U.S. 220 (1987).

⁷¹ Vidya Drolia v. Durga Trading Corp., (2021) 2 SCC 1.

⁷² Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta, (2021) 7 SCC 209.

Further, the Court clarified that the power given to NCLT under Section 60(5)(c)⁷³ constitutes a 'residuary jurisdiction' provision enabling the tribunal to adjudicate all the disputes pertaining to facts arising from or in relation to the insolvency process.

From the above observation, it can be reasonably deduced that the power of the Insolvency Tribunal is only limited to the cases related to the Insolvency process. Therefore, any claim against the corporate debtor, though not affecting the CIRP in any manner, can continue to be adjudicated by the other authorities (including arbitration), which originally had jurisdiction over the subject matter.

Thus, the Apex Court essentially delineates the core matters as those where the preservation of the value of the corporate debtor or maintaining its 'going concern' is directly in relation. While non-core matters are those where the subject action is unrelated to the insolvency or the action is unlikely to cause the liquidation of the corporate debtor.

Further, the glimpse of approaches 7.2 and 7.3 can also be visible in the judgments of the Supreme Court in *Vidya Drolia*,⁷⁴ *Booz Allen*⁷⁵ and of the Delhi High Court in *Power Grid*⁷⁶, as discussed in the fourth head. Through the analysis of the above-stated judgments, it can be reasonably deduced that the judiciary here seems to be carving out exceptions from the general rule i.e. no other proceeding must be initiated or continued during the CIRP, by giving purposive readings to statutes. The Indian judiciary is already on the path of harmonising and reconciling the legal framework between both legislations, and it will be no surprise if, in future, there are more direct implementations of these approaches.

These approaches align with the UNCITRAL Model Law on Cross-Border Insolvency.⁷⁷ Article 20 of the model law imposes an automatic stay on all the proceedings during insolvency, which overrides the parties' agreement to arbitrate for the sake of the insolvency process. However, the Model law allows the State the flexibility to introduce exceptions or additional rules, enabling them to accommodate the complexities of international arbitration more effectively.

⁷³ The Insolvency and Bankruptcy Code, 2016, § 60(5)(c).

⁷⁴ *Vidya Drolia v. Durga Trading Corp.*, (2021) 2 SCC 1.

⁷⁵ *Booz Allen & Hamilton Inc. v. SBI Home Fin. Ltd.*, (2011) 5 SCC 532.

⁷⁶ *Power Grid Corp. of India v. Jyoti Structure Ltd.*, 2017 SCC OnLine Del 12189.

⁷⁷ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, MODEL LAW ON CROSS BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION (2014), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf>.

8 PROBABLE DRAWBACKS AND CONSEQUENCES

No analysis is complete without acknowledging the plausible drawbacks of the argument raised. It is essential to briefly discuss the probable implications of applying the above-discussed approaches in the context of the Indian legal framework.

Firstly, there cannot be a second thought in the argument that frequent use of arbitration during insolvency proceedings would significantly affect the timebound nature of CIRP proceedings. For instance, if arbitration is allowed to be initiated at a later stage of the insolvency process, then the insolvency court would not be in a position to conclude the insolvency process in the stipulated time, ultimately frustrating the overall effectiveness of the process.

Secondly, cost-effectiveness is one of the objectives behind the introduction of IBC. Permitting simultaneous arbitration proceedings would unnecessarily prolong the insolvency resolution process, which in turn would also increase the cost associated with the CIRP process, ultimately putting additional financial strain on the already debt-ridden corporate debtor.

Thirdly, a successful resolution is contingent upon the RP's ability to preserve and protect the value of assets of the corporate debtor. However, if the RP is occupied with defending the suits and proceedings, then the overall outcome of the process would be sacrificed.

Lastly, the negative impact on the time, cost and outcome would drastically affect the overall recovery rate of the company, which would further diminish India's global ranking in the Ease of Doing Business index.

9 CONCLUSION AND WAY FORWARD

Throughout the article, the authors analyse the intersection between the legal framework of Arbitration and IBC. From the above discussion, it becomes evident that there lies a significant gap between the legislative intent and ground reality. Implementing the mandate of the moratorium in its absolute sense is neither feasible nor practical, considering the legal and operational challenges that arise during the insolvency process. To address these challenges globally, various principles have been developed. However, in the authors' view, it would be imprudent to directly apply these approaches within the Indian framework as there exists a substantial difference between India and other jurisdictions in terms of legal infrastructure, multiplicity of legal avenues and established hierarchy among courts. Rather, a prudent approach for India would be to incorporate a calculated and careful change which is adaptable to the requirements of the Indian legal system. Most importantly, this reform

should come from the Parliament rather than the court. Only then will it hold the true value in preserving the fundamental constitutional principle of ‘Separation of Powers’.

* * *

CHAPTER 3

Addressing the Unaddressed: An Analysis of the Confidentiality Void under Section 235 of the IBC in India's Cross-Border Insolvency Regime

SHEKHAR PATHAK* AND ABHIJEET SINGH CHOURE**

*India's Insolvency and Bankruptcy Code, 2016, has not yet incorporated the UNCITRAL Model Law on Cross-Border Insolvency, 1997. Meanwhile, Sections 234 and 235 are stopgap measures to allow international cooperation. Section 234 allows for reciprocal arrangements with foreign states to authorise Indian courts to issue letters of request for cross-border assistance with assets or evidence. No such arrangements have been established as yet. More importantly, Section 235, to make such requests operational, is devoid of crucial procedural protections, particularly for sensitive commercial and personal information being transferred transnationally. This is not simply a lacuna in practice; it is one of principle. Indian law has long recognised confidentiality as an equitable obligation. Courts in cases like John Richard Brady and Urmi Juvekar have protected technical and creative information even in the absence of express statutory backing. Globally, other jurisdictions have enacted such protection. For example, the UK in *In Re Farfetch Ltd.*, limited cross-border disclosure by way of confidentiality undertakings. The U.S., under §107(b) of the Bankruptcy Code, permits protective orders to prevent commercial harm. To bridge this gap, this paper proposes the enactment of a "Protective Protocol" pursuant to Section 235. It encompasses: first, clear statutory mandate for confidentiality orders; second, stepped disclosure standards ("good cause" and "compelling reasons"); third, mandatory confidentiality provisions with automatic sealing; fourth, procedural rules for sealing dispositive documents by affidavit and judicial balancing tests; and lastly, provisions to quash third-party subpoenas involving protected information.*

Keywords: Cross-Border Insolvency, Confidentiality Protective Protocol, Section 235, Insolvency and Bankruptcy Code, 2016

1 INTRODUCTION

Imagine that the firm named Xenon Auto Ltd., an automotive parts-maker with ₹4,200 crores worth of debt, finds its way into the Corporate Insolvency Resolution Process

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(“CIRP”) under the Insolvency and Bankruptcy Code, 2016 (“IBC”). The enterprise has two overseas subsidiaries, namely, Xenon GmbH in Germany and Xenon Thai Co. in Thailand, both of which face insolvency and court-supervised rehabilitation under the laws prevailing in each territory. Pursuant to an assumed reciprocal agreement, the Indian Resolution Professional (“RP”) resorts to Section 235 with the intention of coordinating with overseas courts. The RP, however, finds himself face-to-face with cross-conflicting confidentiality requirements. German jurisprudence mandates liberal disclosure in cross-border insolvency cases, including proprietary manufacturing information, aluminium alloy compositions, and sophisticated EV technology. In the meantime, the Thai legal regime prescribes comprehensive group-level financial disclosure, divulging cost structures, vendor arrangements, and confidential price terms.

In this hypothetical situation, the RP finds it difficult to ensure that such commercially confidential information, once divulged, will not be misused or made public, particularly by applicants with connections to rival foreign firms that stand to benefit competitively. The scenario presents several important questions. How should an RP determine whether the level of confidentiality in an overseas court is sufficient? Must Section 235 require procedural protections, like sealing orders or redaction procedures, prior to sending sensitive information abroad? How should the RP weigh the legal obligation to disclose against the obligation to maintain trade secrets and commercial privacy across borders? What accountability procedures should exist if sensitive information shared with court-to-court cooperation subsequently becomes leaked or misused?

Insolvency process, per se, as the Singapore Court of Appeal held in *Larsen Oil and Gas Pte Ltd. v. Petroprod Ltd.*, “is a collective statutory proceeding involving the public centralisation of disputes with the intention of achieving economic efficiency and optimum returns for creditors.”¹ Even as, in *SRM Exploration Pvt. Ltd. v. N & S & N Consultants S.R.O.*, the court noted that the world is getting smaller these days, with cross-border commercial activity increasingly becoming the order of the day.² The consequence was that each corporate insolvency matter proceeded under the glare of immediacy and uncertainty, where the existence of an entire enterprise, along with thousands of jobs, rested in the court’s hands. Moreover, with the point clear that foreign bankruptcy decrees had no direct effect upon Indian proceedings, as the Supreme Court held in *Y. Narasimha Rao v. Y. Venkata Lakshmi*,³ India was yet to advance the cause of adopting the UNCITRAL Model Law on Cross-Border Insolvency, 1997 (“Model Law”). However, the judgment in *Jet Airways (India) Ltd.*

¹ *Larsen Oil & Gas Pte Ltd. v. Petroprod Ltd.*, [2011] SGCA 21 (Sing.).

² *SRM Exploration Pvt. Ltd. v. N & S & N Consultants S.R.O.*, 2012 SCC OnLine Del 1714.

³ *Y. Narasimha Rao v. Y. Venkata Lakshmi*, (1991) 3 SCC 451.

v. State Bank of India & Anr. marked a progressive step.⁴ There, the Indian tribunal gave effect to a Dutch insolvency proceeding without the existence of an actual agreement, relying upon its sense of judicial comity. However, although Sections 234 and 235 of the IBC are in force, they have not yet been used, as no agreement under Section 234 has been made by the Central Government. Even if such agreements are concluded, it remains to be seen whether Section 235's enforcement will not encounter real difficulties, particularly with respect to ensuring confidentiality in cross-border cooperation.

As the process of insolvency unfolds, it necessarily brings into play an enormous treasure trove of private commercial information, board minutes safeguarding strategic choices regarding recapitalisations or disposals of assets;⁵ private cash-flow and valuation studies estimating survival probabilities;⁶ comprehensive customer and supply contracts with renewal and termination clauses; and technical schematics, patent templates, and source code essential to innovation in products.⁷ Disclosure of such information without permission could mislead bidding procedures, permit aggressive behaviour among competitors, breach data-protection laws, and impair trust among stakeholders.⁸ That, in turn, destroys the enterprise value that insolvency law seeks to maintain. The paper, therefore, confines itself to a question on the aspects of confidentiality under Section 235 of the Insolvency and Bankruptcy Code, and it starts by outlining the history of the evolution of the IBC and its approach towards cross-border insolvency, with particular reference to the limitations inherent in Section 235. Thereafter, it discusses the evolution of confidentiality provisions in insolvency cases. Against this, it provides a comparative analysis of relevant UK and US jurisprudence. In the end, the paper concludes by offering suggestions to strengthen confidentiality under Section 235.

⁴ *Jet Airways (India) Ltd. v. State Bank of India*, Company Appeal (AT) (Insolvency) No. 707 of 2019 (NCLAT 2019).

⁵ Insolvency & Bankr. Bd. of India, *Discussion Paper on Measures to Enhance Integrity of CIRP*, TAXGURU (Aug. 7, 2025), <https://taxguru.in/corporate-law/ibbi-discussion-paper-measures-enhance-integrity-cirp.html>.

⁶ TEJU Finance, *Reading: DCF for Startups – Modelling Survival Probability*, <https://vlp.teju-finance.com/courses/mod/book/view.php?id=137&chapterid=397> (last visited Aug. 7, 2025).

⁷ Gartner, *Master TermsGuide: Structuring Contracts for Flexibility and Control*, <https://www.gartner.com/en/documents/3989112> (last visited Aug. 7, 2025); Wonder.Legal, *Supply Contract Template*, <https://www.wonder.legal/in/modele/supply-contract> (last visited Aug. 7, 2025).

⁸ FAR 3.104-4, Disclosure, Protection, and Marking of Contractor Bid or Proposal Information and Source Selection Information, ACQUISITION.GOV, <https://www.acquisition.gov/far/3.104-4> (last visited Aug. 7, 2025); Nancy Sharma, *Judicial Scrutiny of Arbitrary Tender Rejections and Bidder Compliance in Public Contracts*, THE LAWGIST (Oct. 9, 2024), <https://thelawgist.org/judicial-scrutiny-of-arbitrary-tender-rejections-and-bidder-compliance-in-public-contracts/>; *Misleading Information in the Tender Offer and Designation of Goods*, PORTAL FOR COMPETITION LAW, <https://uclp.eu/misleading-information-in-the-tender-offer-and-designation-of-goods/> (last visited Aug. 7, 2025).

2 EVOLUTION OF INDIA'S CROSS-BORDER INSOLVENCY

The evolution of India's cross-border insolvency framework has been an incremental acceptance of the shortcomings inherent in exclusively territorial practices of dealing with multinational corporate failures.⁹ The IBC, while groundbreaking in its national practice, initially resulted from a legislative process that insufficiently dealt with the nuances of cross-border insolvency.¹⁰ Before the enactment of the IBC, India's insolvency regime was fragmented with multiple legal statutes, including the Companies Act, 1956; the Sick Industrial Companies (Special Provisions) Act, 1985; and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.¹¹ This diffused regulatory framework not only extended periods of time in dealing with debts and recovered less domestically for creditors, but also presented insurmountable challenges in successful cross-border cooperation. Even the process of drafting the IBC initially indicated a domestic-focused approach, based on the urgent need to overhaul India's disjointed and ineffective insolvency regime. This reform was led by the Bankruptcy Law Reforms Committee ("BLRC"), the Committee, which tabled its final report on 4 November 2015 and in its final report, it focused on developing an objective "default" test, rather than the subjective "inability to pay" criterion, but, in the initial stages, ignoring the international aspects of contemporary corporate frameworks. Noting that:¹²

⁹ Roshini Parameshwari S, *Cross-Border Insolvency in India: Evaluating the IBC's Framework in Light of the UNCITRAL Model Law*, 5 INDIAN J. LEGAL REV. 969 (2025), <https://ijlr.iledu.in/cross-border-insolvency-in-india-evaluating-the-ibcs-framework-in-light-of-the-uncitral-model-law/>; Sudhaker Shukla & Kokila Jayaram, *Cross Border Insolvency: A Case to Cross the Border Beyond the UNCITRAL*, INSOLVENCY & BANKRUPTCY BD. OF INDIA (2020), <https://ibbi.gov.in/uploads/resources/c3593c9f41984c6f31f278974de3cf37.pdf>; Mohd. Yasin & Ishita Singh, *Cross Border Insolvency: Initial Roots in India*, BURNISHED L.J. (2024), <http://burnishedlawjournal.in/wp-content/uploads/2024/02/CROSS-BORDER-INSOLVENCY-INITIAL-ROOTS-IN-INDIA-by-Mohd.-Yasin-Ishita-Singh.pdf>.

¹⁰ Sidhi M. Jain, *Cross-Border Insolvency in India: Challenges and Opportunities for Reform*, INT'L J. FOR MULTIDISCIPLINARY RSCH., Mar.–Apr. 2025, at 1, <https://www.ijfmr.com/papers/2025/2/38582.pdf>; Rana Navneet Roy & Satyansh Gupta, *Cross Border Insolvency Under the Indian Insolvency and Bankruptcy Code, 2016*, ACAD. BUS. RES. J. (2024), <https://www.abacademies.org/articles/cross-border-insolvency-under-the-indian-insolvency-and-bankruptcy-code-2016.pdf>; Anurag Yadav, *Cross-Border Insolvency: A Domain to Be Strengthened by the Indian Legal System*, IBC LAWS BLOG (Mar. 15, 2025), <https://ibclaw.blog/cross-border-insolvency-a-domain-to-be-strengthened-by-the-indian-legal-system-abstract-by-anurag-yadav/>.

¹¹ Tejas Omkar Navandar, *A Comparative Analysis of Legal Frameworks of Insolvency Law in India, USA and the UK*, INT'L J. ADV. RES. SCI., COMMUN. & TECH., Paper No. 17042 (2022), <https://www.ijarsct.co.in/Paper17042.pdf>; Neha Mantri, *From SICA to IBC*, LAWYERSCLUBINDIA (Dec. 25, 2020), <https://www.lawyersclubindia.com/articles/from-sica-to-ibc-13455.asp>; Bhatt & Joshi Assocs., *Transition from SICA to IBC: A Legal Framework Evolution in Indian Corporate Insolvency Law*, BHATT & JOSHI ASSOCS. (June 17, 2021), <https://bhattandjoshiassociates.com/transition-from-sica-to-ibc-a-legal-framework-evolution-in-indian-corporate-insolvency-law/>.

¹² BANKRUPTCY LAW REFORMS COMM., MINISTRY OF FIN., GOV'T OF INDIA, REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE: VOLUME I – RATIONALE AND DESIGN (Nov. 4, 2015), <https://ifrogs.org/POLICY/blrc.html>.

“The Committee has taken up, and attempted to comprehensively solve, the question of bankruptcy and insolvency insofar as it is a purely domestic question. This is an important first milestone for India. The next frontier lies in addressing cross-border issues...”

This draft Bill, based on the recommendations of the BLRC, was then scrutinised by a Joint Parliamentary Committee (“JPC”) before enactment. In the course of its consideration, the JPC made some changes to the legislation proposed in order to make its ambit and terminology clearer.¹³ In its April 2016 report, the Committee also took note of the glaring omission of provisions relating to cross-border insolvency. Imbuing the Code with a sense of reality with regard to the increasing interconnectedness of world trade, it noted that, considering that business and corporate transactions today involve an international and cross-border component in large numbers, the effects of cross-border insolvency cannot be overlooked too long if India is to possess a complete and enduring insolvency code, which the Code seeks to fulfil, and that failing to do so would result in an incomplete Code.

The territoriality is embedded in the IBC, as shown under Section 60(1), empowering the National Company Law Tribunal (“NCLT”) at the registered office of the corporate debtor as the adjudicating authority.¹⁴ This strategy, while delivering clarity in local settings, inherently restricts jurisdictional reach to assets in India. It presumes that every state will initiate its own insolvency proceeding, impose its local laws on locally situated property, and distribute proceeds under its own rules of distribution.¹⁵ Hence, this model necessitates the filing of multiple claims by creditors in each forum where proceedings are commenced, generating procedural and strategic drawbacks.

However, recognition of these shortcomings resulted in subsequent legislative responses. The March 2018 Report of the Insolvency Law Committee (“ILC”) was a foundation paper addressing the imperative need for cross-border insolvency solutions.¹⁶ The report realised that unless there were proper international cooperation mechanisms, the

¹³ LOK SABHA SECRETARIAT, REPORT OF THE JOINT COMMITTEE ON THE INSOLVENCY AND BANKRUPTCY CODE, 2015 (Apr. 2016), *quoted in* MINISTRY OF CORP. AFF., INVITATION OF COMMENTS FROM PUBLIC ON CROSS-BORDER INSOLVENCY UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016 2–3 (Nov. 24, 2021), <https://prsindia.org/files/parliamentary-announcement/2021-12-15/Cross-Border%20Insolvency%20under%20IBC.pdf>.

¹⁴ Adv. Partho Sarkar, *Deconstructing the Provision of Territorial Jurisdiction of Filing Application Under Insolvency and Bankruptcy Code*, IBC LAWS (Oct. 30, 2020), <https://ibclaw.in/deconstructing-the-provision-of-territorial-jurisdiction-of-filing-application-under-insolvency-and-bankruptcy-code-by-adv-partho-sarkar/>.

¹⁵ Nishal Makharia, *The Dire Need for an Elaborate Framework for Cross Border Insolvency in India*, IBC LAWS (July 24, 2020), <https://ibclaw.in/the-dire-need-for-an-elaborate-framework-for-cross-border-insolvency-in-india-by-nishal-makharia/>; Maheshwari & Co., *Cross-Border Insolvency: Legal Framework, Challenges & Solutions*, MAHESHWARI & CO. BLOG (Mar. 5, 2025), <https://www.maheshwariandco.com/blog/cross-border-insolvency-framework-consequences/>.

¹⁶ INSOLVENCY LAW COMM., MINISTRY OF CORP. AFF., GOV’T OF INDIA, REPORT ON CROSS-BORDER INSOLVENCY (Oct. 16, 2018), https://ibbi.gov.in/uploads/resources/Report_on_Cross%20Border%20Insolvency.pdf; INSOLVENCY LAW COMM., MINISTRY OF CORP. AFF., GOV’T OF INDIA, REPORT OF THE INSOLVENCY LAW COMMITTEE (Mar. 26, 2018), https://ibbi.gov.in/ILRReport2603_03042018.pdf.

domestic success of the IBC would be impossible. To make these suggestions operational, the ILC suggested the incorporation of *Part Z* in the IBC with detailed legal provisions and procedures for dealing with cross-border insolvency cases. In addition, the Ministry of Corporate Affairs formed the Cross Border Insolvency Rules Committee (“CBIRC”) in January 2020 which institutionalised commitment to putting these frameworks into operation.¹⁷ The CBIRC’s June 2020 report, later opened to public consultation in November 2021, recommended the Insolvency and Bankruptcy (Cross-Border Insolvency) Rules, 2020, to put Draft *Part Z* into operation upon enactment. But this evolution leaves the interim status of the present cross-border provisions. The 2016 review of the JPC led to the introduction of Sections 234 and 235 as stopgap solutions, recognising the necessity of international cooperation while complete frameworks were still in the works. Although these provisions evidence legislative awareness of cross-border insolvency issues, they do not constitute a strong or harmonised framework. Specifically, Section 234’s dependence upon reciprocal treaties poses diplomatic and practical barriers, and Section 235, although providing for foreign court assistance, is deficient in necessary procedural protections, most notably regarding confidential commercial information.

2.1 Section 234: A Reciprocal Dilemma

Examination of Section 234 in text discloses both ambitious aims, as well as practical constraints. The conceivable roles encompass: *firstly*, allowing CIRP to secure extra-territorial effect through formal international treaties, which, nonetheless, is counterproductive with respect to the IBC, given it fails to provide specifically for dealing with assets situated outside India; *secondly*, devising structures for reciprocal recognition that would permit foreign insolvency proceedings to secure effect within Indian jurisdiction. As explained with clarity by Jurist *Bruno Simma*, underlining the value placed upon reciprocity, he indicated it, “[a]s a horizontal legal system, international law rests upon the logic of reciprocity in its entirety.”¹⁸ In this manner, reciprocity stands not merely as a functional norm but as a structural column upon which international legal relations depend. It serves as a meta-principle or secondary law of international law, akin to the law of treaties and the law of state responsibility, inasmuch as it assists in sustaining cohesion within the decentralised international legal order.¹⁹

¹⁷ MINISTRY OF CORP. AFF., GOV’T OF INDIA, CONSTITUTION ORDER FOR CROSS BORDER INSOLVENCY RULES COMMITTEE (Jan. 23, 2020), https://www.mca.gov.in/Ministry/pdf/constitutionOrder_30012020.pdf.

¹⁸ Andreas Paulus, *Reciprocity Revisited*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 113, 113–37 (2011), <https://academic.oup.com/book/7421/chapter/152290672>.

¹⁹ Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT’L L.J. 93 (2003), <https://scholarship.law.cornell.edu/cilj/vol36/iss1/4>; Christiane Ahlborn, *Reciprocity and International Organizations Law*, in RECIPROCITY IN INTERNATIONAL LAW 273, 273–99 (Marcin Kalduński ed., 2024), https://link.springer.com/chapter/10.1007/978-3-031-66746-6_12; Pierre-François Laval, *Reciprocity and Customary International Law*, in

Reciprocity, therefore, finds expression in several dimensions: *firstly*, legally, it assists in the mutual enforcement and recognition of obligations and entitlements across jurisdictions, as envisaged under Section 234;²⁰ *secondly*, sociologically, it creates normative expectations among the states, actors, conducive to compliance with the likelihood of reciprocal benefit, retaliation. The “tit-for-tat” or “quid pro quo” dynamic has, over the course of history, conditioned diplomatic and legal interactions among the states and continues to play an active part in negotiations over international cooperation agreements.²¹

2.2 Section 235: Disclosing Confidentiality

The provision states that, “if, in the opinion of the Adjudicating Authority,” such assistance is necessary, it may send a letter of request to a foreign court or authority. This wording leaves the NCLT with very broad discretionary powers. Such flexibility may well be beneficial, but it creates a significant lacuna in the absence of binding statutory parameters to guide the exercise of discretion. The provision does not prescribe specific criteria, e.g., the pecuniary value of the foreign asset in question, the urgency of enforcement, or the unavailability of domestic options. This statutory vagueness has the unintended consequence of allowing different NCLT benches to apply different criteria. Therefore, predictability and legal coherence suffer in high-stakes cross-border insolvency proceedings involving multi-national corporations.²² In cross-border insolvency, tracing and preservation of assets are among the most sensitive and time-sensitive priorities.²³ This usually involves access to foreign bank records, shareholder registers, and holding company documents.²⁴ However, without statutory guidelines requiring proportionality or due process, such activities risk being branded as overbroad or intrusive.

RECIPROCITY IN INTERNATIONAL LAW 55, 55–84 (Marcin Kaldunski ed., 2024), https://link.springer.com/chapter/10.1007/978-3-031-66746-6_4.

²⁰ JAN KLABBERS, INTERNATIONAL LAW 45 (2013); Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law*, 13 EUR. J. INT'L L. 401, 412 (2002).

²¹ ROBERT AXELROD, THE EVOLUTION OF COOPERATION 20–55 (1984).

²² Irit Mevorach, *Certainty and Predictability in Insolvency Within Multinational Enterprise Groups*, in INSOLVENCY WITHIN MULTINATIONAL ENTERPRISE GROUPS 270–85 (2009), <https://academic.oup.com/book/1429/chapter/140805527>.

²³ Janis Sarra, Stephan Madaus & Irit Mevorach, *Chasing Assets Abroad: Ideas for More Effective Asset Tracing and Recovery in Cross-Border Insolvency*, 32 INT'L INSOLVENCY REV. 253 (2023), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/iir.1499>; Mobolaji Oriola & Izuchukwu Ibeanusi, *Cross-Border Asset Tracing and Recovery: Navigating International Legal Complexities*, ALLEN & BROOKS (June 19, 2024), <https://www.allenandbrooks.com/2024/06/19/cross-border-asset-tracing-and-recovery-navigating-international-legal-complexities/>; Surbhi Pareek & Monil Chheda, *Asset Tracing and Recovery: Is India Ready?* (Cyril Amarchand Mangaldas Tech. Paper Series No. 63, June 2024), <https://www.cyrilshroff.com/wp-content/uploads/2024/07/asset-tracing-and-recovery-is-india-ready.pdf>.

²⁴ IAN F. FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW 278 (2d ed. 2005); Look Chan Ho, *Cross-Border Insolvency and the Challenge of Asset Recovery*, 16 INT'L INSOLVENCY REV. 123, 130 (2007).

A request that invades deeply into a company's financial systems, without compelling necessity or confidentiality assurances, may be refused by foreign courts or simply ignored by counterparties. Further, Section 235 does not require threshold disclosures or proportionality tests, which are required to balance investigation objectives against the privacy protection imperatives required by regimes like the European Union's General Data Protection Regulation ("GDPR").²⁵ Beyond asset discovery, successful insolvency proceedings often depend on the ability to obtain evidence from foreign jurisdictions.²⁶ But Section 235 is silent as to any regime of confidentiality to which such disclosures must be sought and preserved.

This gap in protection of confidentiality is particularly ominous in view of the increasing significance of trade secrets to modern business. As of the early 2000s, more than 83% of the S&P 500's market value rested on intellectual property and other intangibles.²⁷ For technology companies like Microsoft and Yahoo!, it was over 98%. Among the most valuable of these intangible assets are trade secrets: unpatented confidential information essential to the firm's competitive edge. They are represented by anything from customer analyses and pricing algorithms to algorithms and raw data sets. Their value relies solely on secrecy; if disclosed, their exclusivity and commercial value are lost forever.²⁸

This reality underscores the strategic trade-off firms must make when choosing between patent protection and protection by trade secrets.²⁹ Patents award a limited-duration legal monopoly in exchange for public disclosure. Trade secrets offer protection forever, but only if secrecy is absolutely guaranteed. If leaked, reverse-engineered, or independently discovered, trade secret protection is lost forever.³⁰ This tension is heightened in instances of insolvency, as court-ordered disclosures can unwittingly reveal confidential R&D details or strategic business plans, threatening a company's long-term survival.

²⁵ Insolvency Act 1986, c. 45, § 235 (UK); Regulation (EU) 2016/679, 2016 O.J. (L 119) 1.

²⁶ *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 248–49 (2004); *Re Stanford Int'l Bank Ltd.*, [2010] EWCA (Civ) 137, [2010] 3 W.L.R. 941 (Eng.).

²⁷ OCEAN TOMO, INTANGIBLE ASSET MARKET VALUE STUDY (2015), <https://leewardcapitalmgt.com/wp-content/uploads/2019/02/ocean-tomo-intangible-asset-study-2015.pdf>; *MSFT (Microsoft) Intangible Assets*, GURUFOCUS (2025), <https://www.gurufocus.com/term/intangibles/MSFT>.

²⁸ Uniform Trade Secrets Act § 1(4), 14 U.L.A. 538 (1985); David S. Almeling, *Seven Reasons Why Trade Secrets Are Increasingly Important*, 27 BERKELEY TECH. L.J. 1091, 1094–96 (2012).

²⁹ Claimistry Team, *Navigating Conflicts Between Trade Secrets and Patent Rights in Intellectual Property Law*, CLAIMISTRY (Nov. 10, 2024), <https://claimistry.com/trade-secrets-and-patent-rights-conflicts/>; Lennie A. Bersh & Kristopher D. Reichen, *Patents and Trade Secrets: A Dual Strategy for Protecting Innovations*, N.J. L.J. (Apr. 17, 2023), https://www.gtlaw.com/-/media/files/insights/published-articles/2023/04/bersh-and-reichen_njlj-april-article_patent-and-trade-secrets.pdf.

³⁰ Uniform Trade Secrets Act § 1(4), 14 U.L.A. 538 (1985); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475–76 (1974).

3 HISTORICAL DEVELOPMENT OF CONFIDENTIALITY DOCTRINE

The English common law rule of confidentiality is adopted in Indian jurisprudence, and it evolved from the principles governing restrictive equitable remedies beyond statutory limitations.³¹ This duty arose because it is sometimes incumbent upon a person, by reason of the inherent nature of the circumstances under which the information is given, to keep these rights secret in order that they may be made effective. That is a transition from simply thinking of a contract being constructed to an equitable framework for information sharing based on relationships.

The foundational principles that influenced Indian Law were established in *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.*, where the plaintiffs disclosed their confidential designs for a set of manufacturing tools, which the defendants then took and used for themselves.³² It reflected the essence of a well-known equitable principle that a person to whom information was given in confidence should not take undue advantage of performing the equity upon his conscience without respect to his having entered into any arrangement containing confidentiality obligations. The court held that where information is imparted under circumstances importing an obligation of confidence, a duty arises.

It was clarified in *Coco v. A.N. Clark (Engineers) Ltd.*, wherein the three-part test for breach of confidence was formulated by Justice Megarry.³³ It mandates that: *first*, the information must have the necessary quality of confidence; *secondly*, it should have been communicated in situations conveying an obligation of confidence; and *lastly*, there shall be an unauthorised use of such information prejudicial to the disclosing party. In *Coco*, the plaintiff released details of a moped engine in failed negotiations, and the defendant subsequently used similar designs himself. This test gave courts a formal approach for judging at what points confidentiality obligations arise and are broken. “Necessary quality of confidence” requires the information to be unique from material in the public domain and to possess potential value. A confidence obligation can arise from express terms or be implied from relationships such as employer-employee or doctor-patient. Although “detriment” originally applied, subsequent cases, such as *Attorney General v. Guardian Newspapers Ltd. (No. 2)*, decided equity safeguards against unauthorised use to forestall unfair enrichment irrespective of pecuniary loss.³⁴ This development of English law acknowledged that confidentiality is in the interests of society at large, for instance, promoting innovation and commerce

³¹ *Zee Telefilms Ltd. v. Sundial Commc'ns Pvt. Ltd.*, 2003 (5) Bom CR 404; B.N. Srikrishna, *Protection of Trade Secrets and Confidential Information: A Comparative Analysis*, 46 J. INDIAN L. INST. 1, 12–14 (2004).

³² *Saltman Eng'g Co. v. Campbell Eng'g Co.*, (1948) 65 R.P.C. 203 (Eng.).

³³ *Coco v. A.N. Clark (Eng'rs) Ltd.*, [1969] R.P.C. 41, 47 (Ch.).

³⁴ *Att'y Gen. v. Guardian Newspapers Ltd. (No. 2)*, [1990] 1 A.C. 109 (H.L.); PAUL STANLEY, *THE LAW OF CONFIDENTIALITY: A RESTATEMENT* 145–48 (2008).

through enabling the safe communication of sensitive information. This equitable foundation provides for legal redress even in the absence of a formal contract, promoting teamwork in a professional setting. It is such equity-grounded jurisprudence which has significantly influenced the Indian law of confidentiality.

3.1 Indian Jurisprudential Position

These English common law rules were adopted by Indian courts, evolving an independent doctrine of confidentiality, emphasising it as an equitable obligation irrespective of contract, statute, or other enforceable interests.³⁵ The adoption signals both the received tradition in the law and the conditions of current commerce.

A landmark Indian judgment respecting confidentiality was the Delhi High Court's judgment in *John Richard Brady v. Chemical Process Equipments P. Ltd.*,³⁶ where the petitioner disclosed technical know-how for a fodder machine without a formal contract. Justice B.N. Kirpal affirmed that the law "depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it". The court established that a duty of confidence arises from the relationship and the information's character, binding the recipient's conscience when a reasonable expectation of confidentiality exists. This duty extends to any third party receiving the information with knowledge of its confidential nature. The judgment also affirmed the availability of equitable remedies like injunctions and an account of profits to prevent the "springboard" use of confidential information, where a recipient gains an unfair head start.³⁷

The Karnataka High Court in *Inphase Power Technologies (India) Pvt. Ltd. v. Adishakti Loha and Ispat Pvt. Ltd.*³⁸ expanded this doctrine further, where it applied to preliminary commercial negotiation. The petitioner had made disclosure of technical designs in preliminary negotiations that failed to result in an ultimate agreement. It was held by Justice A.S. Bopanna that it is not compulsory that there should be a formal non-disclosure agreement (NDA) in order to enforce confidentiality where the circumstances suggest it. The judgment appreciated that such undertakings are permissible where it is an exploratory talk, because otherwise it will hamper the business and innovation. Verbal proprietary information made in confidence is protected where its confidential nature is clear. The court also mentioned that such undertakings could survive after termination of the business relationship, particularly where the information remains sensitive with respect to competition.

³⁵ Akshay Maheshwari & Anjali Bhatt, *Protection of Confidential Information: The Reality*, ACADEMIKE (Dec. 7, 2014), <https://www.lawctopus.com/academike/protection-confidential-information-reality/>.

³⁶ *John Richard Brady v. Chem. Process Equipments (P) Ltd.*, AIR 1987 Del. 372.

³⁷ Rahil Raval, *Back to Basics: Springboard Doctrine as a Trade Secret Protection Policy*, THE IP PRESS (Oct. 18, 2020), <https://www.theippress.com/2020/10/18/back-to-basics-springboard-doctrine-as-a-trade-secret-protection-policy/>.

³⁸ *Inphase Power Techs. (India) Pvt. Ltd. v. Adishakti Loha & Ispat Pvt. Ltd.*, AIR 2017 Kar. 20.

The Bombay High Court's decision in *Urmi Juvekar Chiang v. Global Broadcast News Ltd.*,³⁹ extended confidentiality protection to creative and artistic materials. In this case, a filmmaker shared her documentary concept and script with a broadcaster, who then produced a strikingly similar program without a formal agreement. The court recognised that creative works have inherent value requiring protection. This decision highlighted how confidentiality can serve as a bridge, offering interim protection for creative ideas before they are developed enough for formal intellectual property rights like patents or copyrights. The court acknowledged that harm in creative contexts extends beyond financial loss to include reputational damage and loss of creative integrity, favouring equitable remedies like injunctions.⁴⁰

Collectively, these Indian decisions provide an adaptive, proportionate body of law, sensitive to the interests of technology, business, and creative expression. Recognising that confidentiality undertakings could take place under circumstances without written contracts, Indian courts fashioned an information assets protection regime under dynamic conditions.⁴¹

4 COMPARATIVE ANALYSIS

4.1 United Kingdom

The United Kingdom's insolvency law framework is marked by the concurrent existence of two main legislative instruments: *first*, the Insolvency Act 1986 ("IA 1986"); and *second*, the Cross-Border Insolvency Regulations 2006 ("CBIR").⁴² Where the IA 1986 forms the core of the UK's domestic insolvency system, the CBIR facilitates worldwide coordination and collaboration in cross-border insolvency procedures.⁴³ They complement each other in approval of the UK's desire for an efficient domestic insolvency system, as well as international harmonisation of insolvency procedures, especially in a post-Brexit legal environment where worldwide coordination is of greater importance.⁴⁴ The IA 1986 is the main act for

³⁹ *Urmi Juvekar Chiang v. Global Broadcast News Ltd.*, (2007) 6 AIR Bom. R. 240.

⁴⁰ Mitali Tikyani & Ajinkya Rajput, *Cross Border Insolvency in India*, 4 INDIAN J. LEGAL REV. 552 (2024), <https://ijlr.iledu.in/wp-content/uploads/2024/07/V4I260.pdf>.

⁴¹ Argus Partners, *Protection of Confidential Information Without a Contract* (Sept. 28, 2020), <https://www.argus-p.com/papers-publications/thought-paper/protection-of-confidential-information-without-a-contract/>.

⁴² Insolvency Act 1986, c. 45 (UK); Cross-Border Insolvency Regulations 2006, SI 2006/1030 (UK).

⁴³ Paul J. Omar, *Chapter 17: The Domestic Framework for Cross-Border Insolvency Cases*, in ENGLISH CORPORATE INSOLVENCY LAW 319, 319–37 (2022), <https://doi.org/10.4337/9781802204094.00028>.

⁴⁴ Chris Umfreville et al., *Recognition of UK Insolvency Proceedings Post-Brexit: The Impact of a 'No Deal' Scenario*, INT'L INSOLVENCY REV. (2018), <https://onlinelibrary.wiley.com/doi/pdf/10.1002/iir.1325>; Norton Rose Fulbright, *Impact of Brexit on Insolvency* (2021), <https://www.nortonrosefulbright.com/en-gb/knowledge/publications/fc0fb698/impact-of-brexit-on-insolvency>.

regulating UK insolvency procedures. It regulates procedures for corporate insolvency, e.g., administration, liquidation, receivership, company voluntary arrangements (CVAs), and individual insolvency procedures such as bankruptcy and individual voluntary arrangements (IVAs).⁴⁵ Enacted in reaction to the deficiencies of earlier insolvency legislation, the IA 1986 attempts to strike a balance between debtors', creditors', and the general economy's interests.⁴⁶ The CBIR, enacted in the UK in 2006, however, simply transposes the Model Law. But one of the most significant differences between the two instruments lies in their purpose and scope. The IA 1986 is strictly domestic in application, dealing with insolvency proceedings occurring only in England, Wales, Scotland, and Northern Ireland, unless judicial cooperation expressly extends it. The CBIR, however, is applicable only in the international sphere. Its main purpose is to enable the recognition of foreign insolvency proceedings in the UK, relief for foreign office-holders, and cooperation between UK and foreign courts.

The Model Law, which the CBIR transposes into UK legislation, addresses principles of comity, mutual cooperation, and fair and efficient administration of cross-border insolvencies. Structurally, the IA 1986 is far more comprehensive and detailed, addressing a wide range of provisions dealing with both procedural and substantive aspects of insolvency. For example, Section 236 of the IA 1986 authorises the court to direct the attendance of persons likely to have information or documents relevant to an insolvency proceeding, and hence plays an important part in asset tracing and investigation.⁴⁷ The power extends to the production of books, records, and other papers, and allows for the examination of parties connected with the debtor company or person. The provision has proven especially useful in tracing fraud or misfeasance by directors or third parties. Nevertheless, it has been criticised when used to assist foreign officeholders, as English courts have been reluctant to permit its use for foreign benefit in the absence of an explicit statutory provision.⁴⁸ In an attempt to solve this issue, Section 246ZD was introduced into the IA 1986, expressly permitting courts to grant relief under Section 236 in certain circumstances to foreign representatives.⁴⁹ Section 246ZD, however, has restricted application and falls short of full adoption of the

⁴⁵ Paul J. Omar, *Chapter 17: The Domestic Framework for Cross-Border Insolvency Cases*, in *ENGLISH CORPORATE INSOLVENCY LAW* 319, 319–37 (2022), <https://doi.org/10.4337/9781802204094.00028>.

⁴⁶ Insolvency Act 1986, c. 45 (UK); Cross-Border Insolvency Regulations 2006, SI 2006/1030 (UK); Mark Craggs, *The Model Law in Great Britain: Cross-Border Insolvency Regulations 2006*, NORTON ROSE FULBRIGHT (June 2022), <https://www.nortonrosefulbright.com/en/knowledge/publications/1d8e1fb5/the-model-law-in-great-britain-cross-border-insolvency-regulations-2006>.

⁴⁷ Insolvency Act 1986, c. 45, § 236 (UK).

⁴⁸ *Re MF Global UK Ltd.*, [2015] EWHC 2319 (Ch); *Re Omni Trustees Ltd.*, [2015] EWHC 2697 (Ch); *Re Tucker*, [1990] Ch 148; *Singularis Holdings Ltd. v. PricewaterhouseCoopers*, [2014] UKPC 36.

⁴⁹ Insolvency Act 1986, c. 45, § 246ZD (UK); *Cage Consultants Ltd. v. Iqbal (Re Totalbrand Ltd.)*, [2020] EWHC 2917 (Ch); Charles Russell Speechlys, *Assigning Your Rights Away – Changes to the Insolvency Act 1986*, LEXOLOGY (Apr. 8, 2015), <https://www.lexology.com/library/detail.aspx?g=4cf25320-822d-4d19-93c1-61c6bcfb4200>.

principles of the Model Law. Thus, the CBIR is the more appropriate scheme for wide-spread cross-border relief. The CBIR, unlike the IA 1986, contains no investigatory powers such as those in Section 236. Instead, it relies on discretionary judicial powers under Article 21, which allows the UK court to grant appropriate relief.

But the dialogue between domestic powers under the IA 1986 and international relief under the CBIR has raised sophisticated legal questions, notably on disclosure and privilege. In *Shlosberg v. Avonwick Holdings Ltd*, the Court of Appeal held that privilege in connection with documents of an individual in bankruptcy could not be excluded by reason of the mere appointment of a trustee in bankruptcy.⁵⁰

The case emphasised the importance of preserving legal professional privilege even in insolvency situations and was a warning against office-holder overreach. Beyond that, in *Asertis Ltd v. Melhuish*, which was about the extraterritorial application of Section 236, the court clarified that domestic powers under Section 236 were not intended to support foreign insolvency proceedings, particularly when used as a substitute for recognition under the CBIR.⁵¹

The judgment emphasised the need to respect the boundaries of domestic and cross-border insolvency tools. Foreign office-holders seeking relief should take the route under the CBIR, which has an appropriate framework for recognition and judicial assistance. In the same vein, in *Phones 4u Ltd (in administration)*, the court refused to allow the application of Section 236 powers to require disclosure of documents from third parties for the benefit of a foreign proceeding.⁵² The court reaffirmed that English courts should not be “clearing houses” for global litigation, save as specifically empowered under international insolvency cooperation schemes like the CBIR. This case again demonstrates the preference of courts to turn to CBIR in cross-border cases, instead of extending the IA 1986 beyond its intended limits.

4.2 United States

Cross-border insolvency is a feature of the globalised legal world. As companies grow abroad and corporate groups cross multiple borders, their insolvency tends to trigger legal proceedings in several jurisdictions. To address the complexity, the United States enacted Chapter 15 of its Bankruptcy Code in 2005, aligning itself with the Model Law.⁵³ Chapter 15 sought to facilitate cooperation between U.S. courts and foreign insolvency proceedings,

⁵⁰ *Shlosberg v. Avonwick Holdings Ltd.*, [2016] EWCA Civ 1138, [2017] Ch 210.

⁵¹ *Asertis Ltd. v. Melhuish*, [2024] EWHC 2819 (Ch).

⁵² *Phones 4U Ltd. (In Administration) v. EE Ltd.*, [2023] EWHC 2826 (Ch).

⁵³ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 801, 119 Stat. 23; Paul Keenan, Mark Bloom & James Leshaw, *Chapter 15: The U.S. Cross-Border Insolvency Law*, GREENBERG TRAURIG LLP, <http://leshawlaw.com/wp-content/uploads/2013/06/Cross-Border-Article.pdf>.

protect the interests of creditors and debtors, and ensure the fair and efficient resolution of international insolvencies. Cross-border insolvency proceedings, however, involve more than a touch of legal coordination; they present a fundamental trade-off between transparency and confidentiality.⁵⁴ On the one hand, U.S. law is skewed in favour of open court records, founded on the public's right to view court proceedings and monitor judicial decision-making.⁵⁵ On the other hand, foreign representatives, having been accustomed to different standards of confidentiality, tend to seek to seal court records or seek protective orders to protect sensitive commercial information, client information, or litigation strategy. So, when a foreign representative seeks recognition, they tend to seek further relief, such as staying suits or protecting assets in the United States. In many instances, such relief is sought in haste, and with it comes a request that particular filings or communications should be confidential. Why are foreign representatives so fixated on confidentiality? The reason lies in the nature of international business and the procedural risk of disclosure. For instance, disclosure of confidential business data, current negotiations, or transactions with creditors can damage a debtor's business operations, discredit current restructuring, or subject the foreign proceeding to undue public or competitor scrutiny.⁵⁶ In addition, what is protected under the foreign forum, e.g., privileged communications between insolvency professionals will not automatically be protected under U.S. law. To understand how U.S. courts decide whether or not to grant protection of confidentiality, one must look at the relevant statutory and procedural context. While U.S. courts otherwise operate under a presumption of openness, the Bankruptcy Code does introduce some exceptions. The most significant statutory provision is 11 U.S.C. § 107(b), under which protection can be afforded to information that

⁵⁴ Vishvajeet Rastogi & Sumedha Singh, *Confidentiality in Insolvency Disputes: How ADR Protects Sensitive Information*, IBC LAWS (May 22, 2025), <https://ibclaw.in/confidentiality-in-insolvency-disputes-how-adr-protects-sensitive-information-by-vishvajeet-rastogi-sumedha-singh/>; Sidhi M. Jain, *Cross-Border Insolvency in India: Challenges and Opportunities for Reform*, INT'L J. FOR MULTIDISCIPLINARY RSCH., <https://www.ijfmr.com/papers/2025/2/38582.pdf>; UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, U.N. Comm'n on Int'l Trade L., U.N. Sales No. E.14.V.2 (2014).

⁵⁵ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Access to Court Proceedings*, U.S. COURTS, <https://www.uscourts.gov/court-records/access-court-proceedings>; *Open Court*, WEX | US LAW | LII / LEGAL INFO. INST., https://www.law.cornell.edu/wex/open_court; *How to Access Public Access Court Records*, LEGALCLARITY, <https://legalclarity.org/how-to-access-public-access-court-records/>; *A. The Roots of Access Rights*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/open-court-sections/a-the-roots-of-access-rights/>.

⁵⁶ SEC, *CF Disclosure Guidance: Topic No. 8 – Intellectual Property and Technology Risks Associated with International Business Operations* (Dec. 19, 2019), <https://www.sec.gov/rules-regulations/staff-guidance/disclosure-guidance/risks-technology-intellectual-property>; IFRS Foundation, *AP2: Discussion on Disclosure of Sensitive Information* (June 2019), <https://www.ifrs.org/content/dam/ifrs/meetings/2019/june/gpf-and-cmac/ap2-disclosure-of-sensitive-information.pdf>; Crowell & Moring LLP, *When Talking Things Through Is the Problem, Not the Solution: The European Commission's Updated Guidance on Information Exchange*, <https://www.crowell.com/en/insights/client-alerts/when-talking-things-through-is-the-problem-not-the-solution-the-european-commissions-updated-guidance-on-information-exchange>.

is “trade secrets” or “confidential commercial information.”⁵⁷ Importantly, the wording of the statute is mandatory; if a court determines that a filing contains protected information under this provision, it must shield it from public access. This is in contrast to general civil litigation, where sealing orders are typically an exercise in balancing public and private interests. Rule 9018 of the Federal Rules of Bankruptcy Procedure is the vehicle to invoke such protection. Under this rule, parties, typically foreign representatives, may ask the court to enter protective orders, conduct in-camera reviews, or authorise sealed filings. These procedural protections are significant, especially in Chapter 15, where foreign confidentiality expectations are typically higher than those in the U.S.⁵⁸

Although U.S. courts are governed by their own code and practices, cross-border insolvency necessarily entails a comparative approach. Foreign jurisdiction rulings, and in particular those of the United Kingdom, tend to determine what confidentiality is. In *Shlosberg v. Avonwick Holdings Ltd*, the English Court of Appeal held whether or not a trustee in bankruptcy could use confidential documents obtained by virtue of statutory powers (i.e., section 236 of the Insolvency Act 1986) for a purpose other than administration of the estate.⁵⁹ The Court held that documents produced under statutory examination powers should not be used to facilitate third-party litigation. The rationale was that the process of examination was intended to benefit the bankruptcy estate, not be a fishing expedition for uncorrelated commercial gain. Similarly, in *Aseris Ltd v. Melhuish*, the court was focused on confidentiality protections where documentation was requested by a liquidator from a former director for litigation funding and recovery of the estate.⁶⁰ The court imposed limitations on how such documentation was to be disclosed, observing that the director still had a residual interest in confidentiality, even after cessation of their cooperation with insolvency authorities.

4.2.1 U.S. Practice: Protective Orders and Judicial Discretion

In the United States, courts exercise prudence when granting Chapter 15 requests for confidentiality, being mindful of the need to apply foreign law and protect legitimate commercial interests. Conversely, they are sensitive to constitutional and democratic ideals behind public access to court hearings.⁶¹ Take, for example, the granting of protective orders in U.S. Chapter 15 proceedings. Whenever foreign representatives seek sealing of filings, they must articulate how the information falls within the definitions of the Bankruptcy Code,

⁵⁷ 11 U.S.C. § 107(b) (2023); *Bankruptcy, Overview – Motion to Seal – 11 U.S.C. § 107(b)*, BLOOMBERG LAW, <https://www.bloomberglaw.com/external/document/X1SNKIE4000000/bankruptcy-overview-motion-to-seal-11-u-s-c-107-b-bankruptcy>.

⁵⁸ Fed. R. Bankr. P. 9018.

⁵⁹ *Avonwick Holdings Ltd. v. Shlosberg*, [2016] EWCA (Civ) 1138, [2017] B.P.I.R. 1, [2017] 2 W.L.R. 1075 (Eng.).

⁶⁰ *Aseris Ltd. v. Melhuish*, [2024] EWHC 2819 (Ch).

⁶¹ *In re Fairfield Sentry Ltd.*, 458 B.R. 665, 678–79 (S.D.N.Y. 2011).

trade secrets, sensitive commercial information, or potential competitive damage. The court may conduct an in-camera review in order to decide whether the material deserves protection. Once a determination is made under Section 107(b), the court must issue the order. But protective orders are not absolute.⁶² U.S. courts demand specificity. General assertions of commercial sensitivity will not do. Parties must particularise a tangible risk of harm, typically with the assistance of declarations or expert assertions. Further, courts have limited protective orders to the narrowest conceivable scope necessary, redacting only the sensitive portion of a filing and not sealing the entire document. A recent example is the Chapter 15 proceeding of Brazilian telecommunication company Oi S.A. There, the court sealed some financial projections and business strategies filed by a foreign representative. The court concluded that this information, if disclosed, would inflict damage to the restructuring effort and competitive position of the company. The court limited the sealing order to only the exhibits that would inflict undue harm. Protective orders, therefore, must have a demonstrable purpose, such as abating harm, protecting privilege, or complying with foreign rules of confidentiality, and not just to avoid embarrassment or scrutiny.⁶³

5 SUGGESTIONS

5.1 Standards for Issuing Confidentiality Orders

Creating a clear, unambiguous statutory foundation is the initial anchor in any effective confidentiality regime. According to the suggested amendments, Section 235's policy rules would clearly grant the NCLT and its Appellate Tribunal ("NCLAT") express powers to pass "orders of confidentiality" at any stage of the CIRP or liquidation. In contrast with the current reliance on tribunals' inherent powers, the new regulation would state: "To protect trade secrets, proprietary research and development information, internal financial estimates, commercial plans, privileged communications, and personal information of key stakeholders, the Tribunal may, *suo motu* or on application by any party, pass confidentiality orders limiting access, copying, retention, and public disclosure of specified documents or classes of information."

To preclude doubt, the rule would provide an illustrative, non-exhaustive definition of "confidential information," such as but not limited to: board resolutions, directors' meeting minutes, and strategic planning meetings; pending merger, acquisition, finance, or debt-

⁶² *In re Orion Pictures Corp.*, 21 F.3d 24, 27–28 (2d Cir. 1994).

⁶³ *In re Oi S.A.*, No. 1:23-bk-10193 (Bankr. S.D.N.Y. filed Feb. 8, 2023); see *Oi Seeks End to Ch15 in New York, Plans Parallel Ch11 Filing*, GLOBAL RESTRUCTURING REVIEW (July 22, 2025), <https://globalrestructuringreview.com/article/oi-seeks-end-ch15-in-new-york-plans-parallel-ch11-filing>; *Cross-Border Clash for the Brazilian Dutch Telco in the U.S. Courts*, JDSUPRA (2025), <https://www.jdsupra.com/legalnews/cross-border-clash-for-the-brazilian-59567/>.

restructuring proposals with indicative pricing; source code, algorithms, system architecture, and engineering schematics; long-term customer and supplier contracts specifying pricing mechanisms, volume rebates, and exclusivity provisions; detailed budgets, cash-flow models, and sensitivity analysis under different macroeconomic scenarios; audit workpapers and forensic reports tracing anomalies or related-party transactions; risk-assessment matrices outlining legal, regulatory, or operational vulnerabilities; and communications between the corporate debtor and external advisors, in-house counsel, or statutory auditors subject to privilege. By providing this statutory clarity, the IBBI would transmit a powerful message that confidentiality orders are neither outliers nor exceptions, but integral tools available from day one of the CIRP through closure or liquidation.

5.2 Disclosure Standards: Good Cause vs. Compelling Reasons

A blanket policy of confidentiality overlooks transparency as well as reasonable protection. In accordance with Federal Rule of Civil Procedure 26(c)(1)(G),⁶⁴ the rules set forth here adopt a measured, two-tiered standard: a “good cause” bar for non-dispositive or discovery-stage materials, and a more stringent “compelling reasons” test for documents central to adjudication. By invoking the “good cause” test, resolution professionals or debtor management teams could seek confidentiality over initial due diligence reports, internal compliance audits, draft cash-flow projections, and risk-assessment logs by showing that premature public disclosure would result in significant competitive harm, erode negotiating leverage, or drain the recoveries of the estate. For instance, a cash-flow model estimating break-even dates, if made public, would lead suppliers to insist on advance payment, throttling liquidity. A simple affidavit, summarising the particular nature of the harm and the nature of data at risk, would suffice to satisfy this standard.

For dispositive filings, resolution plans with debt-equity swap ratios, incentive management plans, and asset-sale plans; confirmation orders with binding conditions; final audited financial statements; and expert valuation reports, a stricter “compelling reasons” test would be used. Applicants would have to demonstrate that, *firstly*, public disclosure would result in serious, irreparable commercial damage or violate statutory protection of privacy (e.g., employee compensation data or whistleblower identities); *secondly*, a less restrictive alternative, partial redaction, executive summaries, or in-camera chambers review, was unavailable to protect the interest; and *lastly*, confidentiality is required to preserve market confidence, creditor participation, and overall viability of the resolution process. The tribunal, in return, would be required to provide written findings linking each factual assertion to the legal

⁶⁴ Fed. R. Civ. P. 26(c)(1)(G).

standard, thereby ensuring consistent jurisprudence and leaving a clear map for appellate review.

5.3 Mandatory Confidentiality Clauses & Automatic Sealing

Administrative lapses and high-pressure docket arrears have a tendency to allow sealed exhibits, sometimes entire annexures, to fall into publicly accessible case portals, rendering confidentiality meaningless. To prevent such lapses, the regulations require that each filing pertaining to insolvency, be it a CIRP petition, information memorandum filing, application for interim relief, and resolution plan, shall be accompanied by a visibly placed Confidentiality Clause right after the cover page. This clause shall list, in detail, each document or exhibit to be kept confidential, e.g., “Exhibit C: Customer Price-List Database,” “Appendix II: Forensic Audit Report,” or “Tab A: Directors’ Meeting Minutes (Jan-Mar 2025).” When a filing with a valid Confidentiality Clause is received, registry staff shall initiate an automatic sealing action: the exhibits so listed shall be sealed in the master case file, kept securely in an access-control section; a simultaneous redacted version, where confidential portions are replaced with uniform placeholders (e.g., “[Confidential – Financial Forecast]”), shall be placed in the public domain; and two synchronized dockets, “Volume I: Public Filings” and “Volume II: Confidential Filings”, shall be kept, each with clear indexing, color-coded tabs, and metadata tags. The regulations shall stipulate specific redaction conventions, minimum thickness of black bars, legible placeholder text, uniform font size, exhibit numbering, and tagging, to enable registry staff to implement these processes with ease, even during peak case-load times, without fear of human error.

5.4 Sealing Orders for Dispositive Filings

The greatest interest is in sealing dispositive documents, i.e., the factual and legal basis of tribunal orders. Parties who wish to seal any portion of resolution plans, confirmation orders, expert valuation reports, or audited financial statements under the new rules will have to support their application with an Affidavit of Harm and Alternatives. The affidavit will: *firstly*, clearly define paragraphs, tables, schedules, or exhibits to be sealed; *secondly*, categorise the interest of confidentiality, trade secret, personal privacy, enforcement-sensitive information; *thirdly*, state in detail the competitive, financial, or regulatory damage disclosure would inflict; *fourthly*, explain why redaction, summary disclosure, or in-camera review is inadequate to protect the interest; and *lastly*, describe why confidentiality is essential to creditor confidence, market perception, and overall success of the CIRP. The court will then perform a meticulous balancing test considering, *firstly*, public interest in open adjudication; *secondly*, risk and seriousness of harm to the protected interest; *thirdly*, sufficiency of

alternatives; and *lastly*, impact of sealing on effectiveness, cost, and speed of the insolvency process. Only if “compelling reasons” demonstrably and clearly outweigh reasons against sealing will the court make an order, and only as narrowly as is appropriate. Orders should include sequential, factor-specific findings to facilitate future applications and ensure accountability.

5.5 Subpoena Quashment & Modification

Third-party subpoenas by investigative reporters in search of leaks, competitive bidders in search of strategic vulnerabilities, or regulatory authorities in search of compliance checks threaten secrecy directly unless expressly cut short. To counter this issue, the rules under Section 235 should take the procedure from Federal Rule 45(c)(3)(B)(i) and permit tribunals to quash or modify any subpoena or document-production order. A movant, the corporate debtor, a creditor, or the resolution professional, will make a motion supported by a non-privileged summary of the materials sought and a description of how disclosure would defeat strategic bargaining, competitive edge, or statutory goals. The requesting party will be required to respond with a showing of particularised need, demonstrating that the information cannot be obtained elsewhere, and a statement of a compelling public or legal interest, e.g., criminal investigation or systemic-risk determination, superior to confidentiality. Tribunals should decide such motions on an expedited schedule, within seven business days, with interim confidentiality maintained to avoid piecemeal disclosure until the final order.

6 CONCLUSION

In conclusion, a confidentiality regime under Section 235 of the IBC must be underpinned by robust enforcement mechanisms to ensure its efficacy. The proposed framework rightly empowers tribunals to impose meaningful contempt sanctions, including daily fines, custodial penalties, or both, against willful violators of confidentiality or sealing orders. Monetary penalties of up to INR 500,000 per breach, directed to the Insolvency Resolution Process Fund, serve as a proportionate deterrent calibrated to the gravity and frequency of violations. Moreover, for serious or repeated breaches, referral to professional bodies such as the Bar Council of India or the IBBI’s Disciplinary Committee can facilitate further disciplinary action, including censure, suspension, or disbarment.

However, enforcement alone is not sufficient. To keep pace with evolving commercial realities, jurisprudential developments, and emerging technological threats, Section 235 should mandate the formation of a Confidentiality Advisory Committee every two years. This multidisciplinary body, comprising insolvency adjudicators, leading professionals, cybersecurity experts, data privacy scholars, and creditor representatives, would play a critical

role in auditing implementation, inviting stakeholder feedback, and recommending reforms. By benchmarking against global best practices and following a transparent public comment process, the committee would ensure that the confidentiality framework remains both dynamic and resilient. Updates to the regulations should be finalised within six months of each review cycle, thereby institutionalising a culture of continuous oversight, accountability, and reform.

* * *

CHAPTER 4

Ambiguous Contours of Personal Guarantors under IBC and the Consequential Implications

YASH SINGH*

The Hon'ble apex court's dictum in Lalit Kumar Jain marked the inclusion of the personal guarantors in the debt resolution and asset maximisation framework of IBC. This paved the way for personal guarantors to institute IRP proceeding against themselves, and for financial creditors and the resolution professionals to initiate IRP proceedings against personal guarantors under Sections 94 and 95 of the IBC. Yet the said framework, despite several judicial clarifications ranging from SBI v. Ramakrishnan to P. Mohanraj case, remains fraught with challenges at multiple stages for personal guarantors under the IBC. The first issue is the ambiguity surrounding the pre-requisite conditions for filing an application under Section 95 of the IBC. This ambiguity arises from the Supreme Court's observation in Mahendra Kumar Jajodia v. SBI which settled the law that CIRP is not a pre-requisite condition for filing a Section 95 application, yet NCLAT in its recent orders, has muddled the effect of the Mahendra Jajodia case by observing that CIRP constitutes an essential condition to invoke the Section 95 application. The second issue concerns the vacuum left by quasi-judicial bodies like NCLT & NCLAT, particularly the inconsistency between the form & manner of invoking the Bank Guarantee and the void created by the absence of the terms and conditions in the Guarantee Deed, thereby creating imminent issues while invoking Section 95(4) IBC in order to institute IRP against the Personal Guarantors. In light of the aforesaid issues, among others, a much-needed clarity is sought by the quasi-judicial and the judicial bodies as well on the potential contradictions that lie between the provisions of IBC and the incidental Regulations and Rules as intended by the law-makers and the interpretation done by NCLT, NCLAT and other judicial forums thereon. Accordingly, the author briefly outlines the judicial underpinnings, and thereby pens comments and sheds some light on the glaring inconsistencies that lie between the provisions of IBC and the judicial precedents with respect to the pre-requisite conditions for filing Section 95 application under IBC, vacuum in the Guarantee Deed and the invocation of Guarantee thereon, the scope of Interim Moratorium under Section 96 IBC.

Keywords: Insolvency, CIRP, Personal Guarantors, Interim Moratorium, Bank and Invocation

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1 INTRODUCTION

Amid India's rising prominence in the industrial and manufacturing sectors, there is an increasing trend of companies being incorporated with the Registrar of Companies under the Companies Act 2013, the backbone of which remains the *promoters* of the corporate persons concerned, and these promoters infuse significant financial capital to the Companies to raise the finances of the Company in order to channelise its incorporation and business. Given that the Indian financial and business ecosystem operates in a manner where *major corporate borrowings and loan transactions are assured by way of 'Personal Guarantees' provided by the Promoters of the company, their family members and close kin, directors, and sometimes individuals within their inner circle of the Promoters*¹, there arose a need to introduce an individual-specific insolvency and bankruptcy framework in the Insolvency and Bankruptcy Code ["IBC"] since, until 2019, the IBC only had the restructuring framework for Corporate Insolvency and guarantee as a result of which, there was a vacuum under Section 5 of IBC², on the restructuring and reorganization of the personal insolvency basis, the guarantees rendered by the Promoters to the Corporate Debtor for the corporate person concerned.

Traditionally, the contract of guarantee was a tripartite agreement between the surety, principal debtor, and the creditor³, where the release of the corporate debtor meant the release of the surety from its contractual obligations⁴. However, a contrasting position was taken in *Maharashtra SEB v. Official Liquidator*⁵ wherein, the Supreme Court held that *the discharge of the principal debtor by operation of law in bankruptcy does not absolve the surety of liability*⁶. In the IBC-led resolution framework, this position was reinforced by the Supreme Court's observation in *State Bank of India v. V Ramakrishnan*⁷ whereby it was clarified that *approval of the resolution plan does not ipso facto discharge the personal guarantor from liability, even though the corporate debtor has been discharged of its contractual obligations*⁸. This marked a significant departure from the traditional concept of the contract of guarantee, leading to the conclusion that the liabilities of the corporate debtor and the personal guarantor, though *co-extensive*, still constitute independent liabilities owed to the creditor.

While a catena of cases has established that the corporate creditors have joint and independent remedies against the corporate debtors and their personal guarantors, IBC lacked

¹ ANANT MERATHIA, *DEFAULTER'S PARADISE LOST: DEMYSTIFYING THE INSOLVENCY AND BANKRUPTCY CODE*, 2016 219 (1st ed. 2023).

² Insolvency and Bankruptcy Code, 2016, § 5.

³ Indian Contract Act, 1872, § 126.

⁴ *Id.* § 134.

⁵ *Maharashtra SEB v. Official Liquidator*, (1982) 3 SCC 358.

⁶ *Id.* ¶ 7.

⁷ *State Bank of India v. V Ramakrishnan*, (2018) 7 SCC 394.

⁸ *Id.* ¶ 25.

a statutory framework for the insolvency of individuals and partnership firms (commonly referred to as ‘personal insolvency’), and thereby, the law on personal insolvency was introduced by the Ministry of Corporate Affairs *vide* its Notification dated 15th November 2019⁹, thereby giving legal sanctity to the provisions governing the insolvency and bankruptcy of individuals and partnership firms [insolvency resolution process or “IRP”], i.e., Part III of the IBC. Subsequent thereto, it received judicial approval from the Supreme Court in *Lalit Kumar Jain v. Union of India*¹⁰ which placed reliance on *V. Ramakrishnan* case and held that, “the release or discharge of the Corporate Debtor by an involuntary process, i.e., by liquidation or insolvency proceeding, does not absolve the surety/guarantor of his/her liability, which arises out of an independent contract.”¹¹

With the 2019 notification providing statutory recognition to the Personal Insolvency framework under IBC, and introducing delegated rules, such as the *Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019* [“2019 Rules”] and *Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019* [“2019 Regulations”], the personal insolvency framework is still fraught with challenges in terms of the manner of invocation of bank guarantees qua Form B demand notice under the 2019 Regulations, the inconsistent approach between pending corporate insolvency resolution process [“CIRP”] and the institution of the IRP against the Personal Guarantors thereon, the scope of the interim moratorium on the rights of secured creditors under the personal insolvency framework and the glaring inconsistencies with the enforcement and recovery actions under the other statutes, such as the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [“SARFAESI Act 2002”].

In light of the above, the author aims to introduce the statutory framework on these persistent issues, highlight the lacunae in the statutory provisions along with the inconsistencies between the judicial precedents, and suggest plausible solutions that could be taken note of to ensure that the legislative scheme of the IBC achieves its objectives, i.e., maximising the value of assets and balancing the interests of all the stakeholders including the personal guarantors, corporate debtors and the corporate creditors concerned.

⁹ Ministry of Corporate Affairs, S.O. 4126(E) (Nov. 15, 2019).

¹⁰ *Lalit Kumar Jain v. Union of India*, (2021) 9 SCC 321.

¹¹ *Id.* ¶ 125.

2 MAINTAINABILITY OF PERSONAL INSOLVENCY APPLICATIONS QUA CIRP PROCEEDINGS

2.1 Understanding the Legislative Scheme

With the issuance of the *notification dated 15 November 2019*, personal insolvency has been brought in line with the corporate insolvency process, which has been further bolstered by the Supreme Court's dictum in the *Lalit Kumar Jain* case. The position is reflected in *Section 60(2) of the IBC*, which provides for the adjudication of CIRP and personal insolvency proceedings under the same adjudicatory authority, i.e., NCLT¹², and further in *Section 60(3) of the IBC*, which provides for the transfer of pending proceedings and establishes the jurisdiction of the NCLT as the competent jurisdiction to adjudicate such disputes, be it pending CIRP or personal insolvency proceedings, within a single forum¹³.

To elaborate on the legislative scheme, *Sections 94 (Insolvency Application by the Guarantor) & 95 (Insolvency Application by the Creditor)*, IBC are the guiding stipulations for instituting insolvency applications against a guarantor as a personal debtor, which allow both creditors and guarantors, as individual debtors, to institute a personal insolvency application before the adjudicatory authority, i.e., NCLT. While in the ordinary recourse, the competent jurisdiction to adjudicate insolvency proceedings against the personal guarantors lies with the Debt Recovery Tribunals ["DRT"] under *Section 179 IBC*¹⁴, a conjoint reading of Sections 60 and 179 of the IBC makes it evidently clear that the legislative structure of the IBC provides for a scheme of provisions where there can be *simultaneous proceedings against both the personal guarantor and the corporate debtor, either by the same or different corporate creditors*¹⁵.

2.2 Is Pending CIRP a Mandatory Pre-Condition for Instituting Section 95 Application?

A reading of the judgments mentioned above and the provisions suggests that the liability of the corporate debtor and the personal guarantor to the corporate creditor is joint and independent, thereby allowing the corporate creditor to initiate independent proceedings against the Corporate Debtor and the Personal Guarantor. To buttress this argument, reliance may be placed upon several decisions of the NCLAT which have allowed applications under Section 95 IBC despite there being no pending CIRP proceedings against the

¹² Insolvency and Bankruptcy Code, 2016, § 60(2).

¹³ *Id.* § 60(3).

¹⁴ *Id.* § 179.

¹⁵ INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, PERSONAL GUARANTORS UNDER IBC: UNLOCKING THE VALUE 3 (2023), <https://ibbi.gov.in/uploads/whatsnew/eed07a9e474cf8da4bf6338a54953ebb.pdf>.

corporate debtor concerned. In *State Bank of India v. Mahendra Kumar Jajodia*¹⁶, NCLAT held that *Section 60(2) IBC is a secondary provision (applicable where a CIRP or Liquidation proceeding is pending) and is supplemental to the substantive provision, i.e., Section 60(1) IBC, and that, to move a Section 95 application, the existence of pending CIRP or Liquidation proceedings, is not a necessary prerequisite*¹⁷ (The decision was upheld in appeal by the Supreme Court¹⁸). In *Mahendra Kumar Agarwal v. PTC India Financial Services Ltd.*¹⁹, while ruling that a pending CIRP proceeding is not mandatory in order to move a Section 95 Application, the NCLAT explained the concept of ‘guarantee’ in the realm of IBC, held as follows:

“In Law, ‘Guarantee’, is an independent obligation of the Guarantor, which is evident from the ‘Personal Guarantee’, and that there is no requirement’, enabling a Person, to exhaust, any remedy, against a Corporate Debtor, prior to the issuance of ‘Demand’, in terms of Personal Guarantee and in the present case, Clauses 3, 4 and 6 of the Personal Guarantee, cannot be lost sight off. In reality, Section 60 of the Code provides for only a ‘Single Fora’, in respect of an adjudication of Insolvency Proceedings, against both the Corporate Debtor and the Personal Guarantor of the Corporate Debtor, Viz. Adjudicating Authority/ Tribunal.”²⁰

Further, NCLAT in *Anita Goyal v. Vistra ITCL (India) Ltd.*²¹, while relying on the Delhi High Court’s decision in *Axis Trustee Services Ltd. v. Brij Bhushan Singal*²², has held that a Section 95 application can be initiated by the creditor despite there being no pending CIRP proceeding. The Supreme Court adopted a similar approach in *BRS Ventures Investments Ltd. v. SREI Infrastructure Finance Ltd.*²³ and held that the Creditor can proceed against the personal guarantor without exhausting its remedies against the corporate debtor. In addition to the above, NCLAT in *State Bank of India v. Gourishankar Poddar*²⁴ has held that *mere approval of the Resolution Plan does not ipso facto release the guarantor from liability, as the obligations arise from the terms of the guarantee deed*²⁵. Additionally, the NCLAT, in *TATA Capital Ltd. v. Arjun Agarwal*²⁶ while placing its reliance upon the *Anita Goyal* case, has held that a pending CIRP proceeding is not a condition precedent to move a Section 95 Application.

¹⁶ *State Bank of India v. Mahendra Kumar Jajodia*, 2022 SCC OnLine NCLAT 58.

¹⁷ *Id.* ¶¶ 10, 11.

¹⁸ *Mahendra Kumar Jajodia v. State Bank of India*, Civil Appeal Nos. 1871–1872 of 2022.

¹⁹ *Mahendra Kumar Agarwal v. PTC India Fin. Servs. Ltd.*, Company Appeal (AT) (CH) (INS.) No. 08 of 2023 (NCLAT).

²⁰ *Id.* ¶ 74.

²¹ *Anita Goyal v. Vistra ITCL (India) Ltd.*, Company Appeal (AT) (Insolvency) No. 2282 of 2024 (NCLAT).

²² *Axis Trustee Servs. Ltd. v. Brij Bhushan Singal*, 2022 SCC OnLine Del 3634.

²³ *BRS Ventures Inv. Ltd. v. SREI Infrastructure Fin. Ltd.*, (2025) 1 SCC 456.

²⁴ *State Bank of India v. Gourishankar Poddar*, 2025 SCC OnLine NCLAT 62.

²⁵ *Id.* ¶ 28.

²⁶ *TATA Capital Ltd. v. Arjun Agarwal*, Company Appeal (AT) (Insolvency) No. 345 of 2025 (NCLAT).

However, in view of the aforesaid precedents, it is no longer *res integra* that pending CIRP proceedings are not a mandatory pre-condition for moving an application under Section 95 IBC, and thus independent proceedings can be initiated by the Creditor, thereby rendering it a binding precedent, the Madras High Court, in one of its seminal judgments, *Robit Nath v. KEB Hana Bank Ltd.*²⁷, deviated from the aforesaid settled position and held that *in view of the literal interpretation of Section 60(2) IBC, when there is no CIRP initiated in respect of the Corporate Debtor, then no insolvency proceeding can be initiated against the Personal Guarantor, rendering the Section 95 application devoid of merit*²⁸. Similarly, the NCLT Kolkata Bench in *UCO Bank v. Rahul Gupta*²⁹, while relying upon the *Robit Nath* case, has held that *NCLT under Section 60(1) and (2) of the IBC can be the adjudicatory authority only when the CIRP has been 'initiated', 'pending' or 'concluded' against the Corporate Debtor, Section 95 Application can be initiated under NCLT. Otherwise, DRT shall be the competent jurisdiction*³⁰.

Thus, a plain reading of the *UCO Bank* case makes it evidently clear that two scenarios would be covered within the confines of the term '*initiated CIRP*':

- a. CIRP commenced but did not culminate in a Resolution Plan;
- b. CIRP commenced but culminated in a Resolution Plan, which has been approved, meaning the CIRP has been concluded.

On the basis of points (a) and (b), the NCLT Kolkata Bench in *UCO Bank* case differentiated observation of the *Robit Nath* case from the *Mahendra Kumar Agarwal* and *Mahendra Kumar Jajodia* case.

This means, by necessary implication, that once a CIRP proceeding has been either *initiated* or *concluded*, then the Section 95 application shall lie before the jurisdictional NCLT, and in the contrary case, the Application will lie before the jurisdictional DRT. To elaborate further, the earlier position following *Mahendra Kumar Jajodia* case emphasised the term 'Pending' (meaning the CIRP has not concluded into a Resolution Plan while Section 95 Application has been moved), and the *Robit Nath & UCO Bank* case stressed upon the term 'Initiation' (meaning the CIRP has either been initiated or concluded while Section 95 Application has been moved, irrespective of whether it is pending while moving such Application), both interpretations rest on different footings, since in the former case, the maintainability of Section 95 application rests upon pendency, and in the latter case, it rests upon initiation. Such differences in interpretation may lead to increasing uncertainty around the institution of insolvency applications against the personal guarantors either before the jurisdictional NCLT under Section 60 of the IBC or the DRT under Section 179 of the IBC.

²⁷ *Robit Nath v. KEB Hana Bank Ltd.*, 2021 SCC OnLine Mad 2734.

²⁸ *Id.* ¶ 22.

²⁹ *UCO Bank v. Rahul Gupta*, IA(I.B.C)/1988(KB)2024 in C.P. (IB)/285(KB)2024.

³⁰ *Id.* ¶ 30.

3 SUGGESTIONS: AMENDMENTS IN SECTIONS 60 & 95 IBC

While the law appeared settled in view of the binding precedents in the *Mahendra Kumar Jajodia*, *Axis Trustee Services* and *TATA Capital Ltd.* case, that a pending CIRP proceeding is not a condition precedent for instituting a Section 95 application against the personal guarantor, these precedents were unsettled by the ratio in *Rohit Nath & UCO Bank* case and this divergence created ambiguity regarding the appropriate forum.

In the author's view, a harmonious construction may be adopted between the *Mahendra Kumar Jajodia* (including the other precedents) and *Rohit Nath & UCO Bank* case by introducing the following amendments to the relevant provisions –

- a. An amendment may be made to *Section 60(2) of the IBC* by adding an Explanation to sub-section (2) to insert the following Explanation: “*With reference to sub-section (2), ‘pending’ means that a CIRP application, under the relevant provisions of the Code, has been either instituted and admitted by the Adjudicatory Authority or has been concluded, and such CIRP has a nexus with the insolvency proceedings against the personal guarantor, irrespective of whether the CIRP application is instituted and admitted or has concluded, simultaneously while instituting an application under Section 95(1) of the Code.*”
- b. Similarly, an amendment is required in *Section 95(1) of the IBC* by adding the words “*Subject to Section 60(2)*” so that the provision reads as follows: “*A creditor, subject to Section 60(2), may apply either by himself, or jointly with other creditors, or through a resolution professional to the Adjudicating Authority for initiating an insolvency resolution process under this section by submitting an application.*”

In this manner, the meaning of ‘pending’ will be clearly understood by stakeholders and thereby the jurisdictional ambiguity surrounding the institution of Section 95 applications shall be alleviated, thereby bringing greater clarity to the institution of insolvency Applications against the Personal Guarantors. This would ensure that the binding precedents following *Mahendra Kumar Jajodia* case are affirmed by the proposed statutory clarification.

4 INVOCATION OF BANK GUARANTEE QUA DEMAND NOTICE UNDER THE IBBI'S 2019 REGULATIONS

4.1 Understanding the Legislative Scheme Around the Invocation of Bank Guarantees under IBC

While the Code mandates the initiation of IRP against the personal guarantors under Section 95(1) of the IBC³¹, the initiation of IRP is preceded by the definition of personal

³¹ Insolvency and Bankruptcy Code, 2016, § 95(1).

guarantors under *Rule 3(e) of the 2019 Rules*³² which comprises two essential elements:

- a. Who constitutes a ‘guarantor’
- b. When a ‘personal guarantee’ is considered to have been invoked, i.e., *when the guarantee has been invoked by the creditor and remains unpaid, in whole or in part.*

In light of the above, as per the definition provided under Rule 3(e) of the 2019 Rules read with Section 95 of the IBC, insolvency proceedings against a guarantor are said to commence when the guarantee has been *invoked* and remains unpaid, *in whole or in part*. The IBBI’s 2019 Regulations additionally mandate that claims against the personal guarantor/debtor must be submitted to the resolution professional in FORM B (demand notice)³³, constituting a list of claims, along with proof of debt, submitted to the resolution professional, thereby forming the basis for a Section 95 application. Accordingly, it may be submitted that to initiate an IRP against the personal guarantor, the claims must be submitted in FORM B which can only be done once the *guarantee has been invoked*. This implies, by necessary implication, that the invocation of the bank guarantee is an essential requirement, which establishes that a personal guarantor has become a debtor, and enables the initiation of IRP against the personal guarantor³⁴ under Section 95 (4) of the IBC read with Regulation 7(1) of the 2019 Regulations and Rule 3(e) of the 2019 Rules.

4.2 Does Form B Constitute a Formal Invocation of Bank Guarantee under Rule 3(e) 2019 Rules r/w Regulation 7(1) 2019 Regulations?

While the IRP proceedings against the personal guarantor under the statutory scheme of IBC, read with the 2019 Rules and Regulations, are clear, in the context of invoking the bank guarantee, submitting FORM B (as a demand notice) to submit the list of claims to the resolution professional, and to initiate a Section 95 application, one of the key questions arising from these provisions is the *manner of invoking a bank guarantee*, which, in light of recent decisions of the adjudicatory authorities, has become a major impediment in instituting a Section 95 application. This section analyses the relevant judgments in order to demonstrate inconsistencies between two lines of judicial reasoning: (i) FORM B as a demand notice does not amount to formal invocation of a bank guarantee; and (ii) FORM B as a demand notice does amount to formal invocation of a bank guarantee.

³² Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, r. 3(e), Gazette of India (Nov. 15, 2019).

³³ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Regulations, 2019, reg. 7(1), Gazette of India (Dec. 1, 2019).

³⁴ Pooja Ramesh Singh v. State Bank of India, Company Appeal (AT) (Ins.) No. 329 of 2023 (NCLAT).

The first line of reasoning was articulated by the NCLAT in *State Bank of India v. Deepak Kumar Singhania*³⁵ wherein the Tribunal held that *since FORM B mentions the particular 'date of default', so it contemplates the default by Guarantor, which means that the invocation of the Bank Guarantee has to be as per the Deed of Guarantee, meaning FORM B is not contemplated as Demand Notice as per the Deed of Guarantee, thereby rejecting the Section 95 Application*³⁶. NCLT Amaravati Bench in *Bank of Baroda v. Rayapati Sambasiva Rao*³⁷ rejected the Section 95 Application on the ground that the bank guarantee merely on the basis of the service of FORM B, cannot be said to have been formally invoked since it was not contemplated in the Deed of Guarantee. In a significant development, NCLT Indore Bench in *Canara Bank v. Ramgopal Agrawal*³⁸ held that neither FORM B, as held in the *Deepak Kumar Singhania* case, nor the Demand Notice under Section 13(2) SARFAESI Act 2002, could be said to constitute a formal invocation of bank guarantee since the latter *pertains to enforcement of security interest rather than contractual liability under the Deed of Guarantee*.³⁹

In line with this, NCLT Indore Bench in *IDBI Bank v. Hemangi Patel*⁴⁰ held that *issuance of a FORM B Demand Notice under Regulation 7(1) of the 2019 Regulations does not create a fresh cause of action, as it is merely a procedural step under the Code*⁴¹. NCLT Ahmedabad Bench, similarly, held that FORM B does not constitute a formal invocation of the bank guarantee⁴². NCLT Ahmedabad Bench in *Omkara Asset Reconstruction Co. Ltd. v. Kirandevi Aggarwal*⁴³ dismissed the Section 95 application on the ground that the Section 13(2) Demand Notice does not constitute the invocation of the bank guarantee, constituting only a procedural step for the enforcement of the security interest.

On the contrary, the NCLAT, in one of its seminal decisions in *Asha Basantilal Surana v. State Bank of India*⁴⁴ held that a demand notice under Section 13(2) of the SARFAESI Act, 2002 constitutes a valid demand notice for the invocation of the bank guarantee, since the said guarantee is an on-demand guarantee *and the guarantee deed does not prescribe any specific mode or manner of issuing a demand notice*⁴⁵. NCLT Chandigarh Bench, on a similar note, recognised a fresh cause of action from the service of the Demand Notice under Section 13(2)

³⁵ *State Bank of India v. Deepak Kumar Singhania*, Company Appeal (AT) (Insolvency) No. 191 of 2025 (NCLAT).

³⁶ *Id.* ¶¶ 20–26.

³⁷ *Bank of Baroda v. Rayapati Sambasiva Rao*, 2025 SCC OnLine NCLT 3117.

³⁸ *Canara Bank v. Ramgopal Agrawal*, CP(IB)/56(MP)2024.

³⁹ *Id.* ¶ 18.

⁴⁰ *IDBI Bank v. Hemangi Patel*, CP(IB)/55(MP)2024.

⁴¹ *Id.* ¶ 7.

⁴² *Bank of Baroda v. Bijal S Shah*, C.P.(IB)/170(AHM)2025.

⁴³ *Omkara Asset Reconstruction Co. v. Kirandevi Aggarwal*, C.P.(IB)/151(AHM)2025.

⁴⁴ *Asha Basantilal Surana v. State Bank of India*, Company Appeal (AT) (Insolvency) No. 84 of 2025 (NCLAT).

⁴⁵ *Id.* ¶¶ 12–14.

SARFAESI Act 2002⁴⁶. Moreover, NCLAT in *Rakesh Jolly v. Indian Bank*⁴⁷ held that a demand notice in the form of FORM B extends the limitation period and gives rise to a fresh cause of action subsequent to the Section 13(2) Demand Notice being served to the personal guarantor. Similarly, NCLAT in *Mavjibhai Nagarbhai Patel v. State Bank of India*⁴⁸ treated the Section 13(2) demand notice as an invocation under an *on-demand guarantee* which, by virtue of the contents of the Guarantee Deed, contemplated the guarantee to be a continuing one, considered the notice to be a valid demand notice in order to approve Section 95 Application. In line with the aforesaid observations, FORM B Demand Notices were considered to validly invoke the bank guarantee by the NCLT (New Delhi Bench)⁴⁹, the NCLAT⁵⁰, and the Supreme Court⁵¹.

5 SUGGESTIONS: AMENDMENT IN REGULATION 7(1) OF THE IBBI 2019 REGULATIONS

A cursory review of the above-mentioned judicial underpinnings suggests a glaring inconsistency among the dicta of various judicial forums as a result of which a barrage of doubts arises regarding the admissibility of FORM B under Regulation 7(1) of the 2019 Regulations (as well as a demand notice under Section 13(2) SARFAESI Act, 2002) as constituting a formal invocation of a bank guarantee under Rule 3(e) of the 2019 Rules. The NCLAT, in *State Bank of India v. Gourishankar Poddar*⁵² has held that *the limitation period against a guarantor commences only when a specific demand is raised*,⁵³ and that, where the guarantee is a continuing one, any *acknowledgement by the personal guarantor through a demand notice in the form of FORM B shall be treated as giving rise to a fresh cause of action under Section 18 of the Limitation Act, 1963*⁵⁴. This implies that if these two conditions are fulfilled, IRP proceeding against a personal guarantor may be initiated. Accordingly, the two conditions are:

- a. A demand is raised by the creditor (irrespective of the mode and manner of the issuance of the demand notice); and
- b. Acknowledgement of debt thereon.

⁴⁶ *In re* Manveer Kaur, 2025 SCC OnLine NCLT 1610.

⁴⁷ *Rakesh Jolly v. Indian Bank*, Company Appeal (AT) (Ins.) No. 1267 of 2023 (NCLAT).

⁴⁸ *Mavjibhai Nagarbhai Patel v. State Bank of India*, Company Appeal (AT) (Insolvency) No. 1702 of 2024 (NCLAT).

⁴⁹ *Indiabulls Hous. Fin. Ltd. v. Mohit Singh*, 2024 SCC OnLine NCLT 3568.

⁵⁰ *Indiabulls Asset Reconstruction Co. v. Pawan Kapoor*, 2024 SCC OnLine NCLAT 1021. *See also* *Neon Lab's Ltd. v. Mayank Shah*, 2024 SCC OnLine NCLAT 989.

⁵¹ *Neon Lab's Ltd. v. Mayank Shah*, 2024 SCC OnLine SC 2651.

⁵² *State Bank of India v. Gourishankar Poddar*, 2025 SCC OnLine NCLAT 62.

⁵³ *Id.* ¶ 57.

⁵⁴ *Id.* ¶¶ 51–54.

A plain reading suggests that if the two conditions are fulfilled, IRP proceedings may be initiated under Section 95 of the IBC. Accordingly, an amendment is proposed by adding an Explanation to Regulation 7(1) of the 2019 Regulations, as follows –

“With reference to sub-regulation (1), and subject to Rule 3(e) of the 2019 Rules, it is clarified that the issuance of FORM B and the demand notice under Section 13(2) SARFAESI Act, 2002 shall constitute a formal invocation of the Bank Guarantee, subject to the provisions of the Limitation Act, 1963 and the contents of the deed of guarantee.”

This will ensure that certain mandatory pre-conditions for initiating an application under Section 95 of the IBC are fulfilled, while, at the same time, the erroneous and inconsistent findings in *Deepak Kumar Singhania* are also addressed and brought in line with other decisions of judicial and quasi-judicial forums⁵⁵.

6 SCOPE OF INTERIM MORATORIUM UNDER SECTION 96 IBC QUA THE RIGHTS OF THE SECURED CREDITORS

6.1 The Legislative Scheme on the Interim Moratorium

While CIRP offers some breathing space to corporate debtors under *Section 14 of the IBC* which is imposed upon the admission and approval of a CIRP application by the NCLT, the position is markedly different in the case of personal insolvency⁵⁶, wherein, based on the U.S. bankruptcy model of an automatic stay on enforcement and recovery actions against the debtor⁵⁷, an *interim moratorium* is automatically imposed on the assets of the personal guarantor under *Section 96(1) of the IBC*⁵⁸, which continues until the report of the resolution professional on the IRP Application is submitted to the NCLT for approval or rejection. There is an additional distinction between Sections 14 and 96 of the IBC, in that the former is narrower in scope, as it covers civil proceedings against the debtor, while the latter is wider in scope, as it stays all proceedings against the corporate debtor, including execution and enforcement actions, and imposes a stay on the debt rather than on the actions of the personal guarantor⁵⁹.

⁵⁵ Anuj Shah, *Invocation of Guarantee: A Mandatory Precondition for Insolvency Proceedings Against Personal Guarantors*, IBCLAWS (Mar. 8, 2025), <https://ibclaw.in/invocation-of-guarantee-a-mandatory-precondition-for-insolvency-proceedings-against-personal-guarantors-anuj-shah/>.

⁵⁶ IIIPICAI, *Comparison Between the IBC and USA's Chapter 11 Bankruptcy Code* 24, 25 (2025), <https://www.iiipicai.in/wp-content/uploads/2025/01/22-28-Article.pdf>.

⁵⁷ 11 U.S. Code § 362 - *Automatic Stay*, CORNELL LAW SCHOOL, <https://www.law.cornell.edu/uscode/text/11/362> (last visited Aug. 8, 2025).

⁵⁸ Insolvency and Bankruptcy Code, 2016, § 96(1).

⁵⁹ Saranga Anilkumar Aggarwal v. Bhavesh Dhirajlal Sheth, (2025) 4 SCC 629.

Additionally, a unique characteristic that reinforces the democratic and inclusive nature of personal insolvency under PART III of the IBC is that *secured creditors* have the right to forfeit their voting rights, remain outside the IRP proceedings, and forgo voting rights on the repayment plan and enforce their security independently against the personal guarantor⁶⁰, subject to the condition that such secured creditors retain residual rights on the unsecured part of the debt⁶¹.

6.2 Does the Interim Moratorium under Section 96 IBC Hamper the Recovery Rights of the Secured Creditors?

On a harmonious reading of Sections 96 and 110 of the IBC, it is clear that secured creditors who forfeit their voting rights are entitled to undertake independent enforcement and recovery actions against the personal guarantor and shall not be prohibited by the imposition of an interim moratorium under Section 96 of the IBC.

While the above position reflects the statutory scheme, the democratic framework of Section 110 of the IBC is undermined when secured creditors are left with no other option but to face an onerous stay on enforcement and recovery proceedings due to the mandatory imposition of interim moratorium, thereby creating inconsistencies between Section 96 and Section 110 of the IBC⁶². The implications for creditors are such that upon the mere filing of an application under Section 94 or Section 95, *the law imposes an automatic stay on creditor actions, even before the adjudicating authority applies its mind to the merits of the application*. Thus, such a moratorium operates without judicial scrutiny, solely based on the filing, and applies indiscriminately to all creditors⁶³.

The Kerala High Court, while adjudicating a Section 94 application, held that such an application, filed solely to obtain the benefit of an automatic stay under Section 96 IBC, constitutes a misuse of the statutory framework of the IBC, and unless there arises any kind of repugnancy between the IBC 2016 and the SARFAESI Act, 2002, there can be no question of the IBC overriding the SARFAESI Act, 2002, and accordingly, proceedings under Section 14 of the SARFAESI Act ought not to be stayed (as both statutes operate in different fields)⁶⁴.

⁶⁰ Insolvency and Bankruptcy Code, 2016, § 110(2).

⁶¹ *Id.* § 110(3).

⁶² Mukesh Chand, *Lacunas in Personal Insolvency Process*, ECONOMIC LAWS PRACTICE (2025), <https://media.licdn.com/dms/document/media/v2/D4D1FAQG-WSmD-n9F6Q/feedshare-document-pdf-analyzed/B4DZaBacmEGgAg-/0/1745927920159?e=1755129600&v=beta&t=KI7OAquVP6BgTCMZ1Webiuy4ENi3kFE96t0UlegTQ7s> (last visited Aug. 8, 2025).

⁶³ *Id.*

⁶⁴ *Jeny Thankachan v. Union of India*, 2023 SCC OnLine Ker 10748.

While the Code offers the secured creditors the option either to relinquish their security and participate in the repayment plan or to stand outside the process and enforce security independently, the blanket imposition of a stay under Section 96 IBC prohibits the enforcement and recovery actions of such creditors, thereby undermining both the objective and the statutory recourse under Section 110 IBC. Such inconsistency and blanket prohibition is seen in the enforcement actions undertaken by the secured creditors under the SARFAESI Act, 2002, when such creditors may be willing to relinquish their security and participate in the IRP, yet remain subject to the implications of Section 96. Similarly, the NCLAT adopted this position in *Syed Sirajis Salikin Khadri v. Edelweiss ARC*⁶⁵ wherein the Tribunal upheld the dismissal of the Section 94 application, emphasizing that an automatic moratorium cannot be misused as a shield against legitimate enforcement actions under the provisions of the SARFAESI Act, 2002.

However, the Delhi High Court in *Sanjay Dhingra v. IDBI Bank Ltd.*⁶⁶ directed the creditor bank-cum-mortgagee not to proceed with the sale of the mortgaged property in the course of its legitimate enforcement actions under the SARFAESI Act, 2002, in view of the interim moratorium, and also held that such enforcement actions can take place once the interim moratorium is lifted. Similarly, despite symbolic possession of the mortgaged property having been taken by the creditor and actual possession being with the District Magistrate pursuant to the order of possession under the SARFAESI Act, the NCLAT in *Indiabulls Asset Reconstruction Company Ltd. v. Pawan Kapoor*⁶⁷ erred in prohibiting further action by the creditor under the SARFAESI Act until the moratorium is lifted.

6.3 Suggestions: Recourse to UK's Corporate Insolvency and Governance Act 2020

While U.S. Bankruptcy Code, under Section 362 of Chapter 11 U.S. Code provides for an automatic stay on enforcement actions and recovery proceedings by the creditors (subject to limited exceptions, as determined by the bankruptcy court)⁶⁸ the UK Insolvency Act 1986, which operates in consonance with the IBC framework in terms of a creditor-in-control mechanism and demand driven personal insolvency under Section 268 of the UK Insolvency Act 1986,⁶⁹ adopts a similar restructuring mechanism, following a creditor-in-control approach in line with the IBC restructuring framework. Apart from the 1986 Act governing insolvency of both corporate persons and individuals, particular emphasis is

⁶⁵ *Syed Sirajis Salikin Khadri v. Edelweiss ARC*, Company Appeal (AT) (Insolvency) No. 455 of 2025 (NCLAT).

⁶⁶ *Sanjay Dhingra v. IDBI Bank Ltd.*, 2024 SCC OnLine Del 4521.

⁶⁷ *Indiabulls Asset Reconstruction Co. v. Pawan Kapoor*, 2024 SCC OnLine NCLAT 1021.

⁶⁸ *Automatic Stay*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/automatic_stay (last visited Aug. 8, 2025).

⁶⁹ Insolvency Act 1986, § 268 (Eng.).

placed on the UK's Corporate Insolvency and Governance Act, 2020 ["2020 Act"] wherein, based on the imposition of a moratorium, there are three types of debts:

- a. pre-moratorium debts for which the company has a payment holiday;
- b. pre-moratorium debts for which the company does not have a payment holiday; and
- c. moratorium debts.⁷⁰

Although the 2020 Act governs the insolvency framework for corporate entities, the same is referred here to explain that certain *pre-moratorium debts* (having no payment holidays) are exempt from the imposition of moratorium, and such debts generally comprise financial obligations owed by the debtor to the corporate creditors⁷¹, and could be incorporated within Part III of the IBC, to address the existing inconsistencies between Sections 96 and 110 of the IBC.

Accordingly, the author proposes some amendments to address two issues: inconsistent approach of the interim moratorium with the rights of the secured creditors, and the exemption of certain financial debts owed by the Personal Guarantors before the Moratorium period –

- a. Amend Section 96 of the IBC by incorporating sub-section (2) as follows:

“Notwithstanding the provisions of the Insolvency and Bankruptcy Code, nothing in this section shall prevent the enforcement and recovery actions by the secured creditors under other applicable laws, who have forfeited their rights under Sections 110 (2) and (3).”

- b. Amend Section 96 of the IBC (in line with Section A18 of the Insolvency Act 1986, inserted by the 2020 Act) by incorporating sub-sections (2A) & (2B) as follows:

“(2A) Subject to sub-sections (1) and (2), the Adjudicating Authority shall have the power to exclude certain kinds of pre-moratorium debts, having pecuniary liabilities, which are subject to the provisions of the other Acts.

(2B) Any decision of the adjudicatory authority in sub-section (2A) shall be challenged before the appellate tribunal under Section 61(1).”

7 CONCLUSION

With the introduction of Part III of the Insolvency and Bankruptcy Code, 2016, and subsequent judicial sanction accorded in *Lalit Kumar Jain*, a landmark step was taken to address the legislative vacuum concerning personal guarantors, which has gained prominence in

⁷⁰ UK *Corporate Insolvency and Governance Act: Moratorium*, DLA PIPER, <https://www.dlapiper.com/en/insights/publications/2020/09/uk-corporate-insolvency-and-governance-bill> (last visited Aug. 8, 2025).

⁷¹ Insolvency Act 1986, c. 45, § A18 (Eng.) (inserted by Corporate Insolvency and Governance Act 2020).

recent years owing to low recovery rates in CIRP proceedings⁷². However, its implementation has been fraught with judicial inconsistencies and procedural ambiguities. This paper examines the complex challenges that currently undermine the efficacy of the personal insolvency framework.

The first major hurdle examined is the maintainability of insolvency applications against personal guarantors. Conflicting judicial pronouncements, particularly in *Mahendra Kumar Jajodia* and *Rohit Nath* cases, have created significant uncertainty regarding whether a pending CIRP is a mandatory precondition for initiating an IRP under Section 95 of the IBC. The second critical issue delves into the invocation of bank guarantees. The adjudicatory authorities remain divided on whether a FORM B demand notice under the 2019 Regulations or a Section 13(2) Notice under the SARFAESI Act, 2002 constitutes a formal invocation of the guarantee, and this procedural impasse often stalls legitimate claims at the very inception of a Section 95 application. Additionally, the third issue concerns the scope of the interim moratorium under Section 96 of the IBC, where an automatic and blanket application inadvertently clashes with the rights of the secured creditors to enforce their security independently, as provided under Section 110 of the IBC.

These inconsistencies have been addressed to highlight the amendments proposed to the provisions of the IBC to remove such procedural and judicial ambiguities and to promote a more coherent approach to the debt resolution framework of the IBC. Ultimately, these proposed amendments are not mere legislative tweaks; they are essential reforms aimed at aligning the personal insolvency regime with the core objectives of the IBC: maximizing the value of assets and balancing the interests of all stakeholders, thereby fostering a more robust, transparent, and inclusive resolution process.

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⁷² *Claims Against Personal Guarantors in IBC Cases Jump 80% in FY25*, THE HINDU BUSINESSLINE, <https://www.thehindubusinessline.com/economy/claims-against-personal-guarantors-in-ibc-cases-jump-80-pc-in-fy25/article69621344>. ece (last visited Aug. 8, 2025).

CHAPTER 5

From Ashes to Assets: Reimagining Phoenixing and Pre-Packs in India's Insolvency Framework

ALISHA KHAN*

Insolvency frameworks in India, prior to the 2021 amendment, operated exclusively through the Corporate Insolvency Resolution Process (CIRP). The 2021 amendment introduced the Pre-Packaged Insolvency Resolution Process (PIRP), but its application is restricted to Micro, Small, and Medium Enterprises (MSMEs). A further amendment in 2018 introduced Section 240A of the IBC, exempting promoters of MSMEs from certain disqualifications under Section 29A. This paper examines how this legislative shift, brought in by the 2021 amendment together with the introduction of Section 240A, creates a potential loophole for MSMEs to exploit through phoenix activity. Phoenix activity — which may be technically legal or outright illegal but is commonly associated with the fraudulent re-acquisition of businesses by their own promoters — has created a regulatory space that enables promoters to re-acquire distressed businesses under PIRP with minimal scrutiny, often through undervalued resolution plans.

Part I of the paper argues that, despite the often minimal direct harm from MSME phoenixing given their limited assets and market presence, India's current complete disregard of this practice is problematic, particularly in light of cases involving larger entities like Essar Steel. This section therefore proposes a tailored regulatory framework for MSME phoenixing, asserting that accommodating controlled phoenixing or sales to connected parties within a broader economic framework can foster long-term wealth creation by supporting the notion of legitimate business failure.

Part II is concerned with the exclusivity of the amendment for MSMEs, rather than a liberal application of pre-packaged insolvency resolution processes to larger corporations as well. While the legislature's cautious approach stems from the possibility of misuse, market instability given the outsized impact of large corporations, and creditor harm, there is a complete disregard of possible positive outcomes such as job preservation, among others. The paper therefore proposes a carefully structured pre-pack regulatory framework to accommodate the merits of extending pre-packs to larger corporations, exploring how India can implement such a mechanism to harness the economic benefits while also safeguarding creditors and limiting liability evasion. The paper underscores how India's experience with MSMEs can serve as a regulatory sandbox, drawing inspiration from comparative models from the UK and Australia, where structured oversight of phoenixing — rather than outright prohibition — has proved successful.

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Keywords: Insolvency, Pre-Packaged Insolvency, MSME Exemptions, Debtor-in-possession

1 INTRODUCTION

India's insolvency framework has undergone a series of significant reforms since its inception, moving from complete reliance on the traditional Corporate Insolvency Resolution Process (CIRP) to a more efficient and inclusive toolkit in the form of the Pre-Packaged Insolvency Resolution Process (PIRP), introduced in 2021. In the aftermath of COVID-19, the country needed a more cost-effective, time-efficient, and accessible resolution path. The PIRP underscores the legislature's intentional departure from the usual creditors-in-control model, incorporating elements of debtor-in-possession while retaining creditor oversight. Yet its scope is seemingly narrow, confining itself exclusively to micro, small, and medium enterprises (MSMEs).

This reform did not occur in isolation. The earlier 2018 amendment to the Insolvency and Bankruptcy Code (IBC) introduced Section 240A, exempting MSMEs from disqualification under Section 29A. Together, these measures have created an environment in which promoters of MSMEs may re-acquire distressed businesses through PIRP without restriction — a dynamic that intersects directly with the controversial practice of phoenixing. While phoenixing can serve as a legitimate tool for preserving jobs and enterprise value when conducted transparently, its abusive form undermines creditor rights and public confidence.

This paper critically examines how the current framework creates a breeding ground for phoenixing activity, contrasting the treatment of MSMEs with that of larger corporations, and assessing whether the MSME exclusivity is justified. Drawing on comparative experiences from jurisdictions such as the UK and Australia, it analyses how targeted regulation — rather than blanket prohibition — can balance efficiency with accountability. By positioning India's PIRP as both a safeguard and a potential sandbox, the discussion extends to whether its benefits, particularly in job preservation, cost savings, and early intervention, merit expansion beyond the MSME sector, subject to robust oversight mechanisms.

2 PURPOSE OF THE PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS (PIRP)

The IBC Amendment Ordinance of April 2021 was replaced by the Insolvency and Bankruptcy Code (Amendment) Bill 2021, introducing Chapter III, which solidified India's

transition from a creditors-in-control to a debtors-in-possession model.¹ However, this change is limited to MSMEs. The 2021 Amendment was introduced in the context of COVID-19, which precipitated widespread financial defaults and brought many businesses to a standstill; even though the pandemic has ended, similar circumstances persist due to rising global tensions.²

The introduction of PIRP aligns with the central objectives of the IBC, such as value maximisation of assets, reduction of litigation costs, and promotion of settlements. This is evident from the fact that 30,000 cases involving Rs 14 lakh crore of debt were settled over nine years, even before applications reached the National Company Law Tribunal (NCLT).³ Unlike the traditional CIRP, which operates within a 330-day statutory timeline, PIRP can only be initiated by the debtor and is designed to conclude proceedings expeditiously within 120 days.⁴ The process not only allows debtors to explore avenues that are cost-effective, less burdensome, and more flexible than court proceedings, but also permits them to retain possession and control over management throughout the resolution process.⁵

Thus, PIRP proposes a seamless amalgamation of out-of-court negotiations and formal proceedings before the NCLT. The reduced involvement of formal courts also addresses the limitations of the corporate insolvency process in India. In *Ruchi Soya Industries Limited*,⁶ the traditional CIRP approach led to a delay of approximately two years in obtaining approval for the resolution plan, highlighting the existing scarcity of resources, the substantial backlog, and systemic deficiencies. By comparison, Section 54K of the IBC under PIRP spares the debtor from the additional costs of a change in management, as it is a mutually agreed mechanism that allows the company to preserve the value of its assets and jobs, thereby ensuring goodwill and economic growth.⁷

¹ Hiteshkumar Thakkar & K. Agarwal, *Pre-Packaged — Integration of Debtor Centric Model with Creditor in Control Model: Indian Insolvency Regime*, 93 BANK QUEST 5, 5–16 (2022).

² Navolina Majumdar, *Pre-Packaged Insolvency Resolution Process for MSMEs — An Analysis*, Insights, KOCHHAR & CO., https://kochhar.com/wp-content/uploads/2021/10/Pre-packaged-Insolvency-Resolution-Process-for-MSMEs-An-Analysis_Insights_Indo-US-Desk_Dispute-Resolution_Oct-2021.pdf (last visited Aug. 8, 2025).

³ Crisil Ratings, *In Nine Years, IBC Helps Resolve Over Rs 26 Lakh Crore of Debt — Directly or Indirectly* (July 22, 2025), <https://www.crisilratings.com/en/home/newsroom/press-releases/2025/07/in-nine-years-ibc-helps-resolve-over-Rs-26-lakh-crore-of-debt-directly-or-indirectly.html>.

⁴ INSOLVENCY & BANKR. BD. OF INDIA, ANNUAL REPORT 2020–2021 (2021).

⁵ S. Deb & I. Dube, *Insolvency and Bankruptcy Code 2016: Revisiting with Market Reality*, 63 INT'L J.L. & MGMT. 125–46 (2021).

⁶ *Ruchi Soya Indus. Limited v. Joint Comm'r*, 2017 SCC OnLine Cal 6187.

⁷ Neeti Shikha & Urvashi Shahi, *Policy Inputs on Report of Subcommittee on Prepacks* (Centre for Insolvency and Bankruptcy, Indian Inst. of Corp. Affs. 2021), <https://iica.nic.in/images/Prepacks-in-India.pdf> (last visited Oct. 27, 2024).

3 SECTION 240A AND ITS EXEMPTIONS FROM SECTION 29A

While the debtor-in-possession principle at the core of PIRP is laudable for the preservation of MSMEs, its interaction with Section 29A requires re-examination. Under Section 29A, certain persons — including those disqualified from acting as directors and erstwhile promoters or management of a company — are barred from submitting a resolution plan under Section 30. The primary aim of this provision is to prevent those responsible for insolvency from participating in the resolution process.⁸ In *Chitra Sharma*, the Supreme Court observed that the legislative intent was to close the loophole and prevent backdoor entry, which could otherwise allow unscrupulous persons to be rewarded at the expense of creditors.⁹

Section 240A of the Code creates an exemption for MSMEs from Sections 29A(c) and 29A(h). This gives rise to the controversy surrounding the cut-off date, which is critical to availing the exemption under Section 240A.¹⁰ In *Hari Babu Thota*, the Supreme Court, while assessing the eligibility criteria under Section 29A, held that “the cut-off date for the application of Section 29A(c) would be the date of submission of the resolution plan.”¹¹ This case sets a precedent for the possibility, through textual interpretation, that erstwhile promoters may apply for an MSME certificate before the resolution process begins and obtain one during an ongoing CIRP. Critics contend that this reopens a “backdoor” previously closed by company law courts, as in *Digambar Anandrao Pingle*, where acquiring MSME status after the commencement of CIRP was held to be an improper attempt by suspended management to evade Section 29A’s strict prohibitions — prohibitions aimed at those who caused the corporate debtor’s financial difficulties — thereby threatening unjust enrichment at the expense of creditors.¹²

4 EMERGING CONCERNS: PHOENIXING RISKS

One of the few substantive discussions on phoenixing in India occurred when the possibility of such activity was considered by the Bankruptcy Law Reforms Committee (BLRC).¹³

⁸ Masad Khan, *MSME Exemption Under IBC: Closing the Loophole*, IRCCL (Jan. 28, 2024), <https://www.irccl.in/post/msme-exemption-under-ibc-closing-the-loophole>.

⁹ *Chitra Sharma v. Union of India*, (2018) 18 SCC 610.

¹⁰ *Id.*

¹¹ *In re Hari Babu Thota*, (2024) 242 Comp Cas 1; Masad Khan, *MSME Exemption Under IBC: Closing the Loophole*, INDIAN REVIEW OF CORPORATE & COMMERCIAL LAWS (Jan. 28, 2024), <https://www.irccl.in/post/msme-exemption-under-ibc-closing-the-loophole>.

¹² *Digambar Anandrao Pingle v. Shrikant Madanlal Zawar*, 2021 SCC OnLine NCLAT 1449; Masad Khan, *MSME Exemption Under IBC: Closing the Loophole*, INDIAN REVIEW OF CORPORATE & COMMERCIAL LAWS (Jan. 28, 2024), <https://www.irccl.in/post/msme-exemption-under-ibc-closing-the-loophole>.

¹³ INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, IBC: EVOLUTION, LEARNINGS AND INNOVATION (2023), <https://www.iiipicai.in/wp-content/uploads/2023/10/IBC-Evolution-Learnings-and-Innovation.pdf>; INSOLVENCY

Given the limited domestic resources on this subject, the author has relied on existing frameworks and precedents from other jurisdictions.

Phoenix activity is not always objectively harmful; in some cases, it is genuine and entirely legal. However, many such cases are not undertaken to rehabilitate a failing enterprise but rather to exploit creditors by transferring vital assets to a New Company (NewCo) and placing the Old Company (OldCo) into insolvency proceedings. Since there is little left for creditors to recover from OldCo, the former management successfully avoids paying outstanding debts.¹⁴

To illustrate the distinction between legal and illegal phoenixing, consider two companies, A and B, both of which have significant outstanding liabilities but also hold valuable assets.

Company A appoints a neutral licensed insolvency practitioner who arranges a fair market-value sale of assets to a newly formed company (“NewCo”). The proceeds are paid into OldCo and distributed fairly among all creditors, including employees and the tax authority, before OldCo enters liquidation. This is a legitimate company rescue or pre-pack sale, conducted transparently to preserve jobs and maximise returns for stakeholders.

Company B’s directors — often acting on partial advice — transfer OldCo’s assets to a NewCo they also control, either at below-market prices or for no consideration, leaving OldCo with nothing. Creditors are left unpaid, and NewCo continues business using the same staff and premises. This is classic illegal phoenix activity, characterised by the transfer of assets “for little or no value” with the intent to defeat creditor interests.

Legal phoenixing is a fair and structured reset aimed at preserving value and providing returns to creditors. Illegal phoenixing is a covert scheme to evade debt and strip assets, giving rise to creditor disenfranchisement. The essential distinction lies in the deliberate intention to exploit the corporate form to the detriment of unsecured and secured creditors, the state, and competitive market conditions.¹⁵

A critical question surrounding corporate phoenixing is whether the practice is inherently harmful to creditors, even when undertaken without fraudulent intent. From a creditor’s perspective, the process may appear fundamentally problematic: valuable assets are transferred to a new, debt-free company, leaving the original entity unable to settle its liabilities, while the business owner preserves the enterprise under a new name.

LAW COMM., REPORT OF THE SUB-COMMITTEE ON PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS 14–16 (Oct. 2020), <https://ibbi.gov.in/uploads/resources/24c7fc03cdffff69960ce374416fa646.pdf>.

¹⁴ Bhargavi Zaveri & Vinay Nair, *Promoter Buy-Back in Insolvency: Phoenixing in India*, OXFORD BUSINESS LAW BLOG (Dec. 6, 2017), <https://blogs.law.ox.ac.uk/business-law-blog/blog/2017/12/promoter-buy-back-insolvency-phoenixing-india>.

¹⁵ Helen Anderson et al., *Defining and Profiling Phoenix Activity* (Melbourne Law School, Dec. 10, 2014), https://law.unimelb.edu.au/files/dmfile/DefiningandProfilingPhoenixActivity_MelbourneLawSchool6.pdf.

However, this perspective often overlooks the practical alternative. The choice is rarely between phoenixing and the full repayment of debts; it is between phoenixing and terminal liquidation. Viewed through this lens, a legal and transparent phoenix transaction frequently emerges as the superior outcome for all stakeholders. It offers creditors a realistic prospect of partial recovery from the new, viable business — a prospect entirely extinguished in liquidation. Furthermore, this approach preserves enterprise value, saves jobs, and promotes entrepreneurial resilience, producing a far better socioeconomic result than a complete business collapse.

In legal phoenixing, through consent and fair value assessment of assets, debt can be restructured and operational creditors such as employees may continue in employment — even if not in precisely the same position they would have occupied had the company not failed. This approach has been shown to significantly preserve employment in the Netherlands and the United Kingdom.¹⁶

5 HOW THE CURRENT REGIME ENABLES PHOENIXING UNDER PIRP

The sub-committee's report on phoenixing risk explains that pre-packaged insolvency resolutions generally follow one of two paths.¹⁷ The first is a pre-pack sale, where the distressed company's business or assets are sold as a going concern to a third party or the existing owners. The second is a pre-pack reorganisation, which focuses on restructuring the company's existing debt and operations to restore financial viability.

The UK's pre-pack model is sale-oriented, which is fundamentally different from the reorganisation model employed by India's framework. Pre-pack sales carry a significant risk of phoenixing, as sales are generally made to connected parties — a feature that has attracted scrutiny and criticism from creditors.¹⁸ The Committee notes this distinction and, while cautioning against the possibility of phoenixing, emphasises that the risk is significantly lower under India's framework, since reorganisation is administered through a resolution plan with several safeguards, such as approval by over 66% of the Committee of Creditors (CoC) and a hybrid model combining debtor-in-possession with creditor-in-control.¹⁹

The Indian Insolvency and Bankruptcy Code (IBC) addresses the risk of illegal phoenixing differently for large corporations and smaller enterprises. For large companies,

¹⁶ Sandra Frisby, *A Preliminary Analysis of Pre-packaged Administrations*, in INSOL EUROPE ACADEMIC CONFERENCE 40–47 (2006).

¹⁷ INSOLVENCY LAW COMM., *supra* note 13.

¹⁸ Sandra Frisby, *A Preliminary Analysis of Pre-packaged Administrations*, in INSOL EUROPE ACADEMIC CONFERENCE 40–47 (2006).

¹⁹ Neil Kothari & Nidhi Agarwal, *Pre-Packaged Insolvency: A Maiden Affair to Rescue the MSME*, NLIU CBCL BLOG (Apr. 2, 2021), <https://cbcl.nliu.ac.in/insolvency-law/pre-packaged-insolvency-a-maiden-affair-to-rescue-the-msme/>.

Section 29A acts as a powerful deterrent by disqualifying promoters and related parties from bidding for the distressed company.²⁰

However, this critical safeguard is effectively neutralised for MSMEs.²¹ The 2018 amendment introduced Section 240A, which exempts MSMEs from the stringent requirements of Section 29A. While the BLRC initially downplayed the overall risk of phoenixing, this exemption creates a significant regulatory gap, potentially allowing such activity to occur within the MSME sector.²²

Section 240A(a) exempts MSME promoters from Sections 29A(c) and 29A(h), allowing them to submit resolution plans even if they defaulted on or guaranteed loans. Although Sections 29A(c) and 29A(h) are relaxed, other disqualifications under Section 29A — such as those relating to persons barred under company law, fraud, and preferential transactions — continue to apply. The exemption was included specifically to prevent liquidation arising from a lack of external bidders, recognising the importance of promoters in running MSMEs.

6 CASE EXAMPLES — IDENTIFYING PHOENIXING ACTIVITY

In India, the legal concept of phoenixing came under scrutiny most notably during the *Essar Steel* insolvency proceedings. The Essar group submitted a resolution plan for Essar Steel, leading to significant debate and litigation that ultimately reached the Supreme Court in *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta*.²³ The case sparked public and judicial discourse around promoter participation, asset recycling, and the fair treatment of creditors — especially operational creditors — raising broader concerns about phoenix-like activity under the IBC, notwithstanding the legal safeguards of Section 29A.

These concerns are not unfounded. The BLRC Report, drawing from international experience including the UK's Graham Review, has flagged key structural issues in the pre-pack model that could enable phoenixing.²⁴ These include a lack of transparency in pre-pack sales, misuse of connected party transactions to shed debt, sub-optimal returns due to limited creditor oversight, and insufficient protections for operational and dissenting financial creditors. If left unchecked, these features create fertile ground for illegal phoenix activity.

²⁰ Insolvency and Bankruptcy Code, 2016, § 29A.

²¹ Sundar Sinha & Saurabh Tripathi, *Indian Pre-Packaged Insolvency Resolution Process for MSMEs: An Assessment* (IBC 2024 Working Paper), https://papers.xkdr.org/PDF/IBC2024/Sinha_Tripathi_IBC2024.pdf.

²² Insolvency and Bankruptcy Code, 2016, § 240A, *as amended by* The Insolvency and Bankruptcy Code (Amendment) Act, 2021.

²³ *Comm. of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta*, (2020) 8 SCC 531.

²⁴ REPORT TO THE RT HON VINCE CABLE MP: GRAHAM REVIEW INTO PRE-PACK ADMINISTRATION (June 2014).

Comparable challenges have been addressed in other jurisdictions. In Australia, courts have explicitly classified phoenixing behaviour into distinct categories.

One of the most common categories involves selling assets to a new company without fair consideration while retaining control. In *Canadian Solar v. ACN* (2014),²⁵ the insolvent company's assets were transferred to a newly formed entity, AJK, which was controlled by the former director. No monetary consideration was paid, prompting the court to remark that the transaction bore the "appearance of a so-called 'phoenix' transaction."²⁶

A second category involves repeated corporate failures associated with a common director, even where deliberate fraud is not established. In *Re Quinlivan and ASIC* (2010), the director had been associated with approximately 70 companies, 15 of which had been wound up. Although there was no evidence of intent to defraud, the pattern of repeated insolvencies resulted in a five-year disqualification. Similarly, in the UK case of *Secretary of State for Trade and Industry v. McTighe* [1996],²⁷ the court upheld a director disqualification for multiple insolvencies despite the absence of proven fraud or intent.²⁸

The third category concerns the establishment of a new company to the detriment of operational creditors, particularly employees. In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v. Beynon* (2013), the director created a new company while liquidating the old one, effectively shifting employees to the new entity. This manoeuvre allowed employees to claim redundancy payments under a government scheme (GEERS) while the employer avoided liability. Although the director's intent was clear, the court was unable to hold the receivers accountable due to the absence of shared intention.²⁹

Courts have also recognised accessory liability for advisors and lawyers who assist directors in executing phoenix schemes. In *ASIC v. Somerville* (2009), a solicitor was found liable for aiding directors in breaching their duties by advising them to transfer company assets to new entities before placing the original companies into liquidation.³⁰ The court held that this amounted to knowing assistance in a breach of fiduciary duty.

7 BALANCING RISK: WHY MSME PHOENIXING MAY BE OVERLOOKED

Phoenixing remains a common practice worldwide wherever the limited liability corporate structure exists. It is essential to note, however, that no statutory framework has defined it

²⁵ *Canadian Solar v. ACN* 138 535 832 Pty Ltd, [2014] FCA 785 (Austl.).

²⁶ André Stephan Basson, *The Regulation of Corporate Phoenix Activity in South Africa* (2023) (Ph.D. dissertation, University of Johannesburg), <https://www.proquest.com/docview/3132876666>.

²⁷ *Re Quinlivan & ASIC*, [2010] AATA 689 (Austl.); *Sec'y of State for Trade & Indus. v. McTighe*, [1996] B.C.C. 965 (Eng.).

²⁸ VANESSA FINCH, *CORPORATE INSOLVENCY LAW: PERSPECTIVES AND PRINCIPLES* (2d ed. 2009).

²⁹ *Automotive, Food, Metals, Eng'g, Printing & Kindred Indus. Union v. Beynon*, [2013] FCA 143 (Austl.).

³⁰ *ASIC v. Somerville*, [2009] NSWSC 934 (Austl.).

as inherently illegal. Rather, it is the behaviour associated with phoenixing that may trigger liability across a range of legal areas, including insolvency law, corporate law, and employment law. Many economists characterise such activity as illegal on moral grounds;³¹ however, phoenixing is not always harmful or unlawful — if not undertaken to defraud, but rather to genuinely save the business, it may serve a legitimate purpose.³² It allows one honest, final attempt to transform a failing enterprise into a vehicle for innovation. This phenomenon is extremely common among MSMEs, given the volatility of market forces combined with the spirit of experimentation among new entrepreneurs.³³

The Neo-Schumpeterian theory of economics extends Joseph Schumpeter's original idea of creative destruction, arguing that innovation is not limited to technology but also encompasses organisational redesign, legal flexibility, and new business models. Under this framework, phoenix activity by MSMEs, if conducted within legal bounds, can be seen as a form of adaptive innovation rather than abuse, enabling struggling enterprises to restructure and survive in volatile markets.³⁴

Under this paradigm, phoenix activity, if lawful, can be seen not as a manipulation of the corporate form but as a type of adaptive innovation in response to systemic economic pressures. Neo-Schumpeterian theory embraces a broad conception of innovation, including organisational, institutional, and social innovation;³⁵ and under that conception, business restructuring would fall within the category of innovation. This realignment makes it possible to view legal phoenixing by MSMEs as economically productive, provided that regulators can distinguish entrepreneurial renewal from abusive insolvency cycles.

8 WHY PIRP SHOULD NOT BE RESTRICTED TO MSMEs

At a recent conference, the Deputy Governor of the Reserve Bank of India advanced a cogent argument for extending PIRP to all corporate borrowers, highlighting the constraints on its transformative potential.³⁶ He emphasised that waiting for a default to trigger insolvency proceedings is inefficient and, in most cases, counterproductive. Instead, lenders should be able to adopt a proactive approach supported by modern resolution mechanisms

³¹ V. Finch, *Corporate Rescue: A Game of 3 Halves*, 32 LEGAL STUD. 302 (2012).

³² Murray Roach, *Combating the Phoenix Phenomenon: An Analysis of International Approaches*, 8 E JOURNAL TAX RSCH. 90, 91 (2010).

³³ MICHAEL QUILTER, COMPANY LAW PERSPECTIVES 107 (2012).

³⁴ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 85 (1942).

³⁵ Horst Hanusch & Andreas Pyka, *Principles of Neo-Schumpeterian Economics*, 31 CAMBRIDGE J. ECON. 275 (2007).

³⁶ Our Bureau, *Extend Pre-Pack Insolvency Resolution Process to All Borrowers: RBI's M. Rajeshwar Rao*, HINDU BUS. LINE (Apr. 29, 2022).

like PIRP, which blend out-of-court negotiation with judicial finality.³⁷ He also noted the stark inefficiencies afflicting CIRP, particularly the average duration of 650 days from the filing of insolvency applications (far exceeding the 14-day limit stipulated in the Code). Such delays erode creditor rights and call into question the effectiveness of the Code. This concern is substantiated by the figure of 23,417 CIRP initiation applications — with an aggregate underlying default of approximately Rs 7 lakh crore — that were resolved even before admission.³⁸

This reflects and reinforces the observation that a substantial number of debts are settled before CIRP even commences. Promoters of defaulting debtors, in the absence of a PIRP framework, often prefer settling their outstanding dues through a settlement agreement akin to a resolution plan, thereby avoiding the need to go through CIRP entirely.³⁹

India's current insolvency regime suffers from regulatory fragmentation, with separate resolution frameworks applying to different classes of lenders. This disjointed approach impedes comprehensive resolutions. Without collective participation, any resolution attempt is likely to be incomplete, merely deferring systemic risk. PIRP therefore presents a promising mechanism capable of achieving higher participation and better outcomes.⁴⁰

Additionally, the need for a group resolution framework deserves emphasis, particularly given the prevalence of cross-obligations and guarantees among group companies in India. A default in one entity often precipitates cascading defaults across the group, amplifying credit risk. PIRP is therefore well-suited to address such scenarios through consolidated resolution plans.⁴¹

The need of the hour is for lenders to significantly improve their risk monitoring practices, with greater emphasis on periodic stress testing and dynamic provisioning. This paper underscores that sophisticated risk assessment — not reactive enforcement — is the foundation of a healthy credit ecosystem.⁴² Overall, it highlights the need for a forward-looking,

³⁷ Andreas Bauer et al., *Flattening the Insolvency Curve: Promoting Corporate Restructuring in Asia and the Pacific in the Post-COVID-19 Recovery* 18–20 (IMF Working Paper No. 2021/016, 2021), <https://www.imf.org/en/Publications/WP/Issues/2021/01/29/Flattening-the-Insolvency-Curve-Promoting-Corporate-Restructuring-in-Asia-and-the-Pacific-in-49997>.

³⁸ Wolfgang Bergthaler et al., *Tackling Small and Medium Enterprise Problem Loans in Europe* (IMF Staff Discussion Note No. 15/04, Mar. 30, 2015), <https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2016/12/31/Tackling-Small-and-Medium-Enterprise-Problem-Loans-in-Europe-42614>.

³⁹ Yasir D. Pathan, *Pre-Packaged Insolvency Resolution in India: A Comprehensive Analysis of PPIRP Under the IBC*, IBC LAWS (Mar. 11, 2025), <https://ibclaw.in/pre-packaged-insolvency-resolution-in-india-a-comprehensive-analysis-of-ppirp-under-the-ibc-by-yasir-d-pathan/>.

⁴⁰ Rukmini Roychowdhury & Rohaneel Mohite, *Pre-Packaged Insolvency Process for MSMEs*, MONDAQ (Nov. 15, 2021), <https://www.mondaq.com/india/insolvencybankruptcy/1132276/pre-packaged-insolvency-process-for-msmes>.

⁴¹ A. Das, A.K. Agarwal, J. Jacob et al., *Insolvency and Bankruptcy Reforms: The Way Forward*, 45 VIKALPA 115, 115–31 (2020).

⁴² A. Gurrea-Martinez, *The Rise of Pre-Packs as a Restructuring Tool: Theory, Evidence and Policy*, 24 EUR. BUS. ORG. L. REV. 93–116 (2023).

flexible, and institutionally backed insolvency regime, in which PIRP can play a critical role in preserving value, reducing systemic vulnerabilities, and accelerating time-bound recoveries in large corporate failures.

Another compelling argument is that India, as a growing economic force, cannot simply adopt international insolvency frameworks wholesale without acknowledging the UNCITRAL Legislative Guide's continued support for and endorsement of pre-packs. Moreover, the IMF, in its report titled "Orderly & Effective Insolvency Procedures" and the World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes — specifically Principle B.42 — stress the benefits of pre-negotiated agreements for resolution.

9 COMPARATIVE MODELS OF PIRP

India's pre-pack framework is distinctive in that it was created through formal legislation, rather than evolving organically from judicial practice or industry usage.⁴³ Unlike the United States and the United Kingdom, where pre-packs developed through informal court guidelines and market-led practices respectively,⁴⁴ India enacted PIRP for MSMEs through statutory law. This means that while other frameworks around the world arose from practice, India's approach is a deliberate creation, subject to legislative scrutiny and built with the specific intent of addressing identified challenges.⁴⁵

Several countries established their pre-packaged insolvency frameworks before India, and many exist in materially different forms, exhibiting considerable variation in how they conceptualise and implement pre-packs and restructuring mechanisms.

As discussed earlier in this paper, the United Kingdom's pre-pack model is largely sale-oriented.⁴⁶ It allows for quick asset transfers, often to connected parties, before a formal insolvency filing is made, giving rise to a significant risk of phoenixing.

Singapore, by contrast, has adopted a more holistic approach through its Insolvency, Restructuring and Dissolution Act, which enhances schemes of arrangement by

⁴³ Ritika Goel & Aurelio Gurrea-Martínez, *The Rise of Pre-Packs as a Restructuring Tool: Theory, Evidence, and Policy* 6–7 (ILA Working Paper Series, 2022), https://insolvencylawacademy.com/wp-content/uploads/2022/09/The-Rise-of-Pre-Packs-as-a-Restructuring-Tool_-Theory-Evidence-and-Policy.pdf.

⁴⁴ Aurelio Gurrea-Martínez, *The Challenges and Opportunities of Pre-Packs as a Restructuring Tool*, CLS BLUE SKY BLOG (Apr. 24, 2024), <https://clsbluesky.law.columbia.edu/2024/04/24/the-challenges-and-opportunities-of-pre-packs-as-a-restructuring-tool/>.

⁴⁵ INSOLVENCY & BANKRUPTCY BOARD OF INDIA, *EXPLORING NEW PERSPECTIVES ON INSOLVENCY* (2021), <https://ibbi.gov.in/uploads/publication/599cf8fb50be73f518fca467311304db.pdf>.

⁴⁶ HOUSE OF COMMONS LIBRARY, *PRE-PACK ADMINISTRATIONS 1* (Mar. 4, 2021).

incorporating moratoria and cross-class cramdowns. This approach provides a flexible restructuring tool without necessitating a pre-packaged sale.⁴⁷

The European Union, through Directive (EU) 2019/1023, envisions a preventive restructuring framework that allows distressed businesses to reorganise at an early stage. Unlike the UK, the EU model is geared more towards reorganisation than sale, and it emphasises early intervention and debtor-in-possession regimes with appropriate checks and balances.⁴⁸

In certain jurisdictions such as Australia, the need for a separate pre-pack regime is arguably diminished by the presence of simplified insolvency frameworks tailored to MSMEs — an approach that echoes India's adoption of a distinct framework for MSMEs, though different in form. For instance, Australia's Corporations Act 2001 provides a streamlined process for small business restructuring without the full rigour of formal insolvency. Similarly, Myanmar has introduced reforms to support micro and small firms through simplified procedures.⁴⁹

While the methods vary, each jurisdiction attempts to balance speed and flexibility against the risks of insider abuse and loss of creditor confidence. India can draw important lessons from these models — both in terms of innovations worth adopting and risks to be guarded against.

10 WAY FORWARD

While pre-packs can preserve enterprise value and reduce the costs of financial distress, they also raise significant concerns — particularly regarding fairness, transparency, and the potential for abuse through connected party sales and phoenixing.

The BLRC Committee has flagged various international concerns, including lack of transparency, connected party sales, opinion shopping, and repeated failures by certain promoters. Addressing these risks requires India to go beyond procedural safeguards and embed robust structural checks.⁵⁰

An important counterbalancing mechanism is the Swiss Challenge process, designed to ensure fair asset valuation. Where a better plan is submitted than the base resolution plan

⁴⁷ Aurelio Gurrea-Martinez, *Insolvency Law in Emerging Markets: The Case of Singapore*, 18 BROOK. J. CORP. FIN. & COM. L. 55, 70–74 (2023); <https://globalrestructuringreview.com/guide/the-art-of-the-pre-pack-archived/edition-2/article/singapore#footnote-080>.

⁴⁸ Directive 2019/1023, Recital 30, at 6, EU Official Journal L 172/22 (June 26, 2019).

⁴⁹ <https://www.nortonrosefulbright.com/en-us/knowledge/publications/d66f08df/insolvency-law-reform-and-capacity-building-in-emerging-markets>; Aurelio Gurrea-Martinez, *Implementing an Insolvency Framework for Micro and Small Firms*, INT'L INSOLVENCY REV. (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3715654.

⁵⁰ INSOLVENCY LAW COMM., REPORT OF THE SUB-COMMITTEE ON PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS 14–16 (Oct. 2020), <https://ibbi.gov.in/uploads/resources/24c7fc03cdffff69960ce374416fa646.pdf>.

put forward by the promoter, the promoter is given the opportunity to match it. This promotes competitive bidding and disincentivises insider deals while simultaneously preventing creditor disenfranchisement. However, the effectiveness of the Swiss Challenge mechanism is highly contingent on the emergence of competing plans — a rarity in the case of MSMEs,⁵¹ which often operate in niche sectors and may be unattractive to third-party bidders. Hence, the practical value of this mechanism may be limited.⁵²

India's PIRP features a hybrid “debtor-in-possession with creditor-in-control” model.⁵³ The CoC also has the power to terminate the process in cases of misconduct, providing an oversight mechanism against mismanagement and asset stripping. While this hybrid mechanism and CoC oversight make a strong case for transparency and creditor protection, purely procedural safeguards can leave edge cases unaddressed. The following solutions are therefore proposed with a dual objective: curbing misuse without diluting the core strengths of the pre-pack model.

The most urgent concern is the limited scrutiny of promoters — particularly those with records of repeated failures or regulatory violations — which creates space for abuse under the guise of business rescue. Introducing mandatory scrutiny measures, modelled on the Australian precedent in *Re Quinlivan*, would ensure that habitual defaulters cannot cycle through insolvency processes without consequence.

Another critical step involves introducing minimum capitalisation rules requiring promoters who seek to re-acquire distressed businesses to demonstrate genuine financial commitment.⁵⁴ Without such an infusion, resolution risks becoming a paper transaction with no real capacity to stabilise the enterprise. Similarly, in cases involving connected party transactions, the burden of proof should be reversed, requiring promoters to affirmatively establish good faith, fair valuation, and compliance with fiduciary duties. Such a mechanism would both strengthen creditor confidence and discourage backdoor acquisitions.

Equally important is the issue of group insolvencies, where defaults in one entity often cascade across affiliated companies. Enhanced collateral requirements or cross-company guarantees would protect creditor recoveries and prevent opportunistic restructuring of one

⁵¹ Alexandra Kastrinou & Stef Vullings, “No Evil Is Without Good”: A Comparative Analysis of Pre-pack Sales in the UK and the Netherlands, 27 INT’L INSOLVENCY REV. 320, 326 (2018); VANESSA FINCH, CORPORATE INSOLVENCY LAW 462 (2009); Stephen Davies QC, *Pre-pack — He Who Pays the Piper Calls the Tune*, RECOVERY, Summer 2006, at 16.

⁵² Bhatt & Joshi Associates, *Pre-Pack Insolvency for MSMEs: Legal Loopholes in Speedy Resolution* (May 16, 2025), <https://bhattandjoshiassociates.com/pre-pack-insolvency-for-msmes-legal-loopholes-in-speedy-resolution/>.

⁵³ Economic Laws Practice, *Judicial Overreach and Commercial Wisdom: A Continuing Challenge in IBC from Kamineni to DHFL* (Apr. 8, 2025), <https://elplaw.in/wp-content/uploads/2025/04/Judicial-Overreach-and-Commercial-Wisdom-A-Continuing-Challenge-in-IBC-from-Kamineni-to-DHFL.pdf>.

⁵⁴ IndiaFilings, *Highlights of Companies Amendment Act 2015 — No Minimum Paid-Up Capital* (2015), <https://www.indiafilings.com/learn/highlights-of-companies-amendment-act-2015/>.

company at the expense of another — a gap clearly exposed by the *Essar Steel* proceedings.⁵⁵ In addition, the current Swiss Challenge mechanism, though designed to promote competition, is frequently ineffective for MSMEs where external bidders are scarce. Its reform — either by incentivising third-party participation or by developing alternative benchmarks for competitive fairness — is necessary to ensure that creditor interests are not sidelined in the name of expediency.

Taken together, these reforms suggest that the PIRP framework, conceived as an MSME-specific experiment, has the potential to evolve into a broader restructuring tool for India. By embedding structural safeguards such as promoter scrutiny, capitalisation thresholds, fair-value checks, and collateral requirements, PIRP can transition from an exception for small enterprises to a credible mechanism for larger corporate failures. A calibrated expansion in this direction would preserve the procedural efficiency of pre-packs while simultaneously addressing the fairness and transparency concerns that continue to limit creditor confidence in the system.

11 CONCLUSION

The Pre-Packaged Insolvency Resolution Process represents a significant opportunity for India's approach to corporate restructuring, providing statutory recognition for an expedited, hybrid model that combines out-of-court negotiations with formal insolvency adjudication. For MSMEs, PIRP has opened a practical and often necessary pathway to retain control, sustain operations, and achieve creditor-approved resolutions. However, the combination of Section 240A's exemptions and limited procedural safeguards also creates the potential for phoenixing — both in its legitimate, value-preserving form and in its abusive, debt-evading guise.

While the economic impact of MSME phoenixing may be modest compared to large corporate failures, and may even be beneficial to long-term wealth creation, ignoring its regulatory implications risks embedding vulnerabilities into the insolvency ecosystem. Comparative frameworks demonstrate that transparent oversight, connected party transaction scrutiny, minimum capitalisation requirements, and promoter background checks can meaningfully suppress abusive practices while closing potential loopholes. If incorporated into the Indian framework, these safeguards could both preserve the operational advantages of PIRP and strengthen creditor confidence.

Extending PIRP beyond MSMEs — as proposed by the Reserve Bank of India and supported by comparative evidence — is not without significant risk and potential pitfalls

⁵⁵ Shubham Jain, *Essar Steel and the Unsecured Creditors: Lessons for Group Insolvency in India*, 11 NUJS L. REV. 77, 93–95 (2018).

for creditors. Yet, a calibrated expansion using the MSME experience as a regulatory sand-box may yield the opportunity to institutionalise a faster, more predictable, and creditor-inclusive resolution culture. In doing so, India can position PIRP not as a narrow exception, but as a cornerstone of a modern insolvency regime.

* * *

CHAPTER 6

Fraud in the Fast Lane: Exposing Risks in India's Pre-Pack Process

SHRISTY YADAV* AND ANMOL NIRANJAN**

In 2021, the government introduced the pre-pack insolvency resolution process, also called PPIRP, through the Insolvency and Bankruptcy Code (Amendment) Ordinance. PPIRP in India is a quasi-formal process with limited judicial oversight before admission to a formal insolvency proceeding. As of now, it applies only to Micro, Small, and Medium Enterprises (“MSMEs”), and is still in its nascent stage.¹ However, in this limited time, multiple instances of fraud have been recorded, which is alarming. Through this paper, the authors seek to expose the loopholes and gaps in the current pre-pack framework that enable fraudulent practices by resolution parties. This paper has three sections; in the first part, it analyses the statutory provisions under the Code dealing with fraud, deceit, and malicious intentions. The second part explores liquidation as a remedy in cases of pre-pack where fraud has been found. Lastly, in the third section, it criticises the weak provisions and discusses missed opportunities for strengthening the framework, which consequently threaten MSME recovery and financial stability. Moreover, a critical comparative study of PPIRP in other countries like the US and UK has been done in order to draw insight from such jurisdictions. Through the analysis of case laws, statistics, and reports, this paper emphasises the urgency of increased transparency, judicial oversight, and protections for creditors to further fortify India's insolvency regime against fraud, which is hindered by the risk of information asymmetry, potential suppression of minority creditor interests, and the looming financial threat to banks. By addressing these challenges and suggesting feasible reforms, this paper fills the small vacuum of current literature, which is underexplored, and endeavours to improve the pre-pack insolvency resolution process of MSMEs in India.

Keywords: Pre-Pack Insolvency Resolution Process, MSMEs, Fraud, Creditor Protection, Judicial Oversight

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¹ *Avoidance Transactions: Protecting Creditors' Interest Under IBC*, 32 QUARTERLY NEWSLETTER OF THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, July–Sept. 2024 (Sept. 30, 2024), <https://ibbi.gov.in/uploads/whatsnew/edc044b410d37f0fd22cbe07a74665f3.pdf>.

1 INTRODUCTION

The Parliament enacted the Insolvency and Bankruptcy Code in 2016 (“Code”), revolutionizing the insolvency framework in India. Earlier there were a few restructuring and insolvency mechanisms such as CDR (Corporate Debt Restructuring)², SDR (Strategic Debt Restructuring)³, and JLF (Joint Lenders Forum)⁴, scrapped in 2018 because of their opacity, inefficiency, and misuse by the corporate lenders and borrowers. Learning from the failure of these resolution methods, the framers filled the gap in the current Code.⁵ However, the rising volume of insolvency cases and instances of fraud and misuse have necessitated alternative approaches, leading to the introduction of the Pre-Packaged Insolvency Resolution Process (PPIRP) for MSMEs in 2021. While Corporate Insolvency Resolution Process (“CIRP”) offers a fairly efficient mechanism, it is tedious and costly and often used by debtors to escape liability and buy time.⁶ To ease the burden of court and provide a cost-savvy and informal alternative, Pre-pack was introduced, with an intention to cover all industries in a phased manner, but due to the pandemic, no further extension could be made to other industries except MSMEs.⁷

The Sunil Mehta Committee headed a project called ‘Project Sashakt,’ launched in 2018. It acted as a precursor for the introduction of pre-packaged insolvency of MSMEs in India in 2021. ‘Project Sashakt’ was an initiative aimed at tackling bad loans through quick, bank-led solutions outside court, focusing on reviving businesses, creating jobs, and boosting public sector banks’ value. Currently in India, pre-pack is available for MSMEs only and is still in its nascent stage, with a reported 13 applications since its inception, out of which seven cases are still ongoing, and the resolution plan for five cases has been approved.⁸ However, in this limited application, multiple instances of fraud have been recorded, which is alarming. It is high time that we discuss it now and action be taken so that it does not linger, paralyzing the mechanism in the future.

² Circular on Corporate Debt Restructuring, 2001, Gazette of India, pt. II sec. 3(i) (Aug. 23, 2001).

³ Circular on Strategic Debt Restructuring Scheme, 2015, Gazette of India, pt. II sec. 3(i) (June 8, 2015).

⁴ INDIAN ECONOMY.NET, <https://indianeconomy.com/splclassroom/what-is-joint-lenders-forum-jlf/> (last visited June 12, 2025).

⁵ *Pre-packaged Insolvency in India: Lessons from USA and UK*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3518287 (last visited June 20, 2025).

⁶ Vellayan Subbiah & Pranay Mehrotra, *Pre-pack Insolvency Resolution Process: Judiciously Strengthening IBC in Times of Crisis*, in QUINQUENNIAL OF INSOLVENCY AND BANKRUPTCY CODE, 2016 347 (2021), <https://ibbi.gov.in/uploads/whatsnew/1d8b31fc65f7ac6f09a973be8f12f868.pdf>.

⁷ M. P. Ram Mohan & Sriram Prasad, *Lessons from Pre-Packaged Insolvency Cases in India: A Long Road Ahead*, in IBBI, IBC: EVOLUTION, LEARNINGS AND INNOVATION 175 (2023), <https://ibbi.gov.in/uploads/whatsnew/525cbe1dd3b1f9fd9866fe77676a96ae.pdf>.

⁸ *Avoidance Transactions: Protecting Creditors’ Interest Under IBC*, 32 QUARTERLY NEWSLETTER OF THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, July–Sept. 2024 (Sept. 30, 2024), <https://ibbi.gov.in/uploads/whatsnew/edc044b410d37f0fd22cbe07a74665f3.pdf>.

2 CORPORATE FRAUD UNDER THE CODE: DEFINITIONS AND STATUTORY PROVISIONS

The Code does not define “fraud” in isolation but incorporates general corporate fraud concepts by reference (for example, Section 447 of the Companies Act 2013 defines fraud to include any act or omission with intent to deceive or injure the interests of the company or its creditors). Under the Code, two key provisions address corporate fraud:

2.1 Fraudulent or Malicious Initiation

Section 65(1) penalises any person who “initiates the insolvency resolution process or liquidation proceedings fraudulently or with malicious intent for any purpose other than resolution.” It authorises the National Company Law Tribunal (“NCLT”) to impose a penalty of ₹1 lakh to ₹1 crore on such petitioners. Sub-section (2) similarly penalises voluntary liquidations filed with intent to defraud. Sub-section (3) extends the penalty to pre-pack insolvency. The object is to ensure that CIRP is invoked only for *bona fide* insolvency purposes.⁹

2.2 Fraudulent/Wrongful Trading

Section 66(1) applies if, during CIRP or liquidation, “any business of the corporate debtor has been carried on with intent to defraud creditors or for any fraudulent purpose.” On the Resolution Professional’s (“RP’s”) application, the NCLT may direct any person knowingly party to such business to contribute assets to the debtor. Sub-section (2) (amended 2020) is akin to “wrongful trading”: if a director knew that there were no reasonable prospects of avoiding insolvency and failed to exercise due diligence to minimize creditor loss, the NCLT may require that director to contribute to the debtor’s assets. The combined Sections 43–46 (preferential/undervalued transactions) and 66 seek to undo transactions that have “the intent to defraud creditors”. By these statutes, “fraudulent intent” in CIRP has a narrow meaning, it refers to dishonest or collusive dealings to prejudice creditors, and not mere business failure.¹⁰

2.3 Judicial Interpretation of “Fraudulent Intent”

Courts have repeatedly held that “fraudulent or malicious intent” under the Code is not easily presumed: it must be proved by evidence. The National Company Law Appellate Tribunal (“NCLAT”) and NCLT emphasize that Section 65 penalties and Section 66

⁹ A. Jha & B. Yadav, *Preventing Fraudulent and Malicious Initiation of Insolvency Proceedings in India*, AZB & PARTNERS (Apr. 21, 2023), <https://www.azbpartners.com/bank/preventing-fraudulent-and-malicious-initiation-of-insolvency-proceedings-in-india>.

¹⁰ Anuj Jain v. Axis Bank Ltd., 2019 SCC OnLine NCLAT 435.

liabilities require proof of intent to defraud, not mere insolvency. For instance, the NCLAT recently held that the mere act of filing an insolvency petition (even if it halts recovery proceedings) does not automatically imply malicious intent.¹¹ The tribunal held that unless there is a *prima facie* case of fraud or malice, no penalty should be imposed under Section 65.¹²

Similarly, applications under Section 66 of the Code demand clear, specific facts. As one NCLT bench observed, “suspicion alone can never take the place of proof” – allegations of fraudulent trading must be supported by unimpeachable evidence. In *Mr. Anuj Bajpai (RP) v. Surendra Lodha*¹³, the Tribunal cited the principle (from *A. L. N. Narayan Chettiar v. Official Assignee*¹⁴) that fraud in civil proceedings is to be proved beyond reasonable doubt. There, a forensic audit report alone was deemed insufficient “to dub transactions as fraudulent” without concrete documentary evidence. The Tribunal also noted that Section 66’s Explanation creates a rebuttable presumption in favour of ex-directors: once a fraud is alleged, the RP must show the intent and knowledge of fraud “at the very inception of the transaction and not later”.¹⁵

The Supreme Court, too, has underscored the high bar for establishing fraud. In *Anuj Jain (IRP, Jaypee Infratech) v. Axis Bank* (2020)¹⁶, the Court explained that the inquiries for preferential, undervalued, and fraudulent transactions are distinct. Pleading “fraudulent trading” under Section 66 requires separate, specific material facts showing intent to defraud, unlike the mechanically presumed preference under Section 43.¹⁷ Absent such pleaded intent, normal transactions cannot be retroactively labelled fraudulent. In short, Indian courts require a “high degree of proof” of fraudulent intent, and mere financial failure or default does not suffice.¹⁸

3 ROLES OF NCLT AND INSOLVENCY PROFESSIONALS

3.1 NCLT / Adjudicating Authority

Under the Code, the NCLT, and on appeal, the NCLAT or the Supreme Court, has wide powers to detect and punish fraud in insolvency. Before admitting any CIRP petition, the tribunal must exercise discretion under Section 7(5) and consider any *prima facie* evidence of

¹¹ Getz Cables Pvt. Ltd. v. SBI, 2024 SCC OnLine NCLAT 1324.

¹² Jha & Yadav, *supra* note 9.

¹³ Anuj Bajpai (RP) v. Surendra Lodha, (2023) 240 Comp Cas 371.

¹⁴ A.L.N. Narayan Chettiar v. Official Assignee, AIR 1941 PC 93.

¹⁵ Bank of India v. Monorex Pvt. Ltd., CP/1381/IB/2018.

¹⁶ Anuj Jain v. Axis Bank Ltd., 2019 SCC OnLine NCLAT 435.

¹⁷ Bank of India v. Monorex Pvt. Ltd., CP/1381/IB/2018.

¹⁸ Getz Cables (P) Ltd. v. SBI, 2024 SCC OnLine NCLAT 1324.

fraud or collusion.¹⁹ Section 65 empowers the NCLT to set aside or penalise malicious or fraudulent petitions: the adjudicator may require proof of a *prima facie* case of fraud before imposing penalties. Notably, courts have held that the tribunal can seek assistance from other agencies and even order an investigation under the Companies Act if it finds evidence of fraudulent initiation. In one case, the NCLT “pierced the corporate veil,” ruling that where “a corporate character is used for defrauding others, the court can ignore the corporate character” to do justice. Similarly, upon an RP’s application under Section 66, the NCLT may order recovery from anyone knowingly involved in fraudulent trading. The NCLT must distinguish good-faith transactions from bad: if mortgages or transfers were made in the ordinary course and without evidence of intent to defraud, they cannot be set aside as “fraudulent.”²⁰ Only where the RP brings forward “tangible materials” on fraudulent purpose and “relevant facts” are pleaded can the tribunal hold transactions to be fraudulent.²¹

3.2 Insolvency Professional (“IP”)

The IRP/RP is the eyes and ears of the insolvency process. By duty (Section 25 and the IBBI Code of Conduct), the RP must preserve the debtor’s assets and rigorously examine its accounts. In practice, RPs often commission forensic audits to uncover hidden fraud. For example, one CoC unanimously directed a forensic audit to detect preferential or fraudulent transfers, and when the final report revealed “transactions not in the best interests of the company but done with a fraudulent motive,” the RP promptly filed a Section 66²² petition.²³ Thus, an RP should identify suspect transactions and either (i) challenge them as antecedent avoidance (Sections 43–51)²⁴, or (ii) file under Section 66 for “fraudulent trading.” Insolvency Professionals must report such findings to the NCLT and CoC, rather than stakeholders taking the law into their own hands. In *Deepak Upadhyaya v. State*²⁵, the Court admonished a creditor who bypassed the mechanism under the Code by lodging an FIR against an RP, holding that complaints against an RP’s insolvency-related conduct should be handled by IBBI or NCLT, not by criminal police procedure. In short, IPs must expose

¹⁹ Jha & Yadav, *supra* note 9.

²⁰ Anuj Jain v. Axis Bank Ltd., 2019 SCC OnLine NCLAT 435.

²¹ Bank of India v. Monorex Pvt. Ltd., CP/1381/IB/2018.

²² Insolvency and Bankruptcy Code, 2016, § 66.

²³ IDBI Bank Ltd. v. Kanakadhara Ventures Pvt. Ltd., 2022 SCC OnLine NCLT 29182.

²⁴ Insolvency and Bankruptcy Code, 2016.

²⁵ Deepak Upadhyaya v. State, 2023 SCC OnLine Mad 2567.

fraud through insolvency channels and the NCLT rather than adjudicating or referring it onward, and rather than aggrieved parties using extraneous legal forums.²⁶

4 LIQUIDATION AS A REMEDY IN FRAUDULENT CASES UNDER THE CODE (PRE-PACK FRAMEWORK)

PPIRP is lucrative for CDs because it gives a clean slate to start over and is an absolute regrowth model. Technically, the purpose of PPIRP is restructuring and not liquidation, though it is the last resort under the Code when fraud compromises the integrity of the pre-pack process. It ensures asset recovery, penalizes misconduct, and protects creditors when revival is no longer feasible.

4.1 Liquidation Trigger and Process

Under Chapter III of the Code, liquidation is initiated when corporate rescue fails. Section 33 mandates that if no viable resolution plan is approved in the allotted time, the adjudicating authority “shall pass an order requiring the corporate debtor to be liquidated”. Similarly, Section 33(2) provides that if the Committee of Creditors (“CoC”) resolves to liquidate at any stage, the Resolution Professional (RP) must apply for a liquidation order, which the NCLT then grants. In addition, Section 33(3) and (4) allows any person (other than the debtor) to seek liquidation if a confirmed plan is contravened by the corporate debtor. Once a liquidation order is made, a limited moratorium applies and, under Section 34, the existing RP typically continues as liquidator. Section 34 further provides that upon liquidation, the board and management of the debtor cease their powers and the liquidator assumes full control, with fees to be fixed by the IBBI and paid from the estate.

In fraud-related cases, these provisions operate in conjunction with anti-fraud measures. Notably, Section 66 empowers the RP or liquidator to recover assets or require contributions from persons who carried on the debtor’s business “with intent to defraud the creditors”.²⁷ Thus, evidence of fraud during insolvency can bolster the liquidation estate. In the new pre-packaged insolvency regime (MSME pre-packs under Part IIIA), the law explicitly provides for management takeover and liquidation where fraud is found. Section 54J allows the CoC to transfer management to the RP if there is proof of fraud or gross mismanagement. If a pre-pack plan fails (for example, is rejected or violates eligibility norms), Sections

²⁶ Apoorva, *Approaching Police Without Resorting to Special Procedure Under IB Code to Arm Twist the Resolution Professional Is Inappropriate: Madras High Court*, SCC TIMES (May 1, 2023), <https://www.sconline.com/blog/post/2023/05/01/police-complaint-without-resorting-to-ibc-code-inappropriate-madras-hc-to-arm-twist-rp-legal-news/>.

²⁷ Bomi Daruwala, *NCLAT: Fraud for the Purpose of Section 66 of the IBC Includes a Debt Where the Debtor Has No Intention to Repay*, VAISH ASSOCIATES ADVOCATES (May 22, 2023), <https://www.vaishlaw.com/Nclat-Fraud-For-The-Purpose-Of-Section-66-Of-The-Ibc-Includes-A-Debt-Where-The-Debtor-Has-No-Intention-To-Repay/>.

54L–54N require the authority to terminate the pre-pack and initiate regular insolvency. If the management remains with an alleged wrongdoer and the pre-pack plan is unviable, the Adjudicating Authority (“AA”) “may order liquidation” under Section 33. Likewise, if a pre-pack is terminated after management transfer, the AA must order liquidation under Section 33 and include pre-pack costs in the liquidation estate. In summary, Sections 33–34 and in the PPIRP context (Sections 54J–54N) set out the trigger mechanisms for winding up a debtor. The detection of fraud can accelerate this transition to liquidation (via Section 66 remedies and PPIRP safeguards), ensuring that fraud-tainted assets are marshalled into the estate for creditor benefit.

4.2 Asset Maximisation and Fair Distribution

Liquidation under the Code is designed to maximize recoveries for creditors when rehabilitation fails. As the Supreme Court has observed, the Code’s “primary objective” is to revive stressed companies in a time-bound manner to “maximize the value of assets” for stakeholders.²⁸ By statute, even a liquidating company can be sold as a going concern to preserve value. *Swiss Ribbons*²⁹ held that liquidation is truly a “last resort” under the Code (used only if no resolution plan is approved) and that “even in liquidation, the liquidator can sell the business as a going concern.”³⁰ Thus, liquidation still strives for highest realizable value of the corporate entity. Empirical data confirms that resolution outcomes typically beat liquidation: the approved resolution plans yielded on average 161% of the value that liquidation would have fetched.³¹ In other words, rescue procedures recover more, but liquidation guarantees that at least the statutory liquidation value is distributed when revival is impossible.

Equally important is fair distribution. Section 53 of the Code prescribes a strict statutory waterfall for applying liquidation proceeds. The liquidator must first pay insolvency and liquidation costs, then the *pari passu* dues of workmen (last 24 months) and any unsecured debt of a secured creditor (if security is relinquished).³² Next are dues to other employees and unsecured financial creditors, followed by government dues and unpaid secured debts. Any remaining claims, then preference shareholders, and finally equity shareholders are paid as per Section 53.³³ This formula ensures that all creditors are treated according to the

²⁸ *Swiss Ribbons Pvt. Ltd. v. Union of India*, (2019) 4 SCC 17.

²⁹ *Id.*

³⁰ *Id.*

³¹ GOV’T OF INDIA, MINISTRY OF FIN., DEP’T OF ECON. AFF., ECONOMIC SURVEY 2024–25 (2025), <https://www.indiabudget.gov.in/> (last visited June 15, 2025).

³² Trisha Shreyashi & Kumar Gourav, *Supreme Court Upholds Waterfall Mechanism Under IBC; Division Bench Overturns Rainbow Ruling*, BAR AND BENCH (Aug. 24, 2023, 8:17 AM), <https://www.barandbench.com/columns/supreme-court-upholds-waterfall-mechanism-under-ibc-2-j-bench-overturns-rainbow-ruling>.

³³ *Id.*

priority of their claims under law. In this way, liquidation under the Code operationalises its objectives of value maximisation and equitable treatment of stakeholders. The Supreme Court has noted the Code's aim to "balance the interests of all the stakeholders" in a time-bound resolution.³⁴ By forcing a definitive value realization and *pro rata* payout, liquidation serves these objectives even if, practically, it often recovers less than a going concern sale. (Indeed, official data suggest resolutions under the Code recoup about 86% of the estimated fair value of assets,³⁵ whereas pure liquidations recover far less.)

4.3 Deterrence and Public Interest

Liquidation carries a strong deterrent message against fraud and abuse. The prospect of mandatory winding up, with loss of control and credit, discourages debtors from engaging in fraudulent conduct. The Code itself embeds punitive measures: for example, Section 66 of the Code allows the liquidator to claw back benefits obtained through "fraudulent trading", while Section 65 authorises fines (₹1 lakh to ₹1 crore) on anyone who "fraudulently or maliciously" triggers insolvency or liquidation to defraud creditors. Together these provisions mean that directors or promoters who mismanage or siphon funds face both civil and criminal sanctions. The economic rationale for stopping a race to the bottom in insolvency has been recognized as being in the public interest. The deterrent effect of the Code is evident in reports that many distressed companies pre-empt proceedings or settle early once the risk of insolvency, and liquidation, looms.³⁶

From a policy standpoint, liquidation in fraud cases aligns with creditor and public interests by penalizing dishonesty and protecting the credit system. Courts have emphasized that insolvency law is as much about public interest and creditor confidence as it is about corporate rescue. For example, in *Swiss Ribbons*,³⁷ the Court held the Code to be a balanced scheme of insolvency and liquidation provisions that serve commercial needs. Importantly, the Code imposes an "insolvency condemnation" on assets so that creditors (including the State) recover what they can when fraud has occurred. By converting assets to cash and distributing them transparently, liquidation ensures that wrongdoers cannot indefinitely postpone liability or leave creditors empty-handed. In sum, the availability of compulsory liquidation backed by avoidance and penalty provisions serves as a concrete disincentive against fraudulent conduct and furthers the Code's public interest goal of timely, fair outcomes.

³⁴ *Swiss Ribbons Pvt. Ltd. v. Union of India*, (2019) 4 SCC 17.

³⁵ ECONOMIC SURVEY 2024–25, *supra* note 31.

³⁶ *Id.*

³⁷ *Swiss Ribbons Pvt. Ltd. v. Union of India*, (2019) 4 SCC 17.

4.4 Drawbacks

Despite its role, liquidation has serious limitations, especially when used as a blunt response to fraud. A fundamental drawback is value destruction. Liquidation generally yields far lower recoveries than successful restructuring. Delay exacerbates this: the Supreme Court³⁸ has cautioned that “the more the delay, the more likely it is that liquidation will be the only answer”, and that assets lose economic value over time. In liquidation, the mandatory moratorium and cessation of the firm’s operations often cause steep haircuts. The liquidation can impose a punitive haircut on creditors themselves (aside from the fraudster), undermining the very “maximisation” goal of the Code.

Liquidation can also carry high social costs. As the liquidation process typically entails shutting down the business, it often leads to significant job losses. In each case, the affected workers (and downstream communities) bear a heavy burden, which arguably undermines public interest goals of the Code. Moreover, liquidation is not instantaneous; any legal challenges or claims of impropriety (ironically, even by creditors who feel short-changed) can prolong liquidation. *Swiss Ribbons*³⁹ explicitly warned that prolonged insolvency increases liquidation risk and reduces recovery. In practice, winding up proceedings can exceed the IBBI’s model timeline (one year) due to litigation and procedural steps, further eroding asset value and delaying any distributions.

Another drawback is finality and loss of flexibility. Once liquidation begins, the scope for renegotiation or correction is largely foreclosed. In *Punjab National Bank v. Kiran Shah*⁴⁰ (Org Informatics Ltd.), the NCLAT underscored that after a liquidation order, the CoC “has no role to play.” Creditors cannot replace the liquidator or reverse the course, and the insolvent firm is soon dissolved. This means that if facts change (for example, if a restructuring opportunity emerges) or if the liquidation process is contested, creditors have very limited remedy. The irreversible nature of liquidation thus makes it a very harsh sanction: in cases of fraud, it means the culprit loses everything, but it also means that any innocent stakeholders (unsuspecting shareholders, junior creditors, etc.) are swept away with them.

While liquidation acts as a deterrent and a remedy in cases of fraud under the CIRP, it comes at a cost of value deterioration, prolonged timelines, and the finality of winding up, which highlights the need for a safer alternative method. In this light, the paper further discusses the fraud risk in the PPIRP framework.

³⁸ SBI v. Murari Lal Jalan & Florian Fritsch (Consortium), (2025) 4 SCC 354.

³⁹ Swiss Ribbons Pvt. Ltd. v. Union of India, (2019) 4 SCC 17.

⁴⁰ Punjab Nat’l Bank v. Kiran Shah, 2019 SCC OnLine NCLAT 1030.

5 PRE-PACK INSOLVENCY IN INDIA: RISK AND MITIGATION

While PPIRP offers several benefits, it comes with a few drawbacks and loopholes that can lead to the risk of abuse through asset stripping, collusive base plans, and information asymmetry. This section examines these vulnerabilities and proposes mitigation mechanisms.

5.1 Debtor-in-Possession Arrangements and Fraud Risk

In PPIRP, the corporate debtor's board remains in charge unless 66% of the members of the CoC votes to transfer control to a Resolution Professional.⁴¹ Section 54H of the Code explicitly vests management with the existing board to “sustain the company”, while Section 54J lets the RP take over with the support of a majority of creditors. This DIP model preserves continuity but risks enabling a fraudulent insider to steer the process. Critics note that a debtor-in-possession may conceal financial irregularities, transfer assets, or delay investigations during the pre-pack period, thereby highlighting the need for enhanced cash-flow controls and oversight mechanisms to prevent any undesirable actions during the resolution process. In effect, fraud-detection mechanisms (normally triggered by an independent Interim Resolution Professional in a standard CIRP) are largely deferred until after admission.⁴²

In practice, this implies that a debtor suspected of fraud can initiate PPIRP and continue running the company unless a majority of creditors intervene. Observers caution that this arrangement creates a tension: the very parties under scrutiny, e.g., defaulting promoters, draft the “base resolution plan” and run day-to-day operations, potentially undermining fraud investigations. The RP may need additional checks on debtor actions to avoid misuse.⁴³ Moreover, MSMEs are small scale and largely unorganised, and often lack proper documentation, so the CD has an upper hand, as only he knows the intricacies of his business. Consequently, there is firm control over the management and a power to potential abuse of the process.

5.2 Less Judicial Scrutiny

Courts have also expressed concern regarding the oversight by the NCLT. One NCLT judge commented that the tribunal must “develop trust” in PPIRP and avoid being “paranoid” about fraud, but judges still spend time probing PPIRP proposals.⁴⁴ It is observed that

⁴¹ A. Rathi, *Pre-Packaged Insolvency Resolution Process*, ICSI INST. INSOLV. PROF. 1 (June 2022), <https://aracs.in/wp-content/uploads/2022/12/PPIRP-By-Akansha-Rathi.pdf>.

⁴² Dr. Isha Goel & Dr. Sunita Gupta, *IBC for MSMEs: Hits and Misses*, in IBBI, NAVDRISHTI EMERGING IDEAS ON IBC 235 (2023), <https://ibbi.gov.in/uploads/publication/a06c288c54627bad9b3b8f6ae322f0e3.pdf>.

⁴³ *Id.*

⁴⁴ Ram Mohan & Prasad, *supra* note 7.

tribunals initially treated PPIRP like a CIRP, issuing formal notices and demanding detailed filings, causing delays.⁴⁵ This reflects a struggle. PPIRP is meant to be quicker, yet judges wrestle with transparency needs, undermining the purpose of an independent and swift resolution mechanism.

5.3 Asset-Stripping and Bad-Faith Resolutions

A related concern is that debtor control during PPIRP could enable asset-stripping or sham deals before a plan is sealed. Under a normal CIRP, once proceedings start, the IRP safeguards assets and can invoke avoidance provisions like fraudulent, preferential, or undervalued transaction recovery under Sections 43–51 of the Code. Despite these protective provisions, the ground reality of “case resolution” presents a systematic failure. According to the IBBI data, out of 808 resolved cases, 200 applications are listed for asset stripping or avoidance transactions, which is alarming.⁴⁶ In PPIRP, much of the pre-filing period is unsupervised or minimally overseen. Managers could, in theory, sell off assets and machinery, divert funds to affiliates, or enter “bad faith” transactions to reduce the estate’s value. With such weak oversight during the negotiation period, MSMEs could easily be the next ventures for money laundering.⁴⁷

5.4 Avoidance Provisions under the Code

The Code’s avoidance remedies still exist for PPIRP. For example, Sections 43–44 (preferential transfers), 45–48 (undervalued transactions), and 50–51 (extortionate credit) technically apply to PPIRP just as in CIRP. Likewise, Section 49 provides for recovery if the debtor “had defrauded its creditors” prior to insolvency.⁴⁸ However, practical enforcement is limited: the RP can challenge such transactions only after appointment, and only if the CoC or creditors catch them in time. Given PPIRP’s 90–120-day timeframe, there is pressure to approve plans swiftly, potentially before any review of complex pre-insolvency transfers.⁴⁹ Moreover, the RP’s role is so limited before admission that he does not get enough evidence and opportunity to uncover such transactions. One thing that can be proposed is that the debtor declare all prior transactions from the past 12-24 months.

⁴⁵ *Id.*

⁴⁶ IBBI, THE QUARTERLY NEWSLETTER OF THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, vol. 28, July–Sept. 2023, at 14, <https://ibbi.gov.in/uploads/whatsnew/b4ce3516920836e9ff9b1e816137bf97.pdf>.

⁴⁷ Kanishka Agrawal & Saurav Singh, *Critical Analysis of Pre-Packaged Insolvency Resolution Process Under IBC*, IBC LAWS (Apr. 16, 2024), <https://ibclaw.in/critical-analysis-of-pre-packaged-insolvency-resolution-process-under-ibc-by-kanishka-agrawal-and-saurav-singh/>.

⁴⁸ Kushagra Gahoi & Akash Krishnan, *Comparative Analysis of Key Provisions of Corporate Insolvency Resolution Process and Pre-Packaged Insolvency Resolution Process Under the Insolvency and Bankruptcy Code, 2016*, 4 INT’L J.L. MGMT. & HUMAN. 1238, 1238–39 (2021), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/ijlmhs12&div=120&id=&page=>.

⁴⁹ *Id.*

5.5 Immunity after Plan

Another issue involves immunity provisions. The amended Code grants that once a resolution plan is approved and management is replaced, the corporate debtor is immune from prosecution for past offences except for continuing offences.⁵⁰ In PPIRP, this is embodied in Section 54N (5), which provides that, if the plan is approved and the promoter exits, the company cannot be prosecuted for prior fraud. While this encourages new investment, it may blunt deterrence against fraud. PPIRP could be used as a “shield” by fraudsters to evade criminal or civil clawbacks by restructuring just enough to change management and gain immunity.⁵¹

5.6 Dissenting Voice in Informal Negotiations

Just like in CIRP, in the Pre-Packaged Insolvency Resolution Process, the CoC is dominated by Financial Creditors, and they wield significant power to approve or reject the base resolution plan. In this skewed arrangement, minority dissenting financial creditors and operational creditors (“OCs”), who are normally not entitled to vote under Section 24⁵² unless their claims are substantial, hardly get any scope to shape or resist these plans. If we see the trend in the case of CIRP, courts prioritise the CoC’s commercial wisdom, as seen in cases like *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta*,⁵³ in which it was held that the minority creditors need to prove significant statutory violations to overturn a plan.⁵⁴ This recourse is even stricter and more limited for operational creditors, as seen in the case of *Swiss Ribbons Pvt. Ltd. v. Union of India*.⁵⁵

Combined with PPIRP’s private negotiations and short timeline, the lack of transparency restricts access to critical information, often creating information asymmetry. While Section 61 empowers creditors to appeal to the NCLAT for an instance of fraud, the bar is very high.⁵⁶ The court in the case of *K. Sashidhar v. Indian Overseas Bank* clarified that challenges must show clear evidence of fraud, statutory non-compliance, or significant harm to stakeholders.⁵⁷ Mere dissatisfaction with commercial distribution or arrangement is insufficient. The court said that the NCLT has a very limited role in reviewing a CoC-approved

⁵⁰ *Id.*

⁵¹ V. Anantha Nageswaran & Aakanksha Arora, *Insolvency and Bankruptcy Code: A Path Well Travelled*, in IBBI, IBC: IDEA, IMPRESSIONS, AND IMPLEMENTATION 21 (2022), <https://ibbi.gov.in/uploads/whatsnew/b5fba368fbd5c5817333f95fbb0d48bb.pdf>.

⁵² Insolvency and Bankruptcy Code, 2016, § 24.

⁵³ *Comm. of Creditors of Essar Steel (India) Ltd. v. Satish Kumar Gupta*, 2019 SCC OnLine NCLAT 38.

⁵⁴ *Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta*, (2019) 2 SCC 1.

⁵⁵ *Swiss Ribbons Pvt. Ltd. v. Union of India*, (2019) 4 SCC 17.

⁵⁶ Insolvency and Bankruptcy Code, 2016, § 61.

⁵⁷ *K. Sashidhar v. Indian Overseas Bank*, 2019 SCC OnLine SC 257.

resolution plan.⁵⁸ It only needs to check whether the plan meets the conditions under Section 30(2) of the Code. These conditions include proper payment priority, management of the corporate debtor, how the plan will be implemented and monitored, and compliance with the law. The NCLT cannot go beyond this while reviewing the plan. In the case of *Garodia Chemicals*,⁵⁹ the AA rejected a PPIRP bid for circumventing SEBI takeover rules demonstrating that tribunals will police pre-packs for improper tactics. Still, with only a handful of PPIRP cases so far, hard lessons are just emerging.⁶⁰

5.7 Limited Oversight by RP

Unlike CIRP, in pre-packaged insolvency, the RP has a less proactive role. He is appointed before plan submission to the Adjudicating Authority and assists in preparing the base resolution plan and ensures compliance under Section 54F.⁶¹ During the negotiation period, he is just a facilitator, which negatively affects his work in subsequent phases. His role includes detection of fraud and bad transactions, but he lacks the authority and resources to detect them in the pre-filing phase, when it is the most susceptible to fraud and mismanagement. The debtor's dominion over the submitted information and the tight deadline restrict the RP's capacity to carry out detailed due diligence, preventing fraud or concealment from being caught. To fix these issues, the RP must be given more than superficial power in the pre-filing phase, and to ensure "real supervision," he must be included in meetings with directors and provided with minutes of the meetings, so that he can keep track of any malicious activity.

5.8 Information Asymmetry and the Role of Information Utilities

Information asymmetry poses a significant impediment in PPIRP, slowing down and discouraging equitable solutions in the case of MSMEs where the formality and documentation are underestimated. It is reported by the Bankruptcy Law Reforms Committee (BLRC, 2015) that it "serves as a major barrier to equitable negotiations and slows down timely conclusion of the insolvency process."⁶² To overcome this, the Code created Information Utilities (IUs), like the IBBI-registered National E-Governance Services Ltd. (NeSL), which

⁵⁸ Indulia B & Ridhi, *The Real "Deal": Implementation of Resolution Plan Under the Insolvency and Bankruptcy Code, 2016*, SCC TIMES (June 20, 3:52 PM), <https://www.scconline.com/blog/post/2025/02/04/the-real-deal-implementation-of-resolution-plan-under-the-insolvency-and-bankruptcy-code-2016/>.

⁵⁹ *Garodia Chem. Ltd. v. Serene Indus. Ltd.*, 2018 SCC OnLine Bom 9783.

⁶⁰ Chinna Aswathy Abraham & Pooja Shree, *PPIRP Probed: Examining Progress and Challenges in MSME Insolvency*, SURANA & SURANA (Feb. 12, 2024), <https://suranaandsurana.com/ppirp-probed-examining-progress-and-challenges-in-msme-insolvency/>.

⁶¹ Insolvency and Bankruptcy Code, 2016, § 54F.

⁶² 1 THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE VOLUME I: RATIONALE AND DESIGN (Nov. 4, 2015), https://ibbi.gov.in/BLRCReportVol1_04112015.pdf.

obtain, store, and distribute confirmed financial information, including debt, defaults, and claims of creditors, as required by Section 215.⁶³ Under the PPIRP for MSMEs, IUs can help mitigate asymmetry by making available correct financial data. While effective, their efficiency is constrained by the debtor-in-possession paradigm (Section 54A). In contrast to the CIRP, under which an RP assumes control, PPIRP provides exclusive access and control to debtors in terms of financial and operational information, thus providing informational leverage to a certain extent. This asymmetry is compounded by MSMEs' informal practices, e.g., inaccurate record-keeping, non-standard accounting, and informal structures like loans and borrowings from local vendors and relatives.⁶⁴

These are frequently outside IUs' capture, compelling RPs and creditors to be dependent on debtor disclosures, which can be selective or timed to benefit the debtor's interests. For instance, a debtor might exclude cash-based loans from IU records or list creditors that are not present in the books of account, deceiving creditors about the actual obligations. The Base Resolution Plan ("BRP"), drawn up by the debtor prior to NCLT admission (Section 54C), further exacerbates this problem since operational creditors have no full access to financial information or independent valuation to assess it in the early stages. RPs and creditors are hindered from confirming the debtor's financial situation because of informal documentation, MSME scale, and PPIRP's short timelines.⁶⁵

Moreover, IUs' credibility is undermined by dependence on creditors and debtor-sourced data, which can be incomplete or doctored.⁶⁶ Whereas RPs are authorized to verify records (Regulation 36), field-level verification is virtually infeasible given the non-cooperation of debtors, off-record practices, and the lack of time. It is thus easy for debtors and their chosen creditors to conceal fraud. The debtor's control over information with limited IU data and poor verification and authentication processes enables strategic withholding or misrepresentation, defeating transparency and fairness in PPIRP. With poor documentation, accounts, audits, and lack of disclosure and declaration, PPIRP will always be plagued with the risk of fraud.⁶⁷ Once the transactions of MSMEs are recorded and formalized on paper, we can make the declaration of financial data with IUs a mandate and prerequisite to PPIRP.⁶⁸

⁶³ Insolvency and Bankruptcy Code, 2016, § 215.

⁶⁴ Sumant Prashant et al., *Issues with the Regulation of Information Utilities*, NIPFP (July 13, 2017), <https://www.nipfp.org.in/publication-index-page/blog-index-page/issues-with-the-regulation-of-information-utilities/>.

⁶⁵ NeSL, *Awareness on Information Utility Under the IBC, 2016*, IPA ICAI (Sept. 27, 2018), https://www.ipaicmai.in/IPANEW/UploadFiles/PPT/NeSL_IPA_27-09-2018.pdf.

⁶⁶ Debajyoti Ray Chaudhuri, *Information Utility - A Vision for the Future*, in IBBI, IBC: EVOLUTION, LEARNINGS AND INNOVATION 211 (2023), <https://ibbi.gov.in/uploads/whatsnew/525cbe1dd3b1f9fd9866fe77676a96ae.pdf>.

⁶⁷ *Id.*

⁶⁸ Rama Subramaniam Gandhi, *Information Utility Ver 2.0*, in IBBI, IBC: EVOLUTION, LEARNINGS AND INNOVATION 203 (2023), <https://ibbi.gov.in/uploads/whatsnew/525cbe1dd3b1f9fd9866fe77676a96ae.pdf>.

5.9 Banks as Creditors

In PPIRP, the fast and DIP-led restructuring mechanism for stressed MSMEs presents considerable fraud risks when creditor banks fail to implement proper checks and balances. MSMEs that are part of larger corporate groups pose a major risk of fraud.⁶⁹ Under the statute, they are eligible for PPIRP, but their inclusion defeats the overall purpose of PPIRP for MSMEs. These entities often have access to financial and operational support through their parent companies; hence there is a risk of fraud and misuse of the PPIRP. Such conglomerate-backed MSMEs could manipulate the process with the tacit cooperation of banks, giving rise to the perception of misuse or creating avenues for backdoor bailouts, while real distressed enterprises are left out.⁷⁰ The parent company can use these “distressed” MSMEs for asset stripping and money laundering, thereby lowering the recovery of banks.

Banks may avoid classifying certain accounts as non-performing by pushing through quick, opaque restructuring deals, engaging in a form of “evergreening,” thereby keeping stressed assets appearing healthy without real financial recovery.⁷¹ As PPIRP prohibits initiation of a second insolvency proceeding against the same corporate debtor for three years after resolution, the process can be abused to keep bad debt recognition in abeyance perpetually. The debtor can also use this method to postpone liability and save its assets. There is also a possibility that the bank agrees to an unfavourable plan just to recover a fair fraction of the loan to avoid NPA and avoid the time costs of a lengthy CIRP.

5.10 Consideration for RBI and Bank’s Board of Directors

To encourage the pre-packaged insolvency while curbing fraud, the Reserve Bank of India (“RBI”) can issue guidelines targeting transparency and oversight. First, the RBI should issue guidelines for enhanced scrutiny in case of those MSMEs that are backed by conglomerates, which have robust support ecosystems, as seen in *GCCL Infrastructure* (NCLT Ahmedabad, 2021), where opacity raised collusion risks. It also helps prevent misuse and fraud, such as hiding intra-group debts.⁷² Banks should monitor loan restructurings, include them in Early Warning Systems, and report exposures in financial statements to prevent any foul play by the debtor. To curb the issue of evergreening, the RBI must introduce prudential

⁶⁹ Subbiah & Mehrotra, *supra* note 6.

⁷⁰ *Id.*

⁷¹ Sugata Ghosh, *ET Analysis: Is Evergreening of Loans Evergreen?*, ECON. TIMES (Dec. 21, 2023, 12:04 AM), <https://economictimes.indiatimes.com/industry/banking/finance/banking/et-analysis-is-evergreening-of-loans-evergreen/articleshow/106163189.cms?from=mdr>.

⁷² *In re GCCL Infrastructure & Projects Ltd.*, MANU/NC/3909/2021.

safeguards.⁷³ One important step would be to mandate higher capital requirements for loans restructured under PPIRP. This would act as a buffer against potential future defaults, acknowledging the elevated risk of failure given the absence of a fallback insolvency mechanism for three years.⁷⁴

Additionally, the RBI should require specific provisioning norms for PPIRP cases. This means banks would be obligated to set aside a portion of funds to cover possible losses from these restructured accounts, discouraging them from using PPIRP simply to avoid making provisions under normal NPA guidelines.⁷⁵ Further, bank boards need specific, quantitative policies for choosing PPIRP over CIRP to ensure consistent decisions, given low PPIRP adoption. In addition to this, proactive risk surveillance using transaction data and analytics is essential, as MSMEs' informal practices evade conventional monitoring. Finally, initially restricting PPIRP to high-risk sectors like services and trade, excluding asset-heavy real estate, aligns it with low-recovery industries, enhancing efficiency.⁷⁶ These measures promote PPIRP's integrity, protect banks, and address fraud risks, ensuring wider acceptance.

6 PRE-PACK INSOLVENCY: PROTECTION AGAINST FRAUD ACROSS DIFFERENT JURISDICTIONS

In the United States, protections against fraud heavily depend on judicial and administrative regulation. Bankruptcy Courts examine pre-pack plans upon approval hearings to ensure adherence to fairness benchmarks.⁷⁷ The US Trustee, akin to the RP, oversees filings and checks for fraud, i.e., asset hiding or preferential transfers. Creditor committees review the plans and object to any instance of fraud. Finally, the discretion of the court to authorize DIP financing needs to be carefully monitored to avoid abuse through related party sales.⁷⁸

Conversely, the United Kingdom puts more emphasis on safeguards by practitioners, supported by recent changes. Statement of Insolvency Practice 16 ("SIP 16") requires disclosure to creditors after sale in detail, vindicating the need and fairness of the pre-pack. In addition, the pre-pack pool ensures independent review of related party sales, but since its

⁷³ Subbiah & Mehrotra, *supra* note 6.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ D.F. Dunne, D.C. O'Donnell & N. Almeida, *Prepackaged Chapter 11 in the United States: An Overview*, GLOBAL RESTRUCTURING REVIEW (Mar. 4, 2022), <https://globalrestructuringreview.com/guide/the-art-of-the-pre-pack-archived/edition-2/article/prepackaged-chapter-11-in-the-united-states-overview>.

⁷⁸ *Id.*

adoption is optional, its influence is limited.⁷⁹ Besides, to address the practice of phoenixing, the Corporate Insolvency and Governance Act 2020 created a requirement of independent reports by assessors for related party sales within eight weeks of administration. In the event of irregularities, the Insolvency Service has the power to penalise practitioners for improper conduct, although the absence of pre-sale creditor engagement and use of voluntary measures undermine fraud deterrence.⁸⁰

6.1 Lessons for India

In comparison to the US and the UK, India's legislative regime has explicit penalties and preventive measures, yet its sidelining of operational creditors and judicial delays negate intended effectiveness. The pre-pack in India is a thoughtfully crafted framework, meticulously designed to address the unique needs of Indian industries, particularly MSMEs. It strikes a delicate balance between efficiency and stakeholder confidence, reflecting the economic and sentimental realities of the Indian market. This is one reason why it is not advisable to directly implement measures from other jurisdictions.

However, we can take cues from the United States that help further sharpen our framework. In the U.S., bankruptcy cases are referred to specialized bankruptcy courts by district courts, where experienced judges make it efficient and uniform to deal with intricate insolvency issues.⁸¹ India can adopt this provision by introducing a special insolvency division or bench within the NCLT, with judges trained on the subtleties of insolvency of MSMEs. This would lighten the workload of the NCLT, especially in fraud cases that are filed objecting to the base resolution plan.⁸² In the case of MSMEs, which tend to have very thin margins, this practice would facilitate quicker resolution, consistent application of principles of insolvency, and scrutiny of pre-negotiated plans with the same careful attention, balancing speed with equity. However, this route would not be viable anytime soon because establishing a tribunal incurs substantial economic and operational costs, which would be warranted only by a multifold increase in PPIRP cases or a broadening of the framework to cover industries other than MSMEs.

⁷⁹ MINISTRY OF CORP. AFF., GOV'T OF INDIA, REPORT OF THE SUB-COMMITTEE OF THE INSOLVENCY LAW COMMITTEE ON PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS 2020–2021 (Oct. 31, 2020), <https://ibbi.gov.in/uploads/resources/24c7fc03cdffff69960ce374416fa646.pdf>.

⁸⁰ Nageswaran & Arora, *supra* note 51.

⁸¹ 28 U.S.C. § 157(a) (2012).

⁸² Himani Singh, *Pre-Packaged Insolvency in India: Lessons from USA and UK*, SSRN (Jan. 13, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3518287.

7 CONCLUSION

The current pre-pack mechanism is an ambitious effort towards simplification of insolvency resolution for MSMEs via an informal, debtor-led route, given that they cannot afford the expense and timeframe of traditional insolvency.⁸³ By emphasizing speed and cost-effectiveness, PPIRP seeks to ease the burden on the NCLT and provide a lifeline to stressed MSMEs, a critical cog in India's economic engine. Yet, as this paper has made clear, the framework's flexibility and minimal regulation have set Pandora's box of vulnerabilities loose, with reported cases of fraud likely to call its effectiveness into question. The analysis exposes a regime caught in the twin imperatives of efficiency and accountability. The debtor-controlled paradigm of PPIRP, while sound in theory, encounters practical challenges because of the stringent burden of proof for fraudulent intent and the tight timelines of PPIRP.⁸⁴

The NCLT's discretion and the RP's investigating role are key shields against fraud, but their efficacy is impaired by information asymmetry, judicial oversight restrictions, and financial creditor dominance in decision-making. Creating dedicated insolvency benches within the NCLT, requiring improved disclosures via information utilities, and having tighter RBI regulations for banks could strengthen the regime against misuse. Most importantly, allowing operational creditors and dissenting voices to participate and be more transparent would put PPIRP in line with the Code's philosophy of fairness towards all stakeholders.

At a fork in the road in its insolvency journey, the PPIRP experiment reminds us that efficiency for the sake of efficiency is a pyrrhic victory. To achieve its transformative promise, PPIRP must transition to a system that not only saves viable MSMEs but also protects the sanctity of the insolvency ecosystem. By intertwining strong oversight, transparent procedures, disclosure, declaration and documentation, India can create a PPIRP regime that tips the scales of swiftness and justice in the right direction, without the threat of fraud.

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⁸³ Subbiah & Mehrotra, *supra* note 6.

⁸⁴ Sunil Mehta, *Pre-Pack: A Great Enabler for Resolution of Stress in MSMEs*, in IBBI, QUINQUENNIAL OF INSOLVENCY AND BANKRUPTCY CODE, 2016 371 (2021), <https://ibbi.gov.in/uploads/whatsnew/1d8b31fc65f7ac6f09a973be8f12f868.pdf>.

CHAPTER 7

Aligning Legislative Intent with Institutional Practice: Reassessing India's Pre-Pack Insolvency Framework for MSMEs

PARAS VERMA* AND PRATHAMESH DESHPANDE**

The Insolvency and Bankruptcy Code, 2016 (“the Code”), introduced the Corporate Insolvency Resolution Process (“CIRP”), which transformed the Indian insolvency landscape by significantly increasing the number of structured resolutions and enhancing stakeholder value while reducing the reliance on liquidation as the primary means of addressing financial distress. Although CIRP was a major success, the Indian Insolvency regime primarily focused on the corporates, thereby excluding Micro, Small and Medium Enterprises (“MSMEs”), which form a significant percentage of the markets of India, out of the purview of the benefits brought in by resolution. To address this gap, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021, enacted the Pre-packaged Insolvency Resolution Process (“PPIRP”). However, its implementation has been met with substantial underuse, as the Insolvency and Bankruptcy Board of India (“IBBI”) reported that only fifteen PPIRPs have been filed. This research critically examines whether the design and procedural architecture of India’s PPIRP framework align with its legislative intent and functional objectives.

Adopting a qualitative doctrinal and empirical legal methodology, the paper is structured in three parts: First, through a case law analysis of all 13 PPIRP proceedings filed, this study is to investigate the procedural timelines, stakeholder behaviour, resolution outcomes and key judicial interventions under sections 54A-54H of the Code. Second, the paper conducts a comparative legal analysis of analogous pre-packaged insolvency mechanisms in foreign jurisdictions, particularly UK’s pre-pack administration under the Insolvency Act 1986, USA’s Pre-packaged reorganization under chapter 11 and the Pre-package insolvency framework of Singapore under the Insolvency, Restructuring and Dissolution Act (“IRDA”) 2018, to assess the divergences in creditor assent threshold, the plan formulation mechanisms, and regulatory functions of the authorities. This comparative analysis is utilised to gain actionable insights on the bottlenecks faced by the current PPIRP framework of India.

Finally, by further utilising these actionable insights, a normative legal approach is followed to prescribe legal reforms that conform to an Indian context. These recommendations are posited as innovative legal

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solutions, with potential relevance to global insolvency reform initiatives. This study contributes to emerging Indian insolvency jurisprudence by identifying empirical lacunae, exposing comparative inefficiencies, and advancing doctrinal reforms, thus offering a holistic evaluation of PPIRP as a special resolution mechanism for MSMEs.

Keywords: Pre-packaged Insolvency, Doctrinal Analysis, Insolvency Reform, MSME Resolution, PPIRP India

1 INTRODUCTION

The MSMEs constitute a major part of the Indian economy, contributing approximately 30% to the Indian GDP¹ while providing employment to over 25.18 crore people². The primary resolution mechanism under the Code, CIRP, with its procedure-intensive, rigidly formal, and financially demanding architecture, mainly catered to the large corporates, marginalising the MSMEs limited by resources³. Furthermore, the impact of the COVID-19 pandemic on the MSMEs made the dire need for a resolution mechanism tending to corporate MSME stress apparent. To address these issues, PPIRP was introduced as an alternative stress resolution mechanism through the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021.

The PPIRP framework embodies a unique, cost-effective, time-saving, and value-maximising resolution alternative, tailored to the needs of MSMEs that blends in the formal features that make CIRP sacrosanct with the informal elements, while adopting the creditor-in-control and debtor-in-possession model that makes the PPIRP framework flexible and suitable to the needs of corporate MSMEs.⁴ The framework envisages a hybrid procedure with an informal pre-initiation phase offering flexibility for the corporate debtor (“CD”) and its creditors a swift opportunity to explore and negotiate the optimal way to resolve business stress, while the formal post-initiation phase drives value-maximisation and bestows the resolution plan with statutory protection.

Despite these advantages, only 15 cases have been admitted as of September 2024,⁵ underscoring a substantial underuse of the provisions. This paper endeavours to critically assess whether the design and implementation of India’s PPIRP framework align with its

¹ Press Information Bureau, *Contribution of MSMEs to the GDP*, Ministry of Micro, Small & Medium Enterprises, Government of India (July 22, 2024), <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2035073>.

² Press Information Bureau, *Budget 2025-26: Fuelling MSME Expansion*, Ministry of Micro, Small & Medium Enterprises, Government of India (Feb. 4, 2025), <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2099687>.

³ Akash Srivastava, *A Detail Study of Pre-Packs: A New Regime of Insolvency in India*, IBC LAWS (June 23, 2020), <https://ib-claw.in/a-detail-study-of-pre-packs-a-new-regime-of-insolvency-in-india-by-adv-akash-srivastava/?print=print>.

⁴ Insolvency and Bankruptcy Board of India, *Pre-Packaged Insolvency Resolution Process*, IBBI (Apr. 2021), <https://ibbi.gov.in/uploads/whatsnew/a650764a464bc60fe330bce464d5607d.pdf>.

⁵ Ruchika Chitravanshi, *Pre-packaged Insolvency Sees Sluggish Growth with 13 Applications till Sep*, BUS. STANDARD (Jan. 3, 2025), https://www.business-standard.com/industry/news/prepackaged-insolvency-sees-sluggish-growth-with-13-applications-till-sep-125010200624_1.html.

intended legislative and functional objectives. It undertakes a threefold analysis: *first*, by examining all fifteen reported PPIRP cases to evaluate procedural efficacy and judicial intervention; *second*, by drawing comparative insights from similar pre-pack regimes in the United Kingdom, United States, and Singapore; and *finally*, by proposing targeted legal reforms through a normative lens, aimed at strengthening PPIRP's utility as an effective resolution mechanism for MSMEs.

2 LEGAL BACKGROUND OF PPIRP

2.1 Evolution of PPIRP in Multiple Jurisdictions

The concept of the PPIRP is not exclusive to India; instead, it represents India's adaptation of internationally successful restructuring mechanisms that have evolved across various jurisdictions, specifically in the United Kingdom, the United States and Singapore, over several decades.

The United Kingdom emerged as one of the earliest adopters of pre-packaged mechanisms through the Enterprise Act 2002. In the standard prepackaged administration of the United Kingdom, the sale of a company's business or assets is planned before the formal administration begins. Once the administrator is officially appointed, the sale is typically finalised on the first day of the process, helping to save the business entirely or at least in part.⁶ This regulatory framework was developed through Statement of Insolvency Practice ("SIP") 16, which provides rules on what information must be disclosed and how transparency should be maintained,⁷ which was later supplemented in 2015 by the Pre-pack Pool mechanism.⁸

In the United States, pre-packaged reorganisations under Chapter 11 allow companies to negotiate and secure creditor approval for a restructuring plan before filing for bankruptcy.⁹ This helps businesses exit bankruptcy quickly while retaining judicial oversight and

⁶ INSOLVENCY PRACTITIONERS ASS'N, STATEMENT OF INSOLVENCY PRACTICE 16: PRE-PACKAGED SALES IN ADMINISTRATIONS (2015) (effective Nov. 1, 2015), <https://insolvency-practitioners.org.uk/uploads/documents/E30389ce35ed923c06b2879fecdb616a.pdf>.

⁷ Bolanle Adebola, *Transforming Perceptions: The Development of Pre-pack Regulations in England and Wales*, 43 OXFORD J. LEGAL STUD. 150 (2023), <https://doi.org/10.1093/ojls/gqac026>.

⁸ Lorraine Conway & Ali Shalchi, *Pre-pack Administrations* (Research Briefing SN 05035, House of Commons Library, Mar. 4, 2021), <https://commonslibrary.parliament.uk/research-briefings/sn05035/>.

⁹ Dennis F. Dunne, Dennis C. O'Donnell & Nelly Almeida, *Prepackaged Chapter 11 in the United States: An Overview*, Insight, GLOBAL RESTRUCTURING REVIEW (May 16, 2023), <https://globalrestructuringreview.com/guide/the-art-of-the-pre-pack/edition-3/article/prepackaged-chapter-11-in-the-united-states-overview>.

creditor protections. Unlike the UK's approach, the US model involves stricter judicial supervision and formal creditor voting.¹⁰

Singapore adopted a similar approach in 2017, creating an efficient pre-pack framework under its IRDA. These reforms, inspired by the US Chapter 11 regime, were introduced to support debtor-led restructurings through a fast-track scheme of arrangement, reducing both time and costs under Section 211 of the Companies Act. The framework has been successful in debt restructurings for companies facing financial distress.

2.2 Overview of the PPIRP Framework under the Code

The legislative purpose behind the PPIRP was outlined in the report of the Sub-Committee, chaired by Dr. M.S. Sahoo of the Insolvency Law Committee, submitted in October 2020.¹¹ Based on this subcommittee's recommendations, a pre-pack mechanism was introduced within the existing structure of the Code.¹² Furthermore, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021, which came into effect on April 4, 2021,¹³ formally introduced the PPIRP Framework through Chapter III-A of the Code, covering sections from 54A to 54P. It is designed as a hybrid model combining global practices with the needs of Indian MSMEs. Section 54A limits its use to MSMEs and sets conditions, including a default threshold of ₹10 lakh, 66% creditor approval, and compliance with Section 29A.¹⁴

The framework follows a clear process from eligibility checks and application, ranging from Section 54B to 54C, formal proceedings including public announcements and creditor verification, covering Section 54D to 54G, and governance through a debtor-in-possession model, where current management stays in control but is subject to creditor oversight, from Section 54H to 54K.¹⁵ The final provisions address plan approval, implementation, and termination procedures (Section 54L-54P), ensuring alignment with the Code principles while maintaining PPIRP's specific characteristics.

Unlike the traditional insolvency process, where control shifts to a resolution professional ("RP"), PPIRP lets the existing management run the business during the process by

¹⁰ BO XIE, COMPARATIVE INSOLVENCY LAW 175–202 (2016), https://www.elgaronline.com/monochap/9781781007372/15_chapter5.xhtml (last visited Aug. 6, 2025).

¹¹ Press Information Bureau, *Sub-Committee of Insolvency Law Committee Recommended IBC Pre-Pack Framework* (Ministry of Corporate Affairs, Govt. of India, Mar. 8, 2021), <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1703245>.

¹² *Id.*

¹³ MMJC, *Pre-Packaged Insolvency Resolution Process for MSME: A Boon in Disguise During Pandemic* (Mar. 2021), <https://www.mmjc.in/pre-packed-insolvency-resolution-process-for-msme-a-boon-in-disguise-during-pandemic/>.

¹⁴ Akansha Rathi & Associates, *Pre-Packaged Insolvency Resolution Process* (Insights Report, June 2022), <https://aracs.in/wp-content/uploads/2022/12/PPIRP-By-Akansha-Rathi.pdf>.

¹⁵ Insolvency and Bankruptcy Board of India, *Pre-Packaged Insolvency Resolution Process* (IBBI information brochure, Apr. 2021), <https://www.ibbi.gov.in/uploads/whatsnew/a650764a464bc60fe330bce464d5607d.pdf>.

combining both the debtor-in-possession and creditor-in-control models.¹⁶ This helps avoid disruptions and is suitable for MSMEs, which often depend on the promoter's networks and experience in building the MSME. By keeping management in place, the framework protects key relationships and operational knowledge that could otherwise be lost if the management is transferred to the RP.¹⁷

At the same time, creditor-in-control safeguards are built in to prevent misuse. Creditors, through the Committee of Creditors ("CoC"), can vote, by a 66% majority, to hand control over to an RP if there's fraud or mismanagement¹⁸. They can also switch the process to normal insolvency proceedings whenever they feel it necessary. This ensures that while the business stays operational, creditors still have the power to step in and protect their interests when needed.¹⁹

2.3 Key Features

The Base Resolution Plan ("BRP") is the initial point of the PPIRP process, prepared by the CD using its inside knowledge of the business. This plan, following Section 54K guidelines, must not reduce payments owed to operational creditors (OC) if it's to be directly approved, and CoC can accept the BRP with some improvements.²⁰ The purpose is to negotiate the plan with creditors beforehand, so that formal proceedings begin only when a workable plan is already in place, reducing delays and uncertainty.

If the BRP is not accepted by the CoC, the Swiss challenge would take place, which is a bidding process. The RP invites alternative resolution plans to compete with the BRP. These competing plans are evaluated, and the best alternative plan ("BAP") is selected. In cases where the BAP is better than the BRP, both the original and the alternative plans can be revised through further rounds until the best plan is finalised. In case there is no alternative plan received, then CoC may approve the BRP. This ensures value maximisation while keeping the process efficient.

The entire PPIRP process follows a strict 120-day timeline. Within the first 14 days, the National Company Law Tribunal ("NCLT") must admit or reject the application. Between Days 1 and 90, creditors evaluate and work on the resolution plan. The final 30 days are for

¹⁶ Manoj Kumar Anand & Rajiv Sharma, *Effects of Individual Insolvency and PPIRP (Pre-Packaged Insolvency Resolution Process) on the Indian Business Environment*, 5 SHODHKOSH: J. VISUAL & PERFORMING ARTS (2024), <https://www.granthaalayapublication.org/Arts-Journal/ShodhKosh/article/download/5122/4641/27301>.

¹⁷ Mathew Jacob, *Catalyzing MSMEs Through a Facilitative Distress Resolution Process*, IBC LAWS BLOG (Feb. 25, 2025), <https://ibclaw.blog/catalyzing-msmes-through-a-facilitative-distress-resolution-process-by-mathew-jacob/>.

¹⁸ Smiti Tewari, Anisa Bawari & Srishti Dembla, *The PPIRP Experiment: A Double-Edged Sword?*, The Indian Restructuring Growth Story, KHAITAN LEGAL (Jan. 4, 2022), <https://khaitanlegal.com/the-ppirp-experiment-a-double-edged-sword/>.

¹⁹ *Id.*

²⁰ Anand & Sharma, *supra* note 16.

NCLT to approve or reject the plan.²¹ The reduced timeline marks a significant compression compared to the 180 to 330 days that is generally required under CIRP²². This is made possible by conducting negotiations upfront and avoiding lengthy marketing and bidding procedures.

3 EMPIRICAL AND DOCTRINAL ANALYSIS OF INDIA'S PPIRP CASE-LAWS

The PPIRP framework was introduced into the Code as a specialised, efficient, and consensual mechanism for the resolution of MSMEs. Despite its legislative intent to provide a swift and less disruptive alternative to the standard CIRP, the framework has seen a remarkably low uptake, with only a handful of cases initiated since its enactment in 2021. This numerical deficit necessitates a deep and critical examination of the cases that have been filed to understand the practical realities of the PPIRP.

This section undertakes a comprehensive qualitative and doctrinal analysis of the set of judicial orders of the proceedings initiated in India. The objective is to deconstruct the procedural efficacy of the framework by investigating four key pillars as they have unfolded in practice: the adherence to procedural timelines, the dynamics of stakeholder behaviour, the nature of resolution outcomes, and the critical role of judicial intervention in interpreting the law under Sections 54A-54H of the Code. The findings herein form the empirical foundation upon which the subsequent comparative analysis and normative recommendations of this study are built.

3.1 Analysis of Procedural Timelines: The Ideal vs. the Reality

A core promise of the PPIRP framework is its “time-bound” and “quicker” nature.²³ The statute prescribes a model timeline of 120 days for completion: 90 days for the CoC to approve a resolution plan, followed by a 30-day window for the Adjudicating Authority (“AA”) to grant its sanction. Our analysis reveals that while this timeline is achievable, it functions more as an ambitious benchmark than a rigid deadline, with judicial flexibility proving essential to the process’s success.

²¹ Insolvency and Bankruptcy Board of India, *Discussion Paper on Amendments to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016* (Aug. 27, 2021), https://ibbi.gov.in/uploads/public_comments/Discussionpaper-CIRP-27Aug2021.pdf.

²² Sharmistha Ghosh & Aditi Sinha, *Pre-packaged Insolvency: To Uphold the Legislative Intent or the Letter of the Law?*, *Juris Corp* (Legal 500 News & Developments, Feb. 8, 2023), <https://www.legal500.com/developments/thought-leadership/pre-packaged-insolvency-to-uphold-the-legislative-intent-or-the-letter-of-the-law/>.

²³ Insolvency and Bankruptcy Board of India, *Pre-Packaged Insolvency Resolution Process* (IBBI information brochure, Apr. 2021), <https://www.ibbi.gov.in/uploads/whatsnew/a650764a464bc60fe330bce464d5607d.pdf>.

The case of Sudal Industries Limited stands as a testament to the framework's potential for speed, where the entire process from admission to final approval was concluded in just 112 days.²⁴ However, this is an exception. More frequently, the 120 days is significantly exceeded, as seen in ENN TEE International Limited²⁵ and RG Residency Pvt. Ltd., where proceedings extended for over a year.²⁶ This deviation is not arbitrary but is consistently attributable to two factors: stakeholder-led negotiations and essential judicial scrutiny. Delays were often necessary to allow the CoC to conduct a market-testing exercise for value maximisation or to engage in multiple rounds of negotiations to improve a BRP.²⁷ Furthermore, the AAs frequently paused the clock to adjudicate on pre-admission objections²⁸ or to remand a procedurally flawed plan back to the CoC²⁹.

This reality of structured delays led to the most critical judicial precedent on timelines, established by the National Company Law Appellate Tribunal (“NCLAT”) in the appeal of Kethos Tiles Private Limited. The appellate tribunal explicitly ruled that the 120-day timeline is directory, not mandatory, reasoning that there is no concept of automatic termination.³⁰ The NCLAT looked at the consequences of a mandatory interpretation – the automatic failure of potentially viable resolutions due to procedural delays – and chose instead to empower the judiciary with discretion. This interpretation prioritises the substantive goal of achieving a viable resolution over the rigid observance of a procedural deadline, thereby embedding necessary flexibility into the framework.

3.2 Examination of Stakeholder Behaviour: A Contested Consensus

The PPIRP model is a delicate balance of a “debtor-in-possession” framework with robust “creditor-in-control” mechanisms. The success of each case hinges on the conduct of its key stakeholders.

²⁴ CA Prashant Jain, Resolution Professional, Interlocutory Application No. 3021 of 2023 in CP (IBPP) No. 01/MB-IV/2022 (NCLT Mumbai Bench-IV Aug. 10, 2023) (Shri Prabhat Kumar & Shri Kishore Vemulapalli, Members), <https://ibbi.gov.in/uploads/order/a812d0a4f5d6ad4270015c2c0772d5ab.pdf>.

²⁵ Ritu Rastogi, Resolution Professional of ENN TEE Int'l Limited, Interlocutory Application No. 4313 (PB)/2023 in CP (IBPP) No. 01 (PB)/2022 (NCLT Principal Bench, New Delhi Oct. 19, 2023), <https://ibbi.gov.in/uploads/order/d8050b65c258ba3b5a74230c2d6709c8.pdf>.

²⁶ Rajeev Lochan, Resolution Professional, Interlocutory Application No. 53 of 2024 in CP (IBPP) No. 01 (PB)/2023 (NCLT Principal Bench, New Delhi May 13, 2025), <https://ibbi.gov.in/uploads/order/9229c1557f7647392eac5e8659bf3fa5.pdf>.

²⁷ Ritu Rastogi, Resolution Professional of ENN TEE Int'l Limited, Interlocutory Application No. 4313 (PB)/2023 in CP (IBPP) No. 01 (PB)/2022.

²⁸ Krrish Realtech Pvt. Ltd. v. Union Bank of India, Company Appeal (AT) (Insolvency) Nos. 1008, 1009 & 1010 of 2021 (NCLAT Dec. 21, 2021), <https://ibbi.gov.in/uploads/order/6c2281182a0c09919cbbf9481a22098a.pdf>.

²⁹ Rajeev Lochan, Resolution Professional, Interlocutory Application No. 53 of 2024 in CP (IBPP) No. 01 (PB)/2023.

³⁰ Mr. Vikash Gautamchand Jain, Resolution Professional for Kethos Tiles Pvt. Ltd., Company Appeal (AT) (Insolvency) Nos. 1173 & 1323 of 2024 (NCLAT Principal Bench, New Delhi Aug. 20, 2024).

- a. **The Corporate Debtor:** The behaviour of CDs presented a mixed spectrum. Many cases, such as Garodia Chemicals Limited and ENN TEE International Limited, showcased the ideal “honest debtor” who proactively engaged creditors and diligently followed pre-initiation requirements.³¹ However, several cases highlighted attempts to misuse the process. The BRP in Amrit India Ltd., offering a mere 10% recovery, was seen as a non-serious offer that undermined the good-faith basis of the process.³² In Krrish Realtech Private Limited, the CD’s attempt to convene a creditor meeting with same-day notice was a clear instance of procedural abuse intended to suppress creditor participation and railroad an approval.³³ More systemically, the AAs in RG Residency Pvt. Ltd. and KVIR Towers Pvt. Ltd. raised serious doubts about the bona fides of the debtors’ MSME status, suggesting a trend of larger, non-operational entities engaging in regulatory arbitrage to leverage the benefits of the PPIRP framework.
- b. **The Committee of Creditors:** The analysis overwhelmingly shows CoCs embracing their “creditor-in-control” role with commercial acumen. They were far from passive, decisively rejecting weak BRPs and successfully triggering the “Swiss Challenge” mechanism to invite better offers. This mechanism, central to PPIRP’s value maximisation goal, allows the CoC to use a competing third-party plan as a new benchmark, which the original debtor is then invited to match or improve upon. This was seen in cases like Amrit India Ltd. and Mudra Lifespaces Pvt. Ltd., which directly led to superior resolution outcomes³⁴. A notable and highly positive trend is that in none of the analysed cases did a CoC vote to terminate the PPIRP, indicating a strong institutional preference for resolution over liquidation.
- c. **The Resolution Professional:** The RP’s role as a facilitator was crucial, though not without challenges. In most successful resolutions, RPs acted as exemplary facilitators, dutifully following CoC directions and ensuring compliance.³⁵ However, the judiciary did not hesitate to point out deficiencies. A recurring challenge was the quality of claim verification. In RG Residency Pvt. Ltd., the AA had to intervene to correct the RP’s under-admission of homebuyer claims, reminding the RP of the duty to look beyond

³¹ Manish Jaju, Resolution Professional, Interlocutory Application No. 02 of 2025 in CP (IBPP) No. 02 of 2023 (Garodia Chemicals Ltd.) (NCLT Mumbai Bench-I Feb. 24, 2025) (Shri Virendrasingh Gyansingh Bisht & Shri Prabhat Kumar, Members).

³² Mukesh Kumar Jain, Resolution Professional, Interlocutory Application No. 1599 (PB)/2023 in CP (IBPP) No. 03 (PB)/2022 (NCLT Principal Bench, New Delhi May 3, 2023).

³³ *Krrish Realtech Pvt. Ltd.*, Company Appeal (AT) (Insolvency) Nos. 1008, 1009 & 1010 of 2021.

³⁴ *Mukesh Kumar Jain, Resolution Professional*, Interlocutory Application No. 1599 (PB)/2023 in CP (IBPP) No. 03 (PB)/2022.

³⁵ *CA Prashant Jain, Resolution Professional*, Interlocutory Application No. 3021 of 2023 in CP (IBPP) No. 01/MB-IV/2022.

flawed corporate records and verify claims based on all available evidence.³⁶ This highlights the dual nature of RP's role – to be a facilitator for the CoC and a compliance officer for the court.

3.3 Analysis of Resolution Outcomes: Value Maximisation in Practice

A striking feature across the analysed cases is the high rate of successful resolution. Of the cases that proceeded to the final stage, 100% resulted in the approval of a resolution plan. This supports the “Liquidation Remote” characteristic of PPIRP, a key design feature. Because the process begins with a debtor-led plan and creditor consent, the entire orientation is towards revival, with liquidation being a distant possibility.

- a. **Change in Management vs. Debtor-led Revival:** The outcomes were split between two primary models. In cases like *Mudra Lifespaces Pvt. Ltd.* and *Amrit India Ltd.*, the process led to a change in management, where a superior competing plan from a third-party applicant was approved.³⁷ In other instances, such as *Sudal Industries Limited* and *ENN TEE International Limited*, the debtor's own BRP was successfully negotiated and approved, keeping the existing promoters in control.³⁸ This dual potential allows for a tailored outcome based on the viability of the debtor's own plan.
- b. **Haircuts and Treatment of Creditors:** The haircuts for financial creditors (“FCs”) in PPIRP can be substantial and are comparable to those in CIRP, often exceeding 90% for unsecured FCs. However, a distinguishing trend is the significantly better treatment of OCs. In multiple approved plans, OCs were proposed to be paid 100% of their admitted claims. This is likely driven by the PPIRP structure, which incentivises debtors to protect OC claims in their BRPs to secure a smoother, more consensual approval. Finally, the “clean slate” principle was clarified in the *Shree Rajasthan Syntex Ltd.* (NCLAT Appeal), where it was held that statutory dues becoming payable in future instalments may not be extinguished by a plan's approval, defining the limits of debt discharge.³⁹

3.4 Synthesis of Key Judicial Interventions

The judiciary has been the most influential force in shaping the PPIRP, transforming it from a statutory text into a functional regime through key precedents.

³⁶ *RG Residency Pvt. Ltd.*, I.A. No. 2527 of 2024 etc. in CP (IBPP) No. 01(PB)/2023 (NCLT New Delhi Bench).

³⁷ *Mudra Lifespaces Pvt. Ltd.*, I.A. (IBC)(PLAN) No. 90 of 2024 in C.P. (IBPP) No. 1/MB/2023 (NCLT Mumbai Bench).

³⁸ *Sudal Indus. Ltd.*, I.A. No. 3021 of 2023 in C.P. (IBPP) No. 01/MB-IV/2022 (NCLT Mumbai Bench).

³⁹ *Shree Rajasthan Syntex Ltd. v. Chief Eng'r (Com.)*, Ajmer, Company Appeal (AT) (Insolvency) No. 1411 of 2024 (NCLAT).

- a. **Strict oversight:** The judiciary has firmly established that the admission stage is a rigorous checkpoint, not a formality. The NCLAT's ruling in *Krrish Realtech Private Limited* is the definitive statement on this, confirming the AA's inherent power to hear objectors who allege fraud or serious non-compliance with pre-initiation requirements before admitting an application.⁴⁰
- b. **Substantive Justice:** The courts have consistently prioritised substantive justice over rigid procedure. In *Shree Rajasthan Syntex Ltd. (Admission Order)*, the AA prioritised a PPIRP application over an earlier-filed CIRP plea, upholding the specific legislative intent to provide MSMEs with a preferred resolution path.⁴¹ Similarly, in *Shreemati Fashions Private Limited*, the AA pragmatically interpreted the 66% creditor approval threshold to apply to those "present and voting," facilitating the initiation of the process.⁴²
- c. **A Dual Judicial Philosophy:** The judiciary's approach is best described as a dual philosophy: highly interventionist on procedure, but hands-off on commercial wisdom. The courts have actively policed the integrity of the process by remanding flawed plans back to the CoC⁴³ and scrutinising MSME eligibility. However, once procedural fairness is established, they have consistently upheld the commercial wisdom of the CoC, as seen in *Garodia Chemicals* and *Sudal Industries*, where plans with unanimous or super-majority creditor support were approved without interference on their commercial terms.⁴⁴ This balanced approach ensures the PPIRP framework remains both equitable and commercially driven.

4 COMPARATIVE LEGAL ANALYSIS OF ANALOGOUS PRE-PACKAGED INSOLVENCY MECHANISMS

In this section, we compare and contrast the pre-packaged regimes of the United Kingdom, the United States, Singapore, and India, from their foundational principles to procedural mechanics, to draw conclusions on India's Pre-Packaged Insolvency Resolution Process.

The pre-packaged insolvency regimes across these four jurisdictions, while sharing a common goal of expedited resolution, are built upon different philosophical foundations (Table 1).

⁴⁰ *Krrish Realtech Pvt. Ltd., Company Appeal (AT) (Insolvency) Nos. 1008, 1009 & 1010 of 2021 (NCLAT).*

⁴¹ *Shree Rajasthan Syntex Ltd. v. State Bank of India, C.P. No. (IBPP)-01/54C/JPR/2022 (NCLT Jaipur Bench).*

⁴² *Shreemati Fashions Pvt. Ltd., C.P. (IBPP) No. 01/KB/2022 (NCLT Kolkata Bench).*

⁴³ *RG Residency Pvt. Ltd., I.A. No. 53 of 2024 in C.P. (IBPP) No. 01(PB)/2023 (NCLT New Delhi Bench).*

⁴⁴ *Sudal Indus. Ltd., I.A. No. 3021 of 2023 in C.P. (IBPP) No. 01/MB-IV/2022.*

TABLE 1. *Pre-packaged insolvency mechanisms compared: India, the United Kingdom, the United States and Singapore*

Parameter	India (PPIRP)	United Kingdom (Pre-Pack)	United States (Chapter 11 Pre-Pack)	Singapore (Pre-Pack Scheme)
Governing Law	Insolvency and Bankruptcy Code, 2016 (Chapter III-A)	Insolvency Act 1986 & The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021	U.S. Bankruptcy Code (Chapter 11)	Insolvency, Restructuring and Dissolution Act 2018 (Section 71)
Core Philosophy	Hybrid Debtor-in-Possession/ Creditor-in-Control Reorganisation	Swift Asset Sale (Administrator-led)	Consensual Reorganisation (Court-supervised)	Court-Sanctioned Scheme of Arrangement
Initiation Control	Debtor-proposed, Financial Creditor-approved	Administrator-driven (often at the behest of debtor/secured creditors)	Debtor-led	Debtor-led
Primary Plan Proponent	Corporate Debtor (via BRP)	Administrator/Purchaser	Debtor	Debtor
Judicial Role	Procedural check at admission, final sanction	Minimal (appoints administrator, but largely hands-off on the sale)	Substantive oversight (disclosure, due process, confirmation)	Dispositive (substantive sanctioning power)
Key Creditor Assent	66% of Financial Creditors (for initiation & plan)	No formal pre-sale creditor vote (historically)	2/3 in value & >1/2 in number per impaired class	Notional 75% in value & majority in number per class

The United Kingdom's pre-pack administration is a tool for swift asset sales, driven by an Insolvency Practitioner (IP) under the Insolvency Act 1986.⁴⁵ It prioritises preserving going-concern value through a rapid asset transfer, often negotiated pre-appointment. Sales to 'Newcos' formed by existing management have drawn criticism for opacity and potential prejudice to unsecured creditors.⁴⁶ The process favours speed and asset sales over consensual reorganisation.

The United States' Chapter 11 pre-pack is a formal mechanism for implementing a pre-negotiated plan of reorganisation.⁴⁷ It front-loads negotiation and voting before the

⁴⁵ Peter Brook et al., *Insolvency: Company Administration* (Research Briefing SN 04915, House of Commons Library, Aug. 8, 2024), <https://researchbriefings.files.parliament.uk/documents/SN04915/SN04915.pdf>.

⁴⁶ Summit Law LLP, *Pre-Pack Administration: Your Essential Legal Guide* (UK Insolvency Law Guide, updated Apr. 14, 2025), <https://www.summitlawllp.co.uk/pre-pack-administration-legal-guide/>.

⁴⁷ Lara Antal, *Prepackaged Bankruptcy*, INVESTOPEDIA (Nov. 25, 2003), <https://www.investopedia.com/terms/p/pre-packagedbankruptcy.asp>.

bankruptcy filing, using the court process to bind dissenters and achieve a rapid exit, often in 30-60 days. The process emphasises robust disclosure via a court-approved Disclosure Statement and strong judicial supervision to protect stakeholder rights, focusing on comprehensive capital restructuring, not just asset sales.

Singapore's pre-packaged scheme under Section 71 of the IRDA 2018 is a court-centric model. It allows a company to bypass creditor meetings and seek direct court sanction for a scheme. This requires satisfying the court that the necessary creditor majorities would have approved the plan. The judiciary's role is dispositive, involving a substantive evaluation of the scheme's fairness before approval.

India's PPIRP is a hybrid model for MSMEs, blending "debtor-in-possession" with "creditor-in-control" safeguards. The Management remains with the debtor under Section 54H of the Code, but the CoC can vote to transfer control to the RP for fraud or mismanagement under Section 54J. This debtor-initiated process requires significant prior approval from FCs, creating a consensual framework that balances promoter expertise with creditor oversight.

4.1 Divergences in Creditor Assent Thresholds

The power to approve an insolvency plan is the ultimate expression of creditor control, and the thresholds for this consent differ dramatically across jurisdictions.

India's PPIRP gives primacy to FCs. Initiation requires approval from unrelated FCs holding at least 66% of the financial debt under Section 54A (3) of the Code. Final plan approval needs an identical 66% vote by the CoC, where FCs dominate. The OCs have no vote at initiation or in the CoC, relegating their protection to downstream procedural rights.

The United States uses a more democratic model. A Chapter 11 pre-pack plan must be accepted by each impaired creditor class. The dual threshold requires approval from creditors holding at least two-thirds in value and more than one-half in number of the claims voted. This structure prevents domination by large creditors and gives a voice to smaller creditors within each class.

In Singapore, to sanction a pre-packaged scheme, the court must be satisfied that the plan would have been approved by a majority in number representing at least 75% in value of the debt within each class. This high-value threshold emphasises securing support from the most significant creditors.⁴⁸

The traditional UK pre-pack was notable for its lack of any formal pre-sale creditor vote, with decisions driven by the administrator and secured lenders. The 2021 Regulations

⁴⁸ Smitha Menon et al., *Singapore Restructuring & Insolvency Yearbook 2023*, SINGAPORE GLOBAL RESTRUCTURING INITIATIVE (CCLA), SINGAPORE MANAGEMENT UNIVERSITY (Jan. 16, 2024), <https://ccla.smu.edu.sg/sgri/blog/2024/01/16/singapore-restructuring-insolvency-yearbook-2023>.

introduced a narrow check for connected-party sales, requiring either creditor approval or a report from an independent evaluator, but this is not a general voting right.⁴⁹

This reveals a dilemma in India's PPIRP. OCs have a powerful defensive right to trigger a "Swiss Challenge" if their claims are impaired, yet they have no offensive right to consent to initiation. The primacy of FCs is a design choice for efficiency, but it creates a moral hazard where FCs and the debtor might collude against OCs. The OC impairment trigger is a reactive safeguard against this risk. However, this design creates a potential bottleneck by allowing an agreed-upon plan to be upended late in the process, an inefficiency absent in the US system, where all impaired creditors' views are sought upfront.

4.2 Plan Formulation and Market Testing

The mechanism for formulating and testing the resolution plan is the commercial heart of any insolvency regime. India's PPIRP is anchored by the debtor's BRP. Its most innovative feature is the regulated "Swiss Challenge." If the BRP impairs OC claims or is rejected by the CoC, the RP must invite competing plans from the market to challenge the BRP, introducing market discipline.

In the UK, the "plan" is typically a private sale agreement, often with a connected party, negotiated with limited marketing to preserve confidentiality and speed. This has led to concerns that the maximum value is not achieved. The primary check is the post-facto disclosure mandated by the SIP 16.

The USA mandates a transparent approach. The plan is formulated pre-filing and must be accompanied by a comprehensive, court-approved Disclosure Statement containing "adequate information" to allow for an informed judgment.⁵⁰ This ensures analytical rigour before any creditor votes.

Singapore's framework focuses on the commercial fairness of the scheme itself, which the company must demonstrate to the court, supported by evidence of notional creditor support and adequate disclosure.

India's PPIRP uses a hybrid reactivity. The Swiss Challenge is not a default mechanism; it is triggered only if the BRP is deemed unfair to OCs or rejected by FCs. This creates a potential loophole where a promoter and FCs could structure a plan to narrowly avoid

⁴⁹ The Insolvency Service, *The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021*, SI 2021/427 (made Mar. 29, 2021), https://www.legislation.gov.uk/ukdsi/2021/9780348220421/pdfs/ukdsi_9780348220421_en.pdf (last visited Aug. 6, 2025) (original UK draft published as UK DSI 2021 9780348220421; legislation enacted via SI 2021 No. 427).

⁵⁰ Chris Mallon, *The U.S. Chapter 11 Process* (Skadden, Arps, Slate, Meagher & Flom LLP, June 2012), https://www.skadden.com/-/media/Files/Publications/2012/06/Mallon_The-US-Chapter-11-Process_June-2012.pdf?sc_lang=en.

impairment, bypassing a market test and potentially leaving value on the table, an inefficiency compared to the mandatory, upfront transparency of the US system.

5 CHALLENGES AND LIMITATIONS

5.1 Structural and Legal Limitations

A fundamental weakness of the PPIRP framework is its narrow eligibility criteria. The process is restricted to CDs recognised as MSMEs under the Micro, Small and Medium Enterprises Development Act, 2006, which requires formal registration. However, nearly 94% of Indian MSMEs remain unregistered, leaving most of the small businesses unable to access the process.⁵¹ Additionally, partnerships, sole proprietorships, and HUFs, which are common business forms in India, are entirely excluded. This limited scope reduces the potential effectiveness of the framework, leading experts to argue that PPIRP should be opened to all corporate entities.

Another significant challenge lies in the requirement of securing consent from at least 66% of unrelated FCs before initiating the process. While aimed at ensuring creditor support, this high threshold often becomes a practical hurdle, especially when creditors are cautious or have conflicting priorities.⁵² In many cases, creditors demand better terms in the BRP before giving their approval, but debtors may lack the resources to meet these demands, resulting in a deadlock.⁵³

PPIRP also emphasises its strict debtor-driven initiation model, unlike CIRP, where creditors can also commence the process. This reliance on the CD to start proceedings can be problematic when management is unwilling or unaware, or fears loss of control and reputational damage.⁵⁴ Lastly, the rigid 120-day timeline, although designed for speedy resolution, has proven overly strict, and courts have clarified that the law does not provide any scope for extending the 120-day period, making compliance with this timeframe

⁵¹ GOV'T OF INDIA, MINISTRY OF MICRO, SMALL & MEDIUM ENTERPRISES, REPORT OF THE TASK FORCE ON MICRO, SMALL AND MEDIUM ENTERPRISES (Final Report, DC-MSME, July 2011), https://www.dcmsme.gov.in/Final_Report.pdf.

⁵² Vikram Kumar, *Pre-Pack Insolvency Resolution Process (PPIRP) for Real Estate Developers: Challenges and Road Ahead*, RESOLUTION PROFESSIONAL, July 2022, at 10–15 (Indian Institute of Insolvency Professionals of ICAI), <https://www.iiipicai.in/wp-content/uploads/2022/07/10-15-Article-Pre-Pack-Insolvency-Resolution-Process-PPIRP-for-Real-Estate-Developers-Challenges-and-Road-Ahead-Vikram-Kumar.pdf>.

⁵³ Surana & Surana, *PPIRP Probed: Examining Progress and Challenges in MSME Insolvency* (Surana & Surana India blog, Feb. 12, 2024), <https://suranaandsurana.com/ppirp-probed-examining-progress-and-challenges-in-msme-insolvency/>.

⁵⁴ Jacob, *supra* note 17.

compulsory.⁵⁵ This timeline often pressures stakeholders into rushed decisions, which may not be optimal for the company, particularly in complex restructurings requiring more time.

5.2 Procedural Complexities and Implementation Challenges

Although PPIRP is intended to be an efficient alternative to CIRP, it involves complex pre-initiation requirements that can be overwhelming for small businesses. These include preparing a detailed BRP, obtaining creditor approvals, verifying claims, and submitting various declarations and reports. For many MSMEs without access to legal or financial expertise, meeting these demands is difficult and undermines the framework's intended accessibility.

PPIRP also requires the involvement of insolvency professionals, registered valuers, and legal advisors, resulting in high costs that many MSMEs cannot afford.⁵⁶ Moreover, there is a shortage of professionals with experience in MSME-specific restructuring and pre-pack processes.⁵⁷ This lack of trained personnel creates delays and often leaves businesses without the guidance necessary to effectively use the mechanism.

While the Swiss Challenge process aims to enhance value, it brings its own set of complications. The process requires maintaining the confidentiality of the BRP and transparent competitive bidding, which creates practical difficulties.⁵⁸ Additionally, limited investor interest in distressed MSMEs due to size and risk perception reduces the effectiveness of the challenge process. This process also creates the risk of losing control of the business to external bidders, which discourages promoters from initiating PPIRP, even when they are willing to restructure.⁵⁹

Furthermore, one of the significant challenges facing PPIRP implementation is the reluctance of financial institutions, particularly public sector banks, to participate in the process. This is mainly due to fears of regulatory scrutiny, accountability for voluntary haircuts, and the absence of clear internal evaluation guidelines.⁶⁰ Lending officers, particularly at lower levels who handle MSME loans, are often hesitant to approve resolutions without strong legal cover, fearing audit or investigation. As a result, even economically viable PPIRP proposals may be rejected due to institutional risk aversion.

⁵⁵ Tewari, Bawari & Dembla, *supra* note 18.

⁵⁶ INDIAN INSTITUTE OF INSOLVENCY PROFESSIONALS OF ICAI (IIPI), STUDY GROUP REPORT: ROLES OF IPS PRIOR TO, DURING AND POST PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS (PPIRP) FOR MSMEs (Study Group Report, Oct. 2021), <https://www.iiipicai.in/wp-content/uploads/2021/11/STUDY-GROUP-REPORT-ROLES-OF-IPS-PRIOR-TO-DURING-AND-POST-PPIRP-FOR-MSMEs.pdf>.

⁵⁷ Anand & Sharma, *supra* note 16.

⁵⁸ Kumar, *supra* note 52.

⁵⁹ Tewari, Bawari & Dembla, *supra* note 18.

⁶⁰ Sandeep Soni, *Pre-pack Insolvency Resolution Adoption Among MSMEs Seems to Be Relatively Muted*: RBI's Shaktikanta Das, FIN. EXPRESS (Jan. 12, 2024), <https://www.financialexpress.com/business/sme/pre-pack-insolvency-resolution-adoption-among-msmes-seems-to-be-relatively-muted-rbis-shaktikanta-das/3362958/>.

In conclusion, the PPIRP framework faces a range of challenges and limitations that affect its effectiveness. Restrictive eligibility, high creditor approval requirements, and complex pre-initiation procedures limit access for most MSMEs. These obstacles are further intensified by institutional reluctance from FCs and a shortage of skilled professionals. Despite its potential as a targeted solution for MSME distress, PPIRP's impact remains limited due to low awareness, social stigma around insolvency, and weak investor interest in small, struggling enterprises. To fulfil its original promise, the framework needs substantial reforms, including legislative changes, procedural efficiency, improved institutional support, and widespread stakeholder education.

6 RECOMMENDATIONS AND WAY FORWARD

The Pre-Packaged Insolvency Resolution Process of India holds considerable potential to support distressed MSMEs, but remains neglected due to various structural and procedural shortcomings. Releasing its full impact requires a comprehensive reform strategy that rethinks its legal design, simplifies operational procedures, and strengthens institutional capacity. PPIRP needs to move beyond its current narrow and rigid form into a flexible, inclusive mechanism designed to meet the diverse needs of India's small businesses.

From a legislative standpoint, several reforms are necessary. First, the eligibility criteria should be broadened to include partnerships, Limited Liability Partnerships, and sole proprietorships by amending Chapter III-A to adopt an approach based on a turnover threshold rather than limiting it to registered CDs. To address the current exclusion of nearly 90% of MSMEs due to a lack of registration, a voluntary registration option for currently unregistered MSMEs should be introduced, allowing entities to apply for Udyam registration during the insolvency process.⁶¹ The initiation mechanism must also evolve, allowing unrelated FCs holding 51% of the voting share to trigger PPIRP, subject to safeguards like a mandatory cooling-off period and a 15-day window for promoters to submit a counter plan that would strike a balance between consensual restructuring and timely creditor action.

A statutory provision for a one-time extension of up to 60 days should also be included, that can be contingent on a 75% CoC vote and certification of the RP of substantial progress, to make the rigid timeline more flexible and align it with evolving NCLAT interpretations of the 120-day limit as directory rather than absolute.⁶²

⁶¹ Aaisha Hira, *Impact of the Revised Insolvency and Bankruptcy Code Provision on Corporate Insolvency*, 3 INT'L J. LEGAL STUD. & SOC. SCI. 621 (2025), <https://ijlss.com/impact-of-the-revised-insolvency-and-bankruptcy-code-provision-on-corporate-insolvency-2025/>.

⁶² *Adjudicating Authority Can Extend Time Limit of PPIRP Beyond 120 Days: NCLAT New Delhi*, LIVE LAW (Oct. 9, 2024), <https://www.livelaw.in/ibc-cases/adjudicating-authority-can-extend-time-limit-of-ppirp-beyond-120-days-nclat-new-delhi-272031>.

Furthermore, valuation-related disputes can be mitigated by mandating a dual valuer system and the publication of a standardised evaluation matrix before inviting competing plans.⁶³ Recognising the financial constraints of micro-units, a subsidy for RP fees should be introduced from the MSME Distress Fund for cases involving defaults of ₹50 lakh or less, with allocation recommendation in the Union Budget 2026.⁶⁴

These reforms, taken together, would significantly enhance PPIRP's functionality and accessibility, enabling it to fulfil its original legislative intent as an effective MSME resolution mechanism.

7 CONCLUSION

This study examined India's new PPIRP, which was introduced in 2021 to aid distressed MSMEs, and found that only 13 cases have been initiated, highlighting a gap between legislative intent and practical uptake. Case-law analysis showed that, although one case closed in 112 days, most PPIRPs exceeded the 120-day target to allow for market-testing and judicial review; the NCLAT has since ruled the 120-day period to be directory rather than mandatory. Debtors generally cooperated (with isolated procedural abuses), and creditor committees actively used the Swiss Challenge to solicit better plans (with none choosing liquidation). All PPIRPs reaching a conclusion produced an approved resolution plan. Courts played a key role, rigorously scrutinising admissions and tempering technical requirements to uphold substantive justice in line with the MSME-supportive intent.

Comparative analysis revealed that India's PPIRP diverges from other pre-pack models. It requires 66% of financial debt for both initiation and plan approval (excluding operational creditors), whereas US Chapter 11 pre-packs require each impaired class's acceptance (two-thirds in value and a majority in number) and Singaporean schemes set a 75% threshold; the UK regime instead focuses on pre-arranged asset sales with minimal pre-sale creditor voting. These differences underscore India's emphasis on creditor control and speed, but raise concerns about potential creditor collusion.

Despite its promise, PPIRP's impact is undermined by narrow eligibility (only registered MSMEs), high approval thresholds, rigid timelines, and institutional risk-aversion. To address these limitations, the paper proposes targeted reforms: broaden eligibility to all small enterprises (using turnover-based thresholds and voluntary registration) and relax initiation to 51% of debt; allow a one-time 60-day extension by creditor vote and mandate greater

⁶³ Insolvency and Bankruptcy Board of India, *Issue of Regulations for Pre-packaged Insolvency Resolution Process* (Meeting Note, Apr. 2021), <https://ibbi.gov.in/uploads/meetings/3b7d255d9ea5811a0190e9aaf9221ed9.pdf>.

⁶⁴ Insolvency and Bankruptcy Board of India, *Legal Framework – Circulars* (IBBI website) (updated June 2025), <https://www.ibbi.gov.in/en/legal-framework/circulars> (last visited Aug. 6, 2025).

transparency (dual valuations, published valuation matrix); and provide cost support (for example, RP-fee subsidies for micro cases).

These measures would realign PPIRP's practice with its legislative purpose. By empirically diagnosing PPIRP's performance and drawing on comparative insights, the study contributes to insolvency jurisprudence and policy. It identifies the framework's empirical lacunae and advances doctrinal reforms, offering a holistic roadmap to strengthen MSME rescue under the Code.

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CHAPTER 8

Buried Together, Tried Separately: The Irony of India's Group Insolvency Practice

YASH SHARAN* AND ANENYA**

The world is a place of business, partnerships, and insolvency. It has witnessed myriad cases of insolvency necessitating discourse on how to address insolvency, especially in large corporate groups. Various instances have cropped up not only in India but also in other prominent jurisdictions, further underscoring the urgency of the necessary discourse. Group insolvency is the process of resolving the financial distress of several interdependent companies in a corporate group, with awareness of their financial or operational interdependence, to treat their creditors fairly and efficiently allocate assets among the legally separate companies. With the collapse of the IL&FS Group, India's insolvency regime for addressing group defaults came into question. Other notable instances, such as the Vedanta Resources case, have not only brought forth novel issues and opportunities but have also thrown up roadblocks to swift business resolution. Despite the systemic significance of the Insolvency and Bankruptcy Code, 2016, there exists a lacuna of legal and practical complications in resolving group insolvencies within its individualistic framework. The IBC has no framework to address group insolvency and follows to the letter the principle of corporate separateness in Section 3(7). This omission leads to a failure in coordinated proceedings, weakens the repayment to creditors, and does not reflect the commercial realities of interdependent conglomerate structures such as IL&FS. The insolvency regime in India is quite different from that of jurisdictions such as the US, where Chapter 11 enshrines the substantive consolidation doctrine, as well as the EU, which allows coordinated group proceedings. Substantive consolidation enables the merging of the assets and liabilities of members of a corporate group and, de facto, the treatment of all members as a single debtor. It is not recognised in Indian law, however, some tribunals have implicitly applied its reasoning, most famously in the IL&FS resolution, without any apparent normative or doctrinal basis. The paper critically evaluates the adoption of the doctrine of substantive consolidation in the Indian insolvency regime. The authors, through the study of best practices from other jurisdictions, and the legal status quo in India, present the roadblocks and challenges posed by group insolvency in India and put forth plausible solutions and reforms for overcoming these roadblocks, aimed at adopting a 'qualified' substantive consolidation tailored for Indian conditions. All in all, the article does not promote blind application of the doctrine, but calls for a sophisticated, situation-specific approach to group insolvency. Since there is a high concentration of conglomerate enterprises in India with opaque inter-company transactions, there is a risk that a failure to consider substantive consolidation would erode the

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efficiency and fairness of large-scale insolvency solutions. A calibrated model, based on due process and creditor consent, may be a revolutionary change in the insolvency regime in India.

Keywords: Group Insolvency, Substantive Consolidation, Insolvency and Bankruptcy Code, Creditor Consent, ‘Qualified’ Substantive Consolidation.

1 INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (“IBC”) is based on the classical principle of corporate separateness, treating each legal person as a distinct juridical entity.¹ This fundamental premise, doctrinally speaking, is consistent with Section 3(7) of the IBC² and Sections 2(68)³ and 2(87)⁴ of the Companies Act, 2013, and collapses in Indian commercial reality, particularly in the case of large, vertically and horizontally integrated corporate groups. Under the Companies Act and IBC, a corporate person is a company that is either private or a subsidiary, except a financial service provider.⁵ These conglomerates are not a loose association of independent firms but highly interlocked economic entities. They are interlinked by intra-group borrowings, cross-guarantees, cross-management, and cross-business strategies. When this is the case, separate resolution proceedings conducted in legal silos are not only economically inefficient, but also artificially and procedurally unfair in a judicial sense. The systematic collapse of *IL&FS* and the default of *Videocon Group* bring to the fore this crisis of doctrine, and require a formalised, qualified solution to group insolvency that reconciles the functional interdependence of entities with the sanctity of creditor rights.⁶

Indian jurisprudence indicates that there is already a judicial inclination to pierce the corporate veil of separateness in situations where the economic interdependence supersedes the form of law. However, without an organised, principled doctrine, such efforts can easily result in arbitrariness and unfairness being injected into what is otherwise a rule-based insolvency ecosystem. What is required to be planned is the formulation of a regime which will recognise the commercial reality of enterprise groups without undermining the legal protection that has been provided to safeguard creditors.

Through this article, the authors contend that a practical solution may be to have a ‘qualified’ Doctrine of Substantive Consolidation, institutionalised legislatively by amending the IBC. It may demand an application form, detailed affidavits by the resolution

¹ The Insolvency and Bankruptcy Code, 2016.

² *Id.* § 3(7).

³ The Companies Act, 2013, § 2(68).

⁴ *Id.* § 2(87).

⁵ *Id.*

⁶ Shashank Pandey, *Explainer: The IL&FS Insolvency Case*, BAR & BENCH, <https://www.barandbench.com/columns/litigation-columns/ilfs-insolvency-the-journey-so-far> (last visited July 21, 2019, 6:15 PM).

professional or by the creditors, and a decision by the court through an adversarial process. All affected stakeholders who have standing to object may be given notice, and no consolidation order may deny priority rights existing at the time of the order, especially those of secured lenders. Significantly, consolidation may not confound different categories of creditors. Recovery pools may be kept separate, even where a joint resolution plan is agreed upon. This will help to ensure that, although the economic content of group-wide resolution is not ignored, the procedural and distributive rights of individual stakeholders are not overridden in the interests of efficiency. A statutorily defined, judicially supervised, and procedurally limited model of qualified substantive consolidation is therefore not just desirable, but a necessity to maintain the integrity and the efficacy of the IBC in an economy where group structures are the rule rather than the exception. Furthermore, a distinction has to be made between procedural consolidation and substantive consolidation. There already exists an implicit provision in the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, in terms of procedural consolidation: joint hearings, designation of a shared RP, synchronised schedules.⁷ India needs a legal instrument of substantive consolidation that will allow the pooling of assets and liabilities by subjecting them to strict requirements that are aimed at discouraging abuse. This kind of structure should not be the rule. It has to be subject to appellate review under Section 61 of the IBC, and thus, ensure accountability and clarity in its invoking.⁸

2 WHEN CORPORATE GROUPS COLLAPSE: THE GLOBAL STRUGGLE OF GROUP INSOLVENCY

Across the world, countries have taken different approaches to solving the problems that arise when a group of companies becomes insolvent together. Two of the most well-known models are provided by the United States and the European Union (“EU”), but neither of them completely addresses the problem. In the United States (“US”), under Chapter 11 of the Bankruptcy Code,⁹ courts use the concept of substantive consolidation. This holds that, in exceptional circumstances, where companies within a group are viewed to be closely entwined, that is, by various means such as crossing up their finances or making it difficult to distinguish between them in the eyes of creditors, a court may treat them as a single company to settle insolvency. This can be observed in cases such as in *re* Augie/Restivo¹⁰ and in *re* Owens Corning.¹¹ However, the courts are generally cautious and give this option only

⁷ The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

⁸ The Insolvency and Bankruptcy Code, 2016, § 61.

⁹ 11 U.S.C. §§ 1101–1195 (2018).

¹⁰ *In re* Augie/Restivo Baking Co., 860 F.2d 515, 518 (2d Cir. 1988).

¹¹ *In re* Owens Corning, 419 F.3d 195 (3d Cir. 2005).

in extreme cases, since this may bring harm to the creditors who expect to do business with a specific firm, rather than with the whole group. Notably, an order of consolidation was overturned in *Owens Corning* due to the lack of sufficient evidence that the creditors had been misinformed, and that the companies were acting as a single entity. This indicates that the courts understand that the conflation of various companies in insolvency may contravene the principles of limited liability and produce unjust results.

The EU follows a different approach. Instead of merging companies, it allows them to retain their legal identities and rather encourages them to coordinate their insolvency processes. According to the 2015 recast of the EU Insolvency Regulation, one such system is the “*group coordination procedure*”,¹² according to which a neutral group coordinator is appointed to assist various companies of the same corporate group in synchronising their insolvency procedures. Nonetheless, this system is only effective in case the companies are willing to participate voluntarily, and the advice of the coordinator is not binding. Consequently, the system may lack actual power, as it encourages cooperation in situations where some of the companies decide not to cooperate, or when the structure of the group is complicated or veiled. However, both models are lacking in their respective applications. The primary concern in the US regarding substantive consolidation is that it can create unfairness for creditors.¹³ Creditors who have been led to believe that they are dealing with a single company may unexpectedly find themselves jointly sharing money with creditors of other group companies. This will erode their contractual expectations. The absence of clear legal tests or rules as to when consolidation should occur and its application as an equitable remedy by the courts without sufficient procedural protections have been criticised by scholars. For instance, giving a prior notice to the creditors or assessing the fairness of the balancing of the assets and liabilities across the group is often not necessary. On the other hand, the biggest weakness of the EU system is that it depends entirely on consent and does not create any binding results. So, in difficult or high-stakes cases, it may be too weak to enable effective coordination. These international practices manifest a more fundamental issue, of how to balance, on the one hand, the recognition of the distinct legal personalities of companies, while recognising that many corporate groups operate in reality as a single economic unit. Ignoring these links risks turning the insolvency proceedings into a chaotic process and devaluing the amount collected in the process. However, merging companies too easily can destroy creditor confidence and violate the principle of each company being responsible only for its debts. The US and the EU have not found the ideal solution. Some

¹² Ilya Kokorin & Bob Wessels, *European Insolvency Regulation (Recast) and Group Insolvencies*, in CROSS-BORDER PROTOCOLS IN INSOLVENCIES OF MULTINATIONAL ENTERPRISE GROUPS 71–83 (2021).

¹³ Ilya Kokorin, *Intra-Group Financing and Enterprise Group Insolvency: Problems, Principles and Solutions*, CORPORATE FINANCE LAB (Oct. 26, 2023).

scholars argue that what is required is a middle path, that is, a legal system permitting coordination or even consolidation where it is necessary, with the presence of rules and safeguards. These may involve clear rules of when a group is treated as acting collectively, a clear rule for testing economic unity, notice to creditors, and a reasonable method of valuing claims before pooling assets and liabilities.

In India, the position is even less clear. There is no legal mechanism under the IBC to deal with group insolvencies. There is a lack of development in law on substantive consolidation, and the courts have not yet come up with any consistent approach. Indian firms tend to be part of large, opaque business groups with complex internal financial interrelationships, and the absence of legal mechanisms to deal with a group insolvency leads to fragmented insolvency proceedings and value destruction. Different cases involving different companies within the same group are treated as distinct, and this is the practice even in case of one company being financially interconnected with the other. This creates delays, conflicting results, and confusion amongst creditors.

Following the example of the US and EU, India must not go to extremes by either allowing the judiciary to go to any extent as in the US, or by relying solely on resorting to voluntary cooperation as in the EU. Rather, India should have a transparent legal framework to identify when it is necessary to resolve insolvency in a group and incorporate adequate protections such as creditor notice, control and transparent decision making. This will enable the law to take into account the economic reality of group enterprises without compromising on fairness or predictability.

3 INDIA'S AD HOC APPROACH TO GROUP INSOLVENCY AND THE URGENT CASE FOR REFORM

The Indian experience on group insolvency has been mainly shaped by *ad hoc judicial intervention*, thus leading to a *de facto* drift towards substantive consolidation without a statutory or doctrinal basis.¹⁴ There are no specific clauses in the IBC or the Companies Act; rather, the tribunals have taken a pragmatic approach, with resolutions occurring across a group in the case of highly complex corporate insolvencies. Nonetheless, such judicial improvisation is expedient but raises more basic questions of legality, fairness, and foreseeability within the Indian insolvency system.

The case of *IL&FS* is one of the most notable examples of such a phenomenon, where the NCLAT sanctioned the establishment of a 'central group resolution' committee to

¹⁴ Rajshree Tiwari, *The Changing Face of Group Insolvency: Is India Ready for Substantive Consolidation?*, IBCLAW.IN (2025), <https://ibclaw.in/the-changing-face-of-group-insolvency-is-india-ready-for-substantive-consolidation-by-rajshree-tiwari/> (last visited Aug. 3, 2025).

facilitate the resolution of more than 300 entities within the group. Although the committee was set up as a coordination mechanism, it had concentrated power over several proceedings, thereby diluting the boundaries of corporate separateness.¹⁵ The absence of statutory support for this step meant that important principles such as independent valuation, arms-length transfer of assets, and inter-creditor equity were undermined. This was an effective judicial sanction of group-level resolution, without any legislative authority or protection of creditors that true consolidation must have.

Similarly, in the *Videocon group insolvency*, the NCLT directed that a joint resolution be passed on thirteen group companies on the ground of operational interdependence and the overlapping of creditor claims.¹⁶ A single resolution professional was appointed, and asset valuation, distribution, and creditor voting were done as though the group were a single entity. Although the rationale was based on efficiency and maximisation of values, there was no clear framework on the threshold at which such aggregation would be achieved. The judgment did not test whether creditors were confused, their assets commingled, or the financial statements could not be disaggregated, factors emphasised in international jurisprudence, such as *Owens Corning* and *Augie/Restivo* under US law.¹⁷ These examples show that even in jurisdictions that have been characterised by a flexible approach to consolidation, substantive consolidation is approached as a remedy of last resort, where entanglement can be demonstrated, and where there is strict procedural control over the process, something that Indian tribunals have not yet explicitly articulated.

The *Jet Airways* case brings additional complexity to the cross-border nature of such a process. Similar proceedings were commenced in India and the Netherlands, which resulted in a jurisdictional standoff.¹⁸ The NCLT declined to acknowledge the Dutch administrator in the first instance, however, the NCLAT subsequently changed this stance and allowed the Dutch administrator to attend the CoC meetings in India, thereby facilitating cross-border collaboration. This was acclaimed as a step towards cross-border judicial comity, while also highlighting the doctrinal vacuum in Indian law. Sections 234 and 235 of the IBC, which are meant to facilitate bilateral arrangements and communication with foreign courts, prove to be ineffective.¹⁹ The absence of a formal cross-border insolvency regime forced courts to rely on equitable discretion, creating uncertainty where legal clarity was most

¹⁵ Pandey, *supra* note 6.

¹⁶ State Bank of India v. Videocon Indus. Ltd., MA 1306 of 2018 in C.P. No. 02 of 2018 (NCLT Mumbai Aug. 8, 2019).

¹⁷ Rajat Sethi, *The Videocon Insolvency Resolution Process — Is Reading Between the Lines Warranted?*, S&R LAW (2022), <https://www.snrlaw.in/the-videocon-insolvency-resolution-process-is-reading-between-the-lines-warranted/> (last visited Aug. 3, 2025).

¹⁸ Jet Airways (India) Limited v. State Bank of India, Company Appeal (AT) (Insolvency) No. 707 (NCLAT 2019).

¹⁹ Rana Navneet Roy & Satyansh Gupta, *Cross Border Insolvency Under the Indian Insolvency and Bankruptcy Code, 2016*, 26 J. LEGAL, ETHICAL & REG. ISSUES 1 (2023).

needed. The case also provides a compelling reason as to why India needs to adhere to a formal structure such as the UNCITRAL Model Law on Cross-Border Insolvency (“UNMLCBI”).²⁰ The UNMLCBI offers systematic access, recognition, as well as cooperation between courts of other countries and that of the home country. In *Jet Airways*, a clearer procedure would have been enabled under the UNMLCBI, particularly on issues of group coordination and ‘centre of main interest’, and the Dutch administrator’s recognition and participation would have followed a defined process, rather than judicial improvisation. A modified version of the UNMLCBI has been proposed by India in the 2018 Report of the Insolvency Law Committee to be included as Part Z of the IBC, with provisions on reciprocity and public policy safeguards, however, it is pending enactment as binding law.²¹ The absence of such legislation leaves India vulnerable in the event of international group failure, which is the cause of creditor uncertainty. This further creates the risk of problems in enforcement. Most importantly, these judicial strategies of courts are not supported by definite statutory language. Section 60(5), which is frequently used as a justification for such interventions, confers wide powers on the NCLT, but is not meant to be used as a replacement for a comprehensive legislation on group insolvency.²² The repetitive use of this residuary provision opens up the possibility of arbitrary results and post hoc rationalisation, and there is no workable test of when and how consolidation is to be achieved. Indian law does not formally draw the line between procedural consolidation and substantive consolidation, despite the two having different implications.

It is in this background that the authors advocate in favour of a ‘*qualified consolidation*’, which is context-sensitive, legal in its definition, and stringent in its procedures. This solution acknowledges the utility of enterprise treatment in true financial entanglement situations, and requires changes in the statute that would establish threshold conditions, court policy to judge proportionality, and protocols within the institutions, such as independent valuation committees or separate classes of creditors to maintain fairness. A legislative framework along these lines may draw inspiration from the group coordination proceedings of the European Union under the EIR Recast, which enable non-binding coordination amongst group members without destroying the separateness of entities, a system that balances efficiency and legal integrity. It is imperative now to shift from reactive adjudication to proactive legislation, and to fill the normative gap with a legally based and practically viable model of group insolvency resolution.

²⁰ UNCITRAL Model Law on Cross-Border Insolvency, U.N. Comm’n on Int’l Trade Law (May 30, 1997).

²¹ Aditi Avashia, *Cross-Border Insolvency in India*, IBCLAW.IN (2023), <https://ibclaw.in/cross-border-insolvency-in-india-by-aditi-avashia/> (last visited Aug. 3, 2025).

²² Nidhi Kamath, *Decoding Section 60(5) of the Insolvency and Bankruptcy Code, 2016*, GBLRSCCLP.IN (Mar. 30, 2024), <https://gblrscclp.in/2024/03/30/decoding-section-605-of-the-insolvency-and-bankruptcy-code-2016/>.

4 WHEN THE LAW FALLS SILENT: THE LEGAL GAPS IN THE INDIAN GROUP INSOLVENCY REGIME

The IBC is a complete and time-bound law to settle corporate distress. Nevertheless, its structure remains anchored in the myth of the isolated debtor, which is an assumption that is increasingly at odds with complex corporate group structures that behave economically coherent, but legally fragmented.²³ As the Indian economy grows further interconnected, and the existence of enterprise groups in the industrial landscape becomes the rule rather than the exception, the absence of an effective legal system for dealing with group insolvency is no longer a procedural oversight, but has now developed into a systemic liability. Though the IBC has given the discretion to individual entities to be resolved either under Sections 7, 9, and 10, it does not provide a statutory framework in the event of joint resolution, settlement of claims amongst the group companies, pooling of assets and liabilities of group companies.²⁴ This gap has been bridged by innovative judicial activism of courts and tribunals, as in *IL&FS and Videocon*, in particular, by referring to Section 60(5), which does not expressly confer legislative authority.²⁵ Discretionary innovation of this nature, however, where it is not influenced by doctrinal or legislative trend, is perilous to the aim of attaining uniformity, creditor rights, and commercial predictability. As the cross-hold and inter-linked conglomerates in India increase, the current section is a sharp and long-due critical analysis of the inadequacies of IBC on group insolvency by examining them through the prism of the law, practice, and comparative jurisprudence.

Firstly, a fundamental weakness of the Indian insolvency regime is that the IBC lacks any statutory basis to allow joint resolution or substantive consolidation of the insolvency proceedings of the group entities. Although Sections 7, 9, and 10 permit only a single company debtor in a corporate group to file CIRP, no statutory provision exists to admit a group of companies into a collective proceeding. Regulation 11 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 permits only procedural coordination, including common resolution professionals or joint meetings, but does not permit any legal or economic consolidation.²⁶ The *IDBI Bank* case before the NCLAT explained the following and warned that such consolidation should be used sparingly; it cannot be handled as a rule of thumb.²⁷ This illustrates the weakness of the judicial creativity approach. India

²³ Ayush Chandra, *The Legal Framework for Corporate Bankruptcy in India: An Analysis of IBC Amendments*, LEGALONUS (July 28, 2025, 7:29 PM), <https://legalonus.com/the-legal-framework-for-corporate-bankruptcy-in-india-an-analysis-of-ibc-amendments/>.

²⁴ The Insolvency and Bankruptcy Code, 2016, §§ 7, 9, 10.

²⁵ *Id.* § 60(5).

²⁶ The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, reg. 11.

²⁷ *State Bank of India v. IDBI Bank Ltd., Company Appeal (AT) (Insolvency) No. 321 of 2024 (NCLAT Jan. 28, 2025)*.

does not have any such statutory scaffolding as is the case in Singapore, where the Insolvency, Restructuring and Dissolution Act, 2018 permits the administration of insolvency in a group.²⁸

Secondly, substantive consolidation changes and modifies the economic rights of the creditors in a fundamental way, yet the IBC does not offer any express protection to the creditors to alleviate them in the course of the consolidation. The voting rights in the Committee of Creditors (“CoC”) are according to financial debt under Section 21.²⁹ This proportionality is skewed in consolidated proceedings, which is usually less advantageous to creditors of fiscally sound organisations. Creditors are exposed since the recalibration of votes or rationalisation of claims is not guided. In *Jet Airways (India) Ltd.*, the plea of the Dutch administrator that the Dutch and Indian subsidiaries of Jet be jointly considered to be put under CIRP was questioned by several anomalies in terms of valuation and voting.³⁰ Though the court permitted the co-operation, it stressed the absence of a legal structure of cross-border or group consolidation in India. In *Reliance Communications Ltd. v. Ericsson India Pvt. Ltd.*, the Court permitted the proceeding of individual insolvency against each of the group entities with a clear indication of collective resolution following separate proceedings without consolidation mechanisms under the law.³¹ Similarly, the ad hoc group-level resolution in IL&FS resulted in an opaque resolution in which creditors were unclear about valuation, the rank of claims, and the voting power. In the absence of legislative changes, consolidation still threatens to result in double-counting, voting dilution, and creditor disenfranchisement.

Thirdly, the lack of any statutory or judicial clarity as to how Section 53 of the IBC, which governs the distribution waterfall, is to be exercised in consolidated group insolvencies provides a basic challenge. Section 53 is formulated on the idea of creditor hierarchy.³² Nevertheless, in a group setting, this does not work in two important respects: (i) an excessive transfer of assets of solvent group members to the distressed; and (ii) inability to address intra-group claims. An incontrovertible example is the case of the insolvency of the *Amtek Auto group*, wherein several companies in the same group, such as Amtek Auto Ltd., Metalyst Forgings Ltd., and others, were put under CIRP. These firms were involved in intricate inter-corporate loans and cross guarantees. However, CIRP was not accompanied by consolidation provisions, and thus every CIRP was conducted independently, which resulted in ineffective asset realisation, with arguments among creditors on the ranking of their claims.

²⁸ The Insolvency, Restructuring, and Dissolution Act, 2018 (Sing.).

²⁹ The Insolvency and Bankruptcy Code, 2016, § 21.

³⁰ *Jet Airways*, Company Appeal (AT) (Insolvency) No. 707.

³¹ *Reliance Commc'ns Limited v. Ericsson India Private Limited*, Comm. Arb. P. (L) No. 253 (2018).

³² The Insolvency and Bankruptcy Code, 2016, § 53.

Creditors in *Metahyst Forgings Ltd.* had objected to the resolution plan, citing that they had not given adequate consideration to inter-company receivables, but the NCLT declined to interfere with the resolution plan due to the absence of clarity of the law regarding inter-group prioritisation.³³

Similarly, in the *Lanco Infratech group*, a number of companies within the conglomerate of infrastructure had been in insolvency proceedings at the same time, including Lanco Infratech Ltd., Lanco Thermal Power, and others.³⁴ There was no standardised procedure followed, which resulted in a misunderstanding of the valuation or extinguishment of intra-group loans and guarantees. In others, the creditors accused inflated intra-group debt of being used strategically to vote in related CIRPs without judicial oversight, or codified rules. The absence of law on the consideration of inter-corporate obligations and the waterfall usage after consolidation, therefore, creates haphazard extinguishment or manipulation of claims. This introduces perverse incentives and undermines the predictability of insolvency outcomes, thus calling for a statutory framework that covers inter-group creditor hierarchy and distribution rules extensively.

The insolvency regime applicable in India is not well suited to deal with group failures, and it is a result of judicial improvisation rather than legislative clarity that finds application. No statutory reform has been undertaken in this regard despite the recommendations of the Working Group of 2019. The regime risks defeating corporate rescue by decisively favouring ad hoc solutions over a codified, creditor-sensitive, and judicially monitored model, at the expense of the substantive goals of the IBC.

5 REDESIGNING THE CODE FOR REALITY: PLAUSIBLE SOLUTIONS FOR INDIA'S GROUP INSOLVENCY GAPS

The prevailing rule under the IBC is adherence to the fiction of corporate separateness, even when it is faced with enterprise groups that are integrated as single economic entities. Nevertheless, consolidation is not possible and should not be general. Instead, what is required is a legally designed, fact-based 'qualified' doctrine of substantive consolidation, where consolidations will only be possible in cases of high entanglement and with the consent of the creditors and with stricter judicial supervision. It is a regime that must pass the doctrinal and operational test.

³³ The 420, *The Amtek Auto Scandal: Inside the Rs 27,000 Crore Banking Fraud That Shook India*, THE 420 (Mar. 29, 2025), <https://the420.in/the-amtek-auto-scandal-inside-the-rs-27000-crore-banking-fraud-that-shook-india/>.

³⁴ Financial Express, *Lanco Infratech Liquidation: Bankrupt EPC Firms Under IBC Feel Heat*, FIN. EXPRESS (Jan. 16, 2019), <https://www.financialexpress.com/business/industry-lanco-infratech-liquidation-bankrupt-epc-firms-under-ibc-feel-heat-1444931/>.

Firstly, the IBC may be subjected to specific amendments that are based on legal accuracy and commercial realism. To begin with, CoC voting percentages after consolidation need to be re-adjusted relative to the consolidated net exposure of every financial creditor, not the standalone claim size. This avoids domination of smaller, strategically insolvent members of a group by their creditors. The treatment by Dutch courts in the *Imtech N.V. group insolvency* serves as a precedent here, where the relative exposure of the entities was used to weigh the voting rights to provide a fair representation. Section 21(2) of the IBC refers to voting shares on admitted debt, but in group insolvency,³⁵ unless the proportions are computed after the consolidation, this will misrepresent creditor agency. Additionally, the netting-off of inter-company claims may be introduced by a statutory protocol under Regulation 14A of the CIRP Regulations to avoid an artificial increase of liabilities. The *IL&FS* case demonstrated how intra-group debt between 348 entities of the group concealed true exposure and stretched the resolution. Even though it later settled out of the IBC, it serves as a warning on how automatic netting is necessary to eliminate intra-group claim recycling. Regulation 14A may therefore be adjusted to accommodate the principles of consolidation and inter-company elimination in International Financial Reporting Standards, making it more transparent, and doing away with accounting manipulations.³⁶

As a last resort, a specialised valuation committee under Regulation 35(2) may be required on group cases to determine enterprise and liquidation value to be consolidated by considering synergy premiums and joint liabilities. This is evidenced by the lack of valuation integrity in the *Dewan Housing Finance Corporation Ltd.* insolvency, where inter-branch asset transfers clouded valuations.³⁷ This committee would be made up of insolvency professionals, sectoral experts, and independent valuers. Such a committee would give arms-length valuation, procedural fairness, and judicial deference as reaffirmed by the Supreme Court in *Ebix Singapore v. CoC of Educomp Solutions Ltd.*³⁸ This framework would elevate group insolvency from a fragmented litigation battleground to a structured, efficient resolution mechanism.

Secondly, although administratively efficient, substantive consolidation interferes with the fixed commercial expectations and legal rights of creditors to have the assets and liabilities of separate institutions pooled together. However, the IBC does not speak of the protection of a creditor in such cases. Section 21 makes voting rights in the CoC proportional to the quantum of financial debt owed, which is skewed when the assets and liabilities are

³⁵ The Insolvency and Bankruptcy Code, 2016, § 21(2).

³⁶ National Financial Reporting Authority, *About Authority*, <https://nfra.gov.in/> (last visited July 28, 2025).

³⁷ Insolvency Tracker, *Supreme Court Upholds Piramal's Resolution Plan for DHFL; Overrules NCLAT Decision*, INSOLVENCY TRACKER (Apr. 2, 2025), <https://insolvencytracker.in/2025/04/02/supreme-court-upholds-piramals-resolution-plan-for-dhfl-overrules-nclat-decision/>.

³⁸ *Ebix Singapore Pte Ltd. v. Comm. of Creditors of Educomp Solutions Ltd.*, (2022) 2 SCC 401.

combined.³⁹ The recoveries of the solvent group company creditors are frequently diluted and the voting powers truncated, which was reflected in the IL&FS Group case, in which a so-called group resolution framework was introduced without any statutory basis. Lack of codified recalibration mechanisms resulted in ad hoc valuation, voting anomalies, and dis-empowerment of creditors.

Furthermore, in *Edelweiss Asset Reconstruction Co. v. GTL Infrastructure Ltd.*, the court had confirmed the separate CIRPs notwithstanding the economic interdependence since there was no legal requirement of consolidation.⁴⁰ To avoid the potential for vote dilution and to treat creditors fairly, any statutory regime should require a creditor impact assessment, pro-rata rebalancing of voting shares on the basis of adjusted net claims following consolidation, and opt-out in circumstances where consolidation gives rise to a prejudice to recovery of a creditor. To address this, the same should be enshrined in statute under a new Chapter in the IBC to ensure due process and financial justice.

Lastly, one of the main issues is the structural gaps in the group insolvency regime in India, which is the lack of clarity in the statutory or judicial interpretation of the use of Section 53 of the IBC in unified proceedings. Section 53 codifies a priority of creditors that will operate in individual CIRPs, but when multiple group companies are commonly connected by inter-company loans, guarantees, and common properties, the operation of the priority causes confusion. In *Edelweiss Asset Reconstruction v. Peter Beck & Anr.*, the tribunal denied the opportunity to decide on the validity of inter-company receivables when there was no specific statutory provision, although Metalyst belonged to the Amtek Auto group in which several entities were subject to parallel CIRPs.⁴¹ Such a lack of consolidation led to inefficient realisation and fragmented claims since the flow of assets between parties was not harmonised, and intra-group liabilities were not adjudicated properly.

Also, in the group insolvency of *Lanco Infratech*, unstandardised treatment of intra-group guarantees gave rise to creditor contention, including the allegation of bloated related-party claims to tilt the voting results under Section 30(4).⁴² The lack of judicial enforcement of consolidation mechanisms allowed for the extinguishment of intra-group claims to be done in an opaque manner and enabled the waterfall mechanism in Section 53 to be gamed. A legally sound solution may be to add a proviso to Section 53 acknowledging the court-approved intra-group priorities, post-consolidation under a new Section 29CA (in the form of Legislative Guide, Part 3, UNCITRAL). This is also supported by the 2021 Report on

³⁹ The Insolvency and Bankruptcy Code, 2016, § 21.

⁴⁰ *Edelweiss Asset Reconstruction Co. v. GTL Infrastructure Ltd.*, Arb. A. (Comm.) 13 of 2020 & I.A. 4322 (2020).

⁴¹ *Edelweiss Asset Reconstruction Co. v. Peter Beck*, Company Appeal (AT) (Ins) No. 161 of 2021 (NCLAT Jan. 5, 2022).

⁴² The Insolvency and Bankruptcy Code, 2016, § 30(4).

Cross-Border and Group Insolvencies by the Insolvency Committee, which recommends statutory provisions to be made in respect of substantive consolidation, adjudication of inter-company receivables, and harmonised valuation.⁴³ Such precision is currently lacking, and without it, the insolvency scheme will become biased toward silos of procedures rather than fairness.

6 CONCLUDING REMARKS

The paper has examined the Indian paradoxes of group insolvency, as corporate groups are frequently buried together in economic hardship and tried apart, under a legal regime that is based on individual debtors. By extensively reviewing statutory definitions, court pronouncements, and actual case studies, the article has highlighted the fact that the existing insolvency regime in India lacks a coherent framework to resolve an interconnected entity in a corporate group, as it is currently focused on the debtor-in-possession model of the IBC. The ad hoc and case-by-case approach followed by the NCLT has resulted in an ad hoc and inconsistent jurisprudence that is not based on any written legislation, regulation, or law.

In this article, the authors have shown how the fundamental issues of dealing with group insolvency are based on the lack of a codified system that enables substantive consolidation, coordinated resolution proceedings, and maximisation of cross-collateral value. To some degree, this gap has been filled by existing jurisprudence, but this is based on judicial discretion, which leads to inconsistency and unpredictability. The case studies of *Videcon*, *IL&FS*, and *Lavasa* reflect the process of procedural fragmentation, and the absence of a coherent approach to interdependent entities tends to lead to long delays, asset-value destruction, and biased treatment of stakeholders.

Notably, the paper has not only diagnosed the structural and functional inadequacies of group insolvency in India but has also presented a tiered roadmap towards reform of the same, with the short-term priority being the standardisation of judicial insolvency practice, followed by the agenda of regulatory scaffolding, and the long-term goal of codification of law. One of the major pillars of this reform blueprint is the promotion of the incorporation of tested international frameworks, including the UNCITRAL Model Law on Enterprise Group Insolvency, adapted to Indian realities of commerce.

In the future, the insolvency regime of India requires change in its current debtor-based silos to those that are enterprise-group based, so that they reflect the economic reality of

⁴³ CROSS BORDER INSOLVENCY RULES/REGULATIONS COMM., MINISTRY OF CORP. AFF., REPORT ON THE RULES AND REGULATIONS FOR CROSS-BORDER INSOLVENCY RESOLUTION (June 2020), <https://ibbi.gov.in/uploads/whatsnew/2021-11-23-215206-0clh9-6e353aefb83dd0138211640994127c27.pdf> (last visited July 28, 2025).

business practice. Law-making paralysis should be replaced by positive law-making, in which corporate groups are not regarded as legal fictions, but as economic entities that expand and contract as one. A principled, predictable, and process-efficient group insolvency regime, which is codified in law and not merely a result of judicial improvisation, is not only desirable but the key to maintaining economic value and investor confidence in the Indian insolvency ecosystem.

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CHAPTER 9

Capital in Crisis: Re-Evaluating the Insolvency and Bankruptcy Code's Efficacy in Corporate Finance Post-2025 Amendments

SEJAL* AND VISHRUT VEERENDRA**

The Insolvency and Bankruptcy Code, 2016 ("IBC"), was heralded as a transformative framework intended to restore creditor primacy and institutional discipline within India's distressed asset ecosystem. However, the Code's expanding interface with corporate finance, particularly its influence on debt structuring, capital markets, and investor confidence, has exposed persistent structural limitations. This paper critically re-evaluates the IBC's efficacy in light of the 2025 Insolvency and Bankruptcy Board of India ("IBBI") amendments, questioning whether the current regime adequately supports the needs of a modern, investment-driven financial system. Adopting a multi-stakeholder lens, the study analyses recent and systemically significant insolvency proceedings such as Zee Entertainment Enterprises, Indiabulls Housing Finance, and Byju's Alpha to highlight procedural asymmetries, erosion of asset value, and the Code's limited adaptability to asset-light and sector-specific financial stress. These cases reveal the consequences of protracted timelines, undifferentiated moratoriums, and misaligned stakeholder incentives. The paper also considers evolving jurisprudence on differential treatment of creditors, valuation disputes, and CoC commercial discretion, as seen in key appellate rulings and regulatory commentaries that continue to shape the resolution landscape. Integrating doctrinal analysis with empirical indicators drawn from SEBI disclosures, CRISIL ratings, and judicial records, the paper assesses the IBC's impact on credit market depth, investment risk appetite, and resolution predictability. Comparative insights are drawn from the UK's pre-pack administration model, the U.S. Chapter 11 debtor-in-possession framework, and Singapore's creditor-class restructuring tools—each offering greater alignment with global capital standards. The paper concludes that without deeper structural reforms—including class-based voting rights, dynamic moratorium design, contingent equity protection, and sector-specific pre-packaged resolution mechanisms—the IBC risks undermining the capital formation it was designed to secure. In a financial environment increasingly shaped by institutional capital, rapid sectoral shifts, and global risk sensitivities, the Code must evolve to protect not just creditor recovery but the integrity and appeal of India's broader investment climate.

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Keywords: Insolvency and Bankruptcy Code, Creditor Classification, Corporate Finance, IBBI 2025 Amendments, Pre-pack Resolution, Investment Climate

1 INTRODUCTION

A nation's insolvency regime efficiency is inextricably linked to the soundness of its financial system. Not only does it determine how capital is recovered, but also how effectively it is recycled, revalued, and redirected across industries. In India, the Insolvency and Bankruptcy Code, 2016 ("IBC") was adopted to replace a fragmented regime with a single integrated statute for corporate resolution of distress. It was meant to rationalise resolution, enforce creditor primacy, and introduce market discipline. Almost a decade on, and in particular with the IBBI's 2025 amendments notified on 12 March 2025, the regime is experiencing indications of structural wear.¹

The 2025 reforms focused on tightening procedural timelines for the Information Memorandum, reforming the appointment of Registered Valuers, and mandating early-stage disclosure of resolution plan essentials, and represent a step forward in administrative clarity. However, these improvements remain procedural and do not confront deeper institutional limitations. The regime still lacks answers to core concerns such as creditor classification asymmetries, valuation uncertainty, and the rigidity of the moratorium architecture, all of which continue to affect investor confidence, delay recoveries, and distort capital flows.²

The challenge is not merely technical or legal; it is financial. Modern corporate finance increasingly depends on transparent, time-bound, and commercially responsive insolvency systems. The Code was constructed at a time when defaults were concentrated in capital-heavy industries—steel, infrastructure, and power. But today's insolvency cases increasingly arise from asset-light, tech-driven, or financial-sector entities whose balance sheets are weighted toward intangibles, investor equity, or layered capital structures. In this environment, the Code's rigid tools are insufficient.

The Byju's Alpha case, for instance, laid bare the challenges in applying conventional resolution mechanisms to firms with investor-led cap tables, cross-border holding structures, and intangible asset profiles. Likewise, the Zee Entertainment Enterprises judgment underscored the Code's failure to reconcile valuation thinking or moratorium design with industry business models such as media and digital streaming. In the case of Indiabulls Housing Finance, the IBC's partial coordination with the financial-sector regulators resulted in jurisdictional ambiguity and ambiguity regarding the resolution process.

¹ Insolvency and Bankruptcy Code (Amendment) Act, 2025, Statement of Objects and Reasons, at 2.

² Insolvency and Bankruptcy Board of India (Amendment) Regulations, 2025 (Mar. 12, 2025).

The genesis of these problems is the unilateral concentration of discretion on the Committee of Creditors (“CoC”). While commercial judgment is protected by judicial standards, the absence of regulation of intra-creditor equity has resulted in persistent judicial disputes over differential treatment of stakeholders standing in comparable shoes—most notably operational creditors and unsecured bondholders. Despite judicial interventions, the structural imbalance³ is at its heart, affecting both fairness and predictability—two essential prerequisites for creating confidence in capital markets.

This stagnation is juxtaposed with reforms enacted by comparable jurisdictions. The United Kingdom, for instance, has updated its pre-pack administration regime by the Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021, requiring independent evaluators to undertake a stringent review of connected party sales to ensure maximum transparency and protection of value.⁴ This mechanism allows debtor firms to negotiate restructuring terms within an in-camera environment before formal insolvency proceedings are initiated, thereby protecting enterprise value and reducing procedural costs. The *United States’ Chapter 11 regime under the Bankruptcy Code of 1978* allows for Debtor-in-Possession (“DIP”) financing, enabling firms to raise capital and retain managerial control over insolvency difficulties. In addition, the Small Business Reorganization Act of 2019, which enacted Subchapter V into Chapter 11, has streamlined procedures for small and medium-sized enterprises by eliminating creditors’ committees, establishing debt thresholds, and utilising simplified restructuring techniques.⁵ Such attributes enhance quicker recoveries and are under contemplation by insolvency reform commissions globally.

Notably, *Singapore’s Insolvency, Restructuring and Dissolution Act of 2018 (“IRDA”)*, which took effect on July 30, 2020, offers a hybrid model that combines elements of the United States and United Kingdom approaches. It permits automatic moratoriums, super-priority rescue financing, and cross-class cramdowns, thereby giving courts greater flexibility to approve plans that meet the broader commercial interests of creditor classes, even where certain groups dissent.⁶ The IRDA was further complemented in 2022 with the introduction of the Simplified Insolvency Programme to expedite restructuring for micro and small businesses.⁷

India’s attempt to emulate these global trends through the Pre-Packaged Insolvency Resolution Process (“PPIRP”) in April 2021, under Chapter III-A of the IBC, was restricted

³ Jaypee Infratech Ltd. v. NBCC (India) Ltd., 2021 SCC OnLine SC 253.

⁴ The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021, SI 2021/427 (UK).

⁵ U.S. Bankruptcy Code, 11 U.S.C. §§ 1181–1195 (Subchapter V under Chapter 11), introduced by the Small Business Reorganization Act, 2019.

⁶ Insolvency, Restructuring and Dissolution Act 2018 (Sing.), Commencement Notification No. S 578/2020 (July 30, 2020).

⁷ Ministry of Law, Singapore, *Simplified Insolvency Programme* (2022), <https://www.mlaw.gov.sg>.

to MSMEs and has seen limited uptake.⁸ The lack of enabling provisions for larger firms to enter pre-agreed, court-supervised restructuring has constrained the Indian system's ability to prevent value destruction during early-stage distress. The cumulative effect of these inefficiencies is a drag on the development of the credit market. Recovery rates remain volatile, averaging 32.8% as of 2024, down from the 43% average recorded in FY20, according to IBBI performance reports.⁹ Institutional investors continue to express concerns over procedural unpredictability, valuation asymmetry, and the absence of creditor-class voting rights. Bondholder participation in stressed asset auctions has declined, and CRISIL's post-resolution outlook for several large cases reflects growing scepticism over recovery certainty.¹⁰

The IBC's original vision was to facilitate timely resolution and capital reallocation, and now requires a deeper recalibration. In an economy increasingly shaped by institutional capital, fast-changing sectoral models, and global credit sensitivities, India's insolvency regime must evolve. Mere procedural reform is insufficient. The framework must now incorporate class-based voting, sector-specific pre-packs, contingent equity protections, and dynamic moratorium design aligned with commercial realities. Without such changes, the Code risks becoming a source of capital friction rather than a mechanism for capital resolution.

2 THEORETICAL FOUNDATION: CREDITOR CONTROL VS. DEBTOR POSSESSION IN MODERN FINANCE

2.1 The Creditor-in-Control Paradigm: Theoretical Underpinnings

The IBC's architectural choice of creditor control reflects the Creditors' Bargain Theory articulated by Thomas Jackson, which treats insolvency as a collective debt-collection exercise designed to replicate the agreement creditors would have reached ex ante. This theoretical foundation posits that creditors, as the residual risk-bearers, possess superior information and incentives to maximise asset value compared to management that has already demonstrated failure. The Supreme Court's endorsement of this approach in *Innovative Industries Ltd. v. ICICI Bank Ltd.*¹¹ crystallised India's transition from debtor-friendly regimes to a creditor-centric framework, with the Court observing that "the erstwhile

⁸ Insolvency and Bankruptcy Board of India (Pre-Packaged Insolvency Resolution Process) Regulations, 2021, reg. 14, Gazette of India, at 6 (Apr. 9, 2021).

⁹ IBBI QUARTERLY NEWSLETTER, vol. 30 (Q3 FY2024).

¹⁰ CRISIL RATINGS, RESOLUTION OUTCOMES AND POST-IBC FINANCIAL RATINGS: 2018–2024 TRENDS (June 2024).

¹¹ *Innovative Indus. Ltd. v. ICICI Bank Ltd.*, (2018) 1 SCC 407, 420.

management, which is in charge of the corporate debtor, has no role to play once the corporate insolvency resolution process is initiated”.

The theoretical basis for creditor control extends beyond mere procedural efficiency to include behavioural economics considerations. The IBBI’s behavioural analysis suggests that the IBC functions as a “nudge” mechanism, creating deterrent effects that foster proactive resolution and discourage strategic defaults. The raising of the default threshold from ₹1 lakh to ₹1 crore in March 2020 acted as a behavioural intervention aimed at limiting corporate debtor opportunism while promoting early intervention.

2.2 Transaction Cost Economics and Insolvency Efficiency

Transaction Cost Economics (“TCE”) provides a crucial lens for analysing the IBC’s efficiency in modern corporate finance contexts. The Code has substantially reduced transaction costs by streamlining provisions and imposing stringent timelines, facilitating smoother negotiations between stakeholders. However, TCE analysis reveals that the IBC’s rigid, one-size-fits-all approach may generate unnecessarily high transaction costs for certain types of corporate restructuring, particularly those involving complex stakeholder hierarchies or cross-border elements.

The Coase Theorem’s application to corporate insolvency suggests that efficient bargaining between creditors and debtors can achieve optimal outcomes regardless of initial legal assignments, provided transaction costs remain low. The IBC’s framework generally supports this by reducing information asymmetries and providing clear procedural guidelines. However, the persistence of high haircuts (averaging 67% for lenders) indicates that transaction costs remain substantial, potentially due to the framework’s inflexibility in accommodating diverse business models.

2.3 Behavioural Economics and Moral Hazard Mitigation

The IBC’s deterrent effect represents one of its most significant achievements from a behavioural economics perspective. The threat of losing management control has generated voluntary settlements worth approximately ₹14 trillion across 30,000 cases—substantially exceeding direct recoveries through formal proceedings. This “shadow effect” demonstrates how insolvency law can shape behaviour even when not directly invoked, supporting theories of legal deterrence in financial markets.

However, behavioural analysis also reveals potential moral hazard concerns inherent in the creditor-control model. The concentration of decision-making power in financial creditors may create incentives for excessive risk-taking by lenders, knowing they retain control during distress situations. This contrasts with debtor-in-possession models that maintain

management accountability and may better align incentives for sustainable business practices.

IBC vs Legacy Recovery Rates 2025

Recovery (%)

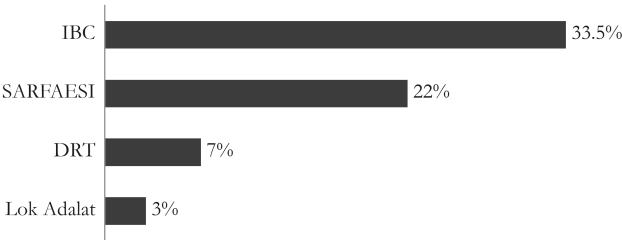


FIGURE 1. *Comparative recovery rates show IBC’s superior performance over legacy debt resolution mechanisms¹²*

3 EMPIRICAL ASSESSMENT: RESOLUTION OUTCOMES AND SYSTEMIC PERFORMANCE

3.1 Timeline and Recovery Analysis: The Persistence of Delay

The IBC’s fundamental promise of time-bound resolution has been systematically undermined by protracted proceedings that substantially exceed mandated timelines. According to IBBI data as of March 2025, the average resolution time has deteriorated to 713 days—more than double the statutory maximum of 330 days. This represents a worsening from 679 days as of March 2024, indicating that recent amendments have failed to address the underlying causes of delay.

More critically, approximately 78% of ongoing CIRP cases have exceeded the 270-day threshold (180-day base period plus 90-day extension), with many proceedings extending beyond two years. Real estate sector cases present particular challenges, with an average pendency of 2.5 years for 200 cases involving approximately ₹70,000 crores in admitted claims. This extended timeline reflects the sector’s unique challenges, including cross-collateralization, regulatory clearances, and homebuyer protection requirements that the IBC’s standard framework cannot adequately address.¹³

¹² INSOLVENCY & BANKRUPTCY BD. OF INDIA, ANNUAL REPORT 2023–2024 41 (Mar. 2024), <https://ibbi.gov.in/uploads/publication/de2f17cca103664da3f2c845fef35505.pdf>.

¹³ INSOLVENCY & BANKRUPTCY BD. OF INDIA, QUARTERLY NEWSLETTER 12 (Jan.–Mar. 2025), <https://ibbi.gov.in/uploads/publication/912e97d4d9f96651386541fb7059203b.pdf>.

3.2 Recovery Rate Performance: Comparative Excellence Amid Structural Constraints

Despite timeline challenges, the IBC demonstrates superior recovery performance compared to legacy mechanisms. Current IBBI data indicate overall recovery rates of approximately 32.76% for financial creditors as of Q4 FY2025, representing an improvement from 31.39% in Q3 FY2025. These figures substantially exceed pre-IBC recovery mechanisms, which achieved approximately 26% through SARFAESI, 7% through DRT, and 3% through Lok Adalats.

The resolution-to-liquidation ratio has improved dramatically from 0.20 in FY18 to 1.89 in Q4 FY2025, with Q4 FY2025 achieving a record-high 70% realisation against admitted claims in certain cases. However, this performance is driven by improved recovery in large cases (with admitted claims exceeding ₹1,000 crores, achieving 77% recovery), while smaller cases continue to face challenges.

Financial creditors have recovered ₹67,000 crores through IBC in FY2025, marking a 42% increase from the previous year and representing the highest annual recovery since the Code's inception. This performance reflects both improved procedural efficiency and enhanced NCLT capacity, with only three vacancies out of 63 positions as of March 2025, compared to 28 vacancies in October 2022.¹⁴

3.2.1 Sectoral Variations and Asset-Light Business Challenges

Empirical analysis reveals significant sectoral variations in resolution outcomes that reflect the IBC's differential effectiveness across business models. Traditional manufacturing and infrastructure sectors demonstrate recovery rates closer to overall averages, while service-oriented and asset-light sectors show lower recovery rates due to value erosion during extended proceedings.

The technology sector presents particular challenges, as demonstrated by the Byju's Alpha case, where primary value resides in intellectual property, user data, and platform functionality rather than traditional physical assets.¹⁵ The IBC's resolution approach, designed for asset-heavy manufacturing companies, proves fundamentally inadequate¹⁶ for such entities, leading to substantial value destruction during the resolution process.

¹⁴ *Id.* at 15–17.

¹⁵ Indranil Sarkar & Arpan Chaturvedi, *Once India's Biggest Startup, Byju's Faces Insolvency Proceedings*, REUTERS (July 16, 2024) (highlighting challenges of resolving companies with intangible-heavy business models under IBC).

¹⁶ ANI, *Corporate Insolvency Cases Fall 28% to 724 in FY2025; Recoveries Still Low: ICR4*, TRIBUNE INDIA (May 28, 2025) (reporting that average resolution time increased from 679 days as of March 31, 2024, to 713 days by March 31, 2025, exceeding the IBC statutory limit, and noting a resolution-to-liquidation ratio of 1.9 in Q4 FY2025).

3.2.2 *Investment Climate Impact: Credit Market Development and Risk Premiums*

The IBC has demonstrably enhanced credit discipline through its deterrent effect, with reports indicating voluntary settlements of approximately ₹14 trillion due to promoter concerns about losing management control. This behavioural impact represents one of the Code's most significant achievements in transforming India's credit culture from a "defaulters' paradise" to a creditor-protective environment.

Private credit market development provides additional evidence of improved investor confidence, with India's private credit assets under management growing 25-fold from \$0.7 billion in 2010 to \$17.8 billion in 2023.¹⁷ The enactment of the IBC is cited as a key catalyst for this growth, providing statutory mechanisms for creditor protection in debt investments.

However, the persistence of high haircuts (averaging 67%) and extended resolution timelines creates risk premiums that partially offset the Code's creditor protection benefits. The Reserve Bank of India's Financial Stability Report (December 2024) reveals that despite the IBC's success, stress tests project potential GNPA ratios rising to 5.3% under severe scenarios by March 2026, indicating ongoing systemic vulnerabilities.¹⁸

4 CASE STUDIES: STRUCTURAL LIMITATIONS IN COMPLEX CORPORATE CONTEXTS

4.1 Zee Entertainment Enterprises: Guarantee Structures and Sectoral Complexity

The Zee Entertainment Enterprises Limited ("ZEEL") case exemplifies the IBC's inadequate treatment of complex guarantee structures and sector-specific business models prevalent in the media and entertainment industries. IDBI Bank initiated insolvency proceedings against ZEEL under Section 7, claiming ₹149.60 crores based on a Debt Service Reserve Account ("DSRA") guarantee provided by ZEEL for loans extended to Siti Networks, an Essel Group entity.

The National Company Law Tribunal ("NCLT") Mumbai initially dismissed IDBI Bank's petition in May 2023, a decision subsequently upheld by the National Company Law Appellate Tribunal ("NCLAT") in April 2025. However, the NCLAT granted IDBI Bank the liberty to file fresh applications for defaults occurring outside the COVID-19 moratorium period specified under Section 10A of the IBC. The tribunals' rejection was based on

¹⁷ Vivriti Asset Mgmt., *Private Credit Market in India – A Deeper Look* (Oct. 30, 2024) (noting private credit AUM grew from US \$0.7 bn in 2010 to US \$17.8 bn by 2023).

¹⁸ RESERVE BANK OF INDIA, FINANCIAL STABILITY REPORT (Dec. 30, 2024) (projecting GNPA ratios rising to 5.3% under severe scenarios by March 2026).

technical interpretations of guarantee obligations rather than a substantive assessment of ZEEL's financial position or the underlying commercial rationale for the guarantee structure.¹⁹

The case highlights several critical limitations: the IBC's binary classification of financial debt fails to accommodate nuanced guarantee obligations in modern corporate structures; media companies' substantial value from intangible assets, including content libraries and brand value, cannot be adequately valued through traditional asset-focused approaches; and the Code's poor integration with sector-specific regulatory frameworks creates additional procedural complexities.

4.2 Indiabulls Housing Finance: NBFC Distress and Systemic Risk Implications

The insolvency proceedings initiated by Indiabulls Housing Finance Limited (IHFL) against Subhash Chandra, as a personal guarantor, illustrate the IBC's limitations in addressing Non-Banking Financial Company (NBFC) distress and associated systemic risk implications. The NCLT Delhi's acceptance of IHFL's insolvency petition against Subhash Chandra in April 2024 arose from defaults by Vivek Infracon, a company associated with the Essel Group chairman.²⁰

The case involves complex inter-group lending arrangements, multiple regulatory authorities (including SEBI, ED, and CBI), and potential criminal law implications, creating a multi-jurisdictional procedural maze. The Supreme Court's criticism of the CBI's non-appearance in related proceedings highlights institutional coordination challenges that arise when IBC processes intersect with criminal investigations and regulatory enforcement actions.

NBFCs operate under specific capital adequacy and liquidity requirements imposed by the Reserve Bank of India. The IBC's standard resolution approach does not adequately address how these regulatory requirements interact with insolvency proceedings, potentially compromising financial stability. Unlike traditional manufacturing entities, NBFCs have direct customer relationships involving deposits, loans, and investment products, requiring specialised stakeholder protection mechanisms that the current framework cannot provide.

4.3 Byju's Alpha: Cross-Border Complexity and Asset-Light Business Models

The Byju's Alpha insolvency proceedings represent perhaps the most complex case testing the IBC's capabilities, involving cross-border elements, sophisticated financial structures,

¹⁹ IDBI Bank Ltd. v. Zee Ent. Enters. Ltd., Company Appeal (AT) (Insolvency) No. 587 of 2023, at 12, ¶ 13 (NCLAT Apr. 2025).

²⁰ Indiabulls Hous. Fin. Ltd. v. Subhash Chandra, C.P. (IB) No. 97/ND/2022 (NCLT Delhi).

and asset-light business models characteristic of modern technology companies. The case involves Think and Learn Private Limited (Byju's parent company) as corporate debtor, Byju's Alpha Inc. (a US subsidiary) as the borrowing entity, and GLAS Trust Company LLC as administrative agent for USD 1.2 billion in loan facilities.²¹

The Supreme Court's decision to reinstate insolvency proceedings despite a settlement between BCCI and Riju Raveendran highlights challenges of managing cross-border asset flows and related party transactions within the IBC framework. The Court's concern about potential "round-tripping" of funds from the US entity to settle Indian obligations reflects the Code's inadequate mechanisms for addressing complex corporate structures spanning multiple jurisdictions.²²

Byju's represents the archetypal asset-light technology company, with primary value residing in intellectual property, user data, technology platforms, and human capital rather than traditional physical assets. The IBC's resolution approach proves fundamentally inadequate for such entities: technology companies' value derives primarily from intangible assets that are difficult to value and transfer; operational continuity requires specialised expertise that the framework cannot accommodate; and cross-border asset mobility undermines the Code's moratorium provisions and creditor protection mechanisms.

4.4 Jet Airways: Implementation Failure and Liquidation

The Supreme Court's November 2024 decision ordering the liquidation of Jet Airways (India) Limited after a five-year resolution effort underscores critical implementation challenges within the IBC framework. Despite the NCLT's approval of the Jalan Fritsch Consortium's resolution plan in June 2021, subsequent implementation failures led to the airline's ultimate liquidation.

The case highlights the IBC's inadequate mechanisms for ensuring resolution plan implementation, with the successful resolution applicant failing to fulfil conditions precedent and payment obligations despite multiple timeline extensions. The Supreme Court's criticism of NCLT functioning and emphasis on the necessity led to subsequent regulatory amendments mandating such committees.²³

²¹ Glas Trust Co. LLC v. Byju Raveendran, 2024 SCC OnLine SC 4064.

²² Riju Ravindran Suspended Director & Promoter of Think & Learn Pvt. Ltd. v. Pankaj Srivastava, IRP of Think & Learn Pvt. Ltd., MANU/NL/0311/2025 (NCLAT Apr. 17, 2025).

²³ State Bank of India v. Consortium of Murari Lal Jalan & Florian Fritsch, MANU/SC/0054/2024 (SC Jan. 18, 2024).

5 INTERNATIONAL COMPARATIVE ANALYSIS: SOPHISTICATED FRAMEWORKS FOR MODERN FINANCE

5.1 UK Pre-Pack Administration: Preserving Going Concern Value

The United Kingdom's pre-pack administration framework demonstrates a sophisticated balance between speed, stakeholder protection, and value preservation that contrasts favourably with the IBC's rigid approach. Pre-pack administration involves the pre-negotiated sale of business or assets before formal administrator appointment, preserving business continuity and going concern value while providing legal certainty.²⁴

The framework operates under Statement of Insolvency Practice 16 (SIP 16) governance, mandating independent asset valuations, marketing evidence, and detailed creditor reporting. Licensed insolvency practitioners must demonstrate superior returns compared to alternative approaches, creating substantive accountability mechanisms often absent in IBC proceedings.²⁵ The Pre-Pack Pool provides independent expert opinions on connected party transactions, offering additional stakeholder protection.²⁶

Recent regulatory enhancements through the Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021 demonstrate continued evolution, requiring independent opinions or creditor approval for substantial disposals to connected persons within eight weeks of administration.²⁷ This level of procedural sophistication and stakeholder protection contrasts sharply with the IBC's one-size-fits-all approach.

5.2 US Chapter 11: Debtor-in-Possession Flexibility and Stakeholder Sophistication

The United States Chapter 11 framework offers perhaps the most flexible approach to corporate reorganisation, with particular strength in accommodating complex stakeholder hierarchies and diverse business models. Chapter 11's debtor-in-possession (DIP) mechanism allows existing management to retain operational control during reorganisation, recognising that management typically possesses specialised knowledge necessary for effective business continuation.²⁸

²⁴ See generally Insolvency Act 1986, c. 45, sch. B1 (UK) (on pre-pack administration).

²⁵ Insolvency Practitioners Ass'n (UK), *Statement of Insolvency Practice 16 (SIP 16)* §§ 6–9 (effective Nov. 1, 2015), <https://www.insolvency-practitioners.org.uk/regulation-and-guidance/sips> (last visited July 28, 2025).

²⁶ THE PRE-PACK POOL LTD., <https://www.prepackpool.co.uk/> (last visited July 28, 2025).

²⁷ Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021, SI 2021/427 (UK).

²⁸ 11 U.S.C. §§ 1101–1174 (2018) (Chapter 11 reorganization provisions of the U.S. Bankruptcy Code).

Commercial Chapter 11 filings increased 20% in 2024 to 7,879 cases, demonstrating continued relevance for complex restructurings.²⁹ The framework's sophisticated creditor classification system accommodates multiple stakeholder categories with differentiated treatment provisions, while "cramdown" mechanisms prevent minority holdout creditors from blocking value-maximising reorganisations.

DIP financing has evolved to include increasingly sophisticated structures, with 2025 seeing facilities with interest rates exceeding 15% and complex fee arrangements, demonstrating market adaptation to diverse financing needs.³⁰ The framework's integration with securities regulations and accommodation of public company considerations provides essential capabilities for listed entities undergoing reorganisation.³¹

5.3 Singapore's IRDA: Cross-Class Cramdown and Enhanced Judicial Innovation

Singapore's Insolvency, Restructuring and Dissolution Act 2018 (IRDA) represents a modern synthesis of common law principles with innovative mechanisms designed for contemporary corporate finance challenges. The cross-class cramdown provisions enable restructuring plans to bind dissenting creditor classes provided procedural and substantive safeguards are met, requiring approval by at least one creditor class and overall creditor approval by a majority in number representing 75% in value.³²

Recent committee recommendations propose refining cross-class cramdown threshold requirements to remove conditions requiring a majority in number of creditors representing three-fourths in value, making the mechanism more functional for contemporary restructurings.³³ The framework's ability to bind secured creditors through cramdown mechanisms, subject to appropriate safeguards, provides essential flexibility for complex restructurings involving multiple security interests.

Singapore's adoption of enhanced cross-border capabilities through UNCITRAL Model Law integration, coupled with recognition and enforcement mechanisms, provides

²⁹ ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2024: U.S. BANKRUPTCY COURTS – BUSINESS AND NON-BUSINESS CASES FILED, BY CHAPTER tbl. F-2 (2025), <https://www.uscourts.gov/statistics-reports/judicial-business-2024> (last visited July 28, 2025).

³⁰ Harvey R. Miller & Shai Y. Waisman, *Is Chapter 11 Bankrupt?*, 47 B.C. L. REV. 129, 139–42 (2005).

³¹ U.S. Sec. & Exch. Comm'n, *Reorganization Under Chapter 11*, <https://www.sec.gov/reportspubs/investor-publications/investorpubsreorg.htm> (last visited July 28, 2025).

³² Insolvency, Restructuring and Dissolution Act 2018, No. 40, § 70 (Sing.) (cross-class cramdown provisions), <https://sso.agc.gov.sg/Act/IRDA2018>.

³³ MINISTRY OF LAW SINGAPORE, REPORT OF THE COMMITTEE TO ENHANCE SINGAPORE'S CORPORATE RESTRUCTURING AND INSOLVENCY REGIME Recommendation 2.1 (2025), https://www.mlw.gov.sg/files/RI_Committee_Report__11Mar2025_.pdf (last visited Sept. 29, 2026).

sophisticated capabilities for managing international insolvency proceedings essential for modern corporate restructurings.³⁴

5.4 Germany's StaRUG: Pre-Insolvency Framework Innovation

Germany's Corporate Stabilisation and Restructuring Act ("StaRUG"), introduced on January 1, 2021, provides a comprehensive pre-insolvency restructuring framework that contrasts with the IBC's limited pre-pack mechanisms. The StaRUG enables companies facing imminent illiquidity to initiate preventive restructuring proceedings while retaining management control, avoiding formal insolvency stigma.³⁵

The framework has gained momentum, with twice as many companies utilising it in recent years compared to initial periods, including larger companies undertaking comprehensive capital structure restructurings.³⁶ The procedure enables "partial-collective" restructuring, allowing selective creditor inclusion and financial-only restructuring, providing flexibility unavailable under traditional insolvency procedures.

However, the StaRUG's limited international recognition compared to UK frameworks highlights the importance of cross-border integration for global corporate restructurings. The requirement for German language proceedings and limited international trust constrain its effectiveness for multinational entities.³⁷

5.5 Canada's CCAA: Flexibility and Third-Party Releases

Canada's Companies' Creditors Arrangement Act ("CCAA") demonstrates a flexible, court-supervised approach that provides a beneficial framework for complex restructurings. The CCAA requires a minimum CDN\$5 million debt threshold and provides broad stay protection for debtors, directors, and officers, with potential extension to third parties.³⁸

The framework's flexibility enables creative solutions benefiting all parties, with court oversight and monitor appointment providing stakeholder comfort and process

³⁴ Insolvency, Restructuring and Dissolution Act 2018, No. 40, §§ 246–250 (Sing.) (adoption of UNCITRAL Model Law); *see also* UNCITRAL, Model Law on Cross-Border Insolvency, U.N. Doc. A/52/17, annex I (1997), https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency.

³⁵ Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen [StaRUG] [Corporate Stabilisation and Restructuring Act], Dec. 22, 2020, BGBl I at 3256 (Ger.), English translation available at <https://www.bmj.de/EN/Ministry/Legislation/StaRUG.html> (last visited July 28, 2025).

³⁶ Philipp Kessler & Arvid Herrmann, *The Rise of StaRUG: Trends in German Preventive Restructuring*, INSOL EUROPE NEWS, Mar. 2024, at 3–5, <https://www.insol-europe.org> (last visited July 28, 2025).

³⁷ Christoph Paulus, *Cross-Border Issues in Preventive Restructuring: Limitations of StaRUG*, 2023 J. INT'L INSOLVENCY L. 112, 118–20 (Ger.).

³⁸ Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, §§ 3(1), 11 (Can.), <https://laws-lois.justice.gc.ca/eng/acts/C-36/> (last visited July 28, 2025).

transparency.³⁹ Specialised tools like “reverse vesting orders” (RVOs) allow corporate preservation by “vesting out” unwanted liabilities without requiring creditor votes, providing distinct advantages for asset preservation.⁴⁰

Q1 2025 statistics show 20 CCAA proceedings filed, demonstrating continued relevance for significant restructurings. The framework’s integration with cannabis industry restructuring (unavailable in US jurisdictions) and well-developed third-party release jurisprudence provides additional flexibility for contemporary corporate challenges.⁴¹

6 STRUCTURAL DEFICIENCIES: CORE ARCHITECTURAL FLAWS

6.1 Rigid Creditor Classification and Stakeholder Hierarchy Inadequacy

The IBC’s binary classification of creditors into financial and operational categories represents a fundamental oversimplification that fails to accommodate sophisticated stakeholder hierarchies characteristic of modern corporate finance. Contemporary corporate structures involve multiple creditor sophistication layers, including senior secured lenders, subordinated debt holders, mezzanine financiers, trade creditors, and specialised service providers that cannot be adequately differentiated within the current binary system.

The NCLAT’s acknowledgement in *NCC Ltd. v. Golden Jubilee Hotels Private Limited*⁴² that operational creditors may require sub-categorisation into “special operational creditors” based on strategic importance represents judicial recognition of the classification system’s inadequacy. However, systemic reform requires a comprehensive framework revision rather than case-by-case judicial intervention.

The concentration of decision-making authority in the Committee of Creditors (CoC), comprised exclusively of financial creditors, reflects outdated assumptions about stakeholder importance and risk allocation. Modern corporate structures often involve operational creditors whose continued participation is essential for business viability, including technology service providers, key suppliers, and intellectual property licensors.

6.2 Undifferentiated Moratorium Design and Sectoral Inflexibility

The IBC’s blanket moratorium provisions under Section 14 reflect a one-size-fits-all approach that proves counterproductive for many modern business models. Asset-light

³⁹ Janis P. Sarra, *Restructuring Under the CCAA: Stakeholder Strategies and Judicial Discretion*, 53 OSGOODE HALL L.J. 445, 450–53 (2016).

⁴⁰ See *Ernst & Young Inc. v. Comark Holdings Inc.*, 2021 ONSC 1334, ¶¶ 34–40 (Can. Ont. Sup. Ct. J.) (approving RVO structure); see also Janis P. Sarra, *Third-Party Releases in Canadian Restructurings*, 2023 J. BUS. L. 98, 102–05.

⁴¹ Office of the Superintendent of Bankruptcy Canada, *Insolvency Statistics in Canada – Q1 2025*, tbl. 4, <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/home> (last visited July 28, 2025).

⁴² *NCC Ltd. v. Golden Jubilee Hotels (P) Ltd.*, Company Appeal (AT) (Insolvency) No. 63 of 2021, at 8, ¶ 10 (NCLAT).

businesses in technology, financial services, and professional services require continuous client relationships, ongoing service delivery, and maintenance of professional licenses that may be compromised by blanket moratorium provisions.⁴³

The Byju's Alpha case exemplifies these challenges, where the company value resided in user engagement, platform functionality, and educational content delivery—all requiring continuous operational management that the IBC framework cannot adequately support. The framework's inability to accommodate such business models represents a significant limitation in India's increasingly service-oriented economy.

The IBC's poor integration with sector-specific regulatory frameworks creates procedural complexities that undermine resolution efficiency. The framework lacks mechanisms for coordinating with specialised regulators like SEBI, RBI, IRDA, or sectoral authorities, leading to conflicting requirements and jurisdictional disputes demonstrated in the Zee Entertainment and Indiabulls Housing Finance cases.⁴⁴

6.3 Limited Pre-Packaged Resolution and Cross-Border Integration Deficiencies

The IBC's restriction of the PPIRP to MSMEs represents a significant limitation preventing efficient resolution of larger, complex entities. Contemporary corporate finance increasingly relies on pre-negotiated resolution arrangements that preserve stakeholder relationships, maintain operational continuity, and minimise value destruction during formal proceedings.

The framework's limited integration with international insolvency mechanisms represents a critical limitation for India's increasingly globalised corporate sector. The Byju's Alpha case demonstrated how easily valuable assets can be transferred across jurisdictions, undermining the IBC's moratorium provisions and creditor protection mechanisms. Unlike jurisdictions adopting the UNCITRAL Model Law on Cross-Border Insolvency, the IBC provides⁴⁵ limited mechanisms for recognising foreign proceedings or coordinating with international restructuring efforts.⁴⁶

⁴³ Insolvency and Bankruptcy Code, 2016, § 14, <https://ibbi.gov.in/legal-framework/act>.

⁴⁴ Zee Ent. Enters. Ltd., C.P. (IB) No. 107 of 2023 (NCLT Mumbai); Indiabulls Hous. Fin. Ltd. v. Subhash Chandra, C.P. (IB) No. 97/ND/2022 (NCLT Delhi); see also *Supreme Court Criticises Regulatory Overlap in Zee, Indiabulls Cases*, LIVE LAW (May 2025), <https://livelaw.in>.

⁴⁵ IBBI, *Discussion Paper on Cross-Border Insolvency Framework in India* (June 2022), <https://ibbi.gov.in/uploads/whatsnew/crossborder2022.pdf> (last visited July 28, 2025).

⁴⁶ UNCITRAL, Model Law on Cross-Border Insolvency with Guide to Enactment, U.N. Doc. A/52/17, annex I (1997), https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency; see also Ministry of Corp. Aff., *Cross-Border Insolvency Framework for India – Draft Bill* (2021), <https://mca.gov.in> (last visited July 28, 2025).

6.4 Procedural Rigidity and Administrative Inadequacy

The IBC's reliance on overburdened NCLTs with limited specialised expertise creates systematic procedural inefficiencies that compound structural limitations. The concentration of proceedings in tribunals creates capacity constraints directly contributing to extended resolution timelines, with significant improvement only following recent member appointments, reducing vacancies from 28 in October 2022 to three as of March 2025.⁴⁷

The framework's reliance on resolution professionals with limited specialised expertise in complex corporate finance creates information asymmetries, undermining optimal resolution outcomes.⁴⁸ International frameworks demonstrate alternative approaches, including specialised commercial courts (UK), bankruptcy judges with focused expertise (US), and flexible administrative mechanisms (Singapore) that could inform IBC procedural reform.⁴⁹

7 TOWARD COMPREHENSIVE STRUCTURAL REFORM: IBC 2.0 FRAMEWORK

7.1 Dynamic Creditor Classification and Sophisticated Stakeholder Management

The binary financial/operational creditor classification requires replacement with a sophisticated multi-tier system that recognises creditor heterogeneity and strategic importance.⁵⁰ The proposed framework would establish five primary categories: Senior Secured Financial Creditors with priority claims; Subordinated Financial Creditors, including unsecured and subordinated debt holders; Strategic Operational Creditors essential for business continuity; General Operational Creditors comprising trade creditors and non-strategic service providers; and Hybrid Creditors spanning multiple categories.

Each category would receive differentiated treatment in CoC composition, voting rights, and distribution priorities based on strategic importance and risk profile. Strategic operational creditors, essential for business continuity, should receive enhanced voting rights during resolution plan evaluation, while maintaining financial creditors' primacy in liquidation decisions. This approach would better align decision-making authority with value creation and preservation capabilities.⁵¹

⁴⁷ Ministry of Corp. Aff., *Parliamentary Reply on NCLT Vacancies and Appointments*, Lok Sabha Unstarred Question No. 2453 (answered Mar. 2025), <https://loksabha.nic.in> (last visited July 28, 2025).

⁴⁸ IBBI, ANNUAL REPORT 2023–2024 (noting training status and qualifications of resolution professionals), <https://ibbi.gov.in/uploads/publication/de2f17cca103664da3f2c845fef35505.pdf> (last visited Sept. 29, 2026).

⁴⁹ See Insolvency Act 1986, c. 45, § 393 (UK) (UK commercial courts' jurisdiction over corporate restructuring); 28 U.S.C. § 157(b) (2018) (US bankruptcy court jurisdiction); Insolvency, Restructuring and Dissolution Act 2018, No. 40, §§ 43–47 (Sing.) (Singapore's administrative oversight framework for RPs).

⁵⁰ See Insolvency and Bankruptcy Code, 2016, § 5(7)–(8).

⁵¹ See Insolvency and Bankruptcy Code, 2016; see also Vinod Kothari & Reshmi Khurana, *Rethinking Creditor Classes: The Case for Functional Differentiation*, 14 INSOLV. & RES. J. 78, 83–86 (2023).

7.2 Flexible Moratorium Design and Sectoral Adaptation Mechanisms

The blanket moratorium under Section 14 requires replacement with a flexible framework distinguishing between value-destructive and value-preserving activities. Core moratorium provisions would protect against enforcement actions, asset transfers, and litigation impairing resolution prospects, while operational continuity exemptions would preserve essential contracts, regulatory licenses, and service relationships necessary for business continuity.

Sector-specific carve-outs would provide tailored exemptions for different business models, including technology platform maintenance, financial services customer obligations, and media content licensing arrangements.⁵² The essential services protection framework would establish statutory protection for services critical to business continuity, operating through a rebuttable presumption favouring continuity, with termination allowed only upon demonstration of material prejudice.

7.3 Universal Pre-Packaged Resolution and Enhanced Cross-Border Integration

Pre-packaged resolution mechanisms should extend beyond MSMEs to all corporate entities, with appropriate safeguards scaled to entity size and complexity. The framework should accommodate Standard Pre-Pack for straightforward cases; Enhanced Pre-Pack for larger entities with sophisticated stakeholder structures requiring additional oversight; and Cross-Border Pre-Pack for multinational entities requiring coordination with foreign proceedings.⁵³

Drawing from UK precedents, an enhanced framework⁵⁴ should mandate independent valuation by qualified professionals, marketing evidence demonstrating optimal value realisation, creditor consultation processes with meaningful participation rights, detailed post-transaction reporting and monitoring, and enhanced disclosure requirements for connected party transactions.⁵⁵

India should adopt the UNCITRAL Model Law on Cross-Border Insolvency to enable effective coordination with international proceedings, complemented by bilateral cooperation agreements with major trading partners and investment source countries.⁵⁶ Enhanced

⁵² See IBBI, EXPERT COMMITTEE REPORT ON SECTOR-SPECIFIC MORATORIUM FLEXIBILITY 21–24 (2023), https://ibbi.gov.in/uploads/publications/moratorium_reform_committee.pdf [<https://perma.cc/Q5TA-VX42>].

⁵³ See Bhatt & Joshi Associates, *Pre-Pack Insolvency for MSMEs: Legal Loopholes in Speedy Resolution*, BHATTANDJOSHIASSOCIATES.COM (June 2022).

⁵⁴ See Joint Insolvency Comm., *Statement of Insolvency Practice 16 (SIP 16)* (Apr. 2021).

⁵⁵ Yasir D. Pathan, *Pre-Packaged Insolvency Resolution in India: A Comprehensive Analysis of PPIRP Under the IBC*, IBC LAWS (2022), <https://ibclaw.in/pre-packaged-insolvency-resolution-in-india-a-comprehensive-analysis-of-ppirp-under-the-ibc-by-yasir-d-pathan/>.

⁵⁶ See The Legal School, *Cross-Border Insolvency in India – Adoption of the UNCITRAL Model Law*, THELEGALSCHOOL.IN (2023), <https://thelegalschool.in/blog/cross-border-insolvency; Insolvency and Bankruptcy Code, §§ 234–235>.

cross-border asset preservation mechanisms should include international cooperation protocols, asset tracing and recovery powers, and jurisdiction coordination frameworks.⁵⁷

7.4 Institutional Enhancement and Professional Capability Development

The current NCLT system requires enhancement through specialised insolvency courts with dedicated judges trained in corporate finance, cross-border insolvency, and sector-specific business models. These courts should be supported by technical advisory panels providing industry expertise, enhanced case management systems, and integrated alternative dispute resolution mechanisms.⁵⁸

The insolvency professional framework requires enhancement through specialised certification programs for complex cases involving cross-border elements, sector-specific knowledge, and sophisticated financial instruments. Professional liability frameworks should include enhanced liability and insurance requirements scaled to case complexity, with mandatory continuing education requirements ensuring updated professional capabilities.⁵⁹

7.5 Investment Climate Integration and Capital Market Coordination

The framework should establish comprehensive coordination mechanisms with SEBI for listed entities, including streamlined disclosure requirements during insolvency proceedings, enhanced minority shareholder protection, and mechanisms for maintaining trading and market-making during proceedings.⁶⁰ Institutional investment facilitation should include accommodation of complex financial instruments, enhanced foreign investment

⁵⁷ See Anshuman Gupta & Hunaynah Shaikh, *Breaking Borders: Crafting a Robust Cross-Border Insolvency Framework for India Through Global Insights*, LEGAL 500 (Feb. 21, 2025), <https://www.legal500.com/developments/thought-leadership/breaking-borders-crafting-a-robust-cross-border-insolvency-framework-for-india-through-global-insights/>; see also Shubhamkar Bhandari, *Insolvency Globalization: India's Adoption of the UNCITRAL Model Law*, MONDAQ (May 9, 2025), <https://www.mondaq.com/india/insolvencybankruptcy/1622318/insolvency-globalization-indias-adoption-of-the-uncitral-model-law>.

⁵⁸ See *The Evolution of Insolvency and Bankruptcy Law in India*: Recommendations include “increase the number of NCLT benches and introduce dedicated insolvency courts” with sector-specific technical support and improved case management capabilities (ssrn 2024).

⁵⁹ See IBBI (Insolvency Professionals) Regulations, 2016, reg. 5(2)(ba) (amended 2022), requiring mandatory continuing professional education for Insolvency Professionals; Guidelines on Continuing Professional Education (2019) mandate minimum credit hours; see also TAXMANN GUIDE TO IPA (2024) for post-registration certification and training requirements for complex insolvency cases.

⁶⁰ See Securities and Exchange Board of India, *Framework for Protection of Interest of Public Equity Shareholders in Case of Listed Companies Undergoing CIRP Under the Insolvency and Bankruptcy Code* (Consultative Paper, Nov. 10, 2022), proposing open-offer and public-shareholding conditions, enhanced disclosures, and exchange-based mechanisms to preserve trading liquidity during insolvency.

protection, and regulatory certainty mechanisms providing clear guidance on tax treatment and cross-border implications.⁶¹

8 CONCLUSION: THE IMPERATIVE FOR ARCHITECTURAL TRANSFORMATION

This comprehensive analysis reveals fundamental misalignment between the IBC's architectural assumptions and contemporary corporate finance realities. While the Code achieved significant improvements in credit discipline and recovery rates compared to legacy mechanisms—with average recovery rates of 32–35% substantially exceeding SARFAESI (22%), DRT (7%), and Lok Adalat (3%) performance—its structural limitations systematically undermine optimal outcomes in modern financial contexts.⁶²

The empirical evidence demonstrates persistent challenges: resolution timelines averaging 713 days against statutory 330-day maximums; value erosion estimated at ₹37,621 crores attributable to procedural delays; and sector-specific inadequacies particularly pronounced in asset-light businesses and cross-border contexts.⁶³ The case studies of Zee Entertainment Enterprises, Indiabulls Housing Finance, and Byju's Alpha illustrate how these limitations manifest in practice, creating procedural complexities that often undermine rather than advance the Code's core objectives.

The 2025 IBBI amendments, while introducing incremental improvements including flexible resolution plan structures, interim finance provider participation, and mandatory monitoring committees, represent symptomatic responses rather than comprehensive solutions to underlying architectural deficiencies.⁶⁴ The comparative analysis of international frameworks—particularly the UK's sophisticated pre-pack administration, the US Chapter 11's debtor-in-possession flexibility, Singapore's cross-class cramdown mechanisms, Germany's StaRUG pre-insolvency regime, and Canada's CCAA adaptability—demonstrates that these limitations are not inevitable features of effective insolvency law but reflect specific design choices amenable to reform.

⁶¹ See Economic Laws Practice and SEBI consultative analyses (Nov. 2022), proposing institutional investor participation, accommodation of complex securities, and maintaining regulatory clarity on post-CIRP shareholding and taxation implications for foreign investors.

⁶² CRISIL and Business Standard report that IBC has resolved ₹26 lakh crore in debt over nine years, with an average recovery rate of 30–35%, compared to ~22% under SARFAESI, ~7% under DRT, and ~3% under Lok Adalat. Recovery timelines now average 713 days, well above the 330-day benchmark.

⁶³ The average resolution timeline of 713 days significantly exceeds the statutory limit, contributing to value erosion estimated in tens of thousands of crores.

⁶⁴ The Fourth Amendment to CIRP Regulations, effective May 26, 2025, introduces key reforms: flexible asset-wise resolution plans, participation of interim finance providers as observers in CoC meetings, mandatory reporting via monitoring committees, and structured payment hierarchy prioritizing dissenting financial creditors.

The proposed “IBC 2.0” framework addresses fundamental structural deficiencies through dynamic creditor classification, flexible moratorium design, universal pre-packaged resolution mechanisms, enhanced cross-border integration, and specialised institutional capabilities. These reforms would position India’s insolvency framework to effectively serve a sophisticated, globally-integrated economy while preserving essential creditor protections and institutional discipline.

The stakes extend beyond technical legal adjustments to encompass India’s broader economic competitiveness and investment attractiveness. In a financial environment increasingly shaped by institutional capital deployment decisions influenced by regulatory sophistication and procedural predictability, the IBC’s continued structural limitations risk constraining India’s access to international capital markets and limiting the development of sophisticated domestic financial instruments. The choice facing policymakers is not between stability and disruption, but between continued value destruction through structural inadequacy and proactive reform aligning India’s insolvency framework with contemporary corporate finance realities. The evidence supports the latter course, suggesting that costs of inaction—measured in continued value erosion, constrained capital formation, and reduced investment attractiveness—far exceed transitional costs of comprehensive structural reform.

The IBC’s evolution from its current form to an effective framework for contemporary corporate finance requires acknowledgement that the Code’s greatest strength—departure from pre-2016 institutional dysfunction—must be complemented by continued adaptation to serve India’s economic development objectives in an increasingly complex global financial system. The proposed reforms provide a roadmap for this essential evolution, offering the prospect of an insolvency regime that truly serves modern corporate finance needs while preserving institutional discipline essential for sustainable economic growth.

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CHAPTER 10

Complexities of Group Cross-Border Insolvency and Arbitration in India

MANSI JAIN* AND SHANYA MISHRA**

The Insolvency and Bankruptcy Code, 2016 (IBC) brought a time-bound and creditor-driven insolvency procedure to India, but it has no comprehensive framework for group or cross-border insolvencies, even though corporate groups and cross-border businesses are now the standard. Since the Code treats each company in a group as a separate debtor, the result is delay, a fragmented resolution process and a loss of value, as happened in the cases of IL&FS and Videocon.

Sections 234 and 235 do provide for cooperation with foreign jurisdictions, but in practice this has not worked because India has no bilateral agreements and no mechanism to allow concurrent proceedings. The draft Part Z also says nothing on group insolvency. The position is made worse by the fact that the IBC, the Arbitration and Conciliation Act, 1996 and the New York Convention operate independently of one another, which leads to conflicts between foreign arbitral awards and the Section 14 moratorium, as well as the public policy exception. This paper examines the IBC along with relevant Indian court decisions, such as those in the Jet Airways and Videocon cases, and compares them with the approaches of the UK, Singapore, the US and the UNCITRAL Model Laws on cross-border and enterprise group insolvency.

It argues that judicial remedies like the one in Jet Airways lack consistency, predictability and international coherence. To address this, the paper suggests that India adopt the 2019 Model Law on Enterprise Group Insolvency and bring its group resolution mechanisms into the IBC. This would include the judicial cooperation provisions in Sections 234 and 235, a moratorium, and approval of the adjudicating authority when foreign judgments are enforced against insolvent debtors, along with a single resolution professional for the group companies.

These reforms would make the system more predictable and rule-based, which should improve value maximization, creditor recoveries and investor confidence. It would also strengthen India's reputation as a reliable insolvency restructuring jurisdiction and reduce forum shopping.

Keywords: Cross-Border Insolvency, Group Insolvency, UNCITRAL, Foreign Arbitral Awards

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1 INTRODUCTION

The Insolvency and Bankruptcy Code (IBC), 2016, represents a significant milestone in India's legal framework for resolving corporate insolvency and plays a crucial role in the management of distressed assets, non-performing assets (NPAs), and fraud containment within the banking sector. By consolidating various fragmented laws into a single, streamlined process, the IBC facilitates a time-bound resolution mechanism aimed at maximizing the value of distressed assets and providing a structured pathway for debt recovery and restructuring. This has contributed to reducing the accumulation of NPAs and enhancing transparency and oversight and thereby mitigating opportunities for fraud in bank transactions and corporate governance. Despite these strengths, the IBC faces challenges such as protracted resolution timelines and comparatively low recovery rates for some creditors, indicating the necessity for ongoing reforms¹. Furthermore, while the code acknowledges cross-border insolvency and foreign proceedings, it currently lacks a comprehensive legislative regime that fully integrates cross-border insolvency with international arbitration standards. This gap is particularly relevant to the evolving context of cross-border insolvency and arbitration in India, which remains an important area for development to align India's Insolvency framework with global best practices. This analysis underscores the foundational impact of IBC on India's insolvency ecosystem while highlighting critical areas aligned with my research on cross-border insolvency and arbitration under the IBC framework. Prior to 2016, India's insolvency was shaped by a patchwork of laws, such as the Sick Industrial Companies (Special Provisions) Act, the Recovery of Debts Due to Banks and Financial Institutions Act, the Companies Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act. Inefficient recovery processes and mounting non-performing assets in the banking sector spurred a need for systematic reform.

The deficiencies exposed by India's prior insolvency regime, notably the excessively protracted resolution timelines and the suboptimal recoveries highlighted in the World Bank's annual Ease of Doing Business reports, exerted a profound influence on India's investment environment and the overall availability of credit in the economy. The convoluted web of disparate, often conflicting laws governing corporate distress led to unpredictability and inefficiency, thereby discouraging both domestic and foreign investors and contributing to the escalating burden of non-performing assets across India's banking sector². In response to these systematic impediments, the objective became clear: to institute a

¹ Mahender Pal Arora & Vikalp Shrivastava, *A Critical Review of Corporate Insolvency Resolution Process Under India's Insolvency and Bankruptcy Code, 2016 in Resolution of Distressed Assets and Containment of Non-Performing Assets and Reduction in Occurrence of Frauds of Banks in India*, 11 RUSSIAN L.J. 485, 486–87 (2023).

² Williams C. Iheme, *Remedying the Defects in India's Credit and Insolvency Frameworks with Adapted Solutions from the Anglo-American Legal Scholarships*, 11 PRAVNI ZAPISI 580, 581–610 (2020).

unified, swift, and predictable mechanism for the resolution of insolvency and bankruptcy that would apply uniformly to corporate entities, partnerships, and individuals. It was in this context that the Bankruptcy Law Reforms Committee (BLRC), established by the Ministry of Finance in 2014, played a vital role in shaping substantive reform. The BLRC critically evaluated the existing landscape and identified protracted delays as the principal obstacle to effective resolution and value maximization. The committee's recommendations centered on creating a singular, comprehensive legislative framework underpinned by firm statutory timelines for the resolution of insolvency proceedings. This vision was operationalized through the introduction of the draft bill of Insolvency and Bankruptcy in Parliament in 2015. Following parliamentary scrutiny and debate, the legislation was enacted and brought into force in May 2016. The IBC thus represented a transformative departure from the prior fragmented regime, laying the foundation for a modern Insolvency law in India premised on efficiency, predictability, and global best practices. This paper aims to clarify why a comprehensive group insolvency framework is necessary and how the existing UNCITRAL Model Law on Cross-border Insolvency (MLCBI) can supplement and enhance it.

2 UNDERSTANDING GROUP INSOLVENCY

The Insolvency and Bankruptcy Code (IBC 2016) operates as a comprehensive legal framework that regulates insolvency resolution and bankruptcy proceedings in India for companies, partnerships, and individuals. It replaces a fragmented and inconsistent set of laws with a streamlined, creditor-led mechanism aimed at expediting the insolvency process³. Under the IBC, insolvency proceedings are initiated through a formal application, triggering the appointment of a licensed insolvency professional who manages the debtor's assets and business operations during the resolution phase⁴. The code emphasizes a strict timeline for completion, generally 180 days, with a possible extension up to 270 days - ensuring that insolvency resolution does not drag on indefinitely⁵. If no resolution plan is approved by the Committee of creditors within this timeframe, the company will undergo liquidation to safeguard creditors' interests⁶. The Insolvency and Bankruptcy Board of India (IBBI) serves as the regulatory authority overseeing insolvency professionals, processes, and information utilities, fostering transparency and accountability throughout the insolvency ecosystem. The IBC fundamentally shifts control from the debtor to creditors, who exercise influence through the committee of creditors and hold the authority to approve or reject resolution

³ Insolvency and Bankruptcy Code, 2016, § 6.

⁴ *Id.* §§ 16, 17.

⁵ *Id.* § 12.

⁶ *Id.* § 33.

plans⁷, marking a departure from traditional debtor-in-possession and strengthening creditor confidence in India's insolvency law.

The UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997, was created to equip states with a modern, harmonized, and equitable legal framework for addressing instances of cross-border insolvency involving debtors facing severe financial distress. Its fundamental purpose is to facilitate effective legal cooperation between courts and authorities of different countries, ensure legal certainty for trade and investment, enable fair and efficient administrations of cross-border insolvencies, protect the interests of all creditors and stakeholders, and maximize the value of the debtor's assets. The model law is structured into four main parts, focusing on access, recognition, cooperation, and coordination, and serves as a reference for national authorities seeking to modernize their insolvency regimes. Accompanying resources, such as the 2009 Practice Guide and the 2013 Judicial perspective, offer practical guidance for courts and insolvency practitioners. Importantly, the model law does not unify substantive insolvency law but introduces a robust procedural mechanism for dealing with concurrent insolvency proceedings across jurisdictions. Recognizing the evolution of insolvency practices, UNCITRAL also adopted the model law on recognition and Enforcement of insolvency-related judgments in 2018, providing a formal framework for the recognition and enforcement of cross-border insolvency judgments to further promote certainty and efficiency in multinational insolvency cases⁸. The term Corporate group or enterprise group refers to a number of companies consisting of parent and subsidiary companies, or generally, two or more distinct legal entities linked through either direct or indirect forms of control or ownership⁹. Such groups are common in cross-border insolvencies, given that they often have branches or separate legal entities in different countries. The need for a comprehensive group insolvency framework in India is increasingly evident as interconnected corporate groups and cross-border business operations become the norm in the modern economy. High-profile cases such as IL&FS and Videocon have revealed how the current entity-based approach under the Insolvency and Bankruptcy Code (IBC) leads to protracted timelines, fragmented resolution, and value erosion as group entities must undergo separate proceedings despite intertwined financial obligations and operations¹⁰. Business press and policy analyses have consistently

⁷ *Id.* § 30.

⁸ G.A. Res. 52/158, annex, UNCITRAL Model Law on Cross-Border Insolvency, U.N. GAOR, 52d Sess., Supp. No. 17, U.N. Doc. A/52/17 (1997).

⁹ Nora Wouters & Alla Raykin, *Corporate Group Cross-Border Insolvencies Between the United States & European Union: Legal & Economic Developments*, 29 EMORY BANKR. DEV. J. 387 (2013).

¹⁰ D. Chakraborty, *Group Insolvency Framework: When One Is Not for All*, NEW INDIAN EXPRESS (2025), <https://www.newindianexpress.com/opinions/2025/Jun/04/group-insolvency-framework-when-one-is-not-for-all> (last visited July 27, 2025).

highlighted that a unified group insolvency mechanism promises significant benefits, including improved recovery rates, preservation of enterprise value, and greater procedural efficiencies for creditors and stakeholders¹¹. Indian scholars and insolvency practitioners emphasize that addressing group insolvency is essential to reflect the commercial realities of complex business groups, where a default in one entity often triggers systemic distress across affiliates¹². There is now a broad academic and policy consensus that India should shift from a rigid company-by-company resolution model toward approaches that enable procedural coordination, joint hearings, and even substantive consolidation – thereby aligning local practice with global standards such as those espoused by the UNCITRAL Model Law on Enterprise Group Insolvency¹³. A coordinated insolvency process for enterprise groups is crucial to maximizing overall enterprise value, ensuring consistent legal application, equitable treatment of creditors, procedural fairness, employment protection, and respecting each entity's separate legal status. The most effective method is a centralized proceeding that reduces costs, expedites resolution, and provides a single forum for decision-making, while preventing unilateral actions that may harm collective interests. However, challenges include respecting creditors' diverse rights under national laws, aligning conflicting interests, and safeguarding national sovereignty. Existing group insolvency solutions vary; joint proceedings facilitate procedural consolidation without merging assets, and substantive consolidation merges estates but is rarely used due to its drastic legal impact. Cross-Border coordination is enhanced by the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI), which promotes cooperation, foreign representative access, and recognition of foreign proceedings. Furthermore, the UNCITRAL Model Law on Enterprise Group Insolvency (2019) specifically addresses group insolvency issues, complementing the MLCBI framework. Together with the UNCITRAL Legislative Guide and Practice Guide, these provide a foundation for harmonized and effective cross-border insolvency resolution¹⁴.

Implementing a single, unified insolvency proceeding for corporate groups is challenging due to differing national laws, creditor interests, and respect for sovereignty. To address these challenges, mechanisms such as joint proceedings, which consolidate procedural aspects while maintaining separate estates, are common in the U.S. and Canada but less so in

¹¹ M. Behura, *IBC 2.0: India Greenlights Game-Changing Group Insolvency Framework*, ETLEGALWORLD.COM (2025), <https://legal.economictimes.indiatimes.com/news/law-policy/ibc-2-0-india-greenlights-game-changing-group-insolvency-framework/122183321> (last visited July 27, 2025).

¹² *Group Insolvency: Harnessing Synergies*, Chairperson's Desk, Insolvency and Bankruptcy Board of India (IBBI) (2023) (on file with author).

¹³ Vivek Saurav & Dr. Bhanu Saxena, *Navigating Group Insolvency in India: Analyzing Implementation Challenges and Enterprise Dynamics for Modern Day Business Structure* (Jan. 17, 2024).

¹⁴ *Insolvency*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, <https://uncitral.un.org/en/texts/insolvency>.

Europe. Substantive consolidation, which merges assets and liabilities, is rare and reserved for exceptional cases with inseparable entities. Coordination mechanism, notably established by the UNCITRAL Model Law on Cross-Border Insolvency, facilitates cross-border judicial cooperation and recognition of foreign proceedings. Additionally, the UNCITRAL Model Law on enterprise group insolvency offers tailored solutions for group Insolvencies, promoting coordinated planning and restructuring. Together, these frameworks strive to balance efficiency, creditor protection, and sovereignty in cross-border insolvency cases.

3 LEGAL FRAMEWORK ON CROSS-BORDER INSOLVENCY IN INDIA

India's approach to cross-border insolvency is currently governed by Sections 234 and 235 of the Insolvency and Bankruptcy Code (IBC)¹⁵, which enable but do not operationalize cooperation with foreign jurisdictions. Section 234 allows the government to enter into bilateral agreements for mutual recognition and enforcement of insolvency proceedings, while Section 235 permits Indian courts to issue letter of request to foreign court concerning debtor assets abroad but only where reciprocity exists. While promoting the spirit of cooperation, its lacunae include no specific provisions outlining the manner of cooperation between local authorities and foreign court/authorities, no mechanism for dealing with the coordination of concurrent proceedings. In practice, India has not concluded any such bilateral agreements, rendering these provisions largely ineffective and causing fragmentation, delays, and inconsistent outcomes in multinational insolvency cases¹⁶. In order to address these gaps, the Insolvency Law Committee's 2018 draft "Part Z" proposes a comprehensive legislative framework based on the UNCITRAL Model Law¹⁷, emphasizing access for foreign representatives, recognition of foreign proceedings, relief and cooperation, with a notable public policy exception to prevent abuse. Similar to Article 17 of the Model law, it distinguishes between foreign main proceedings (based on COMI) and foreign non-main proceedings (based on establishment).

However, this draft excludes provisions for group insolvency, focusing only on individual entities and failing to address the interconnected realities of modern enterprise groups¹⁸. Indian courts have responded proactively to these legislative shortcomings. In *Jet Airways*, for example, the NCLAT initiated unprecedented cross-border judicial cooperation by

¹⁵ Insolvency and Bankruptcy Code, 2016, §§ 234, 235.

¹⁶ A. Rathore, *Navigating Cross-Border Insolvency: Evaluating India's Legal Framework and the UNCITRAL Model Law 2014 - NLIU Law Review*, NLIU REVIEW (2024), <https://nliulawreview.nliu.ac.in/blog/navigating-cross-border-insolvency-evaluating-indias-legal-framework-and-the-uncitral-model-law-2014/> (last visited July 27, 2025).

¹⁷ A. Avashia, *Cross-Border Insolvency in India – by Aditi Avashia*, IBC LAWS (2023), <https://ibclaw.in/cross-border-insolvency-in-india-by-aditi-avashia/> (last visited July 27, 2025).

¹⁸ D. Kumar, *Cross Border Insolvency Regime in India: Draft Part Z Vis A Vis the UNCITRAL Model Law*, 1 J.L. BUS. & ECON. 104–22 (2022).

approving a protocol with the Dutch trustee, allowing foreign participation in creditors' meetings and demonstrating judicial flexibility in the absence of a formal mechanism¹⁹. Similarly, the Videocon and IL&FS group insolvency cases saw the NCLT and NCLAT apply group-based resolution principles and frameworks out of necessity, despite a lack of express statutory backing, thereby advancing judicial intervention in addressing complex domestic and cross-border group insolvency scenarios.

The Indian Insolvency regime under the Insolvency and Bankruptcy Code, 2016, currently lacks a comprehensive framework for cross-border insolvency, relying instead on Sections 234 & 235, which enable reciprocal agreement and issuance of letters of request to foreign courts. This lacuna has been highlighted in complex cases involving multinational corporate groups, such as the consolidation proceedings concerning Videocon Group companies before the NCLT, Mumbai Bench. The tribunal, while addressing substantive consolidation of multiple CIRPs, acknowledged global practices, including UNCITRAL Model Law and comparative jurisprudence from the U.S. and E.U., to emphasize the need for a structured approach for group cross-border insolvency²⁰. The Judgment reflects the judiciary's recognition that the absence of clear statutory provisions creates challenges in achieving value maximization and coordinated resolution, thereby underscoring legislative urgency for adopting a model cross-border framework aligned with international best practices.

3.1 Indian Jurisprudence on Group and Cross-Border Insolvency

The Jet Airways case represents a landmark instance of ad hoc cross-border cooperation between the Indian NCLT and a Dutch Bankruptcy Trustee. The NCLAT's decision to permit the Dutch administrator's participation and finalize a cross-border insolvency protocol highlighted the court's willingness to innovate and coordinate in the absence of explicit legislative backing. In India there is no explicit legislative framework that governs such coordination. When parallel insolvencies were initiated – one in India and another in the Netherlands – the National Company Law Appellate Tribunal (NCLAT) approved an innovative protocol between jurisdictions despite initial refusal by the National Company Law Tribunal (NCLT) to recognize foreign proceedings. The NCLAT's order on September 26, 2019, formalized this cooperation, marking a significant judicial step towards cross-border insolvency coordination in India and demonstrating a proactive, pragmatic approach by Indian courts in line with International best practices, even in the absence of enabling

¹⁹ A. Yadav, *The Insolvency and Bankruptcy Code at Play: Jet Airways' Legal Battle for Survival*, AY ASSOCIATES (2024), <https://ayassociates.in/2024/11/13/insolvency-and-bankruptcy-code-at-play/> (last visited July 27, 2025).

²⁰ *State Bank of India v. Videocon Indus. Ltd.*, MA 1306 of 2018 (NCLT Mum. Aug. 8, 2019).

legislation²¹. One of the most significant judgments in the realm of cross-border group insolvency is the decision in Eurofood IFSC Ltd. In this landmark ruling, the European Court of Justice (ECJ) addressed the determination of a corporate group member's Centre of Main Interests under the European Insolvency Regulation. The ECJ affirmed that the presumption of COMI being located at the company's registered office is exceptionally strong and can only be rebutted by objective and ascertainable evidence – such as the place of actual management – clearly visible to third parties. This judgment profoundly influenced how insolvencies of multinational corporate groups are handled in Europe, making procedural consolidation far more difficult and typically resulting in separate proceedings for each group entity. The Eurofood ruling underscored the primacy of legal certainty and predictability for creditors in cross-border insolvency, while also highlighting the challenge of aligning legal form with commercial reality in complex group structures²². In another case, the²³ English court refused to recognize a U.S. court-appointed receiver as a foreign representative or the proceedings as a collective proceeding, citing the involvement of the Securities and Exchange Commission to prevent fraud. This illustrates potential challenges when proceedings do not align with “collective proceeding” definitions in other jurisdictions.

4 NEED FOR LEGISLATIVE REFORM IN INDIA

The persistent fragmentation of insolvency proceedings for group companies in India – largely stemming from the inadequacy of sections 234 and 235 of the Insolvency and Bankruptcy Code – creates considerable legal uncertainty, prolongs the resolution process, and increases the risk of inconsistent outcomes due to forum shopping. The lack of a unified approach means parallel proceedings across multiple jurisdictions are common, driving up costs and undermining judicial efficiency. This disjointed system also complicates the administration of parallel arbitration and insolvency cases, as reflected in examples like the Nortel Networks case, where litigation lingered even post-asset sales. For creditors, especially those abroad, these inefficiencies erode confidence over the discretionary and potentially expansive interpretation of the public policy exception in the IBC's proposed cross-border provisions. Moreover, despite the IBC's commitment to swift resolution, data reveal that a lengthy average resolution period persists, undermining both the effectiveness and

²¹ B. Indulia, Editor & Ridhi, *NCLAT: Joint CIRP Against Jet Airways to Continue, Dutch Trustee Allowed to Attend COC Meetings as Observer*, SCC TIMES (2019), <https://www.sconline.com/blog/post/2019/10/07/nclat-joint-cirp-against-jet-airways-to-continue-dutch-trustee-allowed-to-attend-coc-meetings-as-observer/> (last visited July 27, 2025).

²² Nora Wouters & Alla Raykin, *Corporate Group Cross-Border Insolvencies Between the United States & European Union: Legal & Economic Developments*, 29 EMORY BANKR. DEV. J. 387 (2013).

²³ Samuel L. Bufford, *International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies*, 12 COLUM. J. EUR. L. 429 (2006), <https://cjel.law.columbia.edu/print/2006/international-insolvency-case-venue-in-the-european-union-the-parmalat-and-daisytek-controversies/?cn-reloaded=1>.

predictability of the process. Experience from comparative cases such as KPNQwest and General Growth Properties²⁴ underscores that coordinated, group-wide proceedings not only foster economic efficiency and value maximization but are also vital for the robust protection of stakeholder interests in complex, transnational insolvencies. In contrast, the U.S. case of *In re General Growth Properties Inc.* highlights the benefits and controversies of coordinated group insolvency. General Growth, a real estate investment trust with hundreds of subsidiaries, filed for Chapter 11 bankruptcy for both the parent and its special purpose entities (SPEs). Despite objections from lenders who argued that solvent subsidiaries should not be swept into bankruptcy, the court permitted joint proceedings, citing the interconnected cash management and cross-default provisions among group entities. Ultimately, the bankruptcy court denied motions to dismiss the bankruptcies of the SPEs, permitting a centralized restructuring that prioritized the interests of the entire corporate group and resulted in full creditor recovery. This decision established a precedent for pragmatic, group-wide solutions in complex insolvencies, even where entity separateness would otherwise dictate fragmented processes²⁵.

International best practices in cross-border and group insolvency illustrate the importance of robust, coordinated frameworks. The UK, through its adoption of the UNCITRAL Model Law and case law such as *Collins & Aikman*, demonstrates the efficacy of centralized proceedings for corporate groups, promoting efficient restructuring and value maximization across multiple jurisdictions. However, the UK Supreme Court's decision in *Rubin v. Eurofinance*²⁶ clarified that while the Model Law aids recognition of insolvency proceedings, it does not authorize enforcement of foreign judgments in personam against third parties, thereby outlining significant limitations even in advanced regimes. Singapore's insolvency framework²⁷ represents a modern, flexible approach aligned with international standards. It centralizes corporate and personal insolvency laws, restricts contract-terminating clauses triggered by insolvency (ipso facto protection), and improves judicial management of transnational cases, serving as a model for legislative growth. The United States, by incorporating the UNCITRAL Model Law as chapter 15 and permitting both procedural and substantive consolidation under its Bankruptcy Code²⁸ allows complex corporates to

²⁴ Eva M.F. de Vette, *Multinational Enterprise Groups in Insolvency: How Should the European Union Act?*, 7 UTRECHT L. REV. 216 (2011), <https://www.utrechtlawreview.org/articles/10.18352/ulr.145/galley/145/download> (last visited July 29, 2025).

²⁵ *In re Gen. Growth Props., Inc.*, 409 B.R. 43 (Bankr. S.D.N.Y. 2009).

²⁶ *Rubin v. Eurofinance* (2012), <https://www.supremecourt.uk/cases/uksc-2010-0184> (last visited 2025).

²⁷ Insolvency, Restructuring and Dissolution Act 2018, Act 40 of 2018.

²⁸ Ministry of Law, *Insolvency, Restructuring and Dissolution Act to Commence on 30 July 2020* (2020), <https://www.mlaw.gov.sg/news/press-releases/2020-07-23-insolvency-restructuring-and-dissolution-act-commencement/> (last visited July 27, 2025).

reorganize through joint or, in rare cases, fully consolidated proceedings if their finances are inextricably linked. This flexibility sets a useful precedent for legislative reform²⁹.

The experience of Indian courts, particularly evidenced by the Jet Airways case, shows that innovative, pragmatic judicial solutions can bridge statutory gaps in cross-border group insolvency, but this reliance on ad hoc interventions and judicial discretion lacks the consistency, predictability, and international alignment essential for effective insolvency resolution in today's interconnected commercial world. Codifying a comprehensive legislative framework for group cross-border insolvency, drawing on international best practices like the UNCITRAL Model Law, would ensure uniformity, strengthen international cooperation, and provide clear mechanisms for recognizing and enforcing foreign proceedings. Implementing such reforms is crucial not only to boost creditor and investor confidence, but also to safeguard asset value and streamline insolvency processes, positioning India as a reliable, modern jurisdiction for global business and financial stability³⁰.

5 CROSS-BORDER INSOLVENCY & ARBITRATION OVERLAP

Since the current framework under the IBC, the Arbitration and Conciliation Act, 1996, and the New York Convention³¹ function relatively independently in India, the intersection of cross-border insolvency and international arbitration presents particular legal and procedural challenges. The conflict results from the fact that arbitration is a private, party-driven procedure intended to settle disagreements between agreeing parties, while insolvency is fundamentally a collective enforcement mechanism intended to achieve fair distribution among creditors. Cross-border situations, where domestic insolvency orders and foreign arbitral awards may directly conflict, amplify this dichotomy³².

6 CONFLICT BETWEEN ARBITRATION AWARDS AND INSOLVENCY PROCEEDINGS

In 2015, in the case of *Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd.*³³, the Bombay High Court ruled that insolvency supersedes contractual arbitration

²⁹ J. Whiteoak, *UK Supreme Court Refuses to Enforce US Judgment Made in Insolvency Proceedings Against English Resident Defendants* | *Litigation Notes*, HERBERT SMITH FREEHILLS KRAMER (Nov. 1, 2012).

³⁰ *UK Supreme Court Refuses to Enforce US Judgment Made in Insolvency Proceedings Against English Resident Defendants*, HSFNOTES (Nov. 1, 2012), <https://hsfnotes.com/litigation/2012/11/01/uk-supreme-court-refuses-to-enforce-us-judgment-made-in-insolvency-proceedings-against-english-resident-defendants/>.

³¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958), 330 U.N.T.S. 3 (entered into force June 7, 1959).

³² Devna Arora & Didon Misri, *The Intersection Between Arbitration and Insolvency Proceedings: An Indian Perspective*, SCC TIMES (Jan. 1, 2023).

³³ *Addhar Mercantile Pvt. Ltd. v. Shree Jagdamba Agrico Exports Pvt. Ltd.*, Arbitration Application No. 197 of 2014 & Arbitration Petition No. 910 of 2013 (Bomb. H.C. June 12, 2015).

clauses and refused to refer parties to arbitration under Section 8 of the Arbitration Act³⁴, after winding-up proceedings had been started under the Companies Act. Despite existing before the IBC, Addhar Mercantile's tenet, that insolvency procedures take precedence over arbitration in cases where the two are incompatible, continues to shape judicial reasoning.

Similar challenges occur in cross-border insolvency instances when the moratorium under Section 14 of the IBC³⁵ conflicts with a foreign arbitral award that is enforceable under Part II of the Arbitration Act. In *Power Grid Corporation of India Ltd. v. Jyoti Structures Ltd.* (2017), the Delhi High Court made it clear³⁶ that during insolvency, arbitral proceedings may proceed as long as they do not impact the corporate debtor's assets. However, if an award interferes with the insolvency estate, its enforceability is automatically halted.

7 ENFORCEABILITY ISSUES WITH FOREIGN ARBITRAL AWARDS DURING INSOLVENCY

India's obligations under the New York Convention require recognition and enforcement of foreign arbitral awards, subject to limited defences under Section 48 of the Arbitration Act³⁷, most notably the "public policy" exception. When insolvency proceedings are pending, courts have invoked this exception to stay or refuse enforcement of awards that would disrupt the collective claims process. In cross-border situations, this creates uncertainty for foreign creditors, especially where the seat of arbitration and the insolvency jurisdiction differ, as illustrated in the *Swiss Ribbons Pvt. Ltd. v. Union of India*³⁸ (2019), reasoning that insolvency objectives have a higher systemic priority.

In comparison, nations with more explicit statutory guidance on the relationship between insolvency and arbitration, such as Singapore (under the Insolvency, Restructuring and Dissolution Act 2018)³⁹ and the UK (under the Cross-Border Insolvency Regulations 2006)⁴⁰, frequently give the insolvency court the authority to either stay or allow arbitral enforcement based on whether doing so would benefit all creditors.

³⁴ Arbitration and Conciliation Act, 1996, § 8.

³⁵ Insolvency and Bankruptcy Code, 2016, § 14.

³⁶ *Power Grid Corp. of India v. Jyoti Structures Ltd.*, O.M.P. (Comm.) 397 of 2016 (Del. H.C. Dec. 11, 2017).

³⁷ Arbitration and Conciliation Act, 1996, § 48.

³⁸ *Swiss Ribbons Pvt. Ltd. v. Union of India*, Writ Petition (Civil) No. 99 of 2018, (2019) 3 SCR 535.

³⁹ Insolvency, Restructuring and Dissolution Act 2018, No. 40, 2018 (Sing.).

⁴⁰ Cross-Border Insolvency Regulations 2006, SI 2006/1030 (UK).

8 BLENDING IN PUBLIC POLICY CONSIDERATIONS

The difficulty is in balancing the contractual autonomy that supports arbitration with the “creditor equality” principle of the IBC. India’s support for arbitration, which has been upheld in cases such as *BALCO v. Kaiser Aluminium* (2012)⁴¹ and *Vijay Karia v. Prysmian Cavi* (2020)⁴², must be balanced with the public policy aspect of insolvency, which ensures value maximization and equitable distribution⁴³. Courts continue to make decisions on an individual basis in the absence of statutory clarification, leaving cross-border stakeholders in the dark.

A harmonized approach could include:

- Statutory clarification that foreign arbitral awards made against an insolvent debtor must first be approved by the adjudicating authority or resolution professional and then be subject to a moratorium⁴⁴ before they can be enforced.
- Using the UNCITRAL Model Law on Cross-Border Insolvency,^{45,46} protocols for parallel insolvency and arbitration proceedings are recognized.
- Frameworks for judicial cooperation that minimize duplication and conflicting orders by enabling insolvency courts⁴⁷ to communicate with arbitral tribunals in multi-jurisdictional disputes.

India can be a part of a group of countries that have effectively struck a balance between the public policy requirements of insolvency and the effectiveness and finality of arbitration by enacting legislation that codifies these principles. This would decrease forum shopping and improve predictability for international investors.

⁴¹ *Bharat Aluminium Co. v. Kaiser Aluminium Technical Servs. Inc.*, Civil Appeal No. 7019 of 2005 (S.C. Sept. 6, 2012).

⁴² *Vijay Karia v. Prysmian Cavi e Sistemi S.r.l.*, Civil Appeal No. 1544 of 2020 (S.C. Feb. 13, 2020).

⁴³ *De-Coding Value Maximisation Under the Code*, SHARDUL AMARCHAND MANGALDAS & CO. (July 15, 2019), <https://www.amsshardul.com/insight/de-coding-value-maximisation-under-the-code/>.

⁴⁴ *All About Moratorium Under Section 14 of the Insolvency and Bankruptcy Code, 2016 Including Judicial Pronouncements*, IBC LAWS (Sept. 25, 2020), <https://ibclaw.in/all-about-the-moratorium-under-ibc-including-judicial-pronouncements/>.

⁴⁵ U.N. *Comm’n on Int’l Trade L.*, Consolidated Text of the UNCITRAL Model Laws on Cross-Border Insolvency, Recognition and Enforcement of Insolvency-Related Judgments, and Enterprise Group Insolvency (2021) (UNCITRAL guidance note and illustrative text).

⁴⁶ U.N. *Comm’n on Int’l Trade L.*, UNCITRAL Model Law on Cross-Border Insolvency, adopted May 30, 1997, U.N. Doc. MLCBI (1997).

⁴⁷ *Need for International Harmonisation of Cross-Border Insolvency Laws: Challenges and Prospects*, SCC TIMES (Apr. 19, 2024), <https://www.sconline.com/blog/post/2024/04/19/need-for-international-harmonisation-of-cross-border-insolvency-laws/>.

9 PROPOSAL FOR A HARMONIZED GROUP CROSS-BORDER INSOLVENCY

A progressive legislative conception must be developed according to the fundamental shortcomings in India's management of group and cross-border insolvency, especially the lack of statutory provisions for enterprise groups. The objective should be to bring the IBC into line with international best practices while tackling issues unique to India, like the backlog of cases in court, the existence of multinational corporations, and the rise in cross-border business dealings.

9.1 Adoption of the UNCITRAL Model Law on Enterprise Group Insolvency (2019)

The 1997 Model Law is expanded upon by the UNCITRAL Model Law on Enterprise Group Insolvency⁴⁸, which respects each entity's distinct legal personality while introducing particular tools for the coordinated management of group insolvencies. It includes the following: First, the protocols and agreements for judicial and practitioner cooperation; then, the group representatives to communicate with courts and insolvency practitioners across jurisdictions⁴⁹ and planning proceedings in one jurisdiction to coordinate restructuring across multiple group entities.

As research for the draft of the 2019 Model Law's versatility to both common law and blended legal systems, nations like Singapore and Australia have already included elements of the model law into their respective domestic laws⁵⁰. Adoption in India, perhaps through a particular part of the IBC, would fill the legal void and provide clarity in situations involving global corporations with assets and operations scattered across borders, like the insolvencies of Jet Airways⁵¹ and Videocon groups⁵².

⁴⁸ U.N. Comm'n on Int'l Trade L., UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment, adopted July 15, 2019 (U.N.).

⁴⁹ The Insolvency Service (UK), *Implementation of Two UNCITRAL Model Laws on Insolvency (UK)* (July 7, 2022, updated July 10, 2023), <https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency>.

⁵⁰ Omar Hisham Al Hyari & Abdullah Rabee Al Ani, *Post-Award Arbitral Tribunal's Mandate Under the UNCITRAL Model Law and National Laws Based Thereon*, 7 HELIYON e07556 (July 2021), <https://doi.org/10.1016/j.heliyon.2021.e07556>.

⁵¹ State Bank of India v. Jet Airways (India) Ltd., C.P. (IB) No. 2205 of 2019 (NCLT Mum. Bench filed June 18, 2019).

⁵² State Bank of India v. Videocon Indus. Ltd., MA 2385 of 2019 in CP(IB)-02/MB/2018, (2020) ibclaw.in 158 NCLT (NCLT Mum. Bench Feb. 12, 2020) (per Smt. Suchitra Kanuparthi, Member (Judicial) & Chandra Bhan Singh, Member (Technical)).

9.2 Amendments to the IBC

9.2.1 *Introduction of Group Insolvency Resolution Mechanisms*

The lack of a framework for the integrated resolution of group enterprises was recognized by the Insolvency Law Committee in its 2021 Report on Group Insolvency⁵³. Based on UNCITRAL's guidelines and the Committee's recommendations, the IBC ought to incorporate:

- Joint application provisions that enable multiple group companies to file for bankruptcy under a single resolution plan in situations where any kind of dependency like managerial, operational, or financial is established.
- In rare instances, such as the U.S. case of *In re General Growth Properties Inc.*⁵⁴, where assets and liabilities are so entwined that separation would be illogical, substantive consolidation may be used.
- Similar to the UK's approach in *Collins & Aikman*, procedural coordination for distinct insolvency proceedings is necessary to prevent duplication and conflicting decisions⁵⁵.

9.2.2 *Judicial Cooperation Clauses*

Express judicial interaction provisions based on Article 25 of the UNCITRAL Model Law⁵⁶ should be incorporated into Sections 234 and 235 of the IBC. This would enable Indian courts to:

- a) Deal directly with insolvency representatives and foreign courts.
- b) Express approval to cross-border insolvency procedures (like the Jet Airways cooperation protocol between the Dutch Bankruptcy Trustee and the NCLT Mumbai).
- c) Subject to reciprocity, acknowledge and support foreign main and non-main proceedings without the need for bilateral treaties.

⁵³ COMM. TO EXAMINE THE ISSUES RELATED TO GROUP INSOLVENCY, REPORT OF THE COMMITTEE TO EXAMINE THE ISSUES RELATED TO GROUP INSOLVENCY AND THE UNCITRAL MODEL LAW ON ENTERPRISE GROUP INSOLVENCY (Dec. 2021).

⁵⁴ *In re Gen. Growth Props., Inc.*, 409 B.R. 43 (Bankr. S.D.N.Y. 2009).

⁵⁵ Craig Montgomery, Alex Thomson & Anna Agnello, *UK Model Law Consultation: Gibbs Preserved, Rubin Overruled*, FRESHFIELDS TRANSACTIONS (U.K.) (July 12, 2022), <https://transactions.freshfields.com/post/102hsos/uk-model-law-consultation-gibbs-preserved-rubin-overruled>.

⁵⁶ UNCITRAL Model Law on Cross-Border Insolvency art. 25 (1997).

9.2.3 Coordination with Cross-Border Arbitrations

Due to frequent clashes in insolvency and arbitration in international disputes, the IBC should specifically address: Initially acknowledging ongoing arbitral proceedings and the procedures for extending, halting, or incorporating them into the process of resolution. Furthermore, priority rules make it clear that, to prevent asset depletion, enforcement of foreign arbitral awards against an insolvent debtor must be subject to a moratorium and adjudicating authority approval⁵⁷. These provisions suggest procedural safeguards that would allow the two systems to coexist without compromising their respective goals.

9.3 Mechanism for Appointment of a Single Resolution Professional for Group Companies

The appointment of a single resolution professional (RP) can guarantee effectiveness, reduce expenses, and avoid competing tactics in situations where group companies have interconnected operations. The following should be part of the RP's mandate⁵⁸:

- Centrally controlled gathering of data among group companies to identify shared assets, cross-guarantees, and intercompany claims.
- Development of a coordinated resolution strategy that strikes a balance between maximizing group value and protecting the rights of individual creditors.
- The right to request court orders for joint hearings in cases where disagreements or approvals impact several group members.

This model is supported by international examples, as seen in the UK's Lehman Brothers⁵⁹. The Coordinated administrators used centralized strategies to manage cross-border entities and in order to facilitate restructuring, Singapore's courts have designated a single judicial manager for affiliated businesses.

9.4 Benefits of a Harmonized Framework

Implementing this integrated model would:

- Boost accuracy and predictability in complicated insolvencies involving multinational corporations with Indian assets.

⁵⁷ *Impact of Insolvency on Ongoing Arbitrations: A Brief Overview of the Legal Framework in India*, IBC LAWS, <https://ibclaw.in/impact-of-insolvency-on-ongoing-arbitrations-a-brief-overview-of-the-legal-framework-in-india-by-adv-pallavi-agrawalla/>.

⁵⁸ Rajeshwar Rao, *Strengthening the Insolvency and Bankruptcy Code (IBC) Framework for Effective Resolution*, speech delivered at the International Conclave (Insolvency & Bankruptcy Board of India/INSOL India), New Delhi (Dec. 7, 2024), BANK FOR INT'L SETTLEMENTS (Dec. 19, 2024), <https://www.bis.org/review/r241218g.htm>.

⁵⁹ *Lehman Bros. Holdings Inc. v. Joint Administrators of Lehman Bros. Int'l (Europe)*, [2017] UKSC 38 (appeal taken from Eng.).

- Increase the confidence of creditors and investors, especially those international parties who are cautious of India's present scattered strategy.
- Since parties would have clear statutory guidance for both domestic and cross-border disputes, there would be less litigation and forum shopping.
- Boost India's standing as a commercially reliable jurisdiction that adheres to the globally recognized insolvency standards set forth by UNCITRAL.

India would transition from depending on judicial spontaneity to a foreseeable, rule-based system that could manage the realities of globalized trade by codifying such a uniform legal framework⁶⁰. This is a strategic reform, not just a technical fix, that is necessary to incorporate India's insolvency regime into the global financial and legal system.

10 ANTICIPATED BENEFITS OF REFORM

Adopting a unified legal framework for group and cross-border insolvency in India that incorporates the UNCITRAL Model Law on Enterprise Group Insolvency, IBC amendments, and organized arbitration coordination would benefit the economy and stakeholders in plenty of ways.

10.1 Value Maximization and Reduced Litigation

Rather than merely dispersing assets through slow liquidation, a coordinated insolvency framework⁶¹ would enable the strategic restructuring of entire enterprise groups, maintaining going-concern value. A single resolution professional and joint resolution procedures can maximize asset sales, prevent duplication of effort, and find synergies among group companies.

10.2 Creditor Recoveries

Simplified group insolvency procedures ensure creditors receive an accurate and transparent distribution process while halting the reduction of the debtor's asset base. The process integration can lead to significantly higher creditor recoveries⁶² than isolated proceedings. Cross-border cooperation protocol's predictability and enforceability give international creditors more confidence to invest in and lend money to Indian companies.

⁶⁰ *India, Cross-Border Insolvency and Legal Reform*, CIVILSDAILY, <https://www.civildaily.com/news/india-cross-border-insolvency-and-legal-reform/>.

⁶¹ *SC Ruling on Liquidation Delays: Implications for Corporate Insolvency Resolution*, ET LEGALWORLD (Nov. 13, 2024), <https://legal.economictimes.indiatimes.com/news/litigation/sc-ruling-on-liquidation-delays-implications-for-corporate-insolvency-resolution/115229173>.

⁶² REPORT OF THE STANDING COMMITTEE ON FINANCE (2024–25) ON INSOLVENCY AND BANKRUPTCY LAW AND NCLT & NCLAT, Eighteenth Lok Sabha, Ministry of Corporate Affairs (Dec. 11, 2024).

10.3 Strengthening India's Global Image in Ease of Doing Business and Cross-Border Trade

An effective insolvency regime is crucial for attracting investment, in line with reports and rankings of the World Bank's Ease of Doing Business. India's standing in international trade and capital markets could grow if it embraced an internationally recognized framework, demonstrating its dedication to modern, accessible, and investor-friendly insolvency procedures. India has the potential to pick up the tracks of nations like the UK and Singapore⁶³, which have made insolvency reform a conscious strategy to serve as cross-border restructuring hubs.

10.4 Prevention of Asset Stripping and Forum Shopping

Gaps that currently allow companies to get involved with asset dispersion or jurisdictional arbitrage prior to or during insolvency would be resolved by a clear legislative framework. It would be less likely for debtors to move assets to less cooperative jurisdictions if judicial cooperation clauses and recognition of foreign main proceedings were in place⁶⁴. As displayed by the disjointed Videocon group insolvency prior to India implementing any official group regime, the coordinated approach also restricts opportunistic litigation by creditors seeking preferential forums.

10.5 Institutionalizing India's Role in Global Insolvency Cooperation

India could shift from being an observing party to a successful leader in establishing international insolvency standards by establishing a strong framework for cross-border insolvency. India's involvement in resolving multi-jurisdictional corporate distress would be institutionalized through active participation in bilateral judicial cooperation agreements and UNCITRAL Working Groups. Additionally, this would establish India as a reliable jurisdiction for both inbound and outbound investments, boosting its credibility in multilateral trade and investment talks.

11 CONCLUSION

India can be the next world leader in establishing international insolvency standards by establishing a strong cross-border insolvency framework. India's role in restitution would be

⁶³ *Singapore's Restructuring and Insolvency Regime Is a Tool for Local and International Companies*, MORGAN LEWIS PUBLICATIONS (Aug. 26, 2022), <https://www.morganlewis.com/pubs/2022/08/singapores-restructuring-and-insolvency-regime-is-a-tool-for-local-and-international-companies>.

⁶⁴ Aparna Ravi, *Filling in the Gaps in the Insolvency and Bankruptcy Code – Cross-Border Insolvency*, INDIA CORPLAW (May 17, 2016), <https://indiakorplaw.in/2016/05/17/filling-in-gaps-in-insolvency-and/>.

institutionalized through active participation in bilateral judicial cooperation agreements and UNCITRAL Working Groups. The ability of India's insolvency regime to formally acknowledge and successfully handle the intricacies of group structures in a globalized business environment will determine its future. The current fragmented approach under the IBC is insufficient to deliver timely, predictable, and value-maximizing outcomes due to the growing prevalence of multi-tiered corporate conglomerates and cross-border financial linkages.

A complete structure that includes judicial cooperation clauses, group insolvency resolution procedures, and harmonization with cross-border arbitration would not only close current legal gaps but also bring India's system into compliance with globally recognized norms like the UNCITRAL Model Law on Enterprise Group Insolvency (2019). India's insolvency law will be future-proofed by this proactive approach, protecting the interests of both domestic and foreign creditors while allowing it to effectively respond to intricate transnational restructurings.

Legislative urgency is crucial given the speed of international trade and the risks associated with cross-border financial distress. In high-stakes insolvencies, delayed action runs the risk of eroding asset value, enabling forum shopping, and eroding creditor confidence. On the other hand, prompt reform will strengthen India's ability to conduct business, raise its profile in the international investment arena, and establish it as a reliable jurisdiction for complex restructuring and insolvency cases.

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CHAPTER 11

The Gibbs Principle Paradox: India's Cross-Border Insolvency through the UNCITRAL Model Law Lens

MIHIR N SINGH* AND TIA SIKKA**

The transformative reforms brought by the Insolvency and Bankruptcy Code, 2016 (IBC), significantly impact India's legal framework yet face challenges in addressing cross-border insolvency, a critical gap in a globalised economy. This underscores the crucial need for robust and internationally balanced insolvency laws. This need becomes apparent when corporate debtors with assets across multiple nations face financial distress, revealing complexities within India's cross-border insolvency framework.

This paper critically examines the deficiency in India's existing cross-border insolvency provisions, i.e., Sections 234 and 235 of the IBC. These sections rely on bilateral agreements and ad hoc letters of request but have proved largely ineffective due to the complex realities of negotiating country-specific treaties and a noteworthy absence of clearly defined procedural rules for judicial cooperation and the recognition of foreign proceedings. Currently, India lacks a dedicated and comprehensive statutory framework for cross-border insolvency. This legal vacuum creates pervasive uncertainty and can lead to the application of common law principles such as the Gibbs Principle. Under this principle, a discharge from debt granted by an Indian insolvency proceeding may not be recognised in foreign jurisdictions unless the foreign creditors have voluntarily submitted to the Indian proceedings. This undermines the principle of universality in insolvency resolutions, potentially leading to fragmented proceedings, reduced asset recovery, and a chilling effect on international credit.

While the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) is widely adopted as the international best practice for facilitating cooperation and recognition of foreign insolvency proceedings, it has yet to be fully endorsed into Indian domestic law. Despite recommendations and draft legislative proposals, the continued non-enactment of the MLCBI prevents the effective implementation of a structured framework, thus aggravating the complexities faced by corporate debtors and foreign creditors alike.

This paper argues that while the 2025 amendment is a step forward, India must adopt a contextualised version of the UNCITRAL Model Law that reconciles sovereignty concerns with global creditor confidence,

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particularly in the light of the Gibbs principle. The proposed framework combines doctrinal analysis with the set of redefined rules, ensuring both feasibility and international credibility.

Keywords: Cross-border insolvency, UNCITRAL Model Law, Gibbs Principle, Insolvency and Bankruptcy Code (IBC)

1 INTRODUCTION

As the economy grows, the aggregate global trade and investment in and out of the country also significantly increase. The rapid rise in corporations expanding, cross-border investment, and international debt financing has posed an adversity in domestic laws; they are insufficient to govern cross-border insolvency and bankruptcy. Therefore, a necessity has been felt for an unambiguous and strong framework in the realm of cross-border insolvency in India as well.¹

The question is, what is cross-border insolvency in the context of India? It is the reference of disputes regarding insolvency that arises between parties based out of different jurisdictions. The major challenges, however, faced in the event worldwide include choice of forums, nation-to-nation enforceability and diversity in laws, causing an overall lowered confidence amongst investors.² Cross-border insolvency in India has been at a nascent stage, however, developing. It has brought about shifts in the Insolvency and Bankruptcy Code, 2016³ (the code), especially in 2025 with the new amendment⁴ tabled in August. The amended code, although still, does not include cross-border insolvency; however, it empowers the government to make rules and conditions in which the process of cross-border insolvency resolution can be initiated. While that is the case, the centre continues to struggle with the adoption of the UNCITRAL model law on cross-border insolvency (model law)⁵ within the code. A foreseeable challenge, in the coming time, will also be the framing of rules under the code for cross-border insolvency and their effective enforcement, particularly in relation to companies or investors already incorporated or registered in India.⁶

India has been expanding in its GDP vastly and attracting foreign investment in diverse sectors, including technology, aviation, infrastructure, finance and manufacturing.⁷ Indian

¹ Debaranjan Goswami & Andrew Godwin, *India's Journey Towards Cross-Border Insolvency Law Reform*, 19 ASIAN J. COMP. L. 197 (2024).

² Nasser Al-Adba, *Guest Blog: Legal Insights on Cross-Border Disputes*, ICC - INTERNATIONAL CHAMBER OF COMMERCE (July 2, 2025), <https://iccwbo.org/news-publications/guests-blog-speeches/guest-blog-legal-insights-on-cross-border-disputes/>.

³ INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, <https://ibbi.gov.in/en/legal-framework/act> (last visited Aug. 31, 2025).

⁴ *Id.*

⁵ UNCITRAL Model Law on Cross-Border Insolvency (1997) (adopted May 30, 1997).

⁶ R.J.R. Kasibhatla, *Commercial and Investor-State Disputes Settlement, the Role of UNCITRAL and Indian Practice: An Analysis*, in INDIAN PRACTICE OF INTERNATIONAL LAW (2024).

⁷ PIB HEADQUARTERS, <http://www.pib.gov.in/PressNoteDetails.aspx?NoteId=154840> (last visited Aug. 31, 2025).

conglomerates have also been raising capital abroad, showcasing that insolvency is rarely a purely domestic issue but rather an international one. India's need for a robust cross-border insolvency framework is pressing. On one hand, the state aspires to project itself as a reliable destination for international investment; on the other, it is hesitant to embrace wholesale international standards for fear of compromising domestic creditor protection and sovereign control. This tension lies at the heart of the current debate. The 2016 code contained only two provisions in relation to this, which in recent times have proved to be inadequate. While the 2025 amendment⁸ empowers the government to notify rules on cross-border insolvency, it remains unclear whether these rules will adequately address the systemic concerns that India faces.⁹

The foremost concern at present is the sheer volume of foreign law-governed contracts that are held by Indian corporations. These external borrowings, etc., are also governed by either English law or US law. In the situation, if India fails to create a framework for foreign courts' recognition of domestic restructuring or insolvency proceedings, or vice versa, the practical effect of the proceedings may be undermined. As the case may be, creditors may take cases abroad to have a safety net, corroding the basics of insolvency law in India.¹⁰ A secondary problem that faced it was the judicial capacity. The National Company Law Tribunal (NCLT) has been overburdened by cases, and additionally subjecting them to cross-border insolvency cases would further delay the process. This is also considering that the same is a highly specialised area of law requiring professionals from the field to adjudicate the matter.¹¹ Any lapses in judgements would reduce creditor and investor confidence, potentially lowering the same in India. Without a bench specifically designated for this, there is a risk that all cases may be a part of the backlog that plagues domestic insolvency, further discouraging foreign participation.¹²

The centre has specified the use of a sensitive approach to be taken in order to ensure the sovereign functioning of the state. It faces an imbalance in public policy and foreign investor protection.¹³ Insolvency as established is not just a matter of debt recovery but

⁸ The Insolvency and Bankruptcy Code (Amendment) Bill, 2025, Bill No. 107 of 2025 (introduced in Lok Sabha Aug. 12, 2025).

⁹ Akhilesh Kumar, *Harmonization of International Bankruptcy Law: Is It Need of Hour? Is It Possible? An Indian Perspective*, 35 ASIAN BUS. LAW. 155 (2025).

¹⁰ *India's Approach Towards Cross-Border Insolvency Law: The Way Forward*, TAXMANN.COM, <https://www.taxmann.com/research/ibc/top-story/10501000000026523/indias-approach-towards-cross-border-insolvency-law-the-way-forward-experts-opinion> (last visited Aug. 31, 2025).

¹¹ Soumya Jan & Sidh Baunthiyal, *Resolving India's Cross Border Insolvency Concerns: A Comparative Jurisdictional Analysis*, 14 NLIU L. REV. 121 (2024).

¹² Editor, *India's Tryst with Cross-Border Insolvency Law: How Series of Judicial Pronouncements Pave the Way?*, SCC TIMES (Apr. 16, 2021), <https://www.sconline.com/blog/post/2021/04/16/cross-border-insolvency-law/>.

¹³ Adam Feibelman & Priya Misra, *The Institutional Challenges of a Cross-Border Insolvency Regime* (July 25, 2021), <https://papers.ssrn.com/abstract=3893126>.

includes employment and stability in the overall scenario. This is considered a ‘public policy’ exception for the general rule, as also stated by the authors in this paper further. While the 2025 amendment encourages the government to make rules pursuant to it, it does not specify the public policy exceptions in the practical state of affairs.

Lastly, the issue of reciprocity combined with foreign creditor treatment also poses a significant legal concern. Political concern may arise over priority given to foreign investors and recognition of proceedings in India or abroad depending on whether the countries are reciprocative or not.¹⁴ In many insolvency cases, often public sector institutions are the largest stakeholders, and any move to prioritise or even equitably align foreign creditors with them could provoke resistance. If recoveries for Indian banks are perceived as being diluted in favour of international investors, the framework may face backlash both politically and institutionally. At the same time, recognition of foreign insolvency proceedings in India will be meaningful only if Indian proceedings are similarly acknowledged abroad. Unless India negotiates reciprocal arrangements or aligns itself with widely adopted frameworks, there is no guarantee that Indian resolutions will carry weight outside its borders. The 2025 amendment¹⁵ empowers the government to notify conditions for recognition, but without clarity on reciprocity and creditor hierarchies, India risks creating a one-sided regime, allowing foreign creditors to benefit from recognition in India while Indian creditors may remain disadvantaged overseas.

2 CROSS-BORDER INSOLVENCY: THE UNRESOLVED GAP UNDER IBC

Cross-border insolvency has emerged to be one of the most critical lacunae in India’s insolvency regime. As globalisation enhances the movement of capital and multinational arrangements, the lack of a definite regime in India under the Insolvency and Bankruptcy Code, 2016 (IBC), has created uncertainty in handling foreign creditors, abroad-located assets, and proceedings launched across various jurisdictions. While the IBC has transformed domestic insolvency practice, its bare-bones provisions on cross-border insolvency, namely Sections 234 and 235, are inactive, leaving a grave lacuna in the system. These only make provision for reciprocal arrangements with foreign nations and permit letters of request to be issued from Indian tribunals, but India has not signed any bilateral treaties and has not operationalised these mechanisms.¹⁶ Across the world, the most widely embraced model is the *UNCITRAL Model Law on Cross-Border Insolvency (1997)*, which offers four central pillars:

¹⁴ Amol Baxi, *Insolvency Laws and International Trade: A Perspective*.

¹⁵ The Insolvency and Bankruptcy Code (Amendment) Bill, 2025, Bill No. 107 of 2025 (introduced in Lok Sabha Aug. 12, 2025).

¹⁶ Dr Parineeta Goswami & Aarushi Goswami, *Global Economic Interdependence: Evaluating the UNCITRAL Model Law and Adaptive Frameworks for Cross Border Bankruptcy* (Jan. 15, 2025), <https://papers.ssrn.com/abstract=5121549>.

- i. The first pillar is access and equal treatment, wherein insolvency legislation has to provide for the proceedings to be made available to all eligible debtors, whether persons or corporate entities, of all sizes. Debtors and creditors ought to have the ability to file for insolvency proceedings, subject to the nature of default or insolvency. Once proceedings have been initiated, the legislation has to provide that creditors who belong to the same class are treated equally, without prejudice or preference.¹⁷ This is to prevent any creditor from gaining an unfair benefit via strong-arm recovery methods or insider trades, thus ensuring collective resolution over fragmented enforcement. Equality among creditors can be ensured by transparency of disclosure of assets, prevention against fraudulent transfers, and safeguarding against preferential claims.
- ii. Maximisation of the value of assets is the second pillar which puts forth the overarching purpose of any insolvency system, which is to maintain and maximise the value of the debtor's estate. Legislation should deter premature liquidation of healthy companies and promote reorganisation or restructuring whenever possible. This concept acknowledges that maintaining going-concern value will, in many cases, result in a greater return for creditors than a prompt sale of assets.¹⁸ Devices like moratorium on enforcement, restructuring regimes, and debtor-in-possession facilities give businesses some leeway to reorganise. Even in liquidation, insolvency law has to ensure fair processes, maximising returns via fair valuation and effective asset realisation.
- iii. The third pillar is fairness and efficiency in the process. Insolvency proceedings should be carried out in a timely, predictable, and transparent manner. Delays tend to destroy asset value and limit creditor recovery, and hence the law has to set clear timelines and streamlined procedures to prevent lengthy litigation. Fairness means that each and every stakeholder, including workers, small creditors, and minority shareholders, should receive appropriate consideration, although balanced with the requirement for economic efficiency.¹⁹ Efficient processes also necessitate specialist courts, expert insolvency professionals, and simple rules of jurisdiction. By promoting both efficiency and fairness, insolvency law can instil confidence in domestic and cross-border investors.
- iv. The fourth pillar is cross-border cooperation and coordination. Under a globalised economy, insolvency often involves assets, creditors, or proceedings that are located in

¹⁷ ARBITRATION AND INSOLVENCY, GOOGLE BOOKS, https://books.google.co.in/books?hl=en&lr=&id=98AHEQAAQBAJ&oi=fnd&pg=PR1&dq=devas+multimedia+insolvency&ots=qC_J3SavnF&sig=yPxM5NV6pkcdRnZev2uxs1DkuoY&redir_esc=y#v=onepage&q=devas%20multimedia%20insolvency&f=false (last visited Aug. 30, 2025).

¹⁸ Peter Ashford, *Chapter 3: Effect of Insolvency on the Arbitration Agreement* (2024), <https://www.elgaronline.com/edcollchap/book/9781800887398/book-part-9781800887398-10.xml>.

¹⁹ Farid Nasirli, *Balancing Investor Protection and Sovereignty: The Evolution of BITs and ISDS in International Public Investment Law* (Apr. 14, 2025), <https://papers.ssrn.com/abstract=5228487>.

several states. UNCITRAL guidelines emphasise that local insolvency law has to ensure that courts and insolvency practitioners have mechanisms to cooperate across borders.²⁰ These mechanisms consist of recognition of foreign insolvency proceedings, aid to foreign representatives, and coordination between parallel proceedings in different states. The Model Law on Cross-Border Insolvency, agreed in 1997, realises this pillar by providing states with a harmonised legal framework for recognition, cooperation, and coordination. This minimises conflicts of laws, avoids duplicative proceedings, and ensures that all creditors across the world are treated equitably.

Together, these four pillars of access and equal treatment, maximisation of value, efficiency and fairness, and cross-border cooperation form a balanced insolvency regime that promotes economic stability, ensures the protection of creditor rights, and stimulates entrepreneurship by providing a consistent framework for addressing financial failure. The lack of statutory cross-border framework in India generates several problems. Foreign creditors are uncertain regarding whether they can join Indian proceedings, denting the confidence of India as an investment hub.²¹ Resolution professionals are unable to retrieve foreign assets or engage with foreign courts, resulting in value deterioration. In addition, without certainty of recognition of foreign proceedings, international insolvencies have the potential to be splintered, with cross-claims and overlapping litigation. This includes the very purpose of the IBC, which is to realise value in a time-sensitive way. The legal principles and laws hereinabove stated were reiterated in the leading decisions of the NCLT and NCLAT:

2.1 State Bank of India v. Jet Airways (India) Ltd.²²

The landmark case in India's insolvency history is the Jet Airways (India) Ltd case since it represented India's first foray into cross-border coordination of insolvency, even prior to the advent of a formal mechanism. Jet Airways, India's former top private airline, was admitted to corporate insolvency proceedings by the Mumbai NCLT in 2019 when it defaulted on over ₹8,000 crore of loans.²³ The peculiarity of this situation was that, in addition to the Indian proceedings, the Amsterdam Bankruptcy Court had also initiated insolvency proceedings against the company concerning its assets and creditors in the Netherlands. This set the question of how to handle concurrent proceedings in two jurisdictions in the absence of a clear statutory framework in India. The NCLT in Mumbai was initially hesitant to accept the Dutch proceedings, referring to the lack of a legal process under Sections 234

²⁰ Amol Baxi, *Insolvency Laws and International Trade: A Perspective*.

²¹ Dr Mohammed Younus, *India's Insolvency Code (IBC 2016): Cross-Border Perspectives*.

²² SBI v. Jet Airways (India) Ltd., 2021 SCC OnLine NCLT 11967.

²³ John F. O'Connell & George Williams, *Transformation of India's Domestic Airlines: A Case Study of Indian Airlines, Jet Airways, Air Sahara and Air Deccan*, 12 J. AIR TRANSP. MGMT. 358 (2006).

and 235 of the Insolvency and Bankruptcy Code, 2016, which demanded bilateral agreements for recognition. But things became practical once again with the Dutch administrator and the Indian Resolution Professional under the IBC coming to a decision to work together. In what was considered a first-of-its-kind move, they entered a cross-border insolvency protocol, which was sanctioned by the NCLAT in September 2019.²⁴ This protocol stipulated mutual assistance, recognition of claims, exchange of information, and coordination of proceedings in a way that was mindful of both Indian and Dutch processes.

This case is very prominent, as it demonstrated the adaptability and pragmatism of Indian practitioners and courts in filling the lacuna in legislation.²⁵ The protocol enabled creditors in the Netherlands to join in the Indian insolvency proceedings without undermining the role of the Dutch court in respect of assets within its jurisdiction. It also prevented duplicative suits and minimised asset value erosion risk. The Jet Airways case therefore proved that without a statutory regime, cooperative arrangements could provide fairness, creditor involvement, and value maximisation in cross-border insolvency proceedings.²⁶ On a wider level, the Jet Airways precedent drew attention to the imperative for a formal cross-border insolvency regime in India since dependence on ad hoc procedures is neither stable nor certain for investors. The case had a direct bearing on deliberations regarding the adoption of the UNCITRAL Model Law on Cross-Border Insolvency, 1997, which emphasises recognition, cooperation, and coordination among jurisdictions. The 2025 IBC Amendment Bill seems to have taken cues from Jet Airways by suggesting a structured mechanism for recognition and cooperation, going beyond treaty-based enforcement to a contemporary, rule-based regime.

Essentially, the Jet Airways case is not just a corporate failure but a watershed in India's insolvency jurisprudence which demonstrates that cross-border insolvency cannot be wished away in an economy which is increasingly globalised. It emphasises the need for harmonising India's laws with international best practices in order to offer certainty to the creditors, make the proceedings efficient, and foster investor confidence in the Indian market.

²⁴ Jashim Uddin Ahmed et al., *The Bankruptcy of Jet Airways in India*, 11 IIUM J. CASE STUD. MGMT. 23 (2020).

²⁵ *Supreme Court Orders Liquidation of Jet Airways*, <https://foxmandal.in/News/supreme-court-orders-liquidation-of-jet-airways/> (last visited Aug. 31, 2025).

²⁶ Editor, *Collapsed Resolutions of Aircraft Insolvencies, End of an Icon: An In-Depth Analysis of the Jet Airways Case*, SCC TIMES (May 6, 2025), <https://www.sconline.com/blog/post/2025/05/06/collapsed-resolutions-of-aircraft-insolvencies-end-of-an-icon-an-in-depth-analysis-of-the-jet-airways-case/>.

2.2 State Bank of India v. Videocon Industries Limited²⁷

The Videocon Industries Ltd. insolvency case is another landmark moment in the development of India's insolvency regime, and though it was not a cross-border protocol case such as Jet Airways, it raised significant questions that bear directly on the necessity of a structured regime of cross-border insolvency. Videocon, an Indian conglomerate with diversified interests in consumer electronics, oil and gas, and telecommunications, was admitted into insolvency in 2018 for defaulting on over ₹90,000 crore of loans.²⁸ This case was special in that it had an enormous asset spread and subsidiaries, of which the majority were overseas, mostly in the oil and gas business in Brazil and Mozambique. This immediately raised questions of how to handle foreign assets within an Indian insolvency resolution process. The NCLT admitted insolvency proceedings against Videocon and subsequently permitted consolidation of 13 group companies into one corporate insolvency resolution process (CIRP).²⁹ This was a rare measure under the IBC and was meant to achieve maximum value by renouncing dismembered proceedings across multiple entities. Yet, with regard to Videocon's foreign assets, the Resolution Professional (RP) encountered great challenges, as India did not have any statute governing the recognition or interaction with foreign proceedings; the RP was limited in making claims or pursuing recognition overseas. Sections 234 and 235 of the IBC, theoretically allowing for bilateral treaties and letters of request to foreign courts, were useless in practice since India did not have any treaties. This underscored the gap in India's legal system regarding cross-border insolvency.

At last, the winning bidder of Videocon, Twin Star Technologies (Vedanta Group entity), encountered challenges in taking control of foreign assets, as there was no organised cross-border framework. Creditors were also dissatisfied with recovery rates that were too low, and banks recovered merely about 4% of admitted claims.³⁰ One of the key reasons for this dismal outcome was the failure to integrate and utilise Videocon's overseas assets properly into the Indian resolution process. As compared to Jet Airways, where at least a protocol was agreed upon, the Videocon case demonstrated how the absence of any mechanism of international cooperation could materially decrease recoveries and investor confidence.

The Videocon insolvency thus turned into a case study of the economic price of being without a cross-border insolvency law. It made fresh sense for India to implement the

²⁷ State Bank of India v. Videocon Indus. Limited, 2019 SCC OnLine NCLT 745.

²⁸ *Resolution of Insolvency of Videocon Industries Limited [A]*, SAGE BUSINESS CASES, <https://sk.sagepub.com/cases/embed/resolution-of-insolvency-of-videocon-industries-limited-a> (last visited Aug. 31, 2025).

²⁹ Jessica E. Salisbury-Copper, Scott A. King & Joe Barton, *Eleventh Circuit Deepens Split on Standing in FDCPA Cases*, 17 PRATT'S J. BANKR. L. 36 (2021).

³⁰ Vivek Saurav & Dr Bhanu Saxena, *Navigating Group Insolvency in India: Analyzing Implementation Challenges and Enterprise Dynamics for Modern Day Business Structure* (Jan. 17, 2024), <https://papers.ssrn.com/abstract=4698201>.

UNCITRAL Model Law on Cross-Border Insolvency or an equivalent domestic version in order to ensure that foreign assets and foreign creditors could be appropriately reflected in Indian insolvency proceedings.³¹ Videocon lessons directly impacted policy discussions and helped spur the inclusion. Together, Jet Airways and Videocon demonstrate 2 contrasting pathways: a pragmatic cooperation in the absence of law versus systematic value destruction where foreign assets remain outside the control of India. The lessons learnt underline the urgency of a statutory cross-border insolvency framework that attempts to ensure recognition and predictable creditor treatment.

3 IBC AMENDMENT BILL, 2025: A STEP TOWARDS CROSS-BORDER INSOLVENCY REFORM

The recent bill that was proposed was the Insolvency and Bankruptcy Code (Amendment) Bill, 2025,³² which stated the intervention by directly tackling the pending issue of cross-border insolvency. So far, India's insolvency system handled such cases under Sections 234 and 235 of the IBC that depended upon bilateral agreements and letters of request. Such provisions were sluggish, discretionary, and mainly ineffective in obtaining recognition of Indian proceedings overseas or enforcement of foreign insolvency procedures in India. The 2025 bill breaks away from such a fragmented structure and puts in place a methodical, rule-based model for dealing with cross-border cases, bringing India closer to international best practices.³³

The Bill authorises the Central Government to make comprehensive rules governing cross-border insolvency. It adds a new provision, i.e., Section 240C, which empowers the government to formulate rules on recognition of foreign proceedings, assistance to foreign courts, and cooperation in parallel proceedings. This will provide a dynamic yet complete system which can evolve in accordance with the intricacies of cross-border disputes. The system is not only likely to enable faster recovery of foreign assets but also increase the predictability for foreign investors who engage with India's insolvency proceedings. Institutionally, the bill also allows for the setting up of special NCLT benches to hear only cross-border insolvency cases. Such specialised infrastructure is expected to bring efficiency, avoid delays, and promote judicial specialisation in taking care of cases involving more than one jurisdiction. Through this, the law gives assurance and confidence to foreign as well as

³¹ Anjali Dixit, *Group Insolvency Under IBC*, 6 INT'L J.L. MGMT. & HUMAN. 1926 (2023).

³² The Insolvency and Bankruptcy Code (Amendment) Bill, 2025, Bill No. 107 of 2025 (introduced in Lok Sabha Aug. 12, 2025).

³³ *ISDS Regimes and Democratic Practice: Creating Conflict of Interests Between Governments, Investors and Local Populations*, <https://hrcaak.srce.hr/clanak/319663> (last visited Aug. 30, 2025).

domestic creditors, debtors, and insolvency professionals that India is capable of resolving transnational insolvency disputes well.³⁴

The larger intent of this reform is to increase investor confidence and bring India at par with international insolvency norms. Currently, India has not yet enacted the UNCITRAL Model Law on Cross-Border Insolvency (1997), which is the foundation of most contemporary insolvency regimes. Yet, the 2025 Bill strongly mirrors the intent of recognition, cooperation, and coordination which the UNCITRAL framework advocates.³⁵ By so doing, it ensures equitable treatment of creditors regardless of nationality, reduces multiplicity of proceedings, and maximises value by ensuring assets are handled in a holistic manner. In a way, the 2025 Amendment Bill is a clear departure from the treaty-based provisions and establishes a contemporary, rule-based regime for cross-border insolvency. This marks India's willingness to open up to the global economy, safeguard the interests of creditors across frontiers, and offer certainty to foreign investors dealing with Indian businesses. The reform is thus not just a legal milestone but an economic one as well and is expected to reinforce India as a creditor-friendly and investor-reliable jurisdiction.

Moreover, implementing a strong cross-border insolvency system would place India among international best practices and increase its credibility in international capital markets. For international investors, legal certainty of treatment in insolvency is a key determinant of risk.³⁶ For Indian companies operating overseas, such a system would avoid fragmentation and optimise recoveries. The Ministry of Corporate Affairs and the Insolvency and Bankruptcy Board of India (IBBI) have also consistently recognised this requirement, and recent policy debates indicate that legislative intervention may be imminent. Yet political reservations about sovereignty, protection of creditors, and potential misuse by multinationals have held back enactment.³⁷

4 CRITICAL ANALYSIS OF THE CONFLICTING INTERNATIONAL PRINCIPLES

The cross-border insolvency disputes have been treated in the past by two competing doctrines: the Gibbs Rule and the doctrine of modernised universalism. Both methods try to deal with the conflicts resulting from a debtor with assets, creditors, and proceedings in

³⁴ Mahir Khanna, *Comprehensive Examination of the Constitutionality of the Insolvency and Bankruptcy Laws*, 5 INDIAN J.L. & LEGAL RSCH. 1 (2023).

³⁵ Gerard McCormack & Wan Wai Yee, *The UNCITRAL Model Law on Cross-Border Insolvency Comes of Age: New Times or New Paradigms*, 54 TEX. INT'L L.J. 273 (2018).

³⁶ Reinhard Bork, *The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency*, 26 INT'L INSOLVENCY REV. 246 (2017).

³⁷ Irit Mevorach, *On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency*, 12 EUR. BUS. ORG. L. REV. 517 (2011).

multiple jurisdictions but do so with utterly different mindsets, and each has been intensely criticised in recent literature.

The Gibbs Rule, named after the English case *Antony Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux* (1890)³⁸, is that a contract subject to English law cannot be released or varied by a foreign insolvency proceeding unless discharge thereunder is effective under English law. Essentially, the law of the contract prevails over any foreign restructuring or insolvency settlement.³⁹ This doctrine provides certainty to creditors who enter into contracts under English law, but at the cost of frustrating collective insolvency procedures overseas. The rule permits English law contract creditors to exclude themselves from foreign restructuring processes, thus undermining the principle of equal treatment of creditors that is central to insolvency law.⁴⁰ The Gibbs Rule, in this view, is excessively territorial and outdated for a globalised world where corporate structures and debts frequently cross borders. In addition, it promotes forum shopping since creditors can opt for English law in contracts precisely to avoid the worst foreign insolvency regimes. This discourages international cooperation and comity and reinforces a parochial mind-set no longer suitable for the needs of interdependent financial systems.

Modernised universalism, by contrast, is an effort to marry universalist principles to the imperatives of national sovereignty.⁴¹ Insolvency proceedings should be held in a single jurisdiction, traditionally the debtor's Centre of Main Interests (COMI), and universally recognised elsewhere. Modernised universalism lessens this inflexibility by permitting ancillary or secondary proceedings elsewhere while placing primacy on the principal proceeding in COMI.⁴² This philosophy has expressed itself in the UNCITRAL Model Law on Cross-Border Insolvency, which encourages recognition of foreign proceedings, cooperation between courts, and coordination of multi-jurisdictional cases. In contrast to the Gibbs Rule, it prefers collective resolution of insolvency with a simultaneous protection of local creditors and interests.

Nevertheless, modernised universalism has its limitations. Its dependence on judicial assistance and mutual recognition among states is a restriction on its efficacy, since not all

³⁸ *Antony Gibbs & Sons v. La Société Industrielle et Commerciale Des Métaux*, <https://www.uniset.ca/lloyddata/25QBD399.html> (last visited Aug. 31, 2025).

³⁹ Varoon Sachdev, *Choice of Law in Insolvency Proceedings: How English Courts' Continued Reliance on the Gibbs Principle Threatens Universalism*, 93 AM. BANKR. L.J. 343 (2019).

⁴⁰ *Antony Gibbs & Sons v. La Société Industrielle et Commerciale Des Métaux*, <https://www.uniset.ca/lloyddata/25QBD399.html> (last visited Aug. 31, 2025).

⁴¹ Fabio Trevisan & Carolina Vasselli, *Modernisation of Luxembourg's Insolvency Law*, 17 INSOLVENCY & RESTRUCTURING INT'L 32 (2023).

⁴² Epp Asar, *The Desirability of 'Centre of Main Interests' as a Mechanism for Allocating Jurisdiction and Applicable Law in Cross-Border Insolvency Law*, 22 EUR. BUS. L. REV. (2011), <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\EULR\EULR2011017.pdf>.

jurisdictions have enacted or strictly adhered to the Model Law.⁴³ The identification of COMI, while being the key to the system, is generally imprecise and open to abuse by debtors in search of more attractive jurisdictions, resulting in the phenomenon of “COMI shopping”. Domestic courts also have a tendency to invoke overly broad public policy exceptions or prefer local creditors, diluting the system’s intended universality. The outcome is an incoherent patchwork of incomplete harmonisation and not a uniform global system. Modernised universalism, though more forward-looking, falls short in practice due to patchy adoption, judicial discretion, and internal imprecision. Comparing the two doctrines, the Gibbs Rule is a vestige of nineteenth-century jurisprudence that prioritises sanctity of contract over collective solution of insolvency, while modernised universalism is an imperfect attempt at international cooperation. The Gibbs Rule remains under attack as archaic, creditor-prejudiced, and contrary to contemporary insolvency goals. Both doctrines thus demonstrate the balance between safeguarding creditor entitlements, deferring to state sovereignty, and facilitating efficiency in international markets. The future of cross-border insolvency law is in developing a modernised universalism rather than continuing with the Gibbs Rule.⁴⁴ In this scenario India risks being caught between 2 extremes: sovereign control that deters foreign creditors and universal recognition that undermines domestic creditor priority regimes. A hybrid framework that is contextualised is the Model Law, incorporating reciprocity, disclosure obligations and public policy overrides, offering the only viable middle path. In the Indian context this means adopting a hybrid approach, one that respects sovereignty and public policy concerns while enabling predictable recognition of foreign proceedings.⁴⁵ Wholesale universalism may not be politically feasible, but a contextualised adoption of the model law, with reciprocity and systemic safeguards, can balance domestic and international interests. Refining the Model Law by having clearer standards, more international adoption, and independent oversight mechanisms could slowly offset its deficiencies. The Gibbs Rule, on the other hand, is the approach to harmonise and equalise treatment of creditors, and its continued use threatens the global insolvency regimes. While both approaches expose limitations, it is the modernised universalist framework that offers a workable path toward balancing efficiency, fairness, and cooperation in an increasingly interconnected financial world.⁴⁶

⁴³ Johan Althini, *The Centre of Main Interests*.

⁴⁴ Bianca Nalbandian, ‘Sovereign Investors INC.’, or *Sovereign Wealth Funds in Investment Arbitration and in Award Enforcement Proceedings*.

⁴⁵ Helen Canton, *United Nations Conference on Trade and Development—UNCTAD*, in *THE EUROPA DIRECTORY OF INTERNATIONAL ORGANIZATIONS 2021* (23d ed. 2021).

⁴⁶ Aparna Ravi, *Indian Insolvency Regime in Practice: An Analysis of Insolvency and Debt Recovery Proceedings*, 50 *ECON. & POL. WKLY.* 46 (2015).

5 WAY FORWARD

The 2025 amendment⁴⁷ seems to be a step in the right direction; however, thorough and true enforcement of the amended provisions and the formation of rules therein are of prime importance. At the present stage, the evolution of India's insolvency regime has been gradual and still at the earlier stages, most notably through periodic amendments to the Insolvency and Bankruptcy Code and policy insights that were derived from expert committees. However, due to lack of rules, a structural gap occurs. The only viable path forward lies in the formulation and implementation of detailed rules under the act, capable of addressing the practical, political, and legal challenges that arise in cross-border insolvency proceedings. A comparative experience demonstrates that Singapore⁴⁸, the UK and the US each customised the model law to domestic realities. India must similarly adopt a tailored approach, neither a wholesale transplant of international law nor an isolationist territorial regime.⁴⁹

The authors, therefore, suggest a set of draft rules, framed in line with India's institutional realities, international obligations, and policy concerns, to operationalise the cross-border insolvency framework under the IBC Amendment Act, 2025. The rules proposed are as follows:

5.1 Cross-Border Insolvency Bankruptcy Rules, 2025

5.1.1 Rule 1: Registration of Foreign Investor Engagement Agreements

- (1) All agreements involving foreign investment, merger, or financial involvement in India must be registered with the National Company Law Tribunal (NCLT) as a condition precedent for recognition in insolvency.
- (2) The NCLT registry shall maintain these agreements for resolution professionals and resolution plan formation, as per the domestic act, to ensure transparency and reduce jurisdictional disputes.

Provided that it is below a certain limit, as set by the central government, the foreign investors may not need to register but disclose to the NCLT.

The intent is to allow recognition of agreements by the NCLT so as to avoid any further disputes in relation to jurisdiction and agreements entered into. This acts as a pre-engagement check and prior permission of the requisite authorities. While that is the case, the

⁴⁷ The Insolvency and Bankruptcy Code (Amendment) Bill, 2025, Bill No. 107 of 2025 (introduced in Lok Sabha Aug. 12, 2025).

⁴⁸ Jared Foong, *Recognising Foreign Solvent Proceedings Under the UNCITRAL Model Law on Cross-Border Insolvency: The Singaporean Approach in Ascentra Holdings, Inc v SPGK Pte Ltd [2023] 2 SLR 421*, 45 LEGAL STUD. 309 (2025).

⁴⁹ Yeejin Jang, Jenny Jihyun Tak & Wei Wang, *Global Insolvency and Cross-Border Capital Flows* (Aug. 6, 2024), <https://papers.ssrn.com/abstract=4936763>.

authors also suggest that the central government, according to statistics, set a cap/limit beyond which registration may be necessary. This cap may be 10 to 15% of equity or credit value to the Indian company; that means a minimum limit is to be set below which registration may not be compulsory; however, disclosure would be. The same ensures that domestic remedies are consented to and no overlap in jurisdictions takes place. The NCLT is able to then keep track of agreements, and there is transparency in the process. This rationale is derived from the example of merger approvals under the competition law, and in company law, it ensures safeguards against hidden contractual clauses that may later cause conflicts in insolvency proceedings. This increases creditor and investor confidence that the agreements will receive formal recognition.⁵⁰

5.1.2 Rule 2: Dedicated NCLT Bench for Cross-Border Insolvency

- (1) The government shall establish a special NCLT bench for the purpose of resolution of cross-border insolvency cases. This bench shall include members specialising in insolvency and investment law.
- (2) The bench shall have exclusive authority over the proceedings, and it shall be recognised if the agreement is registered with NCLT.

The rationale for this rule to be added is to ensure the current benches of the NCLT do not get overburdened and there is no further backlog of cases.⁵¹ The current scenario showcases that this overburdening may cause effects on the current domestic insolvency cases. This also ensures that the parties to the agreement are surrendering themselves to the jurisdiction of the NCLT, further avoiding jurisdictional overlaps.⁵²

5.1.3 Rule 3: CIRP Framework for Cross-Border Insolvency Cases

- (1) Cross-border insolvency cases shall proceed through the corporate insolvency resolution process, which is the domestic process modified to cater to the foreign creditor claims and asset coordination.
- (2) The resolution professional shall be appointed to prepare a consolidated plan under the CIRP, ensuring fair treatment of foreign and domestic stakeholders.

⁵⁰ *Cross-Border Mergers and Amalgamations: An Update on Rule 25a of the Companies Merger Rules*, <https://www.mondaq.com/india/maprivate-equity/1516984/cross-border-mergers-and-amalgamations-an-update-on-rule-25a-of-the-companies-merger-rules> (last visited Aug. 31, 2025).

⁵¹ Banshidhar Dharshani, *Analysis of NCLT's Role in Resolving Corporate Disputes*, 7 INT'L J.L. MGMT. & HUMAN. 917 (2024).

⁵² *India's Approach Towards Cross-Border Insolvency Law: The Way Forward*, TAXMANN.COM, <https://www.taxmann.com/research/ibc/top-story/10501000000026523/indias-approach-towards-cross-border-insolvency-law-the-way-forward-experts-opinion> (last visited Aug. 31, 2025).

- (3) The plan must be approved by both the Committee of Creditors (CoC) and the Special NCLT Bench.

The CIRP framework allows for a set procedure to be used as an adaptation of the domestic procedure to allow insolvency and liquidation proceedings to take place smoothly.⁵³ This ensures a hierarchy and stabilised format that has checks in place. Initially the plan is made by the resolution professional, and the same is approved by the CoC. Therefore visible fair treatment is meted out to the foreign investors. This shall ensure collective treatment of creditors and avoid fragmentation of proceedings. This also considers that the corporate insolvency resolution process is a predictable and consistent procedure well established in India.

5.1.4 Rule 4: Reciprocity in Recognition of Foreign Proceedings

- (1) India shall recognise foreign insolvency proceedings only when reciprocal recognition of Indian proceedings is confirmed in the foreign jurisdiction.
- (2) The ministry shall publish a list of jurisdictions offering reciprocal treatment.
- (3) Recognition may be denied for non-reciprocal jurisdictions unless exceptional approval is granted by the Special Bench in terms of the agreement between the parties.

The reciprocity principle is a safeguard provided for symmetry in cross-border insolvency. The recognition of foreign proceedings in India holds practical value in the situation the proceedings receive equivalent recognition abroad; without this reciprocity, India would establish only a one-sided framework, and the benefits would not be borne to foreign creditors.⁵⁴ This causes Indian creditors to be at a disadvantage in the event they want to pursue claims overseas. Domestic stakeholders, especially in the public sector and financial institutions, are unlikely to support a regime that dilutes their recovery prospects in favour of a foreign creditor unless assured that Indian claims will be treated with equal respect internationally.⁵⁵ Therefore, this rule attempts to balance sovereign interests with international co-operation and acts as a strategic tool for international engagement.

5.1.5 Rule 5: Exhaustion of Domestic Remedies Before ISDS Invocation

- (1) Foreign investors may only initiate Investor–State Dispute Settlement (ISDS) after exhausting all available remedies before the Special NCLT Bench.

⁵³ INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, <https://ibbi.gov.in/en/legal-framework> (last visited Aug. 31, 2025).

⁵⁴ Vijay Kumar Singh, *Internationalization of Cross Border Insolvency Regime – Pondering upon a G20 Model*, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5393945 (last visited Aug. 31, 2025).

⁵⁵ Shannu Narayan & Aryaman Sinha, *Exit Strategy for Solvent Companies Under Indian Insolvency Law* (2024), <https://journals.sagepub.com/doi/abs/10.1177/14737795241250358> (last visited Aug. 31, 2025).

- (2) The NCLT must certify such exhaustion as a prerequisite for admissibility of any ISDS claim.

By allowing investors to bypass Indian courts in favour of international arbitration, it will undermine the sovereignty of Indian courts and the authority of NCLT.⁵⁶ The exhaustion of domestic remedies is not a rule; however, it is a suggestion that strikes a balance between investor claims and Indian courts.⁵⁷ It strengthens domestic institutions while maintaining India's credibility under international treaties, therefore also following treaty obligations. The intent is to renegotiate BIT agreements between nations that include domestic remedies to be pursued before ISDS is invoked.

5.1.6 Rule 6: ISDS Mechanism for Insolvency-Related Disputes

- (1) ISDS may be invoked under applicable treaties (e.g., BITs or FTAs), subject to certification from the NCLT.
- (2) Any ISDS award must not conflict with Indian public policy or disrupt the insolvency process.
- (3) Awards shall be integrated into CIRP as admitted claims to preserve insolvency collectivity and fairness.

Insolvency often intersects with foreign investment protections under bilateral investment treaties and free trade agreements. This provides a structured pathway for ISDS and ensures that investors are not left without recourse while simultaneously integrating ISDS outcomes into CIRP to maintain the principle of collective treatment.⁵⁸ It also ensures avoiding conflicting parallel proceedings⁵⁹ and ensures that investor protection does not override insolvency resolution.⁶⁰

5.1.7 Rule 7: Public Policy Override

- (1) The NCLT retains the discretion to reject recognition of foreign agreements, proceedings, or ISDS awards if they contravene India's public policy, public interest, or systemic integrity.

⁵⁶ Divesh Kaul, *A Fundamental Approach to Local Exhaustion of Remedies in International Law*, 24 WASH. U. GLOB. STUD. L. REV. 151 (2024).

⁵⁷ *Domestic Insolvency Proceedings Before Investment Treaty Arbitration*, ARB. INT'L (Oxford Academic), <https://academic.oup.com/arbitration/article/41/2/349/8058781> (last visited Aug. 31, 2025).

⁵⁸ *ISDS Regimes and Democratic Practice: Creating Conflict of Interests Between Governments, Investors and Local Populations*, <https://hrcak.srce.hr/clanak/319663> (last visited Aug. 30, 2025).

⁵⁹ Yaiphabhi Rajkumari, *Navigating Cross-Border Insolvencies: Unraveling Centre of Main Interest Role and Imperative International Cooperation*, 7 INT'L J.L. MGMT. & HUMAN. 1283 (2024).

⁶⁰ Vivek Saurav & Dr Bhanu Saxena, *Navigating Group Insolvency in India: Analyzing Implementation Challenges and Enterprise Dynamics for Modern Day Business Structure* (Jan. 17, 2024), <https://papers.ssrn.com/abstract=4698201>.

- (2) Grounds include threats to financial stability, fraud, imperatives of sovereignty, or other strategic concerns.

The insolvency system shall require a safeguard against recognition that threatens national interests; therefore, this rule provides the NCLT with a discretion to deny any recognition of foreign proceedings or ISDS awards as well as agreements that contravene India's public policy. This shall also include fraud, systemic financial stability, and strategic sectors such as defence and infrastructure.⁶¹ The override attempts to maintain sovereign control while ensuring India remains in line with global best practices where public policy exceptions are narrow but firm.⁶²

6 CONCLUSION

As the economy grows and more investment and capital enter India, the need for regulations in cross-border insolvency also grows. This paper has attempted to cover major lacunas in the law in contrast with case studies and the 2025 Insolvency and Bankruptcy Code amendment while highlighting the global position in the present scenario.⁶³ The study identifies the main concern of enforcement and formulations of rules under the code and suggests a set of rules that include registration of foreign investor agreements prior to investment, designated benches for cross-border insolvency⁶⁴, usage of the CIRP framework for cross-border cases, fair and equitable treatment of domestic and foreign creditors, recognition of foreign proceedings and reciprocity principle, exhaustion of domestic remedies before ISDS, ISDS mechanism⁶⁵ as a recourse and public policy override system. Each rule caters to gaps found by the authors in the paper and attempts to bridge the same via the formulation of set rules.

The 2025 amendment is a significant step forward for India's evolving approach but, as aforementioned, is a partial measure; India must strike a balance between openness to global capital and protection of domestic financial stability as well. A rules-based approach offers the flexibility to adapt to these changes and challenges while also embedding safeguards against asymmetry and policy risk.⁶⁶ If implemented with institutional capacity building and

⁶¹ J. Tseng, *Insolvency of a Party in International Arbitration: Considerations on Staying Arbitration Proceedings*, 16 J. INT'L DISP. SETTLEMENT idaf027 (2025).

⁶² Vijay Kumar Singh, *Internationalization of Cross Border Insolvency Regime – Pondering upon a G20 Model* (Jan. 26, 2025), <https://papers.ssrn.com/abstract=5393945>.

⁶³ Dr Mohammed Younus, *India's Insolvency Code (IBC 2016): Cross-Border Perspectives*.

⁶⁴ Aurelio Gurrea-Martínez, *The Implementation of the Model Law on Cross-Border Insolvency: International Divergences and Challenges Ahead* (May 23, 2024), <https://papers.ssrn.com/abstract=4839163>.

⁶⁵ *Id.*

⁶⁶ Joseph Cyriac & Elizabeth P Mathai, *Arbitration and Insolvency in India: Legal Conflicts and Practical Guidance* (May 7, 2025), <https://papers.ssrn.com/abstract=5247862>.

international cooperation such a framework can position India as a credible jurisdiction for cross-border insolvency. The broader challenge is to bridge the doctrinal rigidity of Gibbs with the aspirational universalism of the UNCITRAL framework.⁶⁷ A carefully calibrated hybrid model grounded in reciprocity, transparency, creditor equality and institutional capacity building will determine whether India can move beyond ad hoc judicial improvisation to become a credible global restructuring hub.

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⁶⁷ Dr. Hari Krishna Karri, Nithya Ramachandran & Dr. P. Siva Reddy, *Global Financial Resilience: Assessing Opportunities and Challenges in Cross-Border Insolvency Under the Paradigms of Universalism and Territorialism*, 11 IJIREM 60 (2024).

CHAPTER 12

Charting Coherent Cross-Border Insolvency: Addressing Judicial Cooperation and Legal Gaps in India's Adoption of the UNCITRAL Model Law

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India is on the cusp of enacting a cross-border insolvency framework aligned with the UNCITRAL Model Law on Cross-Border Insolvency 1997. This imminent development promises to facilitate the recognition of foreign insolvency proceedings within India. However, the need arises to investigate whether supplementary mechanisms, beyond the Model Law, are essential for addressing cross-border insolvency matters effectively.

Currently, the Insolvency and Bankruptcy Code ("IBC") does not clearly address foreign creditors' rights to initiate insolvency proceedings before the National Company Law Tribunal ("NCLT"). The article posits that foreign representatives could leverage India's commercial courts under common law principles to fill this void, emphasising the need for Indian courts to adopt a proactive and cooperative stance. Furthermore, the study critically evaluates the role of judicial cooperation in operationalising the Model Law, drawing lessons from international best practices.

Although India is set to adopt the Model Law, it is crucial to assess whether an additional basis for recognising and assisting cross-border insolvency proceedings in India is necessary. This is important for several reasons: first, the Model Law is not intended to be the sole pathway for foreign creditors seeking remedies under domestic law; second, in cases where neither the 'Centre of Main Interests' nor an establishment of the debtor is in India, common law jurisdiction may be required to provide assistance and cooperation; and third, India's framework will rely on reciprocity, which might exclude some countries. An independent basis for recognition in India could, therefore, be advantageous for those countries not meeting reciprocity requirements.

Keywords: Judicial cooperation, Draft Z, UNCITRAL Model Law, cross-border insolvency, international insolvency laws.

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1 INTRODUCTION

In today's interconnected global economy, the complexity of insolvency often transcends national boundaries,¹ posing problems that call for international cooperation and harmonised legal frameworks. An important step in improving the nation's insolvency system is India's Insolvency and Bankruptcy Code ("IBC"), 2016.² However, the IBC remains silent on the rights of foreign creditors to initiate the Corporate Insolvency Resolution Process ("CIRP") before the National Company Law Tribunal ("NCLT").³ The demand for efficient cross-border bankruptcy procedures has also grown as more Indian companies conduct business across several jurisdictions.⁴

The 1997 Model Law on Cross-Border Insolvency ("Model Law") of the United Nations Commission on International Trade Law ("UNCITRAL") offers a systematic approach to addressing cross-border insolvency issues.⁵ It places a strong emphasis on international court coordination, recognition, and collaboration. By offering a uniform legal framework that promotes collaboration between various legal systems, the Model Law aims to improve cross-border bankruptcy remedies. Given the increasing complexity of India's insolvency landscape in a globalised economy, engagement with the Model Law is more relevant than ever. While the IBC has reformed domestic insolvency, aligning with the Model Law poses challenges—particularly in ensuring effective judicial cooperation. Its successful implementation will require a nuanced understanding of global best practices alongside India's judicial framework.

The rapid advancement of commercial technology and globalisation has expanded cross-border trade beyond large multinational corporations; today, businesses of all sizes operate across jurisdictions and engage with varied legal frameworks.⁶ When multinational companies become insolvent, this creates complex legal challenges across borders; in the

¹ Lakshmikumaran & Sridharan Attorneys & Manasa Tantravahi, *Cross-Border Insolvency – the Ever-Evolving Framework*, <https://www.lakshmisri.com/insights/articles/cross-border-insolvency-the-ever-evolving-framework/> (last visited July 4, 2025).

² The Insolvency and Bankruptcy Code, 2016.

³ Sadhika Sethi & Rajat Srivastava, *Cross-Border Insolvency: The Indian Legal Regime vs. Rest of the World*, 3 INDIAN J. INTEGRATED RSCH. L. (2022), <https://ijirl.com/wp-content/uploads/2022/07/CROSS-BORDER-INSOLVENCY-THE-INDIAN-LEGAL-REGIME-V-REST-OF-THE-WORLD.pdf> (last visited July 4, 2025).

⁴ Lakshmikumaran & Sridharan Attorneys, *India Proposal to Recognise Cross-Border Insolvency*, LAKSHMISRI (2024), <https://www.lakshmisri.com/insights/articles/india-proposal-to-recognise-cross-border-insolvency/> (last visited July 4, 2025).

⁵ UNCITRAL Model Law on Cross-Border Insolvency, G.A. Res. 52/158, U.N. GAOR, 52d Sess., Supp. No. 49, U.N. Doc. A/RES/52/158 (Jan. 30, 1998); *see also* Edward Adams & Jason Fincke, *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism*, 15 COLUM. J. EUR. L. 43 (2009), https://scholarship.law.umn.edu/faculty_articles/828/ (last visited Aug. 7, 2025).

⁶ IAN F. FLETCHER, *INSOLVENCY IN PRIVATE INTERNATIONAL LAW* (2005), <https://academic.oup.com/book/51788> (last visited July 4, 2025).

absence of a clear framework for cross-border insolvency resolution, uncoordinated legal proceedings in separate jurisdictions frequently arise,⁷ as demonstrated in recent cases such as *Jet Airways*⁸ and *Videocon*.⁹ To address these issues,¹⁰ it is imperative that insolvency laws be harmonised across nations, and the Model Law provides a useful framework for accomplishing this goal.¹¹

As businesses become increasingly global, they are more likely to encounter complex cross-border insolvency challenges. Countries that have established clear and coherent rules for dealing with such situations are better positioned to navigate these complexities effectively.¹² Essentially, the IBC does not allow for the *automatic recognition* of any Indian bankruptcy proceedings in other countries, even if overseas creditors are permitted to file claims against a domestic corporation.¹³ As a result, ‘*recognition*’ refers to the court’s capacity to recognise and accept a foreign judgment’s legal significance within its territorial jurisdiction.¹⁴ There are three main points that need to be addressed when dealing with cross-border bankruptcy: which legislation should be applied; who has the authority to oversee the insolvency process; and how are decisions claiming control over assets enforced.¹⁵ Furthermore, there is a great deal of confusion surrounding India’s current cross-border bankruptcy

⁷ Hannah L. Buxbaum, *Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory*, 36 STAN. J. INT’L L. 23 (2000), <https://www.repository.law.indiana.edu/facpub/395/> (last visited July 4, 2025).

⁸ Jet Airways (India) Ltd. v. State Bank of India, Company Appeal (AT) (Insolvency) No. 707 of 2019 (NCLAT July 26, 2019).

⁹ State Bank of India v. Videocon Indus. Ltd., 2019 SCC OnLine NCLT 745.

¹⁰ Donna McKenzie, *International Solutions to International Insolvency: An Insoluble Problem?*, 26 U. BALT. L. REV. 1 (1994), <https://scholarworks.law.ubalt.edu/ublr/vol26/iss3/4/> (last visited July 4, 2025).

¹¹ ReedLaw, *The Need for a Cross-Border Insolvency Framework Under IBC*, REEDLAW (2016), <https://www.reedlaw.in/articles/the-need-of-cross-border-insolvency-framework-under-ibc> (last visited July 4, 2025).

¹² Ryan Halimi, *Analysis of the Three Major Cross-Border Insolvency Regimes* (University of Chicago Law School, 2017), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1046&context=international_immersion_program_papers (last visited July 17, 2025).

¹³ MINISTRY OF FIN., ECONOMIC SURVEY 2021–22 ¶¶ 4.66–4.68 (2022); Saloni Khaitan, *Recognition of Cross-Border Insolvency Cases in India: Analysis of the Proposed Draft Text*, 3 INDIAN J. INTEGRATED RSCH. L. 1 (2023), <https://ijirl.com/wp-content/uploads/2023/02/RECOGNITION-OF-CROSS-BORDER-INSOLVENCY-CASES-IN-INDIA-ANALYSIS-OF-THE-PROPOSED-DRAFT-TEXT-.pdf> (last visited July 4, 2025).

¹⁴ Saloni Khanderia, *The Hague Conference on Private International Law’s Proposed Draft Text on the Recognition and Enforcement of Foreign Judgments: Should South Africa Endorse It?*, 63 J. AFR. L. 413 (2019), <https://www.cambridge.org/core/journals/journal-of-african-law/article/abs/hague-conference-on-private-international-laws-proposed-draft-text-on-the-recognition-and-enforcement-of-foreign-judgments-should-south-africa-endorse-it/A1D2D3EAAE50F6D9BC4B633CC74CD7FA> (last visited July 2, 2025).

¹⁵ Ran Chakraborti, *Key Issues in Cross-Border Insolvency*, 30 NAT’L L. SCH. INDIA REV. 119 (2018), <https://www.jstor.org/stable/pdf/26743940.pdf> (last visited July 4, 2025).

relief framework.¹⁶ Specifically, there is uncertainty about whether international insolvency-related judgments and orders would be recognised and enforced.¹⁷

Effective cross-border insolvency cooperation is based on *reciprocity*,¹⁸ which balances judicial comity and sovereign interests by guaranteeing that foreign courts provide recognition and relief only where a reciprocal framework is in place.¹⁹ In order to foster mutual respect and reduce the risk of unilateral enforcement, the Model Law leaves enacting States free to require reciprocity in assistance, as several have done.²⁰ However, the absence of clear reciprocity clauses in India's IBC may make it more difficult to recover assets and may reduce the willingness of foreign courts to accept Indian insolvency proceedings.²¹ Reciprocity-requiring jurisdictions, such as Canada and Singapore, exhibit improved creditor confidence and judicial cooperation.²² India's insolvency framework would be in line with global best practices and enable more predictable cross-border insolvency outcomes if reciprocity were incorporated into it.²³

Examining the function of judicial collaboration in putting the Model Law into practice in India is the goal of this paper. This study examines the relevance of foreign practices to the Indian context by analysing comparative jurisprudence. The knowledge acquired will not only add to the current discussion on insolvency law but will also provide useful suggestions for improving judicial collaboration and bringing India's insolvency system into compliance with international norms. According to the IMF,²⁴ a strong bankruptcy system is essential to preventing financial crises, and the World Bank²⁵ has emphasised that courts

¹⁶ Andrew Godwin, Risham Garg & Debaranjan Goswami, *Cross-Border Insolvency Law in India: Are the Principles of Comity of Courts and Inherent Common Law Jurisdiction Relevant?*, 32 INT'L INSOLVENCY REV. 228 (2023), <https://onlinelibrary.wiley.com/doi/full/10.1002/iir.1500> (last visited Aug. 4, 2025).

¹⁷ Dhananjay Kumar & Gautam Sundaresh, *Indian Insolvency Regime Without Cross-Border Recognition – A Task Half Done?*, CYRIL AMARCHAND MANGALDAS BLOG (May 16, 2017), <https://corporate.cyrilamarchandblogs.com/2017/05/indian-insolvency-regime-without-cross-border-recognition-task-half-done/>.

¹⁸ Keith D. Yamauchi, *Should Reciprocity Be a Part of the UNCITRAL Model Cross-Border Insolvency Law?*, 16 INSOL INT'L INSOLVENCY REV. 145, 146 (2007), <https://onlinelibrary.wiley.com/doi/pdf/10.1002/ir.151>.

¹⁹ UNCITRAL Model Law on Cross-Border Insolvency arts. 1, 6, U.N. Doc. A/RES/52/158 (1997); LOOK CHAN HO, CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW 123 (4th ed. 2017); Jay L. Westbrook, *Universalism, Territorialism, and the New International Bankruptcy Code*, 60 AM. BANKR. L.J. 255, 277 (1986).

²⁰ UNCITRAL Model Law art. 6(1).

²¹ Insolvency and Bankruptcy Code, 2016.

²² AbitibiBowater Inc. (*Re*), 2012 ONSC 2869 (Can.); *Re OUE Lippo Healthcare Ltd.*, [2017] SGHC 285.

²³ IMF, RESOLVING CROSS-BORDER INSOLVENCY: ISSUES AND CHALLENGES (2019).

²⁴ INT'L MONETARY FUND, ORDERLY AND EFFECTIVE INSOLVENCY PROCEDURES (1999), <https://www.imf.org/external/pubs/ft/orderly/> (last visited July 13, 2025); INT'L MONETARY FUND, REPORT OF THE WORKING GROUP ON INTERNATIONAL FINANCIAL CRISES (1998), <https://www.imf.org/external/np/g22/ifcrep.pdf> (last visited July 15, 2025).

²⁵ WORLD BANK, EAST ASIA: RECOVERY AND BEYOND (2000), <https://documents1.worldbank.org/curated/en/484571468770740075/pdf/East-Asia-recovery-and-beyond.pdf> (last visited July 4, 2025); WORLD BANK, PRINCIPLES FOR EFFECTIVE INSOLVENCY AND CREDITOR/DEBTOR REGIMES (2021), <https://documents1.worldbank.org/>

are crucial to maintaining the effectiveness of such a regime. The automatic recognition of Indian insolvency proceedings in foreign jurisdictions is currently not holistically addressed by the IBC—a gap that needs to be filled.

2 THE UNCITRAL MODEL LAW: AN OVERVIEW

The Model Law is a well-recognised framework designed to address cross-border insolvency concerns on a global scale. More than 50 countries—including major economies such as the United States, the United Kingdom, and Singapore—have adopted it. The Model Law aims to facilitate the recognition of foreign insolvency proceedings, promote cooperation between courts across jurisdictions, and provide mechanisms for the coordination of cross-border insolvency cases.

It was developed in response to the need for a robust framework to address the increasing number of cross-border insolvency issues. It was designed to be adopted and incorporated into domestic legislation by individual states, enabling them to manage cross-border insolvency issues while preserving the integrity of their local insolvency laws. A fundamental premise of the Model Law is that cross-border solutions should complement, not undermine, domestic legal frameworks.²⁶

The Model Law incorporates a set of consistent rules that support ‘*modified universalism*’ standards.²⁷ These rules address the following topics: first, access to courts and foreign representatives; second, collaboration between foreign courts and representatives in any proceedings;²⁸ third, recognition of foreign proceedings; and fourth, the extent of relief that can be granted.²⁹ A state can create a cooperative framework by allowing the enforcement of international laws alongside domestic law, where one jurisdiction handles primary proceedings while other countries handle supplemental or secondary proceedings. Both main and non-main interest foreign proceedings are recognised under Article 17.³⁰ The main proceedings are held in the nation where the insolvent debtor has its centre of main interests,

curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf (last visited July 4, 2025).

²⁶ Sefa M. Franken, *Cross-Border Insolvency Law: A Comparative Institutional Analysis*, 34 OXFORD J. LEGAL STUD. 97 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2047399 (last visited July 4, 2025).

²⁷ Kent Anderson, *The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience*, 21 U. PA. J. INT’L ECON. L. 680 (2000); IAN F. FLETCHER, *INSOLVENCY IN PRIVATE INTERNATIONAL LAW* ¶ 1.12; Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276 (2000).

²⁸ Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696 (1999), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2754&context=clr> (last visited July 15, 2025).

²⁹ *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325 (S.D.N.Y. 2008).

³⁰ UNCITRAL, *Model Law on Cross-Border Insolvency with Guide to Enactment* art. 17, U.N. Doc. A/CN.9/442 (1997); Rosa M. Lastra, *Cross-Border Bank Insolvency: Legal Implications in the Case of Banks Operating in Different Jurisdictions in Latin America*, 6 J. INT’L ECON. L. 79 (2003).

while the non-main proceedings are established in countries where the insolvent debtor has an establishment.³¹

India stands to significantly improve the predictability and efficiency of its cross-border insolvency framework by adopting the Model Law. Important concepts such as '*foreign main proceedings*' and '*foreign non-main proceedings*,'³² which the legislation creates, empower courts to determine the appropriate jurisdiction when insolvency proceedings are initiated in multiple countries. This framework can help streamline asset recovery for both domestic and international creditors, reduce the risk of conflicting judicial decisions, and curb malpractices such as *asset fragmentation* and *forum shopping*.³³

3 INDIAN SCENARIO & THE HALF-MARCHED PATH

India's insolvency regime has undergone a significant transformation in recent years.³⁴ The IBC, 2016, which came into effect on December 15, 2016,³⁵ consolidated various laws governing insolvency and bankruptcy for individuals, partnerships, and corporate entities into a single, comprehensive framework.³⁶ While the IBC was a milestone for domestic insolvency, its cross-border provisions remain limited. Adopting the Model Law could unify India's approach to multinational bankruptcies, but slow legislative progress reflects challenges in aligning with the global insolvency framework.³⁷

This deficiency became particularly apparent in high-profile cases like *Jet Airways* and *Videocon*, where Indian courts had to rely on ad hoc judicial decisions to manage cross-border insolvency issues. These cases underscore the pressing need for India to establish a comprehensive legal framework—one that can address the complexities of multinational insolvency in a systematic and predictable manner.

³¹ Rongeeet Poddar, *Cross-Border Insolvency in India: The National Company Law Appellate Tribunal Paves the Way*, INDIA-CORPLAW (Sept. 30, 2019), <https://indiacorplaw.in/2019/09/30/cross-border-insolvency-india-national-company-law-appellate-tribunal-paves-way/>; see also Lastra, *supra* note 30.

³² UNCITRAL Model Law on Cross-Border Insolvency, G.A. Res. 52/158, U.N. GAOR, 52d Sess., Supp. No. 49, U.N. Doc. A/RES/52/158 (Jan. 30, 1998).

³³ Wolf-Georg Ringe, *Insolvency Forum Shopping, Revisited*, in *SHORT STUDIES IN PRIVATE INTERNATIONAL LAW* 1 (V. Lazić ed., 2019); Michael Edwards, *Preventing Forum Shopping in International Insolvency Cases*, MICHALEDWARDS.UK (2022); Kaustubh Kumar, *Forum Shopping in Insolvency Law: Comparative Insights and India's Potential*, MONDAQ.COM (2024).

³⁴ NISHITH DESAI ASSOCIATES, *INTRODUCTION TO CROSS-BORDER INSOLVENCY* (2020), https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Introduction-to-Cross-Border-Insolvency.pdf (last visited July 4, 2025).

³⁵ The Insolvency and Bankruptcy Code, 2016.

³⁶ Poorva Sharma, *Crossing Borders in Bankruptcy: India's Leap into Global Insolvency Law*, CCL, NLUO (May 21, 2024); Jitin Boolchandani, *Cross-Border Insolvency: Present Framework, Model Law & Emerging Issues from Banking Perspective* (Indian Institute of Banking & Finance, 2023).

³⁷ MINISTRY OF CORP. AFF., *REPORT OF THE COMMITTEE ON CROSS-BORDER INSOLVENCY* (2018), https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf (last visited July 2, 2025).

In the insolvency proceedings of *Jet Airways (India) Limited*, the NCLT in Mumbai expressly stated that, while insolvency proceedings against the corporate debtor had already been initiated before the Noord-Holland District Court, “there is no provision and mechanism in the I&B Code, at this moment, to recognise the judgment of an insolvency court of any Foreign Nation. Thus, even if the judgment of a Foreign Court is verified and found to be true, still, sans the relevant provision in the I&B Code, we cannot take this order on record.”³⁸

The Dutch Court Administrator and Resolution Professional subsequently came to an agreement on a ‘Cross-Border Insolvency Protocol’ in compliance with the National Company Law Appellate Tribunal’s (“NCLAT”) directives. Under the protocol, India was recognised as the centre of main interests (“COMI”), while the Dutch proceedings were classified as non-main insolvency proceedings. The Resolution Professional and the Dutch Court Administrator agreed on terms of cooperation, with the exception that the Dutch Administrator would only observe the Committee of Creditors (“CoC”) meetings. In line with this, the NCLAT permitted the Administrator to attend CoC sessions solely as an observer, so as to prevent any overlap of authority.³⁹

Similarly, press reports on the bankruptcy of Videocon Industries indicated that the company had asked the NCLT to include its foreign assets in the ongoing corporate bankruptcy resolution process.⁴⁰ In a significant ruling, the NCLT allowed Videocon’s overseas companies to be included in India’s corporate bankruptcy resolution procedure. However, the tribunals are handling such cases on a case-by-case basis, given that India does not yet have a well-defined framework for cross-border bankruptcy.

4 JUDICIAL COOPERATION IN THE IMPLEMENTATION OF THE MODEL LAW

Judicial cooperation is vital for effective cross-border bankruptcy.⁴¹ By promoting the implementation of foreign decisions, accelerating court-to-court communication, and acknowledging international proceedings, the Model Law facilitates effective coordination among courts globally. For India, effective implementation depends on robust judicial

³⁸ NISHITH DESAI ASSOCIATES, INTRODUCTION TO CROSS-BORDER INSOLVENCY (2020), https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Introduction-to-Cross-Border-Insolvency.pdf (last visited July 4, 2025).

³⁹ *Id.*

⁴⁰ Bhavya Dilipkumar, *Videocon Requests NCLT to Include Overseas Oil Assets in Insolvency Process*, ECON. TIMES (Aug. 22, 2019), <https://economictimes.indiatimes.com/industry/banking/finance/videocon-requests-nclt-to-include-overseas-oil-assets-in-insolvency-process/articleshow/70779728.cms>.

⁴¹ Jianli Song & Bing Cheng, *International Judicial Cooperation in Cross-Border Bankruptcy*, in FOREIGN-RELATED COMMERCIAL DISPUTES RESOLUTION IN CHINA 29 (2024); Basil Raju & Jyotirmoy Banerjee, *Cross-Border Insolvency: The Need for a Comprehensive Framework in India*, 4 INT’L J. HUM. RTS. L. REV. (2024).

collaboration both domestically and internationally. This section examines the Model Law's judicial cooperation mechanisms, India's challenges, and lessons drawn from other countries.

4.1 Inherent Power of Common Law Courts

Common law nations have long recognised that courts possess an inherent capacity to assist other courts or parties in cases of insolvency.⁴² The foundation of this authority is the comity principle, a concept with deep historical roots that remains relevant today. Hong Kong serves as an example of the importance of this authority in countries without specific domestic laws pertaining to cross-border insolvency.⁴³ The inherent authority may nonetheless be important even in cases where legislative procedures for cross-border insolvency exist.⁴⁴

An early example of judicial aid in overseas bankruptcy proceedings was demonstrated in the seminal case of *Solomons v. Ross*,⁴⁵ where English courts permitted Amsterdam trustees to recover garnished assets in England. While the court's reasoning was not entirely clear, later decisions highlighted the principle of comity as the basis for such recognition. This approach aligns with the principle of modified universalism, which seeks to harmonise global insolvency proceedings.

Courts have acknowledged the detrimental effects of parallel insolvency proceedings, highlighting the *universality principle* that encourages equitable treatment for all creditors.⁴⁶ In the *Cambridge Gas Transportation Corp* case, it was recognised that the creditor pool and the bankruptcy procedure overall benefit from preventing disjointed insolvency proceedings. Lord Hoffmann reaffirmed the principle of a single, comprehensive bankruptcy procedure to prevent any creditor from improperly benefiting from jurisdictional advantages.⁴⁷

The use of inherent authority is guided by the modified universalism principle, which has been embraced in a number of jurisdictions, including the United States and the United Kingdom. This principle permits judicial discretion while integrating international asset distribution and collection. For example, the United States applied a modified universalism

⁴² Andrew Godwin, Timothy Howse & Ian Ramsay, *The Inherent Power of Common Law Courts to Provide Assistance in Cross-Border Insolvencies: From Comity to Complexity*, 26 INT'L INSOLVENCY REV. 5 (2017), <https://onlinelibrary.wiley.com/doi/10.1002/iir.1267> (last visited July 4, 2025).

⁴³ Andrew Godwin & Charles Zhen Qu, *Cross-Border Insolvency Law in Hong Kong: Recognition of Foreign Schemes of Arrangement*, 30 INT'L INSOLVENCY REV. 1 (2021), <https://onlinelibrary.wiley.com/doi/10.1002/iir.1421> (last visited July 4, 2025).

⁴⁴ Michael Crystal, *'The Golden Thread': Universalism and Assistance in International Insolvency*, JERSEY & GUERNSEY L. REV. 1 (July 2011), https://www.jerseylaw.je/publications/jglr/Pages/JLR1102_Crystal.aspx (last visited July 4, 2025).

⁴⁵ *Solomons v. Ross*, (1764) 1 H Bl 131, as cited in *Folliott v. Ogden*, (1789) 1 H Bl 123.

⁴⁶ *In re African Farms Ltd*, [1906] TS 373, 377 (S. Afr.).

⁴⁷ *Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors of Navigator Holdings Plc*, [2006] UKPC 26.

approach in *Maxwell Communication Corporation*, striking a balance between judicial discretion and global wealth distribution.⁴⁸

The inherent power derives from the doctrine of ancillary liquidation, applicable when a court recognises itself as an ancillary jurisdiction while a foreign court manages the principal proceedings.⁴⁹ This doctrine typically designates the place of incorporation as the venue for principal proceedings, unless compelling evidence suggests otherwise.⁵⁰ The common law approach in the UK follows a trend that requires a statutory or common law foundation before aid may be provided.⁵¹ According to Lord Hoffmann's ruling in *Re HIH*,⁵² common law courts may choose to support international liquidators even if doing so goes against regional preferred creditor laws.⁵³ A preferred creditor regime is established in India under the Companies Act, 2013.⁵⁴

Indian courts may follow domestic preference regimes owing to the uncertainty surrounding the implementation of Lord Hoffmann's approach, which might restrict the utility of inherent power.⁵⁵ The cardinal principle is that relief granted by foreign representatives must have a legal basis under domestic laws or the law of the main proceedings' jurisdiction.⁵⁶ Courts are expected to pursue aggregate welfare benefits despite minor differences in outcomes.⁵⁷

Courts may hesitate to support foreign insolvency proceedings without a clear prospect of company recovery or creditor benefit. For instance, Australia's New South Wales Supreme Court declined to provide assistance in a UK cross-border case, citing doubts about its advantage to creditors or the debtor.⁵⁸ The inherent authority is nonetheless an important judicial doctrine, particularly in light of the limitations of the Indian Code of Civil Procedure in bankruptcy cases.⁵⁹

⁴⁸ *Re HIH Casualty & Gen. Ins. Ltd*, [2008] 1 WLR 852.

⁴⁹ Godwin, Howse & Ramsay, *supra* note 42.

⁵⁰ *Re Opti-Medix Ltd* (in liquidation), [2016] SGHC 108 (Sing.).

⁵¹ Adrian Walters, *Modified Universalism & the Role of Local Legal Culture in the Making of Cross-Border Insolvency Law*, OXFORD BUSINESS LAW BLOG (Dec. 21, 2017), <https://blogs.law.ox.ac.uk/business-law-blog/blog/2017/12/modified-universalism-role-local-legal-culture-making-cross-border>.

⁵² *Re HIH Casualty & Gen. Ins. Ltd*, [2008] 1 WLR 852.

⁵³ *Re Alitalia Lince Aeree Italiane SpA*, [2011] EWHC 15 (Ch).

⁵⁴ The Companies Act, 2013, § 326.

⁵⁵ Godwin, Howse & Ramsay, *supra* note 42; Godwin & Qu, *supra* note 43.

⁵⁶ *Beluga Chartering B.V. v. Timber S.A.*, 294 S.W.3d 300 (Tex. App. 2009).

⁵⁷ Walters, *supra* note 51; Jay L. Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457 (1991).

⁵⁸ Paul Apáthy, *Recognition of UK Part A1 Moratorium Process Rejected by NSW Supreme Court*, HERBERT SMITH FREEHILLS (2021), <https://www.herbertsmithfreehills.com/notes/apac-rti/2021-07/recognition-of-uk-part-a1-moratorium-process-rejected-by-nsw-supreme-court> (last visited July 4, 2025).

⁵⁹ Sudhaker Shukla & Kokila Jayaram, *Cross-Border Insolvency: A Case to Cross the Border Beyond the UNCITRAL* (IBBI), <https://ibbi.gov.in/uploads/resources/c3593c9f41984c6f31f278974de3cf37.pdf> (last visited July 4, 2025).

4.2 Role of Indian Courts: A Case-Law Perspective

Cross-border insolvency cases involve intricate challenges due to varying jurisdictional laws. Historically, the Gibbs rule from *Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux*⁶⁰ has limited English courts' recognition of foreign insolvency discharges. Despite criticism, this rule has persisted in English law, highlighting the need for re-evaluation. These complexities are further compounded by the need for debtors to manage liabilities in multiple jurisdictions.

In India, the first cross-border insolvency case was *P. MacFadyen & Co.* in 1908, which set a precedent for the global distribution of assets involving English and Madras courts.⁶¹ This early case demonstrated the judiciary's role in cross-border insolvency in the absence of specific legislation. In 2019, *SBI v. Jet Airways (India) Ltd.*⁶² became a landmark case. The Dutch-appointed Bankruptcy Administrator sought recognition of parallel insolvency proceedings in the Netherlands before the Mumbai Bench of the NCLT. Initially, the NCLT rejected this request, citing that Sections 234 and 235 of the IBC,⁶³ which govern cross-border insolvency, had not yet been enacted. Consequently, the NCLT deemed the Dutch proceedings null and void.

The NCLAT reversed the NCLT's ruling on appeal by the Bankruptcy Administrator. The NCLAT facilitated a cross-border insolvency protocol based on the Model Law's principles and allowed collaboration between the Dutch Administrator and the Indian Resolution Professional. This protocol acknowledged the Netherlands as the jurisdiction for non-primary insolvency proceedings and India as the COMI. Although the judiciary's proactive approach to cross-border insolvency is demonstrated in this instance, such rulings remain uncommon and are usually handled on a case-by-case basis, given the absence of a comprehensive cross-border insolvency framework.

In August 2019, the NCLT allowed the consolidation of 13 Videocon Group companies under the principle of '*substantial consolidation*,' marking a significant development in Indian insolvency law.⁶⁴ Following an insolvency application by SBI, the NCLT approved consolidating the group companies to maximise asset value, relying on US and UK jurisprudence despite the IBC's lack of explicit group insolvency provisions. In February 2020, it extended this to four foreign subsidiaries, sparking concerns over the IBC's extraterritorial reach.

⁶⁰ *Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux*, (1890) 25 QBD 399 (UK).

⁶¹ *P. MacFadyen & Co.*, [1908] 1 KB 675 (UK).

⁶² *State Bank of India v. Jet Airways (India) Ltd.*, CP No. 2205 (IB)/MB/2019 (NCLT).

⁶³ The Insolvency and Bankruptcy Code, 2016, §§ 234–235.

⁶⁴ *State Bank of India v. Videocon Indus. Ltd.*, 2019 SCC OnLine NCLT 745.

In November 2019, the US bankruptcy court recognised an Indian insolvency proceeding in *SBI v. SEL Mfg. Co. Ltd.*⁶⁵ as a “foreign main proceeding” under Chapter 15 of the US Bankruptcy Code.⁶⁶ This recognition followed the US adoption of the Model Law in 2005 to streamline cross-border insolvency. The court held that the Indian proceedings aligned with international standards and did not violate US public policy, thereby granting the foreign representative appropriate relief.⁶⁷

For successful implementation of the Model Law, India must strengthen judicial capacity, establish clear communication channels with foreign courts, and apply public policy exceptions sparingly. Judicial training should be introduced to familiarise judges with the Model Law, global best practices, and relevant foreign legal systems. India should also establish specialised cross-border insolvency benches, akin to those in the US and Singapore, led by experienced judges. Alongside adoption of the Model Law, judicial training, and institutional reform, this would boost India’s capacity to handle complex cases and reinforce its global insolvency standing.

5 COMPARATIVE JURISPRUDENCE: LESSONS FROM OTHER JURISDICTIONS

Many governments have ratified the Model Law, yet judicial attitudes, economic interests, and legal traditions all influence how it is implemented. This section provides an analytical summary of how major nations—including Singapore, the United Kingdom, the United States, Japan, Canada, and France—have adopted the Model Law, highlighting the advantages and difficulties that each jurisdiction encounters.

5.1 Singapore: Shift Toward Universalism

The “3Cs”—communication, coordination, and cooperation—are highly valued in Singapore’s insolvency framework, as they are essential to the Model Law’s successful execution.⁶⁸ Historically, Singapore adopted a territorial stance on bankruptcy, giving local creditors priority.⁶⁹ With the adoption of the Model Law in March 2017, Singapore shifted to a universalist framework, in keeping with its status as a major global financial centre. Singapore’s adoption of the Model Law aligns with its strategic goal of attracting foreign businesses and enhancing international cooperation in insolvency matters.⁷⁰ By doing so, it has

⁶⁵ Company Petition (IB) No. 114 of 2017 (NCLT Chandigarh).

⁶⁶ The United States Bankruptcy Code, 1978, § 1502(4).

⁶⁷ *Id.* § 1520.

⁶⁸ Justice Kannan Ramesh, *Speech Delivered at the First Meeting of ASEAN Insolvency Judges* (Supreme Court of Singapore, Nov. 19, 2024), <https://www.judiciary.gov.sg> (last visited July 4, 2025).

⁶⁹ Halimi, *supra* note 12.

⁷⁰ Companies Act (Cap. 50, 2006 Rev. Ed.), sch. 10 (Sing.) (inserted by Companies (Amendment) Act 2017).

positioned itself as a leading jurisdiction for cross-border bankruptcy, reflecting the global trend toward greater collaboration in resolving transnational insolvencies.

Singapore's evolution shows that it has deliberately shifted its insolvency policy from a protectionist to an integrationist model, which fits with its broader economic goal of becoming a global financial hub. This shift in approach aligns with UNCITRAL's objectives, yet Singapore's courts remain flexible and practical, focusing on cooperation with creditors and facilitating the judicial process. For example, in *Re OUE Lippo Healthcare Ltd* [2017] SGHC 285, the courts demonstrated a willingness to assist with foreign cases in a manner consistent with Model Law principles.⁷¹ Singapore's adoption also aligns with the ASEAN framework on cross-border insolvency, demonstrating the region's commitment to legal collaboration.⁷² This approach reduces the inherent tension between universalism and territorialism by building trust among creditors across borders without completely displacing domestic legal rights.⁷³ The institutional support for the "3Cs" thus represents the most effective balance between international cooperation and local legal sovereignty, consistent with best practices in international insolvency law and UNCITRAL legislative guides.⁷⁴

5.2 United Kingdom: Post-Brexit Realities

The English courts' development of the *doctrine of comity* from the late 18th century onwards accelerated the advancement of cooperation by encouraging courts to communicate with one another and form cooperative relationships through shared cases with other jurisdictions.⁷⁵ The UK's approach to cross-border insolvency has been complicated by Brexit, which ended the automatic recognition of UK insolvency proceedings in the European Union (EU) as of December 31, 2020.⁷⁶ The UK has retained certain elements of the European Insolvency Regulation (EIR) through the Insolvency (Amendment) (EU Exit) Regulations

⁷¹ *Re OUE Lippo Healthcare Ltd*, [2017] SGHC 285.

⁷² ASEAN SECRETARIAT, ASEAN CROSS-BORDER INSOLVENCY FRAMEWORK (2018).

⁷³ LOOK CHAN HO, CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW 210–15 (4th ed. 2017).

⁷⁴ UNCITRAL, *Legislative Guide on Insolvency Law*, U.N. Doc. A/CN.9/476 (2005).

⁷⁵ *Macaulay v. Guar. Tr. Co. of N.Y.*, (1927) 40 TLR 99 (UK); *Re Vocalion (Foreign) Ltd*, [1932] 2 Ch 196 (UK); *Banque Indosuez SA v. Ferromet Res. Inc.*, [1993] BCLC 112 (UK); *Re BCCI (No 10)*, [1997] Ch 213 (UK); *Re Impex Servs. Worldwide Ltd*, [2004] BPIR 564 (UK); *Re Matheson Bros.*, (1884) 27 Ch D 225 (UK); *Re English, Scottish & Australian Chartered Bank*, [1893] 3 Ch 385 (UK).

⁷⁶ Kangs Solicitors, *Cross-Border Insolvency: The Effects of Brexit* (Mar. 20, 2025), <https://www.kangssolicitors.co.uk/news-insights/cross-border-insolvency/> (last visited July 1, 2025).

2019,⁷⁷ but these provisions no longer guarantee mutual recognition between UK and EU courts.⁷⁸

After Brexit, the UK has reasserted its national procedural autonomy, which has diminished the pre-Brexit regulatory coherence of the EIR. This return to discretionary recognition heightens the risk of jurisdictional conflicts and forum shopping, forcing courts to rely heavily on the doctrine of comity and equitable principles as developed in *Cambridge Gas Transportation Corp. v. Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26.⁷⁹ In addition, the lack of clarity regarding COMI determinations after Brexit means that courts must scrutinise evidence more closely, which could increase the cost and complexity of multinational bankruptcies.⁸⁰ This legal fragmentation not only creates greater legal uncertainty but also threatens the UK's status as a leading centre for cross-border insolvency practice, making it harder to strike the right balance between sovereignty and international cooperation in a globalised economy.⁸¹ The UK government's continued reliance on the Cross-Border Insolvency Regulations 2006, which give effect to the Model Law, also seeks to mitigate disruption, but its effectiveness remains subject to judicial interpretation and political developments.⁸²

As a result, UK insolvency proceedings must now be recognised on a case-by-case basis in EU countries, increasing the likelihood of parallel proceedings and complicating the determination of COMI.⁸³ This legal fragmentation poses significant challenges for businesses operating across both jurisdictions.

5.3 United States: Chapter 15 and Selective Cooperation

The United States adopted the Model Law in 2005, integrating it into Chapter 15 of the US Bankruptcy Code.⁸⁴ Chapter 15 facilitates cooperation between US courts and foreign jurisdictions by granting foreign representatives access to US courts. However, the US applies conditional recognition, meaning courts are not required to defer to foreign decisions and often prioritise the protection of domestic creditors. While Chapter 15 has expanded

⁷⁷ The Insolvency (Amendment) (EU Exit) (No. 2) Regulations 2019, SI 2019/1459 (UK).

⁷⁸ Kai Zhang, Philip Morgan & Judie Rinearson, *Post-Brexit: Significant Changes to UK Cross-Border Payments Regulation, FINTECH AND BLOCKCHAIN LAW WATCH* (July 1, 2021); J.P. Morgan, *The Impact of Brexit on UK–EU Cross-Border Payments* (2020).

⁷⁹ *Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors of Navigator Holdings Plc*, [2006] UKPC 26.

⁸⁰ Mark Brandes, *Cross-Border Insolvency and Brexit: Challenges Ahead*, 29 INT'L INSOLVENCY REV. 143 (2020).

⁸¹ UNCITRAL SECRETARIAT, MODEL LAW ON CROSS-BORDER INSOLVENCY: LEGISLATIVE GUIDE 67 (2020).

⁸² Cross-Border Insolvency Regulations 2006, SI 2006/1030 (UK).

⁸³ Corporate Insolvency and Governance Act 2020, c. 12 (UK).

⁸⁴ Bankruptcy Abuse Prevention and Consumer Protection Act, 2005 (US Code), ch. 15.

international cooperation, US courts remain cautious about relinquishing control over domestic assets, particularly when foreign distribution priorities differ from those under US law.⁸⁵

The selective deference in Chapter 15 reveals a tension in the law between international comity and the protection of US creditors. Courts closely scrutinise foreign proceedings to ensure compliance with US public policy as set out in 11 U.S.C. § 1506.⁸⁶ The case *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031 (5th Cir. 2012), illustrates the courts' caution in guarding against foreign bankruptcy plans that differ substantially from US equitable distribution principles.⁸⁷ This approach aligns with Westbrook's concept of "*conditional universalism*," which balances cooperation with the preservation of domestic legal sovereignty.⁸⁸ The US reliance on a robust "public policy exception" also makes automatic recognition more difficult and illustrates the broader challenge of reconciling divergent national insolvency priorities within a fragmented international legal system.⁸⁹ Scholars further note that courts across different circuits apply varying methodologies, indicating that the law is not always applied consistently.⁹⁰ Legislative commentators call for nuanced reforms to improve predictability without sacrificing core protections.⁹¹

5.4 Japan: A Hybrid Approach

Japan's bankruptcy rules were originally based on strict territorial principles, but the 1999 Civil Rehabilitation Law revisions introduced aspects of universalism for outbound claims.⁹² Japan has enacted four statutes related to insolvency and bankruptcy.⁹³ Through the Law on Recognition of and Assistance in Foreign Insolvency Proceedings (LRAF), which guarantees equal treatment for foreign creditors and facilitates the recognition of foreign insolvency proceedings, Japan has since aligned its framework with the Model Law.⁹⁴ Japan's

⁸⁵ John J. Chung, *The Retrogressive Flaw of Chapter 15 of the Bankruptcy Code: A Lesson from Maritime Law*, 17 DUKE J. COMP. & INT'L L. 253 (2007), <https://scholarship.law.duke.edu/djcil/vol17/iss2/1/> (last visited July 4, 2025).

⁸⁶ 11 U.S.C. § 1506 (2024).

⁸⁷ *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031 (5th Cir. 2012).

⁸⁸ Jay L. Westbrook, *The New International Bankruptcy and the Problem of Universalism*, 60 AM. BANKR. L.J. 255, 261–65 (1986).

⁸⁹ Grant M. Hayden, *Chapter 15 and the Public Policy Exception*, 38 AM. BANKR. INST. J. 22 (2019).

⁹⁰ Charles J. Tabb, *Inconsistent Application of Chapter 15: An Empirical Study*, 92 AM. BANKR. L.J. 305 (2018).

⁹¹ Stephen J. Lubben, *Reforming Chapter 15*, 88 AM. BANKR. L.J. 451 (2014).

⁹² Bankruptcy Law, Law No. 71 of 1922, arts. 1, 126, 127, 132 (Japan).

⁹³ Hasanhō [Bankruptcy Law], Law No. 71 of Apr. 25, 1922; Wagiho [Composition Law], Law No. 72 of Apr. 25, 1922; Shohō [Commercial Code], Law No. 48 of 1899; Kaishakoseiho [Corporate Reorganization Law], Law No. 172 of June 7, 1952.

⁹⁴ Hideo Horikoshi, *Japan's New Corporate Reorganization Law*, 38 INT'L LAW. 855 (2004), <https://scholar.smu.edu/til/vol38/iss3/16/> (last visited July 4, 2025).

cautious attitude to international bankruptcy cooperation is reflected in its continued use of territorial principles for inbound claims.⁹⁵

Japan's hybrid model strikes a balance between tradition and contemporary insolvency requirements, reflecting a cautious incrementalism toward universalism. The Model Law's objectives are supported by the LRAF's facilitation of the recognition of foreign proceedings, but—as evidenced by Tokyo District Court decisions that give precedence to local creditors' rights—judicial practice frequently maintains territorial protections.⁹⁶ This two-pronged strategy demonstrates Japan's commitment to “soft universalism,” which limits inbound claims due to domestic policy concerns while permitting cooperation primarily for outbound insolvencies.⁹⁷ Legal scholars highlight this reticence as a cultural and institutional response to preserving economic stability and creditor confidence within a historically risk-averse framework.⁹⁸ Thus, Japan's gradual adoption of the Model Law serves as an example of the difficulties in bringing deeply ingrained national insolvency cultures into compliance with international standards.⁹⁹ Furthermore, Japanese corporate governance practices and creditor structures—including keiretsu networks—have influenced judicial conservatism in cross-border insolvency cooperation.¹⁰⁰

5.5 Canada: Modified Universalism

With its Bankruptcy and Insolvency Act (BIA) and Companies' Creditors Arrangement Act (CCAA), Canada adopted the Model Law,¹⁰¹ demonstrating a modified universalist stance.¹⁰² Canadian rules provide for the recognition of foreign proceedings even in cases where there is no physical establishment in the foreign jurisdiction, reflecting a broader embrace of international insolvency concepts.¹⁰³ To safeguard domestic interests, Canadian courts retain their discretion when awarding remedies.¹⁰⁴ This adaptability, which preserves

⁹⁵ Raj Bhala, *International Dimensions of Japanese Insolvency Law*, MONETARY & ECON. STUD. (2001), <https://www.imes.boj.or.jp/research/papers/english/me19-1-5.pdf> (last visited Aug. 7, 2025).

⁹⁶ Tokyo District Court decisions on recognition of foreign proceedings (2015).

⁹⁷ Toshiyuki Kono & Shinjiro Takagi, *Japan's Experience with the UNCITRAL Model Law*, in *CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW 400*, 405–10 (Look Chan Ho ed., 2d ed. 2017).

⁹⁸ Koji Tanaka, *Territoriality vs. Universalism in Japanese Insolvency Law*, 24 INT'L INSOLVENCY REV. 289 (2015).

⁹⁹ U.N. COMM'N ON INT'L TRADE L., UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW (2005).

¹⁰⁰ Shinya Ikeda, *Keiretsu and Cross-Border Insolvency: Implications for Japanese Law*, 17 ASIA PAC. J. INSOLVENCY & RESTRUCTURING 85 (2018).

¹⁰¹ Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3; Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (Can.).

¹⁰² Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, § 48(1) (Can.); Marcela Ouatu, *Modified Universalism for Cross-Border Insolvencies: Does It Work in Practice?* (2014) (LL.M. thesis, University of British Columbia).

¹⁰³ Philippe H. Bélanger & Neil A. Peden, *The Changing Framework Relating to the Recognition of Cross-Border Insolvencies in Canada and the United States*, ANN. REV. INSOLVENCY L. 203 (2005).

¹⁰⁴ Alfonso Nocilla, *Canadian Cross-Border Insolvency Law and the Triumph of 'Modified Universalism': A Retrospective*, INT'L INSOLVENCY REV. (Oct. 3, 2024), <https://doi.org/10.1002/iir.1549>.

judicial oversight of bankruptcy proceedings, demonstrates Canada's dedication to global collaboration.

An advanced version of modified universalism is exemplified by Canada's model, which embraces international cooperation while clearly maintaining the discretion required to safeguard domestic creditors and legal principles.¹⁰⁵ Prominent cases such as *AbitibiBowater Inc. (Re)*, 2012 ONSC 2869,¹⁰⁶ showcase Canadian courts' readiness to acknowledge foreign insolvency proceedings without physical establishment, indicating a forward-thinking approach in line with UNCITRAL's policy goals. Judicial discretion, however, prevents excessive intrusion on domestic insolvency sovereignty by ensuring that recognition and aid are not granted without consideration for equity.¹⁰⁷ Canada is able to balance the competing demands of globalisation and national legal autonomy thanks to this balanced approach, which is reinforced by the dual legislative framework of the CCAA and BIA.¹⁰⁸ Academics point to Canada's developing legal system as an example of how to balance local creditor protections with universalism.¹⁰⁹

5.6 France: Strong Territorialism

France continues to place a high priority on a territorial approach to insolvency, asserting jurisdiction based on where a company's COMI is located.¹¹⁰ French courts maintain a protective attitude toward local creditors and are reluctant to recognise international bankruptcy proceedings unless certain requirements are fulfilled.¹¹¹ Despite its participation in international agreements and regulations, France's insolvency laws remain primarily territorial in nature, prioritising domestic economic protection over global collaboration.

By defending protectionist creditor frameworks and opposing the dilution of national jurisdictional authority, France's adherence to territorialism demonstrates a *sovereign-centric* insolvency policy. The cautious judicial recognition of foreign proceedings—which is frequently dependent on rigorous adherence to procedural safeguards and creditor protection—is reflected in the French Commercial Code and jurisprudence, including rulings from the *Tribunal de Commerce de Paris*.¹¹² Scholars attribute this position to the French civil law tradition's emphasis on state sovereignty and codified territorial jurisdiction, which makes

¹⁰⁵ *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (Ont. C.A.).

¹⁰⁶ *AbitibiBowater Inc. (Re)*, 2012 ONSC 2869 (Ont. Sup. Ct. J.).

¹⁰⁷ Jennifer A. Whaley, *Modified Universalism in Canadian Insolvency Law*, 30 CAN. BUS. L.J. 255 (2010).

¹⁰⁸ Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (Can.); Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (Can.).

¹⁰⁹ Adams & Fincke, *supra* note 5.

¹¹⁰ Decree No. 85-1388 of Dec. 27, 1985, art. 1 (Fr.).

¹¹¹ PAUL J. OMAR, CROSS-BORDER INSOLVENCY LAW AND PRACTICE IN FRANCE (2002).

¹¹² Tribunal de Commerce de Paris, Ordonnance (2017).

integration with Model Law universalism more challenging.¹¹³ Even though France was party to the EU Insolvency Regulation prior to Brexit, its insolvency jurisprudence continues to be marked by caution when dealing with foreign proceedings, which restricts international cooperation and increases the likelihood of parallel insolvency proceedings.¹¹⁴ French doctrine emphasises the “*ordre public*” exceptions, which shield domestic creditors from foreign insolvency plans deemed contrary to national economic interests.¹¹⁵

6 CONCLUSION

“The lack of such regimes has often resulted in inadequate and uncoordinated approaches to cross-border insolvency that are not only unpredictable and time-consuming in their application, but lack both transparency and the tools necessary to address the disparities and, in some cases, conflicts that may occur between national laws and insolvency regimes. These factors have impeded the protection of the value of the assets of financially troubled businesses and hampered their rescue.”¹¹⁶

In the absence of a strong cross-border bankruptcy framework, asset protection and company rescue have been hampered by erratic, time-consuming, and disorganised methods. India’s system continues to face cross-border bankruptcy challenges despite the IBC 2016, because it lacks a defined structure and relies on ad hoc judicial rulings—raising uncertainty for foreign creditors and businesses. Implementing the ILC’s proposed provisions could improve judicial cooperation, enhance India’s international reputation, facilitate cross-border bankruptcy proceedings, and increase foreign direct investment.¹¹⁷ Adopting the Model Law is not without its challenges, however, particularly given the intricacy of bilateral agreements addressed by IBC Sections 234 and 235.¹¹⁸ A single framework such as the Model Law could help streamline these processes.

¹¹³ Comité Maritime International, *Answers of the Association Française du Droit Maritime* (2018), <https://comitemaritime.org/wp-content/uploads/2018/05/French-MLA-Cross-border-insolvency.pdf> (last visited Aug. 7, 2025).

¹¹⁴ European Insolvency Regulation, Regulation (EU) 2015/848 (recast).

¹¹⁵ Alexis Hojabr & Saam Golshani, *In Review: Insolvency Law, Policy and Procedure in France*, LEXOLOGY (2023); Gilles Cuniberti & Antonio Leandro, *Article 33: Public Policy*, in *THE EUROPEAN INSOLVENCY REGULATION AND IMPLEMENTING LEGISLATIONS* 394 (2024).

¹¹⁶ U.N. COMM’N ON INT’L TRADE L., UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, PART THREE 83–111 (2012), <https://www.un-ilib.org/content/books/9789210557160c004/read> (last visited July 11, 2025).

¹¹⁷ CROSS-BORDER INSOLVENCY RULES COMM., REPORT ON THE RULES AND REGULATIONS FOR CROSS-BORDER INSOLVENCY RESOLUTION (2020), <https://ibbi.gov.in/uploads/whatsnew/2021-11-23-215206-0clh9-6e353aefb83d0138211640994127c27.pdf> (last visited July 5, 2025).

¹¹⁸ *Resolving Global Defaults: Is India Ready for a Cross-Border Insolvency Framework?*, CIVILDAILY (n.d.), <https://www.civildaily.com/resolving-global-defaults-is-india-ready-for-a-cross-border-insolvency-framework-2/> (last visited July 5, 2025).

The Model Law provides a solution, but it excludes financial institutions—a significant gap in today’s interconnected economy.¹¹⁹ India should therefore consider aligning with Financial Stability Board (FSB) norms for financial institutions alongside adopting the Model Law. A phased reform approach—starting with harmonising domestic practices with global standards and progressing toward full integration—would be ideal. Transitional steps could include pilot projects and bilateral cooperation agreements with key jurisdictions.¹²⁰ A hybrid framework that combines the Model Law with other strategies, particularly for the financial sector, is well-suited to the Indian context. Successful implementation necessitates judicial collaboration, which calls for training, legislative amendments, and conformity with international standards.

The proposed cross-border insolvency provisions raise concerns about whether they are intended to be the sole mechanism for recognition and assistance. However, interpreting them as exclusive would conflict with Article 5 of the draft law. This article underscores the value of preserving Indian courts’ inherent common law powers to recognise and aid foreign insolvency proceedings. Therefore, even after the adoption of the Model Law, India retains several avenues for cross-border insolvency recognition and assistance—as doing so is in the interest of justice.

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¹¹⁹ Shuai Guo, *Cross-Border Resolution of Financial Institutions: Perspectives from International Insolvency Law* (III Prize in International Insolvency Studies, 2018), https://www.iiiglobal.org/file.cfm/12/docs/2018_silver_shuai_guo.pdf (last visited July 5, 2025).

¹²⁰ IRIT MEVORACH, *THE FUTURE OF CROSS-BORDER INSOLVENCY: OVERCOMING BIASES AND CLOSING GAPS* (2018), <https://doi.org/10.1093/oso/9780198782896.001.0001>.

CHAPTER 13

ESG and Insolvency: Rethinking India's Bankruptcy Framework for a Sustainable Future

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With global economies striving for sustainable growth, the convergence of Environmental, Social, and Governance (ESG) principles with financial and legal systems has become increasingly critical. Yet, insolvency frameworks, which are a critical corporate accountability system, have traditionally lagged in incorporating such transformative principles. This study explores the understated yet powerful confluence of ESG standards and India's Insolvency and Bankruptcy Code (IBC), arguing that the future of insolvency reform must be harmonized with sustainability goals.

Employing a doctrinal and comparative analysis, the paper identifies systemic loopholes within the IBC in environmental commitments along with obligations, social spillovers, and governance failures of struggling businesses. It critically reviews the potentiality that the current resolution processes, which place almost singular emphasis on financial metrics, may risk ignoring long-term ESG performance and considerations of the public interest. Drawing on nascent international jurisprudence and policy shifts, the study presents an argument for rethinking India's insolvency system where ESG metrics become critical elements of resolution planning, creditor assessments, and judicial oversight. While existing literature, most notably publication by the IBBI and a few academic studies has begun to acknowledge the need for ESG integration into India's insolvency processes, much of it remains either normative or exploratory, with significant gaps in enforceability, stakeholder representation, and the treatment of environmental or CSR-related claims, including the lack of ESG performance audits, definitional clarity of ESG liabilities, and enforceable compliance post-resolution. The study offers forward-looking policy and regulatory suggestions, bridging the gap in existing literature that seek to embed ESG considerations in insolvency processes, hence bolstering corporate resilience, underpinning investor confidence, and enabling sustainable economic recovery. It also underscores the urgency of aligning India's insolvency regime with global sustainability norms.

Keywords: IBC, ESG, Corporate Insolvency, Sustainable Restructuring, Judicial Oversight

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1 INTRODUCTION

In recent years, Environmental, Social, and Governance (hereinafter ESG) factors have emerged as key considerations for corporate accountability, stakeholders' consideration, investor confidence, and long-term sustainability. Although these factors are gaining global recognition, their integration in insolvency proceedings in India is still untouched. The Insolvency and Bankruptcy Code of India, 2016 (hereinafter IBC), India's primary legislation for corporate rehabilitation and dissolution, is largely designed to maximize asset value and ensure creditor(s) recovery with little emphasis on non-financial risks such as environmental and social harm.

This existing gap becomes a significant factor for consideration when a company having environmental liability, societal violations, or poor governance enters insolvency. In the absence of proper accountability, these factors are generally ignored, affecting vulnerable stakeholders such as local communities, workers, and the environment. Moreover, when ESG-related liabilities, especially those arising from environmental damage or labour right violations, are among the contributing factors behind a company's insolvency, the absence of statutory obligations to govern them often leads to their exclusion during the resolution process. This oversight not only leaves the core issue unaddressed, but also creates a significant risk of recurrence post-resolution, potentially leading the company back into insolvency and creating an endless cycle. Furthermore, neglecting such liabilities undermines investor confidence and weakens stakeholder trust, ultimately affecting the quality and sustainability of the resolution itself.

This paper explores the importance of integration of ESG with the Indian Insolvency regime by analysing the inadequate space of the current IBC framework to incorporate rules governing ESG. The paper uses doctrinal research, including international examples and case studies, to highlight the growing need to address ESG issues in the IBC.

The paper argues for targeted reforms including proper ESG due diligence, amendment of existing provisions such as Sections 5(21), 30(2) and 53 of IBC addressing how waterfall mechanism impacts the integration. Ultimately, the paper proposes a roadmap for making an inclusive Insolvency regime in India with laws governing ESG parameters, as a step towards a sustainable finance.

2 UNDERSTANDING ESG AND INSOLVENCY: CONCEPTUAL FRAMEWORK

Before dealing with the intersection of IBC and ESG it is important to understand the conceptual framework of these concepts in brief. This section will present the brief about

ESG and IBC and their existing principles. In addition, this section will discuss how the confluence of ESG and IBC takes place.

2.1 Defining ESG Principles

ESG principles together form a multi-faceted framework for assessing a company's long-term sustainability, ethical track record, and operational integrity. Although traditionally undervalued in financial assessments, ESG metrics have become increasingly relevant in understanding the broader impact of corporate behavior not only on investors but also on employees, consumers, communities, and the environment. ESG standards have become the dominant feature of modern corporate governance and investment platforms as forward indicators of long-term performance and resilience.

The foundation of ESG in India dates back to 2009 as Business responsibility reporting,¹ which aligns with some of the global standards like Global Reporting Initiative (GRI), Sustainability Accounting Standards Board (SASB).²

The environmental aspect encompasses a company's green footprint, including climate change policy, energy efficiency, pollution control, and biodiversity conservation.³ Ignorance of environmental responsibility can expose companies to legal threats, reputational damage, and economic costs, a trend underpinned by increasing climate litigation and regulatory focus worldwide.

The Social dimension includes labor rights, occupational safety and health, human resource development, community and stakeholder participation.⁴ Studies by the ILO have established that companies with better social practices have better risk management and investor confidence.⁵

Governance is associated with internal control, board composition, audit arrangements, anti-bribery policy, and disclosure. Good governance minimizes the exposure to fraud and mismanagement and ensures that corporate behavior complies with ethical and regulatory

¹ *India's Business Responsibility and Sustainability Reporting (BRSR)*, ECOVADIS, <https://ecovadis.com/regulations/india-business-responsibility-and-sustainability-reporting-brsr> (last visited July 24, 2025).

² *BRSR Reporting and Its Role in India's Emerging ESG Trends*, SNOWKAP (May 20, 2025), <https://snowkap.com/brsr-reporting-and-its-role-in-indias-emerging-esg-trends>.

³ UNEP FINANCE INITIATIVE, *FINANCING CIRCULARITY: DEMYSTIFYING FINANCE FOR CIRCULAR ECONOMIES* 5 (2020).

⁴ Dean Emerick, *What Is the Social in ESG?*, ESG THE REPORT, <https://esgthereport.com/what-is-esg/the-s-in-esg/> (last visited July 24, 2025).

⁵ INTERNATIONAL LABOUR OFFICE, *ALIGNING INVESTORS TO DECENT WORK* 4 (June 2024), https://www.ilo.org/sites/default/files/2025-01/Aligning%20investors%20to%20Decent%20Work%20June2024_0.pdf.

norms.⁶ Empirical findings indicate that firms with good governance arrangements perform better than their peers in terms of financial well-being and valuation in the marketplace.⁷

2.2 Overview of India's Insolvency and Bankruptcy Code (IBC)

Enacted as the Insolvency and Bankruptcy Code, 2016,⁸ IBC consolidated a number of piecemeal insolvency legislation into one single statutory code with the aim of enabling time-bound resolution of corporate insolvency. The IBC aims at maximizing the value of assets of insolvent debtor(s), encouraging entrepreneurship, and balancing the interests of all such stakeholders, including creditors and debtors.⁹

One of the key aspects of the IBC is the “creditor-in-control” structure. Under such a structure, the creditors are empowered to form a committee which then takes the control of the company as the decision-making power during the process of insolvency. On the initiation of a Corporate Insolvency Resolution Process (hereinafter CIRP), the Committee of Creditors (hereinafter CoC) replaces the management board and appoints a resolution professional.¹⁰ The CoC scrutinizes and approves resolution plans, and all stakeholders come under the decisions, subject to judicial approval by the National Company Law Tribunal (NCLT).¹¹

The Code mandates a strict timeline: the CIRP has to be done within 180 days, extendable by up to 330 days plus pendency in litigations.¹² The system is aimed at avoiding value erosion and enabling quick recovery of the distressed assets. Due to this, India's Ease of Doing Business ranking in the World Bank improved substantially after the IBC came into force.¹³

However, ESG obligations find little place in this creditor-centric framework. Regulatory dues such as environmental penalties and pending Corporate Social Responsibility (CSR) obligations are treated as operational debts under Section 5(21) of the code, ranking below secured financial creditors during resolution and liquidation as per the waterfall mechanism under Section 53.¹⁴ This hierarchy often sidelines ESG-related stakeholders in the insolvency process.

⁶ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE 10 (2015), <http://dx.doi.org/10.1787/9789264236882-en>.

⁷ *Id.*

⁸ Insolvency and Bankruptcy Code, 2016.

⁹ *Id.* pmbl.

¹⁰ *Id.* §§ 17, 18, 21.

¹¹ *Id.* §§ 30, 31.

¹² *Id.* § 12(3).

¹³ WORLD BANK, DOING BUSINESS 2020 54–55 (2020).

¹⁴ Insolvency and Bankruptcy Code, 2016, § 5(21), 53.

It is important to broaden the scope of stakeholder interests within the IBC to encompass environmental and social factors, either through legislative modification or by enabling adjudicating authorities to balance the influence of ESG in approving resolution plans.

2.3 The Intersection of ESG and IBC

The convergence of ESG principles with the Insolvency and Bankruptcy Code, 2016 (IBC) is still largely untapped despite being more pertinent in India's economic landscape. Although the fundamental premise of the IBC is to provide time-bound resolution and creditor value maximization, financial models worldwide today presume that financial responsibility must be followed by environmental and social responsibility.¹⁵ Indeed, around 79% of investors consider ESG risks and opportunities management as an important factor before investing,¹⁶ and while this also speaks volumes about the need for India's insolvency landscape to catch up, it is largely a feat to accomplish.

It would make it possible for resolution professionals and the CoC to value not only financial returns but also environmental compliance, social liabilities, and governance risks. For example, environmental clean-up or CSR compliance cannot be relegated. But environmental fines and overdue wages of labor are today valued as operational debts under Section 5(21) and are placed below in the distribution hierarchy of the IBC under section 53(1)(f).¹⁷

Corporate governance deficiencies are increasingly the root of insolvency. Although the current regime incorporates some governance standards during the insolvency process by allowing an insolvency professional to take over the management during the process and prevents the former management from participating in the process,¹⁸ ESG due diligence is not mandated, nor are institutional standards for Sustainability-driven Restructuring.

Thus, in the absence of legislative acceptance and regulatory endorsement, India stands to lose the opportunity to overhaul its insolvency regime on international models like the UN Sustainable Development Goals¹⁹ and the G20 Sustainable Finance Roadmap.²⁰ Incorporating ESG into the IBC is not an elusive ambition but a crucial goal to be achieved to enable economic recovery that is resilient and inclusive of ESG norms.

¹⁵ WORLD ECONOMIC FORUM, THE GLOBAL RISKS REPORT 2023 10 (18th ed. 2023).

¹⁶ PRICEWATERHOUSECOOPERS, PWC'S GLOBAL INVESTOR SURVEY: THE ECONOMIC REALITIES OF ESG 2021 2 (2021).

¹⁷ Insolvency and Bankruptcy Code, 2016, § 53(1)(f).

¹⁸ Carlo Ghia, Thiago Braga Junqueira, Mariam Zaidi & Gabriel Olivera, *Sustainability in Insolvency and Restructuring Procedures* 14 (International Insolvency Institute, June 9, 2024), <https://www.iiiglobal.org/file.cfm/156/docs/sustainability%20in%20insolvency%20and%20restructuring%20procedures.pdf>.

¹⁹ U.N. Sustainable Development Goals, *Sustainable Development Goals*, <https://sdgs.un.org/goals> (last visited July 24, 2025).

²⁰ G20 SUSTAINABLE FINANCE WORKING GROUP, G20 SUSTAINABLE FINANCE ROADMAP (Oct. 2021), https://g20sfwg.org/wp-content/uploads/2022/01/RoadMap_Final14_12.pdf.

3 CURRENT ENFORCEMENT OF IBC AND ESG

This section will discuss the current enforcement of ESG principles under IBC in India with the help of other existing laws and guidelines in relation to the principles of ESG.

The current regime under IBC does not explicitly address the ESG concerns, and there are no obligations on the resolution professional to address the same. However, during the approval of the resolution plan, the Resolution professional needs to verify that the resolution plan should not be in contravention with any law for the time being in force. But the problem is the hierarchy following which the claim amount will be disbursed. The ESG related claims will be coming under the definition of operational debts, and these concerns are lower ranked during the priority of payments due to waterfall mechanisms. As a result, other contractual creditors such as lenders, banks, and bondholders will be paid before those with ESG-related claims, and they are also likely to receive a larger share of the available funds.

India's insolvency framework prioritizes financial creditors, often marginalizing stakeholders related to ESG, such as environmental regulators, workers, and communities. The absence of formal representation in the CoC marginalizes their interests, undermining equitable resolution.²¹

When the process of insolvency against a corporate debtor (hereinafter CD) starts, the order of moratorium under section 14 of IBC is issued. This order prohibits the continuation of existing legal proceedings or actions or the initiation of any such proceedings with respect to any debt against the CD. In this case for the claim of debt, the creditor needs to register their claim with the insolvency professional, and these are termed as contingent claims.²² And these classifications lead to hierarchy of payments of claim during the recovery, and contingent claims are ranked lower and receive insufficient amount in claim, if any.²³

For example few of existing legislations related to ESG are: Air (Prevention and Control of Pollution) Act, 1981, the Environment (Protection) Act, 1986, Companies Act, 2013 (CSR Regulations), SEBI's BRSR framework, SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR Regulations), etc. If there are any existing claims/penalties/debts in relation to these laws, then those will be covered in the definition 'operational debt' in section 5(21). However, the problem is with the hierarchy of such

²¹ VIDHI CENTRE FOR LEGAL POLICY, REPORT ON PRE-PACKAGED INSOLVENCY RESOLUTION (July 2020), <https://vidhilegalpolicy.in/wp-content/uploads/2020/07/Report-on-Pre-Packaged-Insolvency-Resolution.pdf>.

²² M.P. Ram Mohan & Sriram Prasad, *Environmental Claims Under Indian Insolvency Law: Concepts and Challenges*, 59 TEX. INT'L L.J. 6 (2023).

²³ See *Corporate Processes*, INSOLVENCY & BANKRUPTCY NEWS, Q1 (Insolvency & Bankruptcy Bd. of India, New Delhi), Jan.–Mar. 2022, at 19.

claims, which are often subjugated in front of the claims of the ‘financial creditors’ during the resolution and liquidation process. For instance, as per the quarterly newsletter of IBBI published in January-March 2022,²⁴ after calculating the realized amounts for contingent claimants, it was found that, upon successful resolution, financial creditors recovered 34% of their claims, while operational creditors were able to recover only 11%. On the other hand, in the case of liquidation the outcome is no different. The secured financial creditors were able to receive 11% upon waiving away their security interest whereas the “other creditors” under which contingent claims would be classified were able to secure a mere 2%.²⁵

4 COMPARATIVE ANALYSIS OF INTERNATIONAL REGULATIONS

There are existing laws and guidelines worldwide that incorporate ESG metrics under their respective Insolvency and Bankruptcy regimes. This section will discuss existing international statutes and guidelines on insolvency and how they deal with ESG metrics. This analysis is aimed at drawing inspiration and examples on how such an integration can be done, which will be a step closer towards a sustainable economy.

4.1 The United States of America

The U.S. Bankruptcy Code²⁶ governs restructuring and liquidation. Chapter 7 deals with liquidation, while Chapter 11 addresses Restructuring and resolution,²⁷ and the code includes the provision of an ‘automatic stay,’²⁸ similar to the ‘moratorium’²⁹ under India’s IBC, 2016. However, unlike the IBC’s blanket moratorium on ‘any debt,’³⁰ the U.S. Bankruptcy Code provides exceptions, namely the exception for “police and regulatory power”.³¹

This exception allows certain regulatory actions, including those involving environmental violations, to proceed during bankruptcy.³² For example, proceedings under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) do not stall,³³ as affirmed in *In re New York Trap Rock Corporation*.³⁴ Additionally, the Code addresses

²⁴ *Id.*

²⁵ Ram Mohan & Prasad, *supra* note 22, at 19.

²⁶ 11 U.S.C. (2012).

²⁷ *Id.* §§ 1101–1174 (2012).

²⁸ *Id.* § 362.

²⁹ Insolvency and Bankruptcy Code, 2016, § 14.

³⁰ *Id.*

³¹ 11 U.S.C. § 362(b)(4).

³² Ghia et al., *supra* note 18, at 8.

³³ *Id.*

³⁴ *In re New York Trap Rock Corp.*, 153 B.R. 642, 645 (Bankr. S.D.N.Y. 1993) (“governmental actions under CERCLA to recover costs in response to completed environmental violations are not stayed when an alleged responsible party files a bankruptcy case.”).

social concerns, particularly through Section 524(g), which allows the creation of a trust, funded in the restructuring process to handle asbestos and product liability claims.³⁵ An injunction is issued requiring that personal injury, wrongful death, or property-damage claims be paid through this trust.³⁶ In terms of governance, the code mandates clear obligations for directors and trustees. The statutory committee may investigate the debtor's acts, conduct, assets, liabilities, and financial condition³⁷ and debtors are also required to disclose adequate information post-petition, including the debtor's business history and financial records.³⁸

Thus, it reflects a multidimensional approach that considers not just financial creditors but also broader ESG responsibilities, ensuring that restructuring is not limited to economic objectives alone.

4.2 China

The Enterprise Bankruptcy Law of the People's Republic of China³⁹ (hereinafter EBL) governs corporate bankruptcy. Although a centralized integration of environmental concerns into bankruptcy law is still lacking, local initiatives have emerged.⁴⁰ For example, the Guiyang Intermediate People's Court issued guidelines detailing how environmental and ecological concerns should be addressed during bankruptcy proceedings⁴¹ that define stakeholder roles, outline procedures, and propose mechanisms to fund environmental remediation.⁴²

The EBL also integrates social protections, considering employees entitled to subsidies for medical treatment, old age pension, injuries, disability, support of the family of the deceased employees, and other statutory compensations as creditors.⁴³ It explicitly prohibits the restructuring plan from reducing or exempting unpaid social insurance premiums beyond those listed in Article 82(2),⁴⁴ thereby preventing debtors from avoiding social obligations. Debtors must disclose financial details such as claims, debts, history, and employee

³⁵ 11 U.S.C. § 524(g).

³⁶ Ghia et al., *supra* note 18, at 9.

³⁷ 11 U.S.C. § 1103.

³⁸ *Id.* § 1125.

³⁹ Enterprise Bankruptcy Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 27, 2006, effective June 1, 2007) (China).

⁴⁰ Shuai Guo, *When Environment Meets Bankruptcy: Global Lessons for and from China*, REV. EUR. COMP. & INT'L ENVTL. L. (forthcoming), at 6, <http://dx.doi.org/10.2139/ssrn.5160773>.

⁴¹ Guiyang Intermediate People's Court, Guidelines on the Handling of Ecological and Environmental Issues in the Trial of Enterprise Bankruptcy Cases (Trial) / 审理企业破产案件中涉生态环境问题处理的工作指引 (试行) (2022).

⁴² *Id.*

⁴³ Enterprise Bankruptcy Law of the People's Republic of China art. 82(2).

⁴⁴ *Id.* art. 83.

payment plan⁴⁵ while an administrator supervises the process;⁴⁶ directors and senior managers may be personally held liable for misuse of power or irregular income,⁴⁷ ensuring accountability and sound governance during restructuring.

4.3 European Union

The European Union has created one of the most comprehensive ESG integration systems in firm regulation and insolvency. Member States are required to incorporate EU directives into law and directly applicable regulations.⁴⁸ EU Regulations No. 1346/2000 and 2015/848 seek to harmonize cross-border insolvency proceedings for the purposes of encouraging economic, financial, and social sustainability, although not through explicit use of the ESG terms.⁴⁹

Directive 2019/1023 places “efficiency” at the forefront, seeking to maintain discharge of debt and disqualifications, restrict value destruction, and maintain human and administrative resources in the process of restructuring.⁵⁰ Such ESG-sensitive culture is also seen in non-financial disclosure requirements under the Non-Financial Reporting Directive (NFRD), Directive 2014/95/EU, which requires large public-interest entities to provide environmental protection, anti-corruption, diversity, and human rights policies.⁵¹

Regulation 2019/2088, the Sustainable Finance Disclosure Regulation (SFDR), obliges financial market participants to disclose how they integrate sustainability risks into decision-making, making finance serve for ESG objectives.⁵² The Corporate Sustainability Reporting Directive (CSRD)⁵³ and the proposed Corporate Sustainability Due Diligence Directive (CSDD)⁵⁴ extend disclosure obligations for ESG risks and environmental and human rights due diligence in international supply chains.

⁴⁵ *Id.* art. 8.

⁴⁶ *Id.* art. 25.

⁴⁷ *Id.* art. 36.

⁴⁸ European Comm’n, *The EU – What It Is and What It Does*, <https://op.europa.eu/webpub/com/eu-what-it-is/en/> (last visited July 24, 2025).

⁴⁹ Regulation 2015/848, 2015 O.J. (L 141) 19 (EU), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848>.

⁵⁰ Directive 2019/1023, 2019 O.J. (L 172) 18 (EU), <https://eur-lex.europa.eu/eli/dir/2019/1023/oj/eng>.

⁵¹ European Parliament, *Harmonising Insolvency Laws in the EU: New Initiative* (EPRS Briefing, 2021), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/654213/EPRS_BRI\(2021\)654213_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/654213/EPRS_BRI(2021)654213_EN.pdf).

⁵² Regulation 2019/2088, 2019 O.J. (L 317) 1 (EU), <https://eur-lex.europa.eu/eli/reg/2019/2088/oj/eng>.

⁵³ Directive 2022/2464, 2022 O.J. (L 322) 15 (EU), <https://eur-lex.europa.eu/eli/dir/2022/2464/oj/eng>.

⁵⁴ European Commission, Commission Recommendation (EU) 2022/158 on a Common Set of Principles for Climate Mitigation Finance Tracking (Feb. 4, 2022), https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF.

Together, these instruments represent a transformative regulatory ecosystem for ESG. They offer critical lessons for India's IBC, where sustainability integration remains aspirational.

4.4 Brazil

Brazil's bankruptcy legislation includes judicial reorganization proceedings that allow financially distressed businesses to restructure while continuing operations. ESG failures have played a key role in instigating insolvency among many of Brazil's largest businesses and, more importantly, have been incorporated into their restructuring proposals.

One such model case is *Samarco Mineração*, which sought judicial reorganization after the 2015 Fundão dam disaster, a disaster ranked among Brazil's worst environmental catastrophes. The judicially approved plan required Samarco to meet its environmental and social restoration commitments under the 2018 Conduct Adjustment Agreement,⁵⁵ and firms such as Manikraft Guaianazes Industries and the João Santos Group obtained tax incentives in return for meeting social commitments such as financing schools, medicine, and public infrastructure.⁵⁶

Corporate governance flaws have also led to insolvency. In the *Americanas S.A.* case, there was a gigantic accounting scam that created a USD 8.5 billion shortfall,⁵⁷ and the sanctioned reorganization plan needed to meet more stringent ESG and governance requirements. Non-compliance with ESG-based obligations under such plans means liquidation, which provides Brazilian courts with an effective enforcement tool.

Therefore, the case of Brazil illustrates how ESG commitments can be implemented through restructuring, either to repair past damage or to provide improved governance serving both recovery and sustainability.

4.5 Key Takeaways

There are some of the lessons that India can take from the Bankruptcy code of the United States and China. In regard to environmental claims, the inspiration from Guiyang guidelines may be drawn as this tries to address the Environmental concerns within the insolvency proceedings rather than excluding it like the US and raises multiple actions and claims on the distressed company. Secondly, the formation of trust during the restructuring process

⁵⁵ *Blow-Out Materials: RSA/TS Projections*, SAMARCO MINERAÇÃO S.A. (May 2023), <https://www.samarco.com/wp-content/uploads/2023/05/Samarco-Blow-Out-Materials-RSA-TS-Projections.pdf>.

⁵⁶ Manikraft Guaianazes Indus. Judicial Reorganization Case, No. 1107466-61.2022.8.26.0100 (2d Bankr. Ct. São Paulo Sept. 30, 2022).

⁵⁷ *Judicial Reorganization Plan*, SAMARCO MINERAÇÃO S.A. (Sept. 2022), <https://api.mziq.com/mzfilemanager/v2/d/347dba24-05d2-479e-a775-2ea8677c50f2/3d3cdf1-5b23-b2d2-e19f-39ebe8870bb8?origin=1>.

is a valuable addition as it does not ignore social concerns and, on the same hand, does not allow these claims to become a hurdle and slow down the insolvency proceedings.

In an Indian regime where various people suffered directly/indirectly because of the act(s) of the entity declaring itself insolvent, most of the time they are left untouched. This provision will act as a shield for such claims. Although in some aspects the IBC of India addresses the social aspect, such as prioritizing the employees and workmen due and payment under waterfall mechanisms, not every stakeholder is addressed. For instance, claims arising from displacement of people because of the establishment or acts of the companies, along with the health, and cultural loss are often ignored.

Moreover, some international perspectives, including the IMF Staff Climate Note (2022), advocate for legal mainstreaming of ESG concerns in financial governance and debt recovery frameworks.⁵⁸ And the World Economic Forum (WEF) further reinforces this by proposing universal ESG metrics aligned with SDG targets,⁵⁹ which remain absent in IBC resolutions.

5 CASE STUDIES

After analyzing international statutes on the subject matter, it is important to discuss some important case studies which put emphasis on the growing need for the integration of ESG metrics in IBC. This section will discuss two major case studies; one domestic and one global in order to put the emphasis on the existing loopholes and the growing need for integration of ESG under the insolvency regime.

5.1 Liquidation of Jet Airways in India

The Jet Airways case is a landmark example of governance and social failures contributing to insolvency, highlighting the importance of non-financial factors in resolution viability and long-term sustainability. In November 2024, the Supreme Court of India ordered the liquidation of Jet Airways after unsuccessful execution of the Resolution Plan by Jalan Fritsch Consortium, the successful resolution applicant (SRA).⁶⁰ While the book value of the assets of Jet Airways is approximately 1000 crores, NCLT admitted the claim of 15,723

⁵⁸ Int'l Monetary Fund, *Managing Systemic Financial Risks from Climate Change* (IMF Staff Climate Note No. 2022/001, 2022).

⁵⁹ WORLD ECON. F., *MEASURING STAKEHOLDER CAPITALISM: TOWARDS COMMON METRICS AND CONSISTENT REPORTING OF SUSTAINABLE VALUE CREATION* (2020), https://www3.weforum.org/docs/WEF_IBC_Measuring_Stakeholder_Capitalism_Report_2020.pdf.

⁶⁰ Aviral Jain, *From Rescue to Ruin: The Supreme Court's Judgment in Jet Airways and the Future of Airline Insolvencies*, INDIA-CORPLAW (Dec. 4, 2024), <https://indiacorplaw.in/2024/12/04/from-rescue-to-ruin-the-supreme-courts-judgment-in-jet-airways-and-the-future-of-airline-insolvencies/>.

crores when it was first grounded in 2019. The existing aids make up only 13% of total claims of financial creditors and 6.4% of total claims.⁶¹

More than 20000 people were unemployed, ticket claims from passengers went unanswered, vendors had directly or indirectly taken the livelihood of thousands of people.⁶² Jet's financial distress was partly due to poor board oversight, overleveraging, and flawed expansion of the route⁶³ but IBC never formally scrutinized board conduct prior to default. As such, there were no environmental claims present in this case, but even though that would be the case it would be compensated by not more than a penny, if at all.⁶⁴

Claims related to ESG are mostly classified as operational debts which are listed at much lower hierarchy as per waterfall mechanism. So, if the assets of the company are less than the debt amount of secured creditors, then there would be no legal obligations for unsecured creditors to receive any funds. This raises a very critical need for the integration of ESG concerns under IBC so that proper accountability and review can be ensured with proper compensations and payments to all affected stakeholders.

5.2 ESG Failures and Judicial Restructuring in the Samarco and Brumadinho Mining Disasters in Brazil

The Brazilian mining industry saw two of the most disastrous environmental accidents in four years, initially the collapse of the Samarco dam in 2015 and then the Brumadinho tragedy in 2019, both by companies affiliated with Vale S.A., which is a world-renowned mining company.

In the *Samarco* case, the collapse of the Fundão tailings dam caused 19 deaths and extensive environmental damage. Judicial reorganization was requested by Samarco Mineração S.A., a joint venture between Vale and BHP, in 2021 under Case No. 5046520-86.2021.8.13.0024. The Brazilian bankruptcy court authorized a resolution plan that included environmental remediation under the Conduct Adjustment agreement of 2018. The

⁶¹ *Liquidation of Jet Airways Assets May Give Creditors Around Rs 1,000 Crore*, MONEYCONTROL (July 19, 2025), <https://www.moneycontrol.com/news/business/liquidation-of-jet-airways-assets-may-give-creditors-around-rs-1000-crore-12860880.html>.

⁶² *Sky-High Tragedy: How Jet Airways Fell from the Top to Liquidation*, FIN. EXPRESS (July 21, 2025), <https://www.financialexpress.com/business/airlines-aviation-sky-high-tragedy-how-jet-airways-fell-from-the-top-to-liquidation-3659334/>.

⁶³ *The Fall of Jet Airways: What Happened*, SP'S AIRBUZ, <https://www.spsairbuz.com/story/?id=884&h=The-fall-of-Jet-Airways-What-happened> (last visited July 24, 2025).

⁶⁴ Sriram Prasad, *Environmental Claims in Insolvency in India*, OXFORD BUS. L. BLOG (May 24, 2023), <https://blogs.law.ox.ac.uk/oblb/blog-post/2023/05/environmental-claims-insolvency-india>.

plan made socio-environmental liabilities binding and non-subordinated, a first judicial acknowledgment of ESG commitments in insolvency.⁶⁵

In contrast, in the 2019 Brumadinho tragedy, Vale's relatively robust ESG disclosures and interaction reduced investor outrage. A study in *The Quarterly Review of Economics and Finance* (2024) empirically proved that although both tragedies generated substantial negative abnormal returns, Vale's transparency in Brumadinho led to faster market recovery.⁶⁶

These examples reinforce two important takeaways from ESG-insolvency: (i) that global ESG failures materially exacerbate financial distress and (ii) that judicial restructuring can be an effective means of ESG enforcement if obligations are made enforceable in the restructuring process.

6 PROPOSALS AND RECOMMENDATIONS

After analyzing the existing problem on the subject matter, this section discusses and proposes various policies, regulations, and procedural recommendations that would assist in integration of Environmental, Social and Governance principles under the Insolvency and Bankruptcy Code of India.

6.1 Policy Suggestions for Embedding ESG in IBC

The current structure of India's Insolvency and Bankruptcy Code, 2016 (IBC) fails to implement a mechanism to recognize or enforce ESG commitments within the CIRP. This deficiency undermines the pillars of sustainable restructuring and protection of stakeholder interests. In filling this lacuna, a variety of regulatory and procedural steps are suggested.

6.1.1 *Compulsory Due Diligence of ESG for CIRP*

Resolution Professionals (RPs) should perform due diligence on ESG at the beginning of CIRP, as part of the Information Memorandum under Section 29 of the IBC. Environmental liabilities pending under the Environment (Protection) Act, 1986⁶⁷ and Air (Prevention and Control of Pollution) Act, 1981⁶⁸, social issues like CSR defaults under Section 135 of the Companies Act, 2013,⁶⁹ and governance issues like SEBI's LODR or BRSR non-

⁶⁵ *Consensual Judicial Reorganization Plan*, SAMARCO MINERAÇÃO S.A. (July 28, 2023), https://www.samarco.com/wp-content/uploads/2023/07/2023-07-28-Plano-de-Recuperacao-Judicial-Consensual-Final_ENG.pdf.

⁶⁶ Inés Merino Fdez-Galiano & José Manuel Feria-Dominguez, *Do ESG Disclosures Mitigate Investors' Reaction on Mining Disasters? Evidence from Brazil*, 95 Q. REV. ECON. & FIN. 256 (2024).

⁶⁷ Environment (Protection) Act, 1986, § 3.

⁶⁸ Air (Prevention and Control of Pollution) Act, 1981, § 21.

⁶⁹ Companies Act, 2013, § 135.

compliance would be covered in such an assessment. ESG risks are increasingly better known to be material to corporate distress,⁷⁰ and the ESG due diligence report should be attached to the Information Memorandum under Section 29 of the IBC and shared with prospective resolution applicants (RA).

6.1.2 *ESG Metrics in Resolution Plans*

The resolution applicant under Section 30 should be obligated to submit an ESG compliance roadmap as part of their financial restructuring proposal. The roadmap should include historical weaknesses of ESG, suggested cures, and suggested future ESG goals. This will enable CoC to evaluate not only the financial strength of the plan but also its impact on sustainability. In today's world, about 80% of investors factor ESG performance into investment decision-making.⁷¹

6.1.3 *Inclusion of ESG-Driven Review Initiated by the Committee of Creditors (CoC)*

A two-metric assessment approach by the CoC must be initiated, striking a balance between financial revival and ESG compliance. This entails the participation of a non-voting ESG advisor (e.g., from the Central Pollution Control Board or the Ministry of Corporate Affairs) in CoC meetings and ESG impact scores in resolution plan evaluations. EU Directive 2019/1023 also highlights the requirement to preserve human capital and external sustainability in reorganization.⁷² This would ensure a more holistic restructuring aligned with “stakeholder capitalism”.

6.1.4 *Post-Resolution ESG Monitoring*

For the sake of enforceability, approved schemes must provide for post-resolution ESG monitoring in the form of quarterly compliance reports to the IBBI and the appointment of an ESG compliance officer. Non-compliance should invoke penalties under Section 74 of the IBC,⁷³ giving ESG commitments the same status as financial covenants. These reforms will bring India's insolvency resolution framework in line with its SDG 2030, the climate transition, and international investor expectations.

6.2 **Regulatory Recommendations**

The current IBC framework remains largely silent on the assessment, prioritisation, and enforcement of ESG obligations. In an era where sustainable business practices are no

⁷⁰ WORLD ECON. F., *supra* note 59, at 21.

⁷¹ PRICEWATERHOUSECOOPERS, *supra* note 16.

⁷² Directive 2019/1023, 2019 O.J. (L 172) 18 (EU).

⁷³ Insolvency and Bankruptcy Code, 2016, § 74.

longer aspirational but imperative, this vacuum risks stakeholder confidence and long-term sustainability. To bridge this gap, a comprehensive regulatory response is needed. These are some of the Regulatory recommendations that can be embedded in order to step closer to the sustainable process:

6.2.1 IBBI Guidelines on ESG Assessment

The IBBI is empowered under section 196, IBC, to issue guidelines and specify regulation standards,⁷⁴ and it can mandate ESG due diligence as a part of CIRP, by requiring Insolvency Resolution Professionals to disclose ESG risks and liability at the early stage. Such a measure will provide two benefits: first, both the resolution applicants and the stakeholders would be better informed and thus positioned to take better decisions, and second, it would incentivize companies to maintain their ESG compliance, so that they have a better chance for favourable resolution terms and higher valuation during CIRP.

6.2.2 Legislative Amendments in IBC to Integrate ESG

To ensure proper integration of ESG in IBC, certain amendments are necessary. First, the definition of ‘operational debt’ under section 5(21) should be expanded to include ESG terms as this section currently includes dues payable only under statutory obligations. However, there are non-statutory ESG claims such as damages arising from community displacement, unpaid voluntary carbon offset contracts, and many more which may be shadowed due to the current language of the Act. Additionally, amendments under section 30(2) are necessary to require resolution applicants to address ESG liabilities and propose treatment. Inspiration can be drawn from Guiyang guidelines on this and Article 82 of the EBL.⁷⁵ Lastly, the waterfall mechanism under section 53 needs an amendment to prioritise claims related to ESG as currently they are mostly addressed as unsecured creditors.

6.2.3 Enhanced Role of Judiciary

To effectively integrate ESG into IBC, the role of adjudicating Authority should be expanded. Although the Adjudicating Authority is empowered to scrutinize the plan before approving, a regulatory framework can mandate ESG compliance checks as part of this scrutiny. This judicial oversight would not only ensure that resolution applicants incorporate proposals to ESG risks & liabilities in their plans but also serve as a deterrent against environmental and social neglect in pre-insolvency operations.

⁷⁴ *Id.* § 196.

⁷⁵ Enterprise Bankruptcy Law of the People’s Republic of China art. 82(2).

6.3 Procedural Reforms

The following are some of the procedural reforms which are proposed for integrating ESG and IBC:

6.3.1 ESG-Based Creditor Classification

India's IBC does not yet differentiate between financial, operational, and socially or environmentally affected creditors. This leaves a structural lacuna for identifying stakeholders impacted by ESG failures like: Pollution Control Boards, trade unions, and affected communities. A new statutory category of "ESG Statutory Creditors" needs to be established for those whose claims arise under environmental or social legislation.

Identification of such creditors will accomplish the following:

- A place at the table via CoC representation,
- Preferential right to ESG claims in the distribution waterfall, and
- Enforcement of long-overdue environmental and social responsibilities.

This is in line with EU Directive 2019/1023, where human capital retention and stakeholder interest in pre-insolvency restructuring take precedence.⁷⁶ In India, operational creditors recover only an average of 11% in approved resolution plans compared to 34% for financial creditors.⁷⁷ ESG claimants are generally classified as operational or contingent creditors and thus end up at the waterfall bottom. Classification would move them up the hierarchy.

6.3.2 Fast-Track Resolution for Sustainable Enterprises

A green fast-track insolvency procedure should be made available to ESG compliant firms. It can be made available through the following:

- SEBI's BRSR ratings,
- Third-party ESG scores, and
- ISO 14001 or LEED certifications.

This speed will promote compliance with the ESG while ensuring faster resolution. Globally, companies that comply with ESG outperform their peers in crisis resilience and recovery, with 76% of institutional investors considering a company's exposure to ESG risks and opportunities when screening investment opportunities.⁷⁸

⁷⁶ Directive 2019/1023, 2019 O.J. (L 172) 18 (EU).

⁷⁷ Ram Mohan & Prasad, *supra* note 22, at 19–20.

⁷⁸ PRICEWATERHOUSECOOPERS, *supra* note 16.

7 CHALLENGES DURING INTEGRATION AND IMPLEMENTATION

The integration of principles of Environmental, Social and Governance into insolvency resolution is appealing, but there are various practical and legal challenges that hinder its implementation under the current framework of Insolvency and Bankruptcy Code, 2016.

7.1 Resistance from Financial Creditors

ESG related claims such as environmental penalties, unpaid social claims, or/and governance failures often fall under operational, contingent liabilities, or non-statutory claims, and expanding the pool of claims and elevating their priorities in payment may dilute the recovery of financial creditor(s). This will create a natural resistance from financial creditors dominated CoCs towards the recognition or prioritization of such claims notwithstanding of ensuring the long-term viability of corporate debtors.

7.2 Difficulties in Measuring the ESG Impact

A fundamental challenge in the integration of ESG is the absence of standardized metrics to quantify ESG related claims and damages. Environmental liabilities, such as costs of pollution remediation or compliance with green regulations, and social costs, such as rehabilitation or failure to meet CSR obligations, often involve subjective and sector-specific evaluations. The lack of framework for determining the monetary valuation of such non-financial harms makes it difficult for inclusion in insolvency regime.

7.3 Timeliness vs. Sustainability Trade-Off

The need for expert audits or third-party assessments can further delay the resolution process. As according to the official data, the average time taken for completion of resolution process was 716 days⁷⁹ surpassing its statutory obligation of 330 days.⁸⁰ The inclusion of ESG evaluations will require stakeholder consultations, audit certifications, and can increase the already delayed time frame of CIRP. This will create a dilemma of trade-off between the aim of achieving quick resolution and long-term sustainability of the corporate debtor. This delay will not only discourage serious bidders but also impact the value maximisation of the assets.

⁷⁹ *On Average, Resolution of Cases Under IBC Took 716 Days at NCLT in 2023–24: Govt.*, ECON. TIMES (Aug. 26, 2024), <https://legal.economictimes.indiatimes.com/news/law-policy/on-average-resolution-of-cases-under-ibc-took-716-days-at-nclt-in-2023-24-govt/112326165>.

⁸⁰ Insolvency and Bankruptcy Code, 2016, § 12.

7.4 Procedural and Financial Burden

The introduction of ESG dimensions into insolvency may overburden the process both financially and procedurally, which will increase the cost and administrative friction. Additionally, industries involved in mining, chemical, manufacturing that go into insolvency will suffer bidders' deterrence due to the fear of bearing the liability of ESG dues and liabilities, which will ultimately reduce the pool of resolution applicants and hamper the resolution process.

8 CONCLUSION

The integration of ESG principles into the IBC regime is a growing need due to the evolving dynamics of responsible business conduct. As this paper clearly demonstrates, the current structure of IBC lacks the integration of ESG claims and often sidelines such claims. This neglect poses a dual threat: it compromises the long-term viability of revived entities and potential risks, and weakens investor and stakeholder confidence in the resolution process.

The inspiration for such inclusion can be drawn from existing international statutes like the ones in the US, China, EU, and Brazil. Additionally, the need for such integration is further strengthened by the analysis of case studies of Jet Airways and the Samarco and Brumadinho Mining Disasters. The aforementioned analysis clearly points out the need for sustainable finance and how it cannot be achieved without the proper framework and regulatory guidelines.

Although the expansion of the current statute including sections 5(21), 30(2), 53 and 196 of IBC will provide a foundation for this incorporation, the application and implementation is limited. Embedding ESG due diligence into the insolvency resolution process through pre-resolution disclosures by insolvency professionals, ESG inclusive resolution plans, and by mandating ESG compliance checkpoints by CoC can help in mitigating these concerns.

Nevertheless, such integration is not without challenges such as resistance from financial creditors, quantification difficulties, and the dilemma of sustainable finance with the time bound CIRP. A cautious approach is necessary; one that balances the IBC's objective to achieve efficient resolution with India's broader commitment to sustainable development. In addition, a balanced model that involves ESG sensitive regulations on ESG, industry specific exemptions, and post-resolution compliance with ESG could be a better way to integrate ESG into India's Insolvency regime.

CHAPTER 14

Reassessing Taxation on Haircuts: A Case for MSME Recovery under India's Pre-Packaged Insolvency Framework

KARAMPUDI SRI AVANI SATHYA*

India's vibrant insolvency regime has been in the limelight for its responsiveness to sectoral concerns, best illustrated by the introduction of Pre-Packaged Insolvency Resolution Process ("PPIRP") in 2021, particularly for Micro, Small, and Medium Enterprises ("MSMEs"), to ensure their efficient and feasible revival from the drastic cash flow disruptions and business impacts they faced due to COVID-19. While the policy framework under the Insolvency and Bankruptcy Code, 2016 ("IBC"), addresses the growing need for swift and effective revival of insolvent MSMEs, there is a long way to go to ensure its effective implementation and achieve the legislative intentions behind these reforms.

One area that warrants reappraisal is the taxation of haircuts granted to MSME debtors in a restructuring process. Taxing forgiven debt increases the financial burden on an already liquidity-constrained entity, aggravating post-resolution liquidity crises. It also contracts the total pool of recoverable assets, disincentivising creditors from providing significant haircuts. This is especially pressing, given that median haircuts have risen sharply from 64% in FY23 to 73% in FY24, and the median time to resolution has skyrocketed to 834 days. This prolonged resolution process, combined with deep haircuts and additional tax charges, undermines the PPIRP's main aim, eroding the MSME recovery environment.

The paper's primary purpose is to address an important lacuna in the Indian insolvency regime by placing the interaction between taxation policy and insolvency law at the centre stage. It advocates a strategic fiscal policy intervention to ensure that taxation does not undermine the PPIRP's revival goals (and, in turn, the IBC's). In the process, it brings a new and persuasive voice to the MSME rehabilitation and insolvency reform debate in India, which is economically realistic and legally sophisticated.

The paper addresses this concern in a fourfold manner. It begins by outlining the rationale for introducing the PPIRP and recognising MSMEs' specific financial vulnerabilities. Secondly, it conducts a critical examination of existing tax governance regarding haircuts under Indian law and discusses its implications for business viability upon resolution. Thirdly, it provides a comparative policy analysis, drawing on legal frameworks that provide preferential tax schemes for distressed debt resolution. Lastly, it proposes policy

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recommendations, including an initiative to provide preferential tax treatment for haircuts for MSMEs undergoing PPIRP.

Keywords: Insolvency Execution, Debt Haircut, MSME Insolvency

1 INTRODUCTION

MSMEs form the backbone of the Indian economy. With a contribution of almost 30% to India's GDP¹ and employing over 21.17 crore individuals,² these enterprises are a bastion of economic resilience, regional growth, and employment generation. On a similar scale, MSMEs account for 95% of industries globally and 60% of employment across the world, making them an indispensable part of sustainable economic systems.³ While they are of systemic importance, MSMEs, by their very nature, are extremely vulnerable to external shocks due to their fragile financial structures and their susceptibility to credit.⁴ These vulnerabilities became distinctly apparent during the COVID-19 pandemic, leading to unprecedented liquidity crises across the sector.⁵

Owing to this structural weakness, the Indian insolvency framework introduced the PPIRP in 2021 under the IBC.⁶ PPIRP was initiated as a quick, low-cost, and low-disruption instrument specially for MSMEs.⁷ It combines the informality of out-of-court negotiations with the legal certainty of formal adjudication. Its debtor-in-possession framework under the supervision of financial creditors enables stakeholders to draft a base resolution plan,⁸ even before initiating formal insolvency proceedings, and then submit it before the National Company Law Tribunal (NCLT) (the Adjudicating Authority) for authorisation.⁹ This hybrid framework is intended to avoid delays, preserve the value of the debtor's assets, and enable early intervention, factors pivotal to MSME survival.¹⁰

¹ Abhishek Sharma, *PPIRP: A Pre-Packaged Solution for MSMEs with a Post-Dated Cheque*, BUS. WORLD (Nov. 25, 2024), <https://www.businessworld.in/article/ppirp-a-pre-packaged-solution-for-msmes-with-a-post-dated-cheque-540152>.

² *Over 4.91 Crore Enterprises Registered, Udyam Portal Transforms MSME Landscape*, PRESS INFORMATION BUREAU (Aug. 29, 2024), <https://www.pib.gov.in/PressNoteDetails.aspx?NoteId=152063&ModuleId=3>.

³ *Informal Working Group on Micro, Small and Medium-Sized Enterprises (MSMEs)*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/msmes_e/msmes_e.htm (last visited Aug. 3, 2025).

⁴ Alekha Charan Rout & Dr. Girija Shankar, *Pre-Packaged Insolvency Resolution Process (PPIRP) Under the Insolvency & Bankruptcy Code (IBC), 2016: Why a Non-Starter?*, 57 MGMT. ACCT. J. 88, 88 (2022), <https://doi.org/10.33516/maj.v57i10.88-93p>.

⁵ *Id.*

⁶ IBBI, *Pre-Packaged Insolvency Resolution Process* (July 2021), <https://www.ibbi.gov.in/uploads/whatsnew/a650764a464bc60fe330bce464d5607d.pdf>.

⁷ INSOLVENCY LAW COMM., REPORT OF SUB-COMMITTEE OF THE INSOLVENCY LAW COMMITTEE ON PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS 13 (2020).

⁸ Rout & Shankar, *supra* note 4, at 91.

⁹ IBBI, *supra* note 6.

¹⁰ INSOLVENCY LAW COMM., *supra* note 7, at 22.

The IBC takes jurisprudential inspiration from both communitarian and contractarian models. It reflects communitarian tendencies by giving priority to business survival and rehabilitation,¹¹ ensuring long-term economic value creation, and espousing creditor primacy and contractual discipline under contractarian expectations.¹² India's insolvency practice successfully balanced both, as could be seen post-IBC, which made great strides in its brief tenure. The World Bank's 'Ease of Doing Business' 2020 report recorded India's sharp ascent in the insolvency resolution ranking from 108 in 2018 to 52,¹³ which is a testament to more robust institutional frameworks and judicial efficiency.

Yet it remains an evolving field with numerous persistent lacunae. Here, in the context of PPIRP, it exists only in the form of patchy and incomplete implementation. As recently emphasized at IBBI's 8th Annual Day, problems like long resolution durations, high haircuts, and absence of early-stage interaction still bedevil the ecosystem.¹⁴ The numbers: median resolution time of 834 days, and average haircuts of 73%, in FY24,¹⁵ further only exacerbate the situation. Furthermore, given the fact that MSMEs represent ₹27.7 lakh crore of outstanding debt (as of October 2023),¹⁶ these inefficiencies are not marginal; they attack the very heart of financial sector stability.

One of the underexamined friction points that potentially hinders the successful implementation of insolvency processes/plans is the taxation levied on the debts forgiven by creditors (the haircuts). Haircuts are an essential tool of restructuring which are currently being taxed as income in the hands of the corporate debtor. Not only does this aggravate liquidity stress, but it also critically reduces the efficacy of the entire resolution process.¹⁷

This paper argues that taxing haircuts is a doctrinal anomaly and a policy mismatch that immediately threatens the success of MSME insolvency recovery, and that rectifying this could aid in achieving the implementation goals of PPIRP. It proposes preferential taxation of haircuts to align the tax regime with the IBC's legislative objectives and advises a targeted

¹¹ M P Ram Mohan & Sai Muralidhar K, *Taxation and Insolvency: Towards a Foundational Understanding*, IBBI 21, 33 (2024), <https://ibbi.gov.in/uploads/whatsnew/2024-10-04-181657-17py3-8b35dbeca4577105ca46c15e1508dc2c.pdf>.

¹² *Id.* at 28.

¹³ *India Jumps 14 Places in World Bank's Doing Business Report 2020*, MAKE IN INDIA, <https://www.makeinindia.com/india-jumps-14-places-world-banks-doing-business-report-2020> (last visited Aug. 3, 2025).

¹⁴ Aggam Walla & Sukalp Sharma, *With Long Delays and Steep Haircuts, Chorus for Revamping Insolvency and Bankruptcy Code Grows Louder*, INDIAN EXPRESS (Oct. 6, 2024), <https://indianexpress.com/article/business/economy/with-long-delays-and-steep-haircuts-chorus-for-revamping-ibc-grows-louder-9605768/>.

¹⁵ Sharma, *supra* note 1.

¹⁶ *Creditors' Haircuts in Bankruptcy Cases Jump to 73 pc in FY24, Resolutions Taking Longer: Report*, ECON. TIMES (May 17, 2024), <https://economictimes.indiatimes.com/industry/banking/finance/creditors-haircuts-in-bankruptcy-cases-jump-to-73-pc-in-fy24-resolutions-taking-longer-report/articleshow/110210505.cms?from=mdr>.

¹⁷ Irving Aw, Brendan Crowley & Jose M. Garrido, *Should Tax Be King? The Debate over Tax Priority in Insolvency* (IMF, WP/25/118, 2025).

fiscal policy review in this direction to deliver a more sustainable and equitable recovery framework for MSMEs.

2 HAIRCUTS AND THE TAX HURDLE IN MSME INSOLVENCY

The PPIRP is essentially geared to maintain the viability of MSMEs through a time-bound and concerted resolution process. It facilitates early intervention in financial distress, enabling stakeholders to halt the erosion of the debtor's assets and thereby uphold the creditor's confidence and interests.¹⁸ In addition to value maximisation, the mechanism of voluntary intervention by the debtor facilitates simpler and quicker resolution, and promotes the least disruptive recovery, outcomes critical to the survival of financially stressed MSMEs,¹⁹ as already noted above. All these characteristics indicate that it is essential to enhance the implementation of the process, which is currently quite meagre.²⁰

The use of haircuts is a keystone for the success of the PPIRP. In bankruptcy law, a haircut is the shortfall in the recovery of creditors' original claims.²¹ It is essentially a stepped write-down enabling creditors to forego recovery in part in return for the possibility of reviving the debtor. In insolvency restructurings, where liquidation will most likely produce value distant from the going concern potential,²² haircuts are a necessary compromise that enables ongoing operations, job preservation, and derivative economic activity.

"Tax administration in insolvency is a devouring monster."²³

Though slightly exaggerated, it represents a true picture within the Indian tax framework, which subjects the quantum of debt waived under the resolution plan to tax as the income of the corporate debtor. It is a commercially harmful treatment. The so-called "income" out

¹⁸ Several legislative guides on insolvency law implementation, especially for MSME recovery, constantly stressed the importance of early intervention with financial distress. See UNCITRAL, UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW FOR MICRO- AND SMALL ENTERPRISES 47 (2022).

¹⁹ INSOLVENCY LAW COMM., *supra* note 7.

²⁰ As of March 2023, only eight cases have gone through the PPIRP. See IBBI, *IBC: Evolution, Learnings and Innovation* (Oct. 1, 2023), https://www.ima.ac.in/sites/default/files/2023-10/Pre-Packs_IBBI_Annual%20Publication_2023.pdf.

²¹ Debajyoti Ray Chaudhuri, *The Haircut That Never Was: Need to Factor in Whether a Loan Account Had Become an NPA While Assessing Haircut from Its Resolution Under IBC*, IBBI (Aug. 6, 2021), <https://ibbi.gov.in/uploads/resources/cf9e3f8a658e837ba704fc8594670a68.pdf>.

²² Reports show that creditors received 200% of liquidation value while reviving. See MS Sahoo, *Moving Up in 'Ease of Resolving Insolvency'*, IBBI, <https://ibbi.gov.in/uploads/whatsnew/faf3af70524e6c7ccf0b6762ab70216c.pdf> (last visited Aug. 3, 2025).

²³ Comment made in a 1967 paper referred to by the IMF in its working paper which debated the need for tax priorities in insolvency proceedings. See Aw, Crowley & Garrido, *supra* note 17.

of a haircut is not a result of cash flow at all.²⁴ It is an accounting fiction created by the Indian Accounting Standards.²⁵ To tax a waiver of this kind is to turn a restructuring solution into a fiscal burden, thereby penalizing entities for availing the very relief meant to rescue them.²⁶

For MSMEs, the effect of this tax treatment is particularly severe. The problem is compounded by the absence of post-insolvency finance for MSME debtors,²⁷ and they have to survive on the relief provided by the restructuring to get solvent once more. Taxing haircuts negates the economic benefit of resolution and, in effect, restores insolvency risks shortly after the plan is implemented. This further disincentivises MSME debtors from initiating insolvency proceedings at early stages. In this way, the tax regime thwarts not only the intent of the PPIRP but the entire policy agenda of MSME rehabilitation.

Besides, the tax imposition also has a deterrent effect on creditor behaviour. Since haircuts made in good faith will be subject to tax and absorbed before they can resume operations, creditors may hesitate to make voluntary haircuts.²⁸ Both the pool of debtor's assets and the likelihood of the corporation's successful revival are affected. This reduces the range of feasible restructuring plans, makes the filing for PPIRP less attractive, and ultimately undermines the spirit of cooperation required for it to work.

The policy position is also uncomfortably at odds with the state's intent to rescue MSME players during times of crisis. Scholarly arguments, according to the IMF, note that "tax priorities (by the state) will actually amplify the negative effect of tax claims over third parties at a time of crises".²⁹ It also correctly points out the fact that states often pursue contradicting policies: on one hand, giving subsidies and bringing policy changes to support SMEs (such as PPIRP, Credit Guarantee Trust Fund for Micro and Small Enterprises)³⁰ and on the other hand, recovering taxes during insolvency.³¹ So, if the aim is to encourage early, value-protecting, out-of-court resolutions, then taxing key restructuring instruments, such as haircuts, is not merely counterintuitive but also counterproductive.

²⁴ Aurelio Gurrea-Martinez & Vincent Ooi, *The Tax Treatment of Haircuts in Financial Reorganizations*, 27 REVENUE L.J. 1, 3 (2020), https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?params=/context/sol_research/article/5128/&path_info=A035_The_Tax_Treatment_of_Haircuts_in_Financial_Reorganizations.pdf.

²⁵ IndAS, *infra* note 44.

²⁶ Gurrea-Martinez & Ooi, *supra* note 24, at 12.

²⁷ Rout & Shankar, *supra* note 4, at 91.

²⁸ Gurrea-Martinez & Ooi, *supra* note 24, at 12. It is crucial to note that formal lenders are also hesitant to take 'voluntary haircuts', due to fear of 'allegations of impropriety'. See *IBC Au-Courant*, INSOLVENCY PROFESSIONAL AGENCY OF INSTITUTE OF COST ACCOUNTANTS OF INDIA (Sept. 13, 2022), https://www.ipaicmai.in/IPANew/Uploadfiles/Newsletters/NL_13092022073127.pdf.

²⁹ Aw, Crowley & Garrido, *supra* note 17, at 28.

³⁰ *Schemes for MSMEs*, MAKE IN INDIA, <https://www.makeinindia.com/schemes-msmes> (last visited Aug. 4, 2025).

³¹ Aw, Crowley & Garrido, *supra* note 17, at 28.

Considering the World Bank benchmark for the measurement of insolvency outcomes, which is a function of time, cost, and recovery value, it can be ascertained that due to taxation of haircuts, the resolution incurs more costs, slows down the process, and reduces chances of successful recovery, and as a result, India's overall insolvency performance sees a reduction.³²

MSMEs thrive in an extremely tight financing market where any additional fiscal cost, and especially one that is unwarranted and does not reflect real gains, is a structural obstacle to resolution success. Where the sustainability of business hinges on fiscal space, taxing notional profits is a direct disincentive to economic growth.

3 TAXATION OF HAIRCUTS IN INDIAN LAW: LEGISLATIVE AND JUDICIAL FRAMEWORK

Given the destructive effects of taxation on the MSME insolvency environment, it is imperative to examine the statutory provisions imposing such tax liabilities and the judicial stance on the subject, identifying any inconsistencies. Further, this section evaluates the provisions that add to the fiscal burden and cause policy asymmetries and identifies the judicial leaning on tax priorities.

3.1 Statutory Basis for Taxation

3.1.1 Section 28(iv): Benefits or Perquisites Arising Out of Business

Section 28(iv) of the Income Tax Act, 1961 charges tax on any "benefit or perquisite" arising from the exercise of a profession or business, whether in monetary form or otherwise.³³ The scope of the section, which previously covered only benefits not in the form of money, was widened by the Finance Act, 2023, to include waived loans and cash haircuts.³⁴

Before this amendment, in *The Commissioner v. Mahindra & Mahindra Ltd.*, the Supreme Court held that the waiver of a term loan was not taxable under section 28(iv) because the benefit was in cash and not a perquisite in kind.³⁵ This view was, however, rendered redundant by the post-2023 legislative amendment.

Even with the amendment, this section still requires the benefit to arise out of business. Courts such as the Gujarat High Court in *CIT v. Chetan Chemicals Pvt. Ltd.* have made it clear that waiver of a loan cannot be treated as a benefit (under the provision), as it cannot be said that the business of the assessee is to obtain loans. Therefore, the waiver of such loans

³² IBBI, *supra* note 20.

³³ The Income Tax Act, 1961, § 28(iv).

³⁴ The Finance Act, 2023, § 11.

³⁵ *Commissioner v. Mahindra & Mahindra Ltd.*, MANU/SC/0513/2018.

cannot be considered a benefit of such a business.³⁶ A similar approach was taken in the cases of *CIT v. Gujarat State Fertilizers and Chemicals Ltd.*,³⁷ and *ITO v. Undavalli Constructions*.³⁸ The apex court has not yet clarified the ambiguity. So it leaves an open-ended question whether the recipient of such a waiver must necessarily be involved in a business of loans, or whether, as the loan is a crucial part of the conduct of business, such a waiver would come under the ambit of the section regardless of the assessee's business. Thus, business nexus is still a sine qua non for invocation even after the amendment.

3.1.2 Section 41(1): Cessation or Remission of Trading Liabilities

Section 41(1) of the Income Tax Act considers any cessation or remission (waiver or surrender) of a trading liability, upon which benefit or deduction has already been claimed earlier, to be a taxable income in the year in which the said waiver of liability takes place.³⁹ In *Mahindra & Mahindra*, the Supreme Court ruled that, because the loan in question was neither a trading liability nor one previously claimed as a deduction, section 41(1) did not apply.⁴⁰ Meaning, the provision is narrow and has two cumulative requirements:

- a. The liability in question must be a “trading liability” only, and
- b. A deduction or allowance must have been taken on that liability previously.

The same has been adhered to in *CIT v. Kesaria Tea Co. Ltd.*⁴¹ as well. It is crucial to note that the judiciary, through various case laws, also distinguished what types of liabilities come under the ambit of the term “trading liability”. For example, “working capital borrowing” is considered a trading liability,⁴² while “tooling” is considered a capital asset and does not fall under the purview of this section.⁴³ Therefore, whether the assessee will be taxed here depends on the nature of the loan forgiven and the benefits he had received before the waiver of the said loan.

3.1.3 Section 115JB: Minimum Alternate Tax (MAT)

Even if a corporate debtor is exempted from taxation under sections 28(iv) or 41(1), section 115JB of the Income Tax Act comes into play as the default tax provision. The provision applies to the “book profits” calculated under Indian Accounting Standards (IndAS).

³⁶ Comm'r of Income-Tax v. Chetan Chems. Pvt. Ltd., (2004) 267 ITR 770.

³⁷ CIT v. Gujarat State Fertilizers & Chems. Ltd., (2013) 358 ITR 323.

³⁸ Income Tax Officer v. Undavalli Constrs., MANU/IV/0046/2021.

³⁹ The Income Tax Act, 1961, § 41(1).

⁴⁰ Commissioner v. Mahindra & Mahindra Ltd., MANU/SC/0513/2018.

⁴¹ CIT v. Kesaria Tea Co., (2002) 3 SCC 684.

⁴² Logitronics P. Ltd. v. CIT, (2011) 333 ITR 386.

⁴³ Mahindra & Mahindra Ltd. v. Comm'r of Income-Tax, 2003 SCC OnLine Bom 1261.

Under IndAS 109, which takes an accountant's perspective on taxation, the derecognition of a financial liability, or a part of it, must be recognised as a gain in the profit and loss account.⁴⁴ Such notional gain, therefore, improves book profits and gives rise to MAT liability, without at all increasing the financial position of the debtor.

While section 115JB provides limited relief to insolvent companies by allowing the deduction of carry-forward losses and unabsorbed depreciation, the initial amount of the haircut is not exempt and must be passed through the P&L.⁴⁵

Here, it is worth noting that the judicial opinions are again bifurcated. In cases such as *JSW Steel Ltd. v. Asst. CIT*,⁴⁶ and *Shree Cement Ltd. v. Addl. CIT*,⁴⁷ a loan waiver was treated as a capital receipt, and the applicability of MAT was exempted. But on the other hand, we also have rulings supporting the MAT applicability based on the principles of accounting, such as *B&B Infotech Ltd. v. ITO*,⁴⁸ and *Duke Offshore Ltd. v. Dy. CIT*.⁴⁹ While, in the author's opinion, it is legitimate to tax such a waiver, the lack of conformity regarding the status of MAT applicability leaves another open-ended question.

From the above, it is evident that regardless of the nature of the loan on which a relief is given to the MSME debtor, in some way or another, there could be a channel to tax it (subject to judicial scrutiny as seen by contradicting judgements above). These represent the practical angle that impacts the business viability and recovery environment of MSMEs, as discussed in the previous part.

3.2 Other Asymmetrical Tax Policies

3.2.1 Section 115BAA: Exclusion from MAT

Section 115BAA of the Income Tax Act provides a concessional rate of 22% plus surcharge and cess to domestic companies⁵⁰ and exempts them from section 115JB MAT.⁵¹ But at the cost of enormous trade-offs: the company would be required to account for all other

⁴⁴ Companies (Indian Accounting Standards) Rules, 2015, Ind AS 109, G.S.R. 111(E), Gazette of India, pt. II sec. 3(i), at 823 (Feb. 16, 2015).

⁴⁵ The Income Tax Act, 1961, § 115JB.

⁴⁶ *JSW Steel Ltd. v. Assistant Comm'r of Income-tax*, Circle 11(5), Bangalore, [2017] 82 taxmann.com 210.

⁴⁷ *Shree Cement Ltd. v. Additional Comm'r of Income-tax*, [2014] 49 taxmann.com 274.

⁴⁸ *B & B Infotech Ltd. v. Income-tax Officer*, Ward 12(1), Bangalore, [2015] 63 taxmann.com 122.

⁴⁹ *Duke Offshore Ltd. v. Deputy Comm'r of Income-tax* 10(1), Mumbai, [2011] 9 taxmann.com 214.

⁵⁰ The Income Tax Act, 1961, § 115BAA.

⁵¹ Several authorities believe exemption from MAT is necessary to avoid unnecessary fiscal burdens for companies going through insolvency. See S.R. Patnaik, Reema Arya & Shivam Garg, *Unfolding Tax Tools to Invigorate Resolution of Companies Under IBC*, CYRIL AMARCHAND MANGALDAS (Feb. 8, 2024), <https://tax.cyrilamarchandblogs.com/2024/02/unfolding-tax-tools-to-invigorate-resolution-of-companies-under-ibc/>.

concessions and deductions, such as carry-forward of losses and unabsorbed depreciation,⁵² reliefs that are often the most critical to post-insolvency turnaround.

In addition, opting for 115BAA does not exclude the assessee from the application of sections 28(iv) and 41(1). The exposure merely shifts from one clause to another. Section 115BAA is thus at best a half-shield with narrow coverage due to procedural inflexibility and is subject to conditional relief.

3.3 Tax Arbitrage

The unequal tax treatment of debtors and creditors exacerbates the financial strain. A classic example of tax arbitrage occurs when debtors are liable under several provisions while creditors are exempt from paying taxes on amounts that have been waived. According to Glen Loutzenhiser, “tax treatment of the parties to a transaction should generally be symmetrical to prevent arbitrage opportunities”.⁵³ This disparity was also evident in CBDT Circular 18/2022, which explicitly mentioned no relief to debtors but exempted creditors from TDS (u/s. 194R)⁵⁴ obligations on waivers.⁵⁵ The IBC’s goal of transparent and equitable insolvency outcomes is undermined by this asymmetry, which also deters formal resolution and could encourage opaque, informal settlements.

3.4 Judicial Leaning Towards Favourable Tax Treatment

Further, it becomes necessary to make note of two important case laws: (1) *Ghanashyam Mishra and Sons Pvt. Ltd. v. Edelweiss Asset Reconstruction Company Ltd.*,⁵⁶ and (2) *Pr. Director General of Income Tax (Admin & TPS) & Ors. v. Synergies Dooray Automotive Ltd. & Ors.*⁵⁷ These cases convey the judiciary’s leaning towards less or no tax imposition on a corporate debtor emerging from an insolvency process.

In *Ghanashyam Mishra*, the apex court noted that if the resolution plan approved by the adjudicating authority contains no mention of payments to the tax authorities, i.e., if the tax liabilities are exempted in the approved resolution plan, it shall be binding on all stakeholders, including the statutory authorities.⁵⁸ Here, the NCLT clearly did not uphold the priority of tax payments, which points to the above-mentioned leaning tendency among the

⁵² Kushal Parikh & Mehul Bheda, *India: The Interplay of India’s New Insolvency Code with Income Tax Law*, INT’L TAX REV. (Feb. 9, 2020), <https://www.internationaltaxreview.com/article/2a68rfy5bw2ycq1wn3hf4/india-the-interplay-of-indias-new-insolvency-code-with-income-tax-law>.

⁵³ Gurrea-Martinez & Ooi, *supra* note 24, at 16.

⁵⁴ The Income Tax Act, 1961, § 194R.

⁵⁵ Ministry of Finance, Circular No. 18/2022/F. No. 370142/16/2022-TPL (Sept. 13, 2022).

⁵⁶ *Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co.*, (2021) 9 SCC 657.

⁵⁷ *Pr. Director General of Income Tax (Admin & TPS) v. Synergies Dooray Automotive Ltd.*, CA (AT) (Ins.) No. 205 of 2017 (NCLAT).

⁵⁸ *Ghanashyam Mishra & Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co.*, (2021) 9 SCC 657.

adjudicating authorities and the Supreme Court to recognise the binding nature of the Tribunal's decisions.

In *Synergies Dooray*, “downward settlement of crystalized tax liability”⁵⁹ was upheld. In clearer terms, NCLT Hyderabad, in this case, allowed a very steep haircut of 99% on the income tax payable by the corporate debtor, noting that all statutory dues are dues pending to operational creditors and they should be subjected to providing significant write-offs to ensure that the corporate debtor rises as a viable entity post-insolvency.⁶⁰ Hence, it shows the judicial support for the least priority of tax dues in insolvency proceedings.

Ultimately, the decision of whether to levy tax dues on an already distressed entity (which could affect its full recovery, particularly for MSMEs) comes down to a policy choice. What is needed is preferential tax treatment for loan forgiveness under NCLT-approved resolution plans. Only then will India's insolvency and fiscal regimes be in sync rather than at loggerheads, making PPIRP a dependable and effective instrument for MSME revival.

4 COMPARATIVE ANALYSIS: INSPIRATIONS FROM FOREIGN JURISDICTIONS, POLICY GUIDES, ETC

4.1 Practices in Foreign Jurisdictions: USA and UK

Internationally, the mature insolvency regimes have long recognised the imperative for beneficial tax treatment of debt forbearance. Notably, Chapter 11 of the United States Bankruptcy Code, at 26 U.S.C. § 108, provides that any debt decreased or discharged under a confirmed reorganisation plan is not considered taxable income.⁶¹ This helps the corporate debtor to leave insolvency in a financially healthy state,⁶² thus increasing chances of a true turnaround.⁶³ The logic is simple: if a haircut is the cost of staying alive, to tax it goes against the very spirit of restructuring.

Equally, in the United Kingdom, statutory schemes of arrangement identify waivers as necessary relief and explicitly exclude such incentives from tax calculations. Waivers, although accounted for, are not treated as income for tax purposes.⁶⁴ This is based on the

⁵⁹ Pr. Director General of Income Tax (Admin & TPS) v. Synergies Dooray Automotive Ltd., CA (AT) (Ins.) No. 205 of 2017 (NCLAT).

⁶⁰ *Id.*

⁶¹ 26 U.S.C. § 108 (2018).

⁶² Gurrea-Martinez & Ooi, *supra* note 24, at 13.

⁶³ *Debt Restructuring: International Tax Considerations*, NORTON ROSE FULBRIGHT, <https://www.nortonrosefulbright.com/en-gb/knowledge/publications/3f5f5dbb/debt-restructuring-international-tax-considerations> (last visited Aug. 4, 2025).

⁶⁴ *Corporate Finance Manual*, GOV.UK (July 16, 2025), <https://www.gov.uk/hmrc-internal-manuals/corporate-finance-manual/cfm33190>.

understanding that notional gains do not amount to real economic enrichment, particularly when occurring through insolvency procedures.

4.2 Policy Guidelines from International Organizations: UNCITRAL and World Bank

Foreign best practices are also reflected in the standard-setting materials of organisations such as UNCITRAL and the World Bank. The ‘UNCITRAL Legislative Guide on Insolvency Law for Micro and Small Enterprises (MSEs)’ promotes: (1) tax relief mechanisms that encourage timely disclosure and restructuring of obligations;⁶⁵ (2) fiscal and accounting rules favouring transparency rather than opacity;⁶⁶ and (3) tax exemption or relief for debt cancelled by formal procedures⁶⁷ to induce institutional resolution as opposed to informal workouts.⁶⁸ The World Bank also emphasises that successful MSME insolvency regimes must provide for the discharge of individual entrepreneurs’ debts, reinforcing the notion that a clean exit and incentivising creditor participation are fundamental to economic re-engagement.⁶⁹ In the absence of such an arrangement, the distress cycle deepens, especially for smaller enterprises with poor capital resilience.

4.3 Lessons from Precedents: Wisdom of SICA

Interestingly, India’s own policy choices in its past legislation reinforce the same approach. The erstwhile repealed Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) also exempted book profits of sick companies from MAT liability for the rehabilitation period.⁷⁰ Waivers accounted under restructuring were not regarded as actual income according to the then accounting principles, and were exempted from taxation liability.⁷¹ This historical precedent reflects the Indian state’s prior recognition of the non-taxable nature of insolvency-driven waivers.

In addition, in 2017, ASSOCHAM (Associated Chambers of Commerce and Industry of India) strongly recommended that waivers provided under an IBC-approved resolution plan must not be taxed under general provisions or MAT, and that the tax treatment under

⁶⁵ UNCITRAL, *supra* note 18, at 50.

⁶⁶ *Id.* at 47.

⁶⁷ *Id.* at 42, 113, 116.

⁶⁸ *Id.* at 33.

⁶⁹ WORLD BANK, REPORT ON THE TREATMENT OF MSME INSOLVENCY 34 (2017).

⁷⁰ Payaswini Upadhyay, *Insolvency Law: Case for Tax Exemption*, NDTV PROFIT (Nov. 21, 2017), <https://www.ndtvprofit.com/law-and-policy/insolvency-law-case-for-tax-exemptions>.

⁷¹ *Id.*

SICA should be compared.⁷² The organisation highlighted the irony of charging MAT on paper profits arising solely from IndAS entries, rather than from any realised income, thereby undermining the protection envisaged for stressed enterprises.⁷³

Be it jurisdictional comparison or inspiration from scholarly studies and suggestions, the argument for favourable tax treatment regarding haircuts is persuasive. International models, historical Indian precedents, and institutions' normative frameworks, such as those of the World Bank and UNCITRAL, all point to a clear policy imperative: resolution-driven waivers should not lead to taxation. Reforms to harmonise India's taxation policy with its insolvency law would not only promote greater adoption of PPIRP but also signal the seriousness of the legal framework in achieving true economic rehabilitation. In the long run, harmony ensures that insolvency will no longer be a stigmatising last resort but rather an initiative-driven, revival-focused programme benefiting all stakeholders.

5 POLICY RECOMMENDATIONS: ADVOCACY FOR A FAVOURABLE TAX TREATMENT⁷⁴

While interpreting taxing statutes, equitable considerations are entirely out of place; they cannot imply anything not expressly provided for.⁷⁵ This section proposes a suite of targeted legislative interventions to deliver tax neutrality for debt waivers under PPIRP. It also provides protection mechanisms or anti-abuse provisions to prevent fiscal abuse, ensuring the proposed framework remains robust, principled, and aligned with the broader aims of the Insolvency and Bankruptcy Code (IBC).

5.1 Statutory Exemption

The Income Tax Act, 1961, should incorporate an explicit provision to exempt all the income accrued from haircuts given to the MSME debtors going through the PPIRP. The same can be implemented by introducing a new clause under section 10 (which lays down those incomes that are exempted from taxation)⁷⁶ i.e. as clause (51) of section 10. The said provision can be drafted based on the model provision provided below:

⁷² *Waive Certain Taxes for Companies in Insolvency Proceeding: Assocham*, ECON. TIMES (Sept. 13, 2017), <https://economictimes.indiatimes.com/news/economy/policy/waive-certain-taxes-for-companies-in-insolvency-proceeding-as-socham/articleshow/60495542.cms?from=mdr>.

⁷³ *Id.*

⁷⁴ To draft the model provisions herewith, the scheme and language as used in the Income Tax Act is mimicked.

⁷⁵ *LSE Sec. Limited v. Commissioner*, 2013 (29) S.T.R. 591.

⁷⁶ The Income Tax Act, 1961, § 10.

“10. In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included⁷⁷....

(51) any income, whether in cash or in kind or partly in cash and partly in kind, arising from a remission, waiver, or reduction of a liability, whether trading or non-trading in nature, under a resolution plan approved by the Adjudicating Authority under Chapter III-A of the Insolvency and Bankruptcy Code, 2016.

Explanation.— For this clause, the expression “Adjudicating Authority” shall have the meaning assigned to it in clause (1) of section 5 of the Insolvency and Bankruptcy Code, 2016.”

On the contrary, separate exemption clauses may be incorporated into individual provisions used to levy taxes in the present context, i.e., sections 28(iv) and 41(1), if the legislature believes this would provide greater clarity. They could be included in the form of a proviso under these sections by following the models below:

“S. 28....(iv)...

Provided that nothing contained in this clause shall apply to any income, whether in cash, or in kind, or partly in cash and partly in kind, arising from a remission, waiver, or reduction of a liability, under a resolution plan approved by the Adjudicating Authority under Chapter III-A of the Insolvency and Bankruptcy Code, 2016.

Explanation.— For this clause the expression “Adjudicating Authority” shall have the meaning assigned to it in clause (1) of section 5 of the Insolvency and Bankruptcy Code, 2016.”

AND

“S. 41...(1)...

Provided that nothing contained in this clause shall be applicable to any income, arising from a remission, waiver, or reduction of a liability, whether trading or non-trading in nature, under a resolution plan approved by the Adjudicating Authority under Chapter III-A of the Insolvency and Bankruptcy Code, 2016.

Explanation.— For the purposes of this clause the expression “Adjudicating Authority” shall have the meaning assigned to it in clause (1) of section 5 of the Insolvency and Bankruptcy Code, 2016.”

5.2 Deeming Provision (for S. 115JB)

To address the problem of book profit inflation under section 115JB due to accounting standards (e.g., IndAS 109), the author believes that including a deeming clause would

⁷⁷ *Id.*

improve the flow and clarity in the application of legislative intent. A proviso could be added to s. 115JB and the same could follow the below-mentioned model:

“Provided that the income incurred due to a loan waiver given to the corporate debtor under a resolution plan approved by the Adjudicating Authority under Chapter III-A of the Insolvency and Bankruptcy Code, 2016, shall not be deemed to be a part of book profits under this section.

Explanation.— For the purposes of this clause the expression “Adjudicating Authority” shall have the meaning assigned to it in clause (1) of section 5 of the Insolvency and Bankruptcy Code, 2016.”

For the purposes of this deeming clause, taking inspiration from the cases of *JSW Steel Ltd.* and *Shree Cement Ltd.*, the income (aforementioned) may also be deemed as a ‘*capital receipt*’, which would have the same impact as the above model clause.

5.3 Tax Relief Outside of PPIRP

Looking beyond, the author would also like to suggest certain policy initiatives that could be applied to restructuring/insolvency proceedings apart from PPIRP. These suggestions are made with the view that, upon the successful implementation of a favourable tax regime for MSMEs undergoing PPIRP, the legislature may feel the need to revamp taxation policy across the entire insolvency sector. Here, the author proposes a strategic exemption method with a discretionary relief mechanism administered by the NCLT or the CBDT under section 119 of the Income Tax Act.⁷⁸ This could be notified through a circular by the CBDT or added as a provision in the Income Tax Act. This could be drafted as:

“(1) Notwithstanding anything contained in any other law for the time being in force, where any income arises to a corporate debtor by reason of waiver of a loan or debt by a financial creditor or operational creditor in pursuance of a resolution plan approved under the Corporate Insolvency Resolution Process, the Adjudicating Authority (or CBDT, as the case may be) may, upon application made by the corporate debtor, direct that —

(a) the whole or any part of the tax payable in respect of such income shall be waived; or

(b) such tax liability shall be reduced to such extent as it may deem fit, subject to the satisfaction of the following conditions:

(i) that the payment of such amount would cause genuine hardship to the corporate debtor; and

⁷⁸ *Id.* § 119.

(ii) that the corporate debtor has co-operated in good faith with all proceedings under the Corporate Insolvency Resolution Process.

(2) An application under sub-section (1) shall be submitted along with the resolution plan for consideration by the Adjudicating Authority, along with such supporting documents as may be prescribed.

Explanation. – For the purposes of this section, the expressions “Adjudicating Authority”, “Corporate Debtor”, and “Corporate Insolvency Resolution Process” shall have the meanings respectively assigned to them in clause (1) of section 5, (8) of section 3 and, Chapter III of the Insolvency and Bankruptcy Code, 2016.”

5.4 Anti-Abuse Provisions

While the above proposals aim to preserve the economic integrity of the insolvency process, there may be situations in which these provisions are used opportunistically, calling for strong fiscal restraint to prevent fraudulent activity. These provisions could either be added as further provisos to the above provisions or be circulated as circulars/notifications by the concerned authority.

The safeguard provisions may include:⁷⁹

1. A three-year business continuity clause: The MSME debtor availing the tax benefits must continue to run the same business for a minimum period of three years post-resolution. This is to ensure that the process is not arbitrarily used to carry out shell acquisitions.
2. Lock-in periods for shareholders: If the resolution results in new shareholders acquiring a stake in the company, their equity shall be locked in for a period of three years. This is to ensure that speculative investors do not flip post-tax benefits.
3. Independent audits post-resolution: Upon successful implementation of the resolution plan, independent audits by a third-party must be conducted to guarantee that the process is not misused with fraudulent intentions.

The above safeguards are merely indicative, and other such provisions must be further explored. It is important to note that the three-year cooling period applicable to an MSME debtor opting for PPIRP also serves as an inherent deterrent to prevent arbitrary abuse of the tax reliefs. These conditions not only allow for restricting actions taken in bad faith, but also boost public confidence in the framework’s accountability and transparency, which is often considered lacking in PPIRP.⁸⁰

⁷⁹ All the time periods mentioned are just indicative and could be amended as per the wisdom of legislative policy.

⁸⁰ Rout & Shankar, *supra* note 4, at 91.

6 CONCLUSION

As India's insolvency framework evolves, achieving a balance between fiscal and insolvency frameworks is central to the success of efforts like the PPIRP. In this paper, the author argues that taxing haircuts, although legally justified by existing statutory provisions, is a policy anomaly that erodes the economic rationale and legislative intent of MSME-focused insolvency resolution. The tax obligation on notional gains as real taxable income in restructuring cases distorts creditors' and debtors' incentives, making recovery even more elusive.

The broader lesson of this paper is that insolvency law cannot be imposed fiscally in a vacuum. The revival of distressed businesses, particularly MSMEs, must be supported by a legal framework that makes tax policy a catalyst rather than a hindrance to economic revival. This requires legislative foresight and inter-regulatory harmonisation, in which the Income Tax Act must evolve in concert with the IBC's architecture.

The paper provides a way forward for further legislative and academic experimentation. Future studies can examine the viability of combined insolvency-fiscal codes by conducting empirical research charting the effects of tax burdens on resolution outcomes across different classes of debtors, particularly in the MSME sector, or by using econometrics to quantify the exchequer's potential revenue loss relative to the economic benefit of improved resolution outcomes.

Above all, India's insolvency system cannot be perceived as a discrete process of debt restructuring but as an economic rebirth tool. In that perspective, tax neutrality on resolution-facilitated haircuts is not a concession but an institutional necessity. Only then can tools like the PPIRP effectively realise their potential as agents of sustainable and equitable enterprise revival.

* * *

CHAPTER 15

Mediation as a Tool for Balancing Creditor-Debtor Interest in Insolvency Proceedings

AYUSH PANDEY* AND SHASWAT TIWARI**

The Mediation Act defines mediation as a process that encourages parties to reach a consensual agreement through various types of mediation, whether institutional or commercial, to arrive at a mutually agreeable solution. Unlike arbitration, mediation enables parties to work together collaboratively to resolve their disputes. Section 89 of the Indian Civil Procedure Code allows arbitrators or mediators to assist parties in finding common ground, even when binding decisions may not fully meet their needs. Section 10 of the IBC outlines the procedures for handling insolvency. Although mediation is referenced in several sections, its practical application has grown, as countries like the US and France have successfully employed it. For example, in the US, the Greyhound Lines Inc. bankruptcy case demonstrated mediation's effectiveness, as it resolved various claims, with most settled at an early stage. France experienced similar success.

The primary aim of this paper is to examine the utility and necessity of a process like mediation in bankruptcy proceedings, for achieving a cost-effective, time-saving solution. The paper is structured around a central research question: How will mediation help in the resolution of insolvency cases? It will consider whether mediation is essential for supporting struggling businesses, facilitating methods of debt repayment to creditors, or managing the competition for assets. The paper will also address the challenges of balancing the interests of all creditors, the impact of agreements with creditors, and the complex situations involved in finding solutions that benefit all stakeholders.

The paper will explore the application of mediation in India, drawing examples from other jurisdictions such as the European Union and the United States. It will also analyse the factors that contribute to the success of mediation in these countries and will explore how similar approaches can address prevailing disputes and the “Common Pool Problem” in India. The paper will propose ways to enhance the existing literature by advocating for new mediation methods and legislative reforms that are necessary in India.

Keywords: Mediation, Insolvency, Bankruptcy, Dispute Resolution, Stakeholder Interests

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1 RESEARCH QUESTIONS

1. How does mediation influence resolution of insolvency cases in terms of cost, time and stakeholder satisfaction compared to litigation?
2. What are major problems in solving Insolvency proceedings with the help of mediation techniques?
3. How can best practices and proceedings in EU and U.S.A. help in transforming mediation problems in India related to insolvency cases?

2 OBJECTIVES

1. To analyze effectiveness of mediation as an alternative dispute resolution in insolvency cases. Realizing the cost-effectiveness and other beneficial outcomes.
2. To analyze the challenges that hinder the widespread use of mediation proceedings in insolvency cases in India.
3. To recommend the legal reforms and strategic framework as adopted by international practices to transform mediation practices in India.

3 METHODOLOGY

The methodology used in this paper is grounded on the doctrinal approach. The objective of this paper is to examine the role of mediation process in the Insolvency & bankruptcy proceedings of India. To answer the central question of this paper, various primary sources such as the Insolvency and Bankruptcy Code of India, 2016; Bankruptcy Law Reforms Committee Report; The Mediation Act, 2023; Arbitration and Conciliation Act, 1996 etc. along with secondary sources such as Judgments, case comments, Government notifications & directives, journals, articles etc. have been analysed.

The research also includes the comparative analysis of foreign jurisdictions like US, the UK, European Union etc. This provides insights into how other nations apart from India are utilising mediation as an effective mechanism to deal with Insolvency and Bankruptcy cases.

4 LITERATURE REVIEW

4.1 Justice Arjan Kumar, Constitutionalism and Rule of Law in Theatre of Democracy (Norton Rose Fulbright 2022)

The author highlights the use of mediation in insolvency proceedings as to facilitate a relationship between creditor and debtor so as to reach an amicable solution. It highlights the transformative role of mediation in insolvency proceedings as a form of “democratic decision making”. The mediation is seen as a cost-effective solution to the adversarial litigation, facilitating more amicable solutions in business world which may help to preserve relationships.

4.2 Nishith Desai Associates, Decoding Mediation Act 2023

It aims at decoding mediation act 2023 and its innovation which it has brought into the field of ADR and how to use it. It puts light on the use of online mediation and institutional mediation which is to be done in institutions. It highlights the use of institutional mediation in insolvency matters to solve it amicably as well as promotes online mediation in response to mediation problems involving business abroad.

4.3 IBBI Research Paper Report, “Mediation in Insolvency Matters” (ibbi.gov.in, 2023)

The report examines mediation as an increasing form of dispute resolution in ADR field in insolvency cases. It talks about the effects of mediation and its benefits in solving common pool problem in insolvency cases. It highlights the benefits of mediation like the cost effectiveness, the time saving and a proceeding that promotes the parties to solve their problems by appointing their mediators and by facilitating the process in their own way as well as maintaining confidentiality of proceedings.

The paper highlights different problem-solving techniques of mediation in insolvency cases whether related to common pool problem or related to the debt repayment issue through analyzing the books and research paper. The books highlight the statutory provisions as well as practical techniques while paper highlights the benefits of mediation proceedings thus helping in the study.

5 INTRODUCTION

In this era of industrialisation and globalisation, the world is now characterised by the evolution of industrial programmes, dealings, and banking operations across the globe. In this era of development, the backbone of any country is its industrial operations and the dealings

that take place around them. But with growing innovation and technology, problems also arose in relation to debtors and creditors, and insolvency proceedings related to a debtor. The Code that has been enacted to regulate the process and resolve problems of bankruptcy has contributed in many respects, as it has amended previous laws and created unified procedures for bankruptcy and insolvency proceedings related to companies, banks, and industries, and has also instituted a time limit for resolving insolvency proceedings of approximately 180 days, thereby consolidating the insolvency proceedings for creditors who may face difficulties in its absence.¹

Though the Insolvency and Bankruptcy Code has solidified the process of bankruptcy as well as matters related to insolvency, this can be seen in various sections of the Code — whether in terms of creditors' rights to recover their dues from the debtor, or whether it is for filing a case before an adjudicating authority for initiating proceedings against the debtor, as in Section 7 of the IBC, which provides that an individual creditor or a group of them can file a complaint in the NCLT to initiate proceedings against the debtors or a group of them.² Though the Code has laws and statutes to enable proceedings and for regulating the business world, India's dispute resolution practices and time-saving resolution mechanisms do not yet align with practices around the world. When we examine what India is lacking, the answer lies in the absence of mediation — as provided under Section 89 of the CPC, which states that if a court sees that settlement is possible, it can refer the matter to an Alternative Dispute Resolution process like mediation. Industries, when disputes arise, lack these mechanisms, and this paper has examined how mediation can help in solving debt problems, including when they arise from limited assets, and how it can be less time-consuming and effective — thus leading to cost-effective, amicable solutions.

6 HISTORICAL BACKGROUND

Insolvency and bankruptcy laws transitioned from being excessively punitive in nature to providing a fair opportunity to all stakeholders. Since pre-medieval times, insolvency was considered a criminal wrong in societies such as Rome and Greece; if a debt remained unpaid for 30 days, the debtor would be taken captive by their creditor. If the debtor was unable to pay within a further 60 days, the creditor was entitled to put the debtor to death or sell them into slavery.³ This approach instilled fear in the minds of people and they were

¹ INSOLVENCY & BANKRUPTCY BOARD OF INDIA & VIDHI CENTRE FOR LEGAL POLICY, UNDERSTANDING THE INSOLVENCY AND BANKRUPTCY CODE, 2016 (2019).

² Insolvency and Bankruptcy Code, 2016, § 7.

³ S.B. Ayed, G. Matteucci & T. Van Nam, *Mediation and Insolvency, with a Focus on Developing Countries*, in COMPROMISO CON LOS OBJETIVOS DE DESARROLLO SOSTENIBLE (COMMITMENT TO THE SDGs—SUSTAINABLE DEVELOPMENT GOALS) 115, 115–53 (Rosa Pérez Martell ed., 2021) (Spain).

reluctant to open new businesses for fear of going insolvent. The collapse of the *Ammanati Bank of Pistoia* in 1302⁴ was one of the earliest cross-border insolvency issues, which showed that domestic legislation of nations was inadequate in resolving insolvency cases where assets were distributed across multiple nations. This was one of the earliest indications of the need for comprehensive insolvency frameworks that were less punitive and promoted less formal proceedings to ensure the welfare of all stakeholders.⁵

A few centuries later, the United Kingdom enacted the Bankruptcy Act and brought other such reforms, which brought a major shift in the system towards commercial rehabilitation and culminated in the Insolvency Act, 1986.⁶ This law currently governs personal and corporate insolvency in the UK, embedding both liquidation and rescue mechanisms, notably administration and company voluntary arrangements (CVAs).

The United States institutionalised corporate reorganisation through Chapter 11 of the U.S. Bankruptcy Code in 1978.⁷ Chapter 11 emphasises debtor-in-possession, automatic stay, and a plan of reorganisation, thereby preserving both creditors' and debtors' rights. Landmark rulings such as *Northern Pipeline Construction Company v. Marathon Pipe Line Company*⁸ and *Till v. SCS Credit Corp.*⁹ have shaped the insolvency and bankruptcy framework by reinforcing judicial oversight and equitable treatment of all stakeholders in the US.¹⁰

In India, the term "insolvency" was first used when the British established 'insolvency courts' in the presidency towns (Calcutta, Madras, and Bombay) via legislation in 1828. The primary aim of establishing these insolvency courts was not necessarily welfare-driven, but rather a strategic attempt by the British to present a flourishing business environment by solely protecting the interests of insolvent debtors (borrowers). One of the significant drawbacks of this legislation was that it limited insolvency proceedings to the presidency towns (the insolvency framework beyond these towns was expanded by the Provincial Insolvency Act, 1907). The Presidency Towns Insolvency Act, 1909¹¹ was enacted as modern industries were rising and India was becoming more commercially active. This statute was quite significant because, unlike the earlier debtor-centric laws and courts, this Act marked a gradual shift by considering the interests of both lenders and borrowers.

⁴ Kurt H. Nadelmann, *Bankruptcy Treaties*, 93 U. PA. L. REV. & AM. L. REG. 58–97 (1944).

⁵ R.V.N. Ramakanth, P. Sridhar, Yellapu Prasad & S. Sumitra, *Evolution of Indian Insolvency Regime – A Legal Perspective*, 20 NANOTECHNOLOGY PERCEPTIONS 3203–08 (2024), <https://nano-ntp.com/index.php/nano/article/download/4480/3452/8609>.

⁶ 1986 c. 45.

⁷ 11 U.S.C. §§ 1101–1174.

⁸ 458 U.S. 50 (1982).

⁹ 541 U.S. 465 (2004).

¹⁰ John A.E. Pottow, *The Past, Present, and Future of Cross-Border Insolvency Law in the United States*, 87 AM. BANKR. L.J. 249, 252–53 (2013).

¹¹ Presidency-Towns Insolvency Act, 1909.

After independence, several significant developments were made with respect to Alternative Dispute Resolution mechanisms like mediation and to insolvency and bankruptcy laws. The Indian Constitution places the terms “insolvency” and “bankruptcy” under the Concurrent List of Schedule 7, meaning that both the Union and the States were empowered to enact legislation for insolvency and bankruptcy. Under the Industrial Disputes Act, the concept of mediation received legislative recognition in India for the first time. India introduced its first comprehensive company law — the Companies Act — in 1956.¹² While the Act did not specifically mention the terms “insolvency” or “bankruptcy”, it contained certain provisions that allowed companies to focus on corporate revival rather than resolution or liquidation. The Act also provided an indirect route to deal with financial distress, though a formal insolvency framework was still missing at this stage.¹³ It further allowed companies to reorganise and restructure their operations, enter into mergers and acquisitions, and restart as a going concern even in cases of financial default.¹⁴

ADR mechanisms were formally recognised under the Legal Services Authorities Act, 1987.¹⁵ Mediation was not specifically provided for among the ADR mechanisms at the outset.¹⁶ In 1996, the Indian Parliament passed the Arbitration and Conciliation Act, which set out the procedures for arbitration as well as conciliation of disputes based on legal relations, whether contractual or otherwise, and related proceedings. Nonetheless, mediation did not fall within the scope of this Act. The Act provided procedures for initiating conciliation, appointment of conciliators, seeking assistance of appropriate institutions to recommend or appoint conciliators, and statements detailing how the conciliator would help the parties arrive at a negotiated settlement.

The *Recovery of Debts and Bankruptcy Act, 1993*¹⁷ was further supplemented by the introduction of the *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI)* in 2002,¹⁸ which brought major enhancements. The two Acts also established avenues to recover debts through two major tribunals: the Debt Recovery Tribunal (DRT) and the *Debt Recovery Appellate Tribunal (DRAT)*. These tribunals dealt with cases under SARFAESI as well as the Recovery of Debts and Bankruptcy Act, thereby streamlining the process of debt recovery by financial institutions.

¹² Companies Act, 1956.

¹³ Kanika Ojha & Simranjeet Kaur Gill, *Legal Framework for Alternative Dispute Resolution in India*, 5 INT’L J. RSCH. PUB. & REV. 3452 (2024).

¹⁴ Justice S.U. Khan, *Judicial Settlement Under Section 89 C.P.C.: A Neglected Aspect*, INDIAN J. TRAINING & RSCH. (2014).

¹⁵ Legal Services Authorities Act, 1987.

¹⁶ Manisha Arora & Pranav Ashutosh, *The Constitutionality of IBC Upheld: Understanding the Procedural Aspect and the After-Effects*, IBC LAWS (Feb. 22, 2021).

¹⁷ Recovery of Debts and Bankruptcy Act, 1993.

¹⁸ Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

Moreover, the Parliament enacted the CPC Amendment Act in 1999, which introduced Section 89 in the Civil Procedure Code (CPC)¹⁹ and enabled courts to refer pending cases to ADR mechanisms such as mediation — a first in Indian law. Ever since this amendment, numerous courts in India have set up court-annexed civil mediation and conciliation centres. These centres have recorded high rates of acceptance of their mediations by opposing parties, as opposed to courts referring cases to independent mediators. The *Bankruptcy Law Reforms Committee (BLRC)* was formed in 2014 by the Ministry of Finance with the aim of developing an overall framework for bankruptcy reform in India, under the chairmanship of Dr. T.K. Viswanathan.²⁰ The recommendations of the Committee across two volumes formed the foundational basis for the enactment of the *Insolvency and Bankruptcy Code of India, 2016*. Not only did the IBC consolidate the various insolvency and bankruptcy laws of the nation into a single framework, but its primary objective was also the resolution of distressed companies while safeguarding the interests of all involved parties.²¹

Currently, the IBC lacks specific provisions on mediation. However, Section 12A of the IBC reflects the legislature's intention to neutralise the adversarial nature of the procedure by enabling dispute resolution and allowing withdrawal of an application from the Corporate Insolvency Resolution Process (CIRP) even after an application is admitted, so long as 90% of the Committee of Creditors (CoC) agrees.²²

Besides that, in the landmark case of *Swiss Ribbons Pvt. Ltd. v. Union of India*,²³ in the absence of a constituted CoC, the Supreme Court held that a party may make an application directly to the National Company Law Tribunal (NCLT) for withdrawal. The NCLT may grant or reject such withdrawal applications in the exercise of its inherent powers. This illustrates that, despite the absence of express provisions on mediation in the IBC, courts have regularly tried to relieve the NCLT and NCLAT by promoting out-of-court settlement of disputes through amicable resolutions.

The Mediation Act²⁴ was enacted in 2023 with the primary objective of promoting and facilitating mediation, especially institutional mediation, to resolve disputes, commercial and otherwise. The Act permits voluntary and consensual mediation, and also encourages and gives legal validity to mediated settlement agreements. Since the Mediation Act neither specifically excludes nor includes the IBC within its purview, it is silent on the Code. There is

¹⁹ Code of Civil Procedure, 1908, § 89 (inserted by the Code of Civil Procedure (Amendment) Act, 1999).

²⁰ Avantika Tewari & Chetan R., *Mediating the Game of Insolvency: Unlocking Efficiency and Equity in India's Bankruptcy Landscape*, RMLNLU L. REV. BLOG (Apr. 11, 2025).

²¹ Anonymous, *Resolving Corporate Conflicts Outside the Courtroom: A Study of ADR Mechanisms and the Companies Act in India* (SSRN Working Paper, Feb. 29, 2024).

²² Arbitration and Conciliation Act, 1996.

²³ *Swiss Ribbons Pvt. Ltd. v. Union of India*, (2019) 4 SCC 17.

²⁴ The Mediation Act, 2023.

no mention of any limitations on mediation under *the Code, or on mediation in bankruptcy cases, in the 2023 Act*.²⁵ The Code does not appear to be covered by the 2023 Act, since it is special legislation and no particular adjustment has been made to allow mediation under the Code as per the 2023 Act.²⁶ The expert committee has determined that a self-contained code is necessary to accomplish the goal of the statutory deadline under the Code, and that the “one size fits all” approach under the 2023 Act is not appropriate for insolvency mediation.²⁷

Thus, it can be said that India appears poised to blend formal insolvency adjudication with informal resolution techniques.²⁸ Mediation, though not yet codified under the IBC,²⁹ is progressively being acknowledged by tribunals as a legitimate and desirable tool — particularly in pre-pack insolvency processes and cross-border insolvency cases, where consensual resolutions are vital.³⁰

7 MEDIATION IN INSOLVENCY: CONCEPT AND MECHANISM

Mediation can be defined as a process whereby the disputing parties collaborate to reach a consensus by appointing a neutral third party who facilitates them in reaching a consensual decision. In insolvency proceedings, it will certainly help stakeholders whether debtors or creditors to resolve the financial disputes prevailing between them. It differs from traditional litigation, which involves a procedural process before different courts and tribunals that can be both costly and time-consuming; mediation may therefore spare the parties in an industrial dispute from such processes.³¹

Mediation is a dynamic process in which parties approach an institution such as the Indian Institute of Mediation and Arbitration and appoint a mediator who facilitates them in reaching an amicable solution. In insolvency proceedings, parties may also exercise their will to appoint a mediator who has proficiency in commercial matters and insolvency law.

²⁵ Insolvency and Bankruptcy Code, 2016.

²⁶ Mediation Act, 2023.

²⁷ Pitamber Yadav & Sanyam Gupta, *Streamlining Insolvency Through Mediation in India: Key Takeaways from the IBBI's 2024 Report*, MEDIATE (Dec. 6, 2024), <https://mediate.com/streamlining-insolvency-through-mediation-in-india-key-takeaways-from-the-ibbis-2024-report/>.

²⁸ MINISTRY OF FIN., REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE, Vol. I & II (2015).

²⁹ Insolvency and Bankruptcy Code, 2016, § 12A.

³⁰ Press Information Bureau, *Year End Report 2023 Mediation Act, 2023*, PIB (Dec. 15, 2023), <https://www.pib.gov.in/pressreleaseiframepage.aspx?PRID=1986723>.

³¹ EXPERT COMMITTEE, INSOLVENCY & BANKRUPTCY BOARD OF INDIA, FRAMEWORK FOR USE OF MEDIATION UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016 (Jan. 31, 2024), <https://ibbi.gov.in/uploads/resources/1256aa8a9e2c89bd09d8186dae2e6019.pdf>.

The scope of insolvency mediation is broad, as it may occur at the pre-insolvency stage and also in the context of cross-border transactions involving different jurisdictions.³²

Various problems can be addressed through mediation, including the prominent “common pool” problem in insolvency cases. The common pool problem arises when a debtor has limited assets and there are multiple creditors, raising the question of how to satisfy each creditor’s claim. Mediators can facilitate negotiations to address this problem so that the assets can be optimally valued and creditors can be satisfied despite limited assets, thereby preventing significant loss to both creditors and debtors.³³

7.1 Global Mediation Framework in Different Areas Including Business Framework

7.1.1 European Union

The European Union promotes mediation as a flexible and time-efficient platform for resolving disputes. The EU’s 2014 recommendations on business failure and insolvency, and the 2019 Directive, mandated the appointment of mediators so that negotiations on restructuring plans could be conducted. The EU’s evolving framework highlights the need for mediator training and codes of conduct for professional mediation practice.³⁴

7.1.2 United States

In the United States, mediation has been embedded in insolvency proceedings under Chapter 11 of the complex bankruptcy law. Bankruptcy courts in federal districts also have the power to order parties into mediation. U.S. mediation has demonstrated to the world how multi-creditor disputes can be resolved and how consensus for restructuring plans can be achieved.³⁵

7.2 Challenges of Mediation in Indian Bankruptcy Laws

Mediation in Indian insolvency cases marks a significant breakthrough in bankruptcy and insolvency law, having contributed to the development of the *Insolvency and Bankruptcy Code, 2016*. Previously, Indian insolvency cases were resolved through traditional tribunal and

³² Adv. Aayush Gupta & Abhishek Kedia, *Mediation in Insolvency: A Way Forward*, IBC LAWS, <https://ibclaw.in/mediation-in-insolvency-a-way-forward-by-adv-aayush-gupta/> (last visited Aug. 6, 2025).

³³ EXPERT COMMITTEE, INSOLVENCY & BANKR. BD. OF INDIA, FRAMEWORK FOR USE OF MEDIATION UNDER THE INSOLVENCY AND BANKRUPTCY CODE 6–7 (Jan. 31, 2024), <https://ibbi.gov.in/uploads/resources/1256aa8a9e2c89bd09d8186dae2e6019.pdf>.

³⁴ EU Framework: European Parliament, Directive (EU) 2019/1023, 2019 O.J. (L 172) 18; European Commission, Recommendation 2014/135/EU, 2014 O.J. (L 74) 65.

³⁵ US Framework: Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–658; *In re Purdue Pharma L.P.*, 633 B.R. 53 (Bankr. S.D.N.Y. 2021).

adjudicatory processes to address corporate distress; however, with an increasing number of cases, backlogs, and the need for collaborative solutions, there has been a move towards alternative dispute resolution.³⁶

Though alternative mediation has started gaining ground, it also faces several challenges that have prevented it from achieving recognition on a wider scale.

7.2.1 *Coordination Among Creditors*

In insolvency proceedings, creditors often have conflicting strategies and interests. Though cooperation may assist in overall recovery, creditors may be reluctant to collaborate and may even “free ride” by benefiting from others’ efforts for their personal interest, thereby hampering the mediation process.³⁷

7.2.2 *Complexity and Fragmentation of Creditor Claims*

Coordination among creditors across different jurisdictions is difficult. This problem of diverse jurisdictions primarily challenges the mediator, who must build consensus among different creditors, which becomes particularly difficult when multiple jurisdictions are involved, creating significant complications.³⁸

7.2.3 *Problem of Maintaining Confidentiality*

The tension of keeping mediation proceedings confidential is another challenge, as insolvency mediation proceedings may involve a great deal of financial and sensitive business data that is required to be disclosed under the *Insolvency and Bankruptcy Code, 2016*, thereby reducing trust among stakeholders.³⁹

7.3 Pathways for Reform: Strengthening Mediation in Insolvency Resolution

Mediation offers a holistic, cost-effective, and expeditious solution to many disputes — whether related to matrimonial matters or to the relationship between debtor and creditor in insolvency cases. Integrating mediation with the IBC, 2016 will address the present need to de-congest court dockets and reduce procedural delays. Fostering a mediation culture among stakeholders will address the questions and problems arising from their disputes.

³⁶ Shashyak Roy & Arima Kaushal, *Mediation Under the IBC Framework: A Pragmatic Shift or Premature Experimentation?*, INDIACORPLAW (Apr. 27, 2025).

³⁷ Avantika Tewari & Chetan R., *Mediating the Game of Insolvency: Unlocking Efficiency and Equity in India’s Bankruptcy Landscape*, RMLNLU L. REV. BLOG (Apr. 11, 2025).

³⁸ Scott Atkins & Kai Adam Luck, *Mediation as a Bankruptcy and Insolvency Game Changer*, NORTON ROSE FULBRIGHT (Nov. 1, 2022), <https://www.nortonrosefulbright.com/en-in/knowledge/publications/50ba6f9d/mediation-as-a-bankruptcy-and-insolvency-game-changer>.

³⁹ Rajesh Chakrabarti & Poonam P. Som, *Mediation and the Insolvency Resolution Process in India: Challenges and Opportunities*, SSRN (Dec. 17, 2024), <https://ssrn.com/abstract=5060666>.

7.3.1 *Establish a Mediation Framework within the Insolvency and Bankruptcy Code*

A self-contained mediation framework should be enshrined within the IBC, 2016, operating independently of any external statute. The mediation framework should respect the timelines of the insolvency proceedings. A dedicated mediation cell would also be beneficial, on the model of the NCLT mediation cell.⁴⁰

7.3.2 *Promote Experienced and Uniform Mediators*

Only experienced mediators with expertise in restructuring, business management, and insolvency matters should be empanelled. These mediators will play a crucial role in fostering trust among debtors, creditors, and companies in cases of dispute resolution. Ensuring rigorous training and qualification requirements will ensure that mediators possess both the knowledge and credibility required.⁴¹

7.3.3 *Introduce the Practice of Voluntary Mediation*

Mediation should evolve on a voluntary basis, supported by regulatory frameworks that allow for its adoption in the industry. Mediation processes should be regulated by institutions such as the Insolvency and Bankruptcy Board of India for the refinement of mediation processes related to insolvency.⁴²

8 CONCLUSION

In the era of insolvency and business operations, massive financial transactions not only affect the business operations of a particular company but also have a wider impact on nations as a whole. Though the Insolvency and Bankruptcy Code of India provides various processes and laws for approaching the adjudicating authority, mediation, as provided under Section 89 of the CPC, is an evolving mechanism that promotes amicable solutions, whether in family matters or in business disputes. Through this paper, we have come to understand how other countries employ this mechanism for resolving matters related to business transactions, and we have also identified the various challenges that mediation may face in India, along with a set of innovative solutions.

* * *

⁴⁰ EXPERT COMMITTEE, INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, REPORT ON FRAMEWORK FOR USE OF MEDIATION UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016 (Jan. 31, 2024), <https://ibbi.gov.in/uploads/resources/1256aa8a9e2c89bd09d8186dae2e6019.pdf>.

⁴¹ *Paper on ADR and Personal Laws: Evolving Practices and Challenges in the Indian Context*, at 15.

⁴² *Phased and Voluntary Implementation with Regulatory Oversight*, 4 RESOL. PROF'L, at 6 (Apr. 2024), <https://www.iiipicai.in/wp-content/uploads/2024/05/the-resolution-professional-april-2024.pdf>.

CHAPTER 16

Blurring the Line between Guardians and Agents: The Fading Independence of Resolution Professionals in India's Insolvency Framework

SAKSHI SINGH* AND DR. TRUPTI RATHI**

With the increasing reliance on the Insolvency and Bankruptcy Code (“Code”), concerns regarding its transparent and equitable functioning have become critical. Recently, cases report an emerging trend of collusion between Resolution Professionals (RPs), Financial Creditors (FCs), and Corporate Debtors (CDs), systematically undermining Operational Creditors’ (OCs) rights. FCs often misuse their commercial wisdom to push resolution plans that disproportionately benefit them, allegedly aided by IRP/RP. This includes facilitating suboptimal plans and making incomplete disclosures of OC claims in the Information Memorandum, with such claims extinguished once the FC gains control of the CD and invokes the Clean Slate Theory under Section 32A. These actions breach the RP’s statutory duty to act fairly and transparently, violating OCs’ rights under Sections 30(2) and 53 of the Code, and Articles 14, 19(1)(g), and 300A of the Constitution.

The authors critically analyse such collusion and its impact. Through empirical research with industry practitioners, the paper confirms growing concern around these practices. To address this, it proposes shifting from a reactive CIRP framework to proactive, rights-protective alternatives, such as structured pre-insolvency hybrid mediation, court-regulated arbitration, and rescue financing supported by super-priority debt classification. Amendments to Section 53 and RP disqualification norms are also recommended to ensure independence and fairness.

Keywords: Pre-insolvency arbitration, Pre-insolvency mediation, Collusion, Operational Creditors.

1 RESEARCH OBJECTIVE

1. To critically investigate the growing trend of collusion between RP, FCs, and the CD by examining existing market practices and identifying systemic loopholes within the Indian insolvency framework.

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2. To assess the legal and constitutional implications of such collusion on the rights of operational creditors, with reference to Section 30(2) read with Section 53 of the Code, and Articles 19(1)(g), 21, and 300A of the Constitution.
3. To analyse the broad powers vested in the IRP and RP and the preferential treatment accorded to FCs under the Code, which contribute to procedural imbalance and the marginalization of operational creditors.
4. To propose a robust set of alternatives to the current corporate insolvency resolution process, including a pre-insolvency hybrid mediation model, a court-regulated arbitration mechanism, and a court-supervised rescue financing framework supported by a super-priority debt classification, along with recommendations for amendments to Section 53 of the Code and introducing additional disqualification criteria to ensure the independence and accountability of the IRP and RP.

2 RESEARCH QUESTIONS

1. Does the current insolvency legal framework provide scope for collusion between the RP, FC and the CD?
2. How does collusion between the RP, FC and the CD undermine the objectives, aims and novelty of the Code?
3. Does the wide discretionary power vested in the IRP/RP and the preferential treatment accorded to the FCs override the constitutional and statutory rights of the OC?
4. Can an alternative pre-insolvency in personam mechanism provide a more effective forum for the OC to advocate for their rights and financial interests?

3 METHODOLOGY

This research will involve the Doctrinal and Non-Doctrinal research.

3.1 Doctrinal Research

- a) The researcher will collect data relating to the unlawful collusive working of IRP/RPs, preferential treatment to FCs, and the violation of legal, constitutional and fundamental rights of OCs in India. Thereby suggesting amendment to the Code in view of insolvency regime in US and Singapore and the recent IBBI discussion paper on mediation by the OCs. The data will include primary and secondary data from the library based sources, books, journals, articles, judgments, case laws.
- b) Thereafter the researcher will critically analyse the laws, rules, regulations related to interests and rights of the OC violated by trending collusion between RP, FC and CD.

- c) Researcher will review the primary and secondary data, articles, journals, books which are related to the Code.
- d) The researcher will also study the various insolvency systems adopted in Singapore, the UK and the US including pre-insolvency hybrid mediation mechanism, a court regulated arbitration procedure, a court supervised rescue financing and super-priority model etc.
- e) Researcher will evaluate the various Committee reports such as Justice V.B. Eradi report, Dr. J.J. Irani Committee report, Insolvency Law Committee (ILC) report on cross-border insolvency arbitration, National Seminar for Presiding Officers of Debt Recovery Tribunal (DRT), SE-27, Programme Report and IBBI discussion paper on mediation by OC, IBBI expert committee report on framework for use of mediation under the Code 2016.
- f) Researcher will scrutinize the legislative framework of Insolvency regime of the US, the UK and Singapore.

3.2 Non-Doctrinal Research

- a) The researcher will conduct the empirical study in the Section 30(2) read with Section 53, along with Sections 32A, 29, 17, 18, 19, 20, and 25 of the Code, as well as the Regulation 3 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016. Researcher will collect the data through questionnaire method for these sections.
- b) Questionnaire will be circulated to the maximum companies pan India during the year of 2024 to seek the opinion and information regarding its implementation in context of Collusion between RP, FC and CD and discussion would be allowed from various stakeholders via G-form with various stakeholders of IBC including Insolvency Professionals, IRP/RPs, FC, CDs, OCs, Company Secretary, Company Accountant, Company lawyers, Advocates, Students and Law Professors.

Method: In present research the researcher would rely on sampling method of data collection for collection of empirical data. In sampling method the research is intending to apply non-random stratified sampling method. In stratified sampling the researcher would rely on dis-proportionate sampling method. The researcher will use Morgan Table to determine the size of sample.

Tools: The research will rely on questionnaire as a tool of data collection while collecting empirical data.

Rules of citation: The research would rely on Blue Book of Rules of Citation 21st Edition (2020).

4 INTRODUCTION

4.1 Is the Novelty of the Indian Insolvency Intact or Eroding?

In 2016, the Code was enacted as umbrella legislation governing India's insolvency and bankruptcy framework.¹ By its introduction, the regime shifted from debtor-centric to a creditor-centric approach, aligning more closely with its objective of addressing creditors' concerns. Drafted on the recommendations of the Bankruptcy Law Reforms Committee (chaired by Dr. T.K. Viswanathan), the Code sought to replace earlier mechanisms with a market-driven, predictable, time-bound and incentive-compatible process for resolving corporate distress.² Beyond promoting value maximisation, it aims to ensure the availability of credit and balance the interests of all stakeholders; a prioritisation that is fundamental and unavoidable.³

However, the effectiveness of the Code has declined over time due to emerging systematic inefficiencies. In FY 2023–24, the average “haircut” sustained by creditors reached an alarming 73%, with financial creditors recovering merely 32% of their admitted claims. Of the approximately 4,700 cases resolved by the first quarter of FY 2023–24, only 15% culminated in successful resolution, while nearly 45% resulted in liquidation.⁴ Furthermore, delays in the resolution process have worsened significantly, with the average duration escalating to 630 days, almost double the prescribed 330-day limit under the Code. Aggregate recoveries remain modest, amounting to merely ₹2.67 lakh crore, reflecting a recovery rate of just 32.6% against total admitted claims of ₹8.18 lakh crore.⁵ This underwhelming performance is largely attributable to protracted litigation. However, this paper argues, based on empirical and secondary research, that the increasing inefficiency of the Code may also be attributed to the rising trend of collusion between RPs and FCs.

Under Chapter I, the Code distinguishes between two types of creditors: FCs and OCs. As paragraph 5.2.1 of the Bankruptcy Law Reforms Committee Report states, FCs are individuals *or entities whose connection to the organization is solely based on a financial agreement, like a loan or debt instrument*. OCs, on the other hand, are those whose claims against the entity arise from

¹ INT'L FIN. CORP. & INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, UNDERSTANDING THE IBC: KEY JURISPRUDENCE AND PRACTICAL CONSIDERATIONS: A HANDBOOK (2020), <https://ibbi.gov.in/uploads/whatsnew/e42fdce80e99d28b683a7e21c81110e.pdf>.

² IBBI Research Chair, *IBC Brief: Powering with Information, Vol. 1, July–Sept. 2023*, INDIAN INSTITUTE OF CORPORATE AFFAIRS (IICA) (2023), <https://www.iica.in/> (last visited Mar. 26, 2025) alongside STANDING COMM. ON FIN., IMPLEMENTATION OF INSOLVENCY AND BANKRUPTCY CODE – PITFALLS AND SOLUTIONS, 32d Report (Aug. 3, 2021), <https://www.parliamentofindia.nic.in/> (last visited Mar. 26, 2025).

³ Insolvency and Bankruptcy Code, 2016, § 30.

⁴ IBBI Research Chair, *IBC Brief: Powering with Information, Vol. 1, July–Sept. 2023*, INDIAN INSTITUTE OF CORPORATE AFFAIRS (IICA) (2023), <https://www.iica.in/> (last visited Mar. 26, 2025).

⁵ *Id.*

*operational transactions. In recognition*⁶ of broader economic interests and public policy considerations, the Code grants FCs preferential treatment, relegating OCs to a subordinate position. While this hierarchy may serve the public good, the expansive powers conferred on FCs acting through the CoC in determining the fate of OCs raise serious concerns.

The Resolution Professional, a statutory officer appointed to oversee insolvency proceedings, wields significant authority at every stage of the process. While the Code relies on the commercial wisdom of the CoC and presumes the RP will act fairly and transparently, recent cases and reports suggest that the RP's independence may be compromised through collusion with FCs. This veneer of FC-driven commercial wisdom has, in effect, concealed practices that adversely impact OCs, many of whom depend on continued business relationships yet often recover nothing upon liquidation.

This paper critically examines the Code itself, IBBI Circular No. IP/005/2018⁷ read with Regulation 38(1) of the CIRP Regulations, 2016⁸ (which prescribes the RP's disqualification criteria), and prevailing industry practices. It demonstrates how misplaced reliance on the CoC and the RP has, in certain instances, been exploited for commercial gain, undermining the rights and legitimate interests of OCs.

5 CASE STUDY

In a significant ruling, the Madras High Court in *National Sewing Thread Co. Ltd. v. TANGEDCO*⁹ directly addressed an increasingly subtle but dangerous practice in insolvency, collusion between the RP, FC, and the CD and its repercussions on OCs. The case concerned the petitioner, an MSME undergoing insolvency proceedings.¹⁰ As an MSME, the petitioner submitted a resolution plan under Section 240A,¹¹ which was subsequently approved by the AA. However, the plan was skewed: the FC received partial repayment of their claimed debts while OCs were offered a mere 1% of their admitted claims, far below their liquidation value.

Later, the Resolution Applicant ("RA") relied on the Clean Slate Theory ("CST") under Section 32A¹² to deny pre-CIRP statutory electricity dues payable for a period of 3 years

⁶ BANKRUPTCY LAW REFORMS COMM., THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE, VOLUME I: RATIONALE AND DESIGN (2015), https://ibbi.gov.in/BLRCReportVol1_04112015.pdf.

⁷ Insolvency and Bankruptcy Board of India, Circular No. IP/005/2018 (Jan. 16, 2018), [https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/Disclosures-Circular-12012018\(1\)-1_2018-01-16182645.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/Disclosures-Circular-12012018(1)-1_2018-01-16182645.pdf).

⁸ IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, reg. 38(1), <https://ibbi.gov.in/uploads/legalframework/2023-10-04-212254-qxy5-9c59d1599fc4604c5f9b220bc26e4f93.pdf>.

⁹ *Nat'l Sewing Thread Co. v. Superintending Eng'r, TANGEDCO*, W.P. No. 29845 of 2022 (Madras HC June 7, 2024).

¹⁰ The Insolvency and Bankruptcy Code, 2016, § 7.

¹¹ *Id.* § 240A.

¹² *Id.* § 32A.

owed to TANGEDCO, contending that such dues stood extinguished post plan approval by the AA, provided such claims were not included in the plan. The Court sharply analyzed whether the RP and FC acted in collusion to sideline OCs' rights, and whether Section 32A was being misused as a shield to promote mala fide plans.

The Court ruled that the commercial wisdom of the CoC under Section 30(4)¹³ is not supreme. The CoC's approved plan must still pass judicial muster under Section 31.¹⁴ A qualifier to Section 31 is Section 30(2) Explanation 1,¹⁵ which mandates that OCs cannot be treated less favorably in plans than in liquidation under Section 53¹⁶, a substantive statutory right of OCs.

The exclusion of genuine OC claims from the resolution plan impacts their fundamental right to property under Article 300A¹⁷, right to trade under Article 19(1)(g), and right to livelihood of promoters and employees of the OC under Article 21. The Court noted that the Information Memorandum ("IM") prepared under Section 18¹⁸ by the IRP/RP forms the bedrock of claim admission, and its manipulation or selective disclosures can lead to unconstitutional extinguishment of claims post-resolution through Section 32A.¹⁹

It held that IRP's and RP's statutory roles under Sections 18 and 25 are not merely administrative but fiduciary and constitutional in nature. Transparency and fair representation of OC claims are core obligations of the IRP and RP. The judgment also dismissed the myth of a fiduciary hierarchy between FCs and OCs, noting both stand equally as stakeholders of the CD's assets. The Court while ruling against the exploitation of Section 32A by the RA warned that allowing collusion between RP, FC, and CD undermines the IBC's objective of equitable resolution and violates statutory safeguards and constitutional guarantees, especially for OCs. In yet another case, the Supreme Court in *Independent Sugar Corporation Ltd. v. Girish Sriram Juneja & Ors.*²⁰ emphasized the mandatory nature of obtaining prior approval from the Competition Commission of India (CCI) where a resolution plan amounts to a combination under Section 5 of the Competition Act²¹, in line with Section 31(4) of the IBC. In the present case, the resolution plan of AGI Greenpac, the successful resolution applicant, had no such approval at the time it was placed before the CoC; the appeal was brought by INSCO, a competing resolution applicant.

¹³ *Id.* § 30(4).

¹⁴ *Id.* § 31.

¹⁵ *Id.* § 30(2)(b), explanation 1.

¹⁶ *Id.* § 53.

¹⁷ INDIA CONST. art. 300A.

¹⁸ The Insolvency and Bankruptcy Code, 2016, § 18.

¹⁹ *Id.* § 32A.

²⁰ 2025 INSC 124.

²¹ The Competition Act, 2002, § 5.

The Court categorically held that prior CCI approval is a statutory prerequisite, not a procedural formality, wherever the plan involves a combination. It further held that the RP had no power to relax this requirement, as the RP had sought to do in its communication to the resolution applicants. The Court reinforced that the RP is not a mere facilitator, but a statutory officer bound to remain fair and transparent throughout the process. The judgment reinforced that the burden of compliance with such preconditions lies with the RP, and procedural misconduct would breach mandatory statutory safeguards.

In a similar instance, the insolvency proceedings of *GLAS Trust Company LLC v. BYJU Raveendran & Ors.*²² garnered significant public attention when the founder of Byju's, through a LinkedIn post, alleged collusion between the RP and the FC. While the matter was ultimately adjudicated by the SC, the ruling of the NCLT holds greater relevance for the present research. The NCLT observed that the conduct of the RP was prejudicial to the interests of stakeholders and the CIRP, particularly in light of his decision to exclude Aditya Birla Finance Ltd and Glas Trust LLC from the CoC, despite their combined voting share amounting to 99.82%. The tribunal, recognising the impropriety, reinstated the excluded creditor and simultaneously directed the initiation of disciplinary proceedings against the IRP for misleading the adjudicatory process and misusing his powers. Further, the NCLT directed the IBBI to conduct an investigation into the actions of the IRP.

6 LOOPHOLES IDENTIFIED

1. Are FCs misusing their commercial wisdom to push resolution plans that suppress legitimate claims of OCs, possibly in collusion with the RP?
2. Are the IRP and RP exploiting their powers under Sections 18 and 25 by making selective or incomplete disclosures of OC claims in the IM, thereby allowing FCs to later extinguish these claims by invoking the CST under Section 32A?
3. Can the potential collusion between the RP, FC, and CD be traced to the fact that FCs can suggest the RP under Section 7, and Regulation 3 fails to lay down adequate safeguards to ensure the RP's independence from creditors and the CD?
4. Does the Code's preferential treatment of FCs enable collusion and weaken the position of OCs, who lack an effective platform to assert their claims on an equal footing?

²² GLAS Tr. Co. LLC v. BYJU Raveendran, I.A. Nos. 835, 840, 940 of 2024, I.A. Nos. 177, 178 & 179 of 2024 in C.P. (IB) No. 149/BB/2023 (NCLT Bengaluru Feb. 24, 2025).

7 EMPIRICAL STUDY: COLLUSION BETWEEN RP, FC AND THE CD DURING CIRP

To understand the existence and awareness of collusion between the RP, FC and the CD, the authors conducted an empirical study based on 100 responses (Fig.1). The research sample consisted of IPs, IRPs/RPs (including liquidators/administrators in the pre-2016 regime), CAs, CS, advocates, lawyers, law professors, students, and investment bankers (Fig. 1).

To which category of resolutional professional do you belong (mandatory)
n = 100 respondents

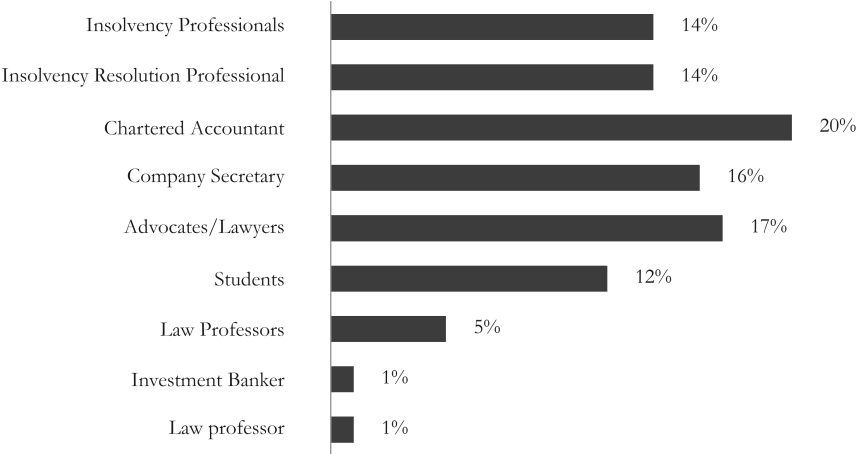


FIGURE 1. Out of the 100 respondents, 20% were Chartered Accountants, 17% were advocates, 16%, 14% were Insolvency Professionals and Insolvency Resolution Professionals respectively, 6% were law professors and 1% were investment bankers.

Years of practice as a (in years) as IRP/RP (post) 2016; liquidator or administrator (pre 2016)
n = 92 respondents

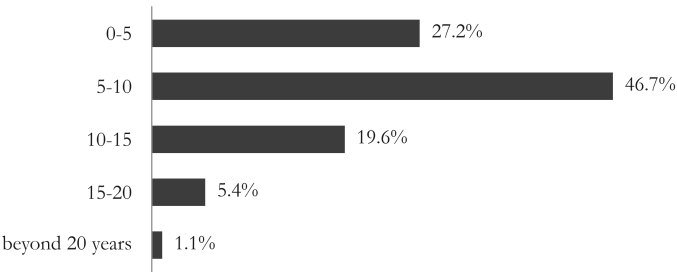


FIGURE 2. Of the 92 respondents, 46.7 % have 5-10 years of experience, 27.2 % have 0-5 years of experience, 19.6% have 10-15 years of experience, 5.4% have 15-20 years of experience while remaining 1% have more than 20 years of experience in the insolvency regime.

Number of cases wherein they have appointed as IRP/RP
n = 87 respondents

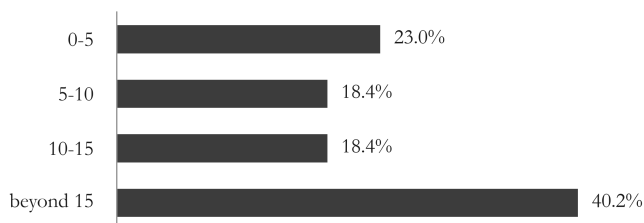


FIGURE 3. Of the 87 respondents, 40.2% have been appointed as an IRP/RP in more than 15 cases, 23% in 0-5 cases, 18.4% in 5-10 cases and the remaining 18.4% in 10-15 cases.

Do you think the IBC landscape prioritises the interest of financial creditors more than that of operational creditors

n = 99 respondents

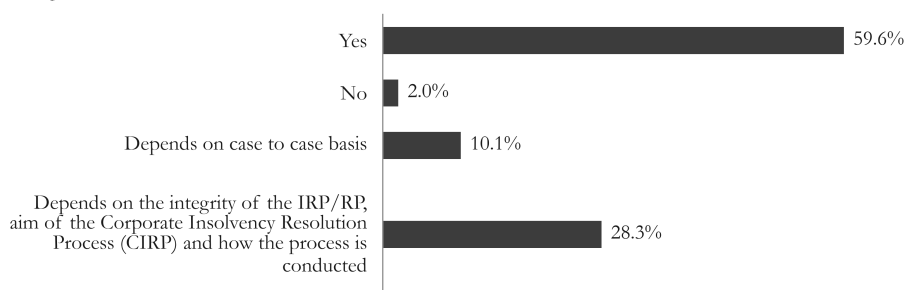


FIGURE 4. Of the 99 respondents, 59.6% strongly agree that the IBC prioritises the interests of FCs over OCs, 28.3% agree that this depends on the mechanism and objectives of the CIRP, as well as the integrity of the IRP/RP; 10.1 % believe that such prioritisation depends on a case-to-case basis, while remaining 2% do not agree with this preferential treatment.

Does the interest of financial creditors influence the decision of IRP/RP in collection and/or verification of claims made post public announcement?

n = 100 respondents

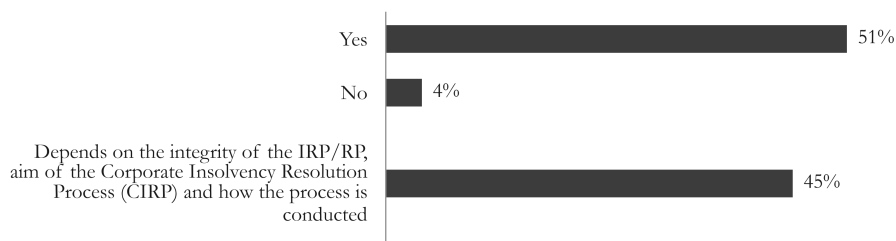


FIGURE 5. Of the 100 respondents, 51% agree that the decision-making of the IRP/RP in the collation and verification of claims under Section 18 is influenced by the interest of FCs; 45% agree that this depends on the objectives and mechanism of the CIRP, as well as the integrity of IRP/RP; while 4% do not agree with this statement.

Have you experienced a FC or CD intending to collude with you to favour their claims

n = 92 respondents

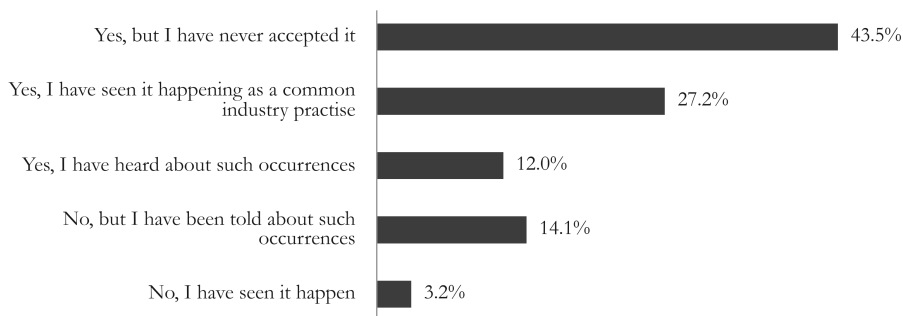


FIGURE 6. Of the 92 respondents, 43.5% agree that they have witnessed collusion between the RP and FC/CD; however, they have never indulged in it. 27.2% consider it a common industry practice, 12% and 14.1% have heard of and been informed about such occurrences, respectively, while 3.2% have never witnessed such instances.

Is the principle of clean slate under section 32A of the IBC Code being exploited by company to defraud or violate the interest of its creditor?

n = 98 respondents

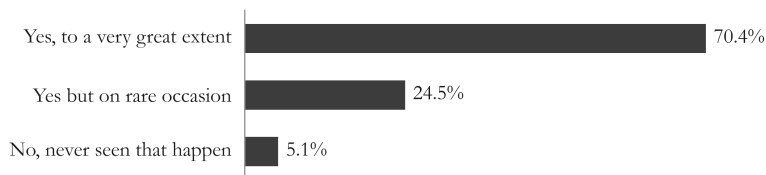


FIGURE 7. Of the 98 respondents, 70.4% agree that Section 32A is exploited by companies to defraud creditors, 24.5% agree that this occurs on rare occasions, while the remaining 5.1% have never witnessed the same.

Do you think higher haircut in the IBC regime is due to biased functioning of IRP/RP

n = 99 respondents

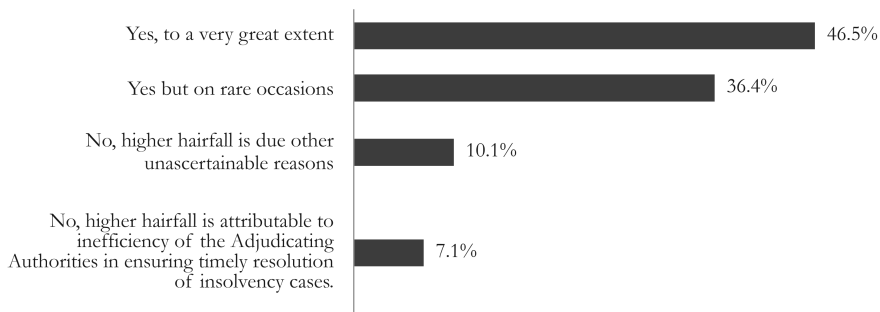


FIGURE 8. Of the 99 respondents, 46.5% agree that higher haircuts under the IBC are attributable to biased functioning of the IRP/RP; 36.4% agree that such instances are rare; 10.1% attribute higher haircuts to other factors, while 7.1% believe that they are attributable to the inefficiency of the AA.

Do you a major reason for higher haircut for OC is the collusion between RP, FC and CD

n = 99 respondents

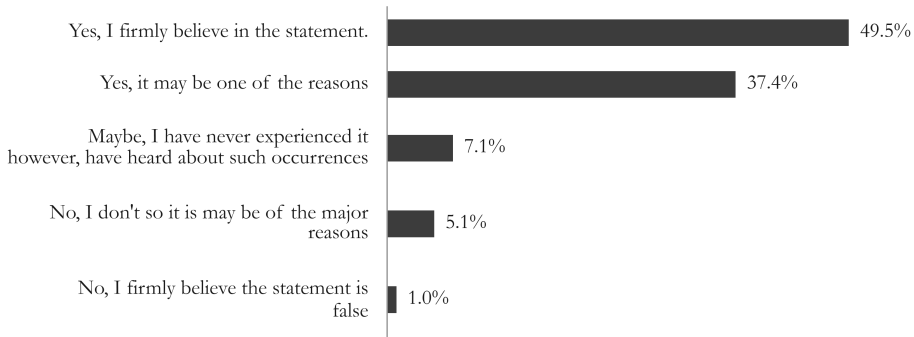


FIGURE 9. *Of the 99 respondents, 49.5% agree that higher haircuts for OCs are due to collusion between the RP, FC and CD; 37.4% agree that this may be one of the reasons; 6% are unaware of such occurrences; 5.1% do not consider it a major reason, while 2% believe the statement to be false.*

Do you think appointment of court manager for a period of 180 days when the company is solvent however, there's apprehension of it turning insolvent would be helpful for the Indian Insolvency regime?

n = 99 respondents

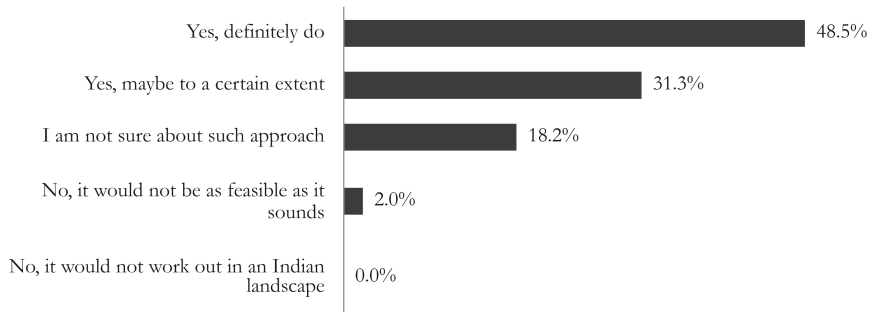


FIGURE 10. *Of the 99 respondents, 48.5% agree with the appointment of a court appointed professional where the CD prima facie appears to be entering insolvency; 31.3% agree that the model may be feasible to a certain extent; 18.2% are uncertain about the model's feasibility, while remaining 2% do not consider the model feasible.*

Do you think mandatory arbitration, mediation or negotiation model before entering CIRP help the Indian Insolvency regime deal better with the delay... of all classes reach a more acceptable resolution?

n = 100 respondents

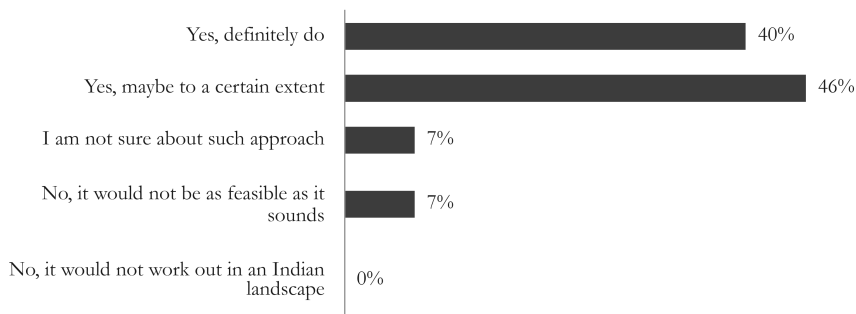


FIGURE 11. *Of the 100 respondents, 40% strongly believe in the model's efficiency; 46% agree that the model is efficient only to a certain extent; 7% are uncertain about the model's efficiency, while the remaining 7% do not consider the model feasible.*

Do you think a model of rescue financing would be able to eliminate the scope of collusion between RP, FC and OC

n = 98 respondents

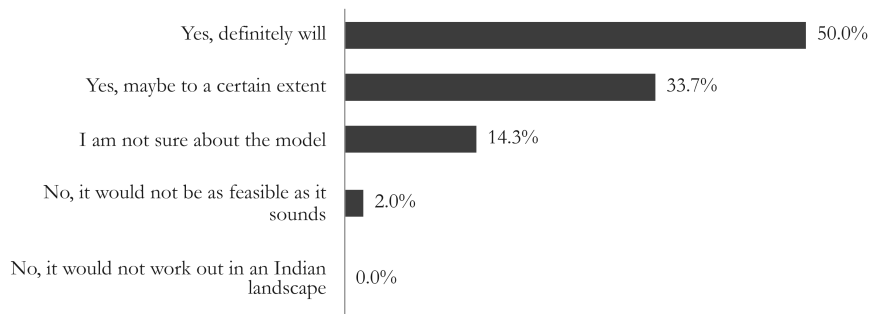


FIGURE 12. *Of the 98 respondents, 50% agree that the rescue financing model would be able to eliminate collusion between the FC, RP and CD; 33.7% agree that this would be true only to a certain extent; 14.3% are uncertain about the model, while 2% do not consider the model feasible.*

Do you think introduction of cram down and super-priority functions with rescue financing during mandatory arbitration, mediation and negotiation would be able to achieve the objectives of IBC

n = 100 respondents

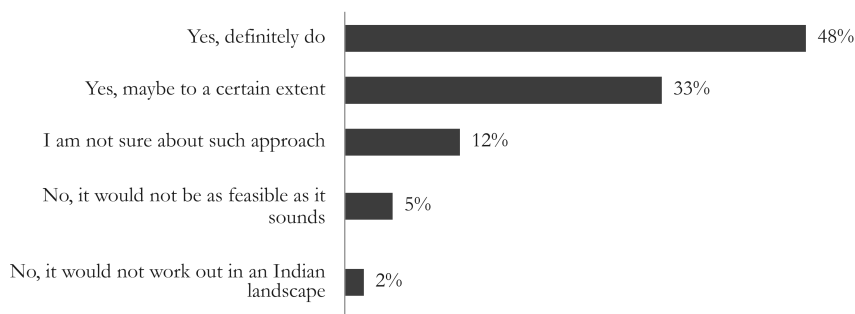


FIGURE 13. Of the 100 respondents, 48% agree that the cram-down provision and super-priority financing, when supplemented with rescue financing and a pre-insolvency alternative dispute resolution mechanism, would be effective; 33% agree to this only to a certain extent; 12% are uncertain about the model; 5% do not consider the model feasible, while the remaining 2% believe it would not work out in an Indian landscape.

8 DATA FINDING

1. Notably, 67% of respondents (Fig. 1) are CAs, CS, advocates/lawyers, and IRPs. A majority, 66.3% of respondents (Fig. 2) have an industry experience of 5-15 years as IRPs/RPs (post-2016) and as liquidators/administrators (pre-2016), with 40.2% of these practitioners having handled more than 15 insolvency disputes at the time of filling the form (Fig. 3).
2. The survey reveals that 59.6% of respondents (Fig. 4) strongly agree that the Code prioritises the interests of FCs over OCs, while only 2% disagree; the remaining respondents acknowledge the biased functioning of the Code. Additionally, 96% of respondents (Fig. 5) concur that collusion between the RP and FC continues to grow due to the preferential treatment accorded to FCs under the Code.
3. The survey indicates that 96.8% of respondents (Fig. 7) believe that the CST under Section 32A of the Code is being misused by FCs to the detriment of OCs. FCs allegedly exploit this provision to assume control over the CD's management post-CIRP, offering minimal returns to OCs through their proposed resolution plans and thereby evading accountability for future claims initiated by OCs.
4. The survey reveals that 70.4% of the respondents (Fig. 7) believe that the CST under Section 32A of the Code is being misused by FCs to the detriment of OCs. FCs allegedly exploit this provision to assume control over the CD's management post-CIRP,

offering minimal returns to OCs through their proposed resolution plans to successfully evade accountability for future claims initiated by OCs.

5. The survey indicates that 86.9% of respondents (Fig. 8) agree that rising instances of higher haircuts under the Code may be attributed, inter alia, to the biased functioning of the IRP/RP. A minority of 7.7% (Fig. 8) attribute this to inefficiency of the AA. Moreover, 36.4% of respondents (Fig. 9) agree that higher haircuts and biased functioning may also be attributed to collusion between the RP, FC, and CD. While higher haircuts can primarily be attributed to the depreciation in the CD's asset valuation, another significant factor is the RP's role in facilitating the approval of suboptimal resolution plans. In several instances, such plans are proposed by FCs who allegedly engage in unfair practices with the RP, resulting in minimal value realisation for OCs.
6. In furtherance of the loopholes highlighted by the authors—particularly concerning the collusion between RP and FC—the respondents have expressed an overwhelmingly positive response to the proposed solutions.
7. The survey indicates that 48.5% (Fig. 10) support the appointment of a court-appointed professional for a period of 180 days to aid the CD in continuing as a going concern, especially in cases where the company is solvent but the creditor has a reasonable apprehension that, without financial and managerial support, the CD may enter insolvency.
8. The survey indicates that 86% of respondents (Fig. 11) concur that pre-insolvency arbitration and mediation may enable OCs to recover their debts more efficiently than during CIRP, while also supporting the CD's ability to remain a going concern.
9. The survey shows that 88.7% of respondents (Fig. 12) agree that a rescue financing model would help eliminate collusion between the FC, RP, and CD.
10. The authors will elaborate on the recommendations outlined in points 7, 8, and 9 in the subsequent “Proposed Solutions” section, along with alternative mechanisms that can be introduced into the Code to safeguard the interests and rights of OCs.

9 ANALYSIS

9.1 Preferential Treatment Accorded to the FC: Creating a Burning Divide?

Under the Code, creditors must constitute a CoC to take material decisions and approve resolution plans under Sections 21²³ and 28²⁴. Only financial creditors sit on this committee; operational creditors may attend as observers if their aggregate claims amount to at least ten

²³ Insolvency and Bankruptcy Code, 2016, § 21.

²⁴ *Id.* § 28.

percent of the total debt, but they have no vote. The committee's decisions are conclusive: resolution plans affecting both financial and operational creditors are sanctioned on the committee's economic assessment alone, as provided by Sections 30(3)²⁵ and 30(4)²⁶. In liquidation, Section 53²⁷ prescribes a waterfall mechanism that explicitly prioritises financial creditors; operational creditors are not separately identified and thus rank only within the residual class at the bottom of the priority ladder. This differential treatment has been upheld by the courts²⁸. The 2015 Report of the Bankruptcy Law Reforms Committee²⁹ justified this structure on the grounds that financial creditors have a continuing interest in the debtor's revival and the capacity to extend further credit, whereas operational creditors seek only to recover their claims. The Supreme Court in *Swiss Ribbons*³⁰ affirmed that this intelligible distinction promotes efficient capital allocation: repaying financial creditors enables banks and financial institutions to redeploy funds, while operational creditors pursue private debts. Both the UNCITRAL Legislative Guide³¹ and the World Bank's 2015 report³² endorse priority of financial over operational creditors as "fundamental to credit efficiency".

A longstanding concern under the Code has been the differential treatment accorded to its two classes of creditors, FCs and OCs. Unlike many foreign insolvency regimes, the Indian Code adopts a creditor-centric model, purporting both to protect creditor interests and to preserve the CD as a going concern. In practice, however, preferential treatment of FC renders the regime effectively focused on their interests alone. While the Code mandates constitution of a CoC and vests it with exclusive decision-making authority during CIRP under Section 30(4)³³, OC are categorically excluded from CoC membership under Section 21(2)³⁴. Consequently, every approved resolution plan accords first priority to FC claims³⁵. OCs have no voting rights, despite the direct impact of CoC decisions on their continued existence and livelihood.

²⁵ *Id.* § 30(3).

²⁶ *Id.* § 30(4).

²⁷ *Id.* § 53.

²⁸ *Swiss Ribbons Pvt. Ltd. v. Union of India*, (2019) 4 SCC 17 read with *Rajputana Props. Pvt. Ltd. v. UltraTech Cement Ltd.*, Company Appeal (AT) (Insolvency) No. 188 of 2018 (NCLAT July 19, 2018).

²⁹ MINISTRY OF FIN., GOV'T OF INDIA, THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE, VOLUME I: RATIONALE AND DESIGN (Nov. 2015), https://ibbi.gov.in/BLRCReportVol1_04112015.pdf.

³⁰ *Swiss Ribbons Pvt. Ltd. v. Union of India*, (2019) 4 SCC 17.

³¹ UNITED NATIONS COMM'N ON INT'L TRADE LAW (UNCITRAL), LEGISLATIVE GUIDE ON INSOLVENCY LAW (2005), <https://uncitral.un.org/en/texts/insolvency/legislative-guides/insolvency-law>.

³² WORLD BANK, REPORT ON THE TREATMENT OF THE INSOLVENCY OF NATURAL PERSONS (2015), <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/826061467086349622/report-on-the-treatment-of-the-insolvency-of-natural-persons>.

³³ Insolvency and Bankruptcy Code, 2016, § 30(4).

³⁴ *Id.* § 21(2).

³⁵ Swati Singh, *Distinction b/w Operational & Financial Creditors & Position of the Former in View of Swiss Ribbons*, INDIAN REVIEW OF CORPORATE AND COMMERCIAL LAWS (June 25, 2019), <https://www.irccl.in/post/distinction-b-w-operational-financial-creditors-position-of-the-former-in-view-of-swiss-ribbons>.

The Code's stated object is to balance the interests of all stakeholders, yet the dual effect of FC preference and a rising trend of collusion between FC and the RP not only undermines this objective but also infringes the commercial and fundamental rights of OCs³⁶. Such collusive arrangements appear designed to divert liquidation proceeds away from OC in order to satisfy FC claims first, as will be elaborated in the subsequent sections³⁷.

9.1.1 *Breach of Code's Objective for Value Maximisation: Violation of OC's Fundamental Rights?*

The disparity in the treatment of OCs and FCs first came before the Supreme Court in *Essar Steel*³⁸, which observed that, prior to the 16 August 2019 amendment³⁹, Section 30(2)(b) of the Code⁴⁰ required that accepted OC claims be satisfied in a manner prescribed by IBBI, i.e., not less than the amount to be paid to OC in the event of liquidation. While the Court reaffirmed that FC claims remain paramount, it emphasised that satisfying OC claims is essential if the CD is to continue as a going concern. Section 53's⁴¹ waterfall mechanism, however, classifies creditor priorities in detail yet remains silent on treatment of OCs, relegating them to the residual bracket of "any remaining debts and dues." The 2020 Report of the Insolvency Law Committee⁴² acknowledged this ambiguity and recommended inserting an explanation under Section 53(2)⁴³ to validate inter-creditor and subordination agreements, but this recommendation has not been adopted. Regulation 38 of the CIRP Regulations, 2016 mandates that every resolution plan "conform to the interests of all stakeholders," including OCs and FCs, yet offers no guidance on how those interests should be balanced or maximised. In *Essar Steel*, the Court held that OCs and FCs are not entitled to equal recovery, since the principle of equality applies only to similarly situated creditors. Thus, both the Code and successive landmark rulings have repeatedly compromised the interests of OCs.

Nonetheless, OC services are indispensable to the CD, and their stake in the debtor exerts a direct and substantial impact on its survival. The "intelligible differentia" between

³⁶ Nat'l Sewing Thread Co. v. Superintending Eng'r, TANGEDCO, W.P. No. 29845 of 2022 (Madras HC June 7, 2024).

³⁷ Nat'l Sewing Thread Co. v. Superintending Eng'r, TANGEDCO, W.P. No. 29845 of 2022 (Madras HC June 7, 2024) read with Aditya Birla Fin. Ltd. v. Pankaj Srivastava, IA Nos. 660, 820 of 2024 in C.P. (IB) No. 149/BB/2023 (NCLT Bengaluru Jan. 29, 2025) read with Gajendra Verma v. State of Madhya Pradesh, MCRC No. 2535 of 2019 (Feb. 1, 2019).

³⁸ Comm. of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta, (2020) 8 SCC 531.

³⁹ The Insolvency and Bankruptcy Code (Amendment) Act, 2019.

⁴⁰ Insolvency and Bankruptcy Code, 2016, § 30(2)(b).

⁴¹ *Id.* § 53.

⁴² INSOLVENCY LAW COMM., MINISTRY OF CORP. AFF., GOV'T OF INDIA, REPORT OF THE INSOLVENCY LAW COMMITTEE (Feb. 2020), <https://ibbi.gov.in/uploads/resources/2020-02-20-ILC-Report.pdf>.

⁴³ Insolvency and Bankruptcy Code, 2016, § 53(2).

FCs and OCs, endorsed in *Swiss Ribbons*⁴⁴ continues to justify OC subordination in resolution plans. In *Binani Industries Ltd.*⁴⁵, allegations of collusion between the RP and FC led to the rejection of five OC claims on the grounds of delayed verification, without any effort to ensure proportionate OC representation under Section 53⁴⁶. The RP facilitated the approval of various resolution plans by the CoC without adequately addressing the pending claims of OCs. Despite having received the necessary documents, the RP delayed the verification process by repeatedly seeking additional evidence, ultimately excluding the claims from the IM and proceeding with the approval of resolution plans that later led to the extinguishment of OC claims. It is the fundamental duty of the RP to act in a fair and transparent manner to ensure the interests of all stakeholders including OC are duly considered. However, courts have upheld resolution plans wherein the economic interests of OC have been compromised, thereby undermining the sanctity of the Code.

While the authors concur with the principle of intelligible differentia, the differential treatment justified under the Code has led to a situation where the liquidation value accorded to OCs often remains nil, while FCs recover a substantial portion of their dues such as the *Binani Industries*⁴⁷, *K. Sashidhar*⁴⁸ and *Sirpur Paper Mills*⁴⁹ to name a few. This clearly fails to achieve the objective of asset value maximisation of the CD⁵⁰. The concern is aptly reflected in *Essar Steel*⁵¹, where the Court observed that granting the minimum liquidation value often nil to OCs in the name of balancing stakeholder interests does not, in fact, lead to asset maximisation. This in turn violates the fundamental rights of the OCs under Articles 19(1)(g), 21 and 300A of the Constitution⁵². The Court placed the responsibility on the CoC to take an unbiased commercial decision that equitably considers OC claims. It was further clarified that mere semantic compliance with Section 30(2)⁵³ is insufficient; rather, the

⁴⁴ *Swiss Ribbons Pvt. Ltd. v. Union of India*, (2019) 4 SCC 17.

⁴⁵ *Binani Indus. Ltd. v. Bank of Baroda*, Company Appeal (AT) (Insolvency) No. 82 of 2018 (NCLAT).

⁴⁶ Insolvency and Bankruptcy Code, 2016, § 53.

⁴⁷ *Binani Indus. Ltd. v. Bank of Baroda*, Company Appeal (AT) (Insolvency) No. 82 of 2018 (NCLAT).

⁴⁸ *K. Sashidhar v. Indian Overseas Bank*, (2019) 12 SCC 150.

⁴⁹ *Central Bank of India v. Resolution Professional of the Sirpur Paper Mills Ltd.*, Company Appeal (AT) (Insolvency) No. 526 of 2018 (NCLAT).

⁵⁰ Swati Singh, *Distinction b/w Operational & Financial Creditors & Position of the Former in View of Swiss Ribbons*, INDIAN REVIEW OF CORPORATE AND COMMERCIAL LAWS (June 25, 2019), <https://www.ircl.in/post/distinction-b-w-operational-financial-creditors-position-of-the-former-in-view-of-swiss-ribbons>.

⁵¹ *Comm. of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta*, (2020) 8 SCC 531.

⁵² *Nat'l Sewing Thread Co. v. Superintending Eng'r, TANGEDCO*, W.P. No. 29845 of 2022 & W.M.P. No. 29233 of 2022, 2024 SCC OnLine Mad 2330 (Madras HC June 7, 2024).

⁵³ Insolvency and Bankruptcy Code, 2016, § 30(2)(b).

resolution plan must reflect the spirit of the Code, i.e., a genuine attempt to balance the interests of all stakeholders⁵⁴.

Hence, the core concern that remains is whether Section 30⁵⁵ of the Code and Regulation 38(1) of the CIRP Regulations, 2016⁵⁶ are in themselves adequate to safeguard the interests of OCs when the RP entrusted with upholding and implementing the objective of these provisions acts in a manner that compromises their claims.

9.2 Instances of Collusion

A common link among following instances is that the IRP or RP, although being an administrative and not a quasi-judicial officer is empowered under Regulation 10 of the CIRP Regulations, 2016, to call for additional evidence from a creditor to substantiate its claim. This means, that, in the absence of a specific list of documents provided in the Code as “evidence”, the RP decides what qualifies as “sufficient evidence”.

This becomes all the more relevant because the claims admitted by the RP are listed in the Information Memorandum (IM) under Section 29 of the Code, which is relied upon by the RAs to formulate resolution plans for the CD’s revival. In the following instances and corresponding precedents, the authors illustrate how RPs misuse their power under Regulation 10 to facilitate discrimination *inter-se* similarly placed creditors, reclassify creditors, and favour resolution plans that benefit specific FCs:

- (i) *Discrimination*: In *Binani Industries Limited v. Bank of Baroda & Anr.*, the National Company Law Appellate Tribunal (NCLAT) observed that the CoC wrongly approved the resolution plan submitted by Rajputana Properties, which discriminated among FCs to whom Binani Industries, the CD, was a guarantor and those to whom it was not, while rejecting UltraTech Cement’s higher revised offer for unacceptable reasons, despite the offer having been greenlit by the court.
- (ii) *Reclassification*: In *Rajnish Jain v. BVN Traders & Ors*, the NCLAT observed that neither the CoC nor the RP has the power to reclassify a creditor’s status, as both lack adjudicatory powers. The authors argue that this reclassification aimed to concentrate voting rights among certain FCs to approve a plan favouring those FCs.
- (iii) *Promotion of Plans*: In *Independent Sugar Corporation Limited v. Girish Sriram Juneja*, while courts did not directly address any aspect of collusion, it was alleged that the RP

⁵⁴ Swati Singh, *Distinction b/w Operational & Financial Creditors & Position of the Former in View of Swiss Ribbons*, INDIAN REVIEW OF CORPORATE AND COMMERCIAL LAWS (June 25, 2019), <https://www.ircl.in/post/distinction-b-w-operational-financial-creditors-position-of-the-former-in-view-of-swiss-ribbons>.

⁵⁵ Insolvency and Bankruptcy Code, 2016, § 30.

⁵⁶ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, reg. 38(1).

allowed AGI Greenpac's resolution plan to be approved by the CoC without prior approval from the Competition Commission of India (CCI), a requirement under Section 31(4) of the Code, while simultaneously indicating to other bidders that such clearance was mandatory.

While Section 60(5)(c) of the Code permits aggrieved creditors to approach the Adjudicating Authority (AA) for relief, by the time AA issues an order, the CIRP proceedings have often concluded. In *Greater Noida Industrial Development Authority v. Prabhjit Singh Soni*, the Supreme Court (SC) upheld the AA's decision to recall plan approval to meet the ends of justice. However, recall results in further delays to the CIRP, which already average approximately 582 days, thereby increasing asset depreciation and leading to higher haircuts for creditors. This underscores the insufficiency of existing relief mechanisms and runs contrary to one of the Code's key objectives, which is, maximizing value of the CD's assets. Therefore, the RP's discretion in classifying creditors or determining the nature of their debt must be better regulated under Regulation 13, read with Sections 18(1) and 25(2) of the Code.

9.2.1 *Misuse of the Clean Slate Theory (CST)*

As per the CST, once a resolution plan is approved, all previous claims not covered in the plan are extinguished, providing clarity and closure. This rule shields resolution applicants from post-resolution liabilities, facilitating uninterrupted operations and avoiding complex litigation. The provision ensures that the successful resolution applicant can run the corporate debtor's business without being burdened by prior claims or liabilities, thereby avoiding complex, multi-faceted litigation arising from unresolved past claims.

However, Section 29A of the Code places no bar on FCs submitting plans as RAs to gain control over the CD. In some cases, banks have proceeded to acquire the debt-ridden CDs through plans approved by FC-dominated CoCs, often allegedly colluding with RPs to delay the admission of OC claims or favour plans offering higher upfront payment to FCs while imposing massive haircuts on OCs, effectively resulting in negligible or no recovery for them.

These near-zero recoveries are justified using the doctrine of "intelligible differentia", upheld in *Swiss Ribbons v. Union of India (Swiss Ribbons)*, where the SC recognized that FCs and OCs differ in the nature of debt, financial capacity, and objectives, the revival of the CD and recovery of dues, respectively. In the same year, the SC in *CoC of Essar Steel India Limited v. Satish Kumar Gupta & Ors.* reiterated that "equality for all" does not mean treating unequally placed creditors alike. A conjoint reading of these precedents suggests that equal or proportionate treatment is not a mandate under the Code, a position that is often invoked to justify denying recovery to OCs.

A textbook example is *National Sewing Thread Co. Ltd. v. Superintending Engineer TANGEDCO & Anr.*, where the promoter group excluded TANGEDCO's claims from their resolution plan and concealed them from the RP. The Madras High Court observed that CST does not extinguish undisclosed claims, especially when the successful RA is also the promoter, and highlighted the misuse of CST through RP-FC collusion to suppress OC claims.

This practice infringes upon the constitutional right to property under Article 300A, as OCs hold enforceable claims on the CD's assets, similar to FCs. The disproportionate haircuts imposed on OCs in contrast to significantly higher recoveries for FCs also raise concerns regarding the right to livelihood under Articles 19(1)(g) and Article 21 of the Indian Constitution, particularly since OCs (notably in vendor-centric industries) rely on timely debt repayment to survive.

9.3 Nil Liquidation Value for the OCs: Rising Fear for a Sustainable Livelihood?

Under Section 25,⁵⁷ it is the statutory duty of the RP to preserve and protect the assets, management, and affairs of the CD. In furtherance of this duty, the RP is required to invite resolution plans from RAs for approval by the CoC. As per Regulation 37B⁵⁸, the RP must issue an IM, the evaluation matrix, and a request for resolution plans within five days of the issuance of the provisional list, with possible timeline extensions subject to CoC approval. However, given the concentration of decision-making authority in the CoC and the broad powers vested in the RP under the Code, the resolution process is susceptible to manipulation.

This concern materialised in the *Binani Industries*⁵⁹, where the RP accepted and submitted a suboptimal resolution plan to the CoC well beyond the stipulated deadline, favouring the interests of FCs at the expense of OCs. The RP is obligated to act fairly, transparently, and in compliance with Section 30(2) of the Code⁶⁰. However, multiple cases such as *Binani Industries*⁶¹, *National Sewing Thread*⁶², *Gajendra Verma*⁶³, and *Dharmindra Kumar*⁶⁴ reflect a repeated pattern wherein the RP has promoted sub-optimal plans and failed to object to

⁵⁷ Insolvency and Bankruptcy Code, 2016, § 25.

⁵⁸ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, reg. 37B.

⁵⁹ *Binani Indus. Ltd. v. Bank of Baroda*, Company Appeal (AT) (Insolvency) No. 82 of 2018 (NCLAT).

⁶⁰ Insolvency and Bankruptcy Code, 2016, § 30(2).

⁶¹ *Binani Indus. Ltd. v. Bank of Baroda*, Company Appeal (AT) (Insolvency) No. 82 of 2018 (NCLAT).

⁶² *Nat'l Sewing Thread Co. v. Superintending Eng'r, TANGEDCO*, W.P. No. 29845 of 2022 (Madras HC June 7, 2024).

⁶³ Civil Appeal No. 1234 of 2021 (SC Mar. 15, 2021).

⁶⁴ *Dharmindra Constrs. Pvt. Ltd. v. Rajendra Kumar Jain*, Resolution Professional of Kudos Chemie Ltd., Company Appeal (AT) (Insolvency) No. 1477 of 2022 (NCLAT Jan. 18, 2023).

resolution plans that do not effectively maximise the CD's asset value, resulting in inequitable and disproportionate distribution of resolution plan proceeds to OCs, thereby compromising the Code's core objective of value maximisation⁶⁵. For instance, in *Balaji Minerals*⁶⁶ and *Yogeshwar Garg*⁶⁷, the RP failed to contest valuation methods that unjustly allocated negligible or no value to OCs. Similarly, in *Byju's* the NCLT found the IRP's conduct prejudicial to the stakeholders and the CIRP, and in *Independent Sugar* the Supreme Court held that the RP had no power to relax a statutory precondition to the approval of a resolution plan.⁶⁸ This conduct runs contrary to the spirit of the Code and infringes upon the rights of OCs.

While the RP is merely empowered to verify claims and is not conferred with an adjudicatory role, as clarified in *Swiss Ribbons*⁷⁰, discriminatory rejection of OC claims, particularly sector-specific exclusions was found to violate the principle of equality. Similarly, in *TP Central Odisha Distribution*⁷¹, the NCLAT, despite upholding the RP's acceptance of OC claims, reiterated that OC cannot expect parity with FC. Nonetheless, these decisions highlight how the RP's statutory duty has been repeatedly disregarded, leading to the systemic erosion of OC rights and breach of the Code's objective of equitable stakeholder treatment and value maximisation.

9.4 Misuse of Information Available with the IRP or RP

In recent developments, a controversy emerged when the CEO of *Byju's* publicly alleged, via LinkedIn, that the IRP, EY India and GLAS Trust, one of the FCs, had colluded during the CIRP to undermine the interests of the CD⁷². The allegations suggest that the IRP attempted to allocate the assets of the CD in a manner that undermined the value of its assets.

⁶⁵ Swati Singh, *Distinction b/w Operational & Financial Creditors & Position of the Former in View of Swiss Ribbons*, INDIAN REVIEW OF CORPORATE AND COMMERCIAL LAWS (June 25, 2019), <https://www.irccl.in/post/distinction-b-w-operational-financial-creditors-position-of-the-former-in-view-of-swiss-ribbons>.

⁶⁶ *Balaji Minerals v. Essar Power M.P. Ltd.*, Company Appeal (AT) (Insolvency) No. 1083 of 2021 (NCLAT Apr. 29, 2024).

⁶⁷ *Yogeshwar Garg v. Mandeep Gujral, RP, Jaycon Infrastructure Ltd.*, Company Appeal (AT) (Insolvency) No. 1481 of 2023 (NCLAT Dec. 18, 2023).

⁶⁸ *Bd. of Control for Cricket in India v. Think & Learn Pvt. Ltd.*, C.P. (IB) No. 149/BB/2023 (NCLT Bengaluru Mar. 20, 2025).

⁶⁹ *Indep. Sugar Corp. v. Girish Sriram Juneja*, 2025 INSC 124.

⁷⁰ *Swiss Ribbons Pvt. Ltd. v. Union of India*, (2019) 4 SCC 17.

⁷¹ *TP Central Odisha Distrib. Ltd. v. COS Bd. Indus. Ltd.*, Company Appeal (AT) (Insolvency) No. 613 of 2022 (NCLAT July 4, 2023).

⁷² *Byju Alleges Collusion in Insolvency Proceedings Amid Whistleblower Claims*, TIMES OF INDIA (Mar. 1, 2025), <https://timesofindia.indiatimes.com/business/india-business/byju-alleges-collusion-in-insolvency-proceedings-amid-whistleblower-claims/articleshow/118648513.cms>.

Pursuant to Sections 17, 18, 19, 20, and 25 of the Code⁷³, the RP/IRP is entrusted with control over the assets, financial position, management, and affairs of the CD. Additionally, the RP/IRP is granted access to a wide array of financial and operational information, including records from Information Utilities, statutory filings, and reports from professionals such as company secretaries and chartered accountants. With such extensive access, the RP/IRP is uniquely placed to assess the viability and operational prospects of the CD.

Under Section 29,⁷⁴ the RP is required to prepare an IM in accordance with the format and content specified under Regulation 36(2) of the 2016 Regulations⁷⁵. However, the scope of the IM is largely retrospective, it is confined to disclosure of present and past data, including assets, liabilities, debts, financial statements, security interests, management details, and the CD's performance history. It does not mandate disclosure of forward-looking viability assessments—an omission that leaves RAs dependent on case-specific requests for such information, which are further subject to confidentiality undertakings.

In practice, there have been reported instances where the RP/IRP, in alleged collusion with certain FCs, has withheld or selectively disclosed such viability-related information, thereby facilitating the acquisition of high-potential assets by favoured FCs at undervalued prices. This practice was notably highlighted during *Binani Industries*,⁷⁶ where concerns were raised regarding the strategic withholding of critical information.

Such deliberate concealment and selective dissemination of material information not only undermine the core principles of the Code—transparency, fairness, and equity—but also expose the system to exploitative practices. The RP/IRP's failure to act impartially and uphold their statutory duties thereby perpetuates systemic discrimination against other stakeholders, particularly OCs, and exposes fundamental vulnerabilities within the IBC framework.

9.5 A Weak Guarantee for the Independence of RP

The criteria laid down under the Code for adjudicating the independence and impartiality of the IRP and RP primarily focus on their relationship with the CD, rather than with the FCs. Regulation 3 of the 2016 Regulations⁷⁷ provides that the RP must satisfy two conditions to qualify as independent: (i) the RP must be independent of the CD, and (ii) all directors and partners of the Insolvency Professional Agency of which the RP is a partner or

⁷³ Insolvency and Bankruptcy Code, 2016, §§ 17, 18, 19, 20, 25.

⁷⁴ *Id.* § 29.

⁷⁵ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, reg. 36(2), Gazette of India, pt. III sec. 4 (Nov. 30, 2016).

⁷⁶ *Binani Indus. Ltd. v. Bank of Baroda, Company Appeal (AT) (Insolvency) No. 82 of 2018* (NCLAT Nov. 14, 2018).

⁷⁷ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, reg. 3, Gazette of India, pt. III sec. 4 (Nov. 30, 2016).

director must also be independent of the CD. The criteria for assessing the independence of the RP from the FC were introduced only in 2018. A reading of Regulation 3(1A)⁷⁸ read with IBBI Circular No. IP/005/2018⁷⁹ reveals that only limited relationships between the RP and the FCs are brought within the scope of scrutiny, specifically, instances where the RP is a shareholder, director, key managerial personnel, or partner of the FC. However, this framework does not extend to cover other forms of professional and personal associations that may have existed during or prior to the three-year period preceding the RP's appointment such as advisory, legal, or audit services, or instances where the RP is or was a partner or director of a firm rendering such services to the FC.

Further, the Regulation confines itself to examining the direct relationship between the RP and the concerned FC, while ignoring the RP's potential relationships with the FC's associate companies, holding companies, or subsidiaries. This oversight is significant, especially given that indirect associations are expressly recognised under Section 149 of the Companies Act, 2013⁸⁰ when assessing the independence of independent directors.

While the IBBI notification does account for pecuniary relationships between the RP and the FC, such as revenue generated through professional services and shareholding in the FC, it fails to consider potential bias arising from the issuance of debt instruments by the FC to the RP in a personal capacity. Moreover, even if the RP's shareholding in the FC is negligible, the RP may still possess voting rights, a factor taken into account under foreign regimes such as those in the United States but one that remains unaddressed in the IBBI framework.

Additionally, although the IBBI prescribes a three-year look-back period for assessing such relationships prior to the commencement of the CIRP, it does not contemplate any disqualification of the RP following the conclusion of the CIRP, particularly in situations where the RP may be associated with the successful resolution applicant post-implementation of the resolution plan.

9.6 Causes of Collusion

A core concern in CIRP is the excessive discretion given to the CoC to determine IRP and RP fees and expenses under Regulations 33, 34, 34A and 34B of the CIRP Regulations. This includes both fixed and variable remuneration.

⁷⁸ *Id.* reg. 3(1A).

⁷⁹ Insolvency and Bankruptcy Board of India, Circular No. IP/005/2018, Disclosures by Insolvency Professionals and Other Professionals Appointed by Insolvency Professionals Conducting Resolution Processes (Jan. 16, 2018), [https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/Disclosures-Circular-12012018\(1\)-1_2018-01-16182645.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/Disclosures-Circular-12012018(1)-1_2018-01-16182645.pdf).

⁸⁰ Companies Act, 2013, § 149.

Schedule II, Clause 1 (read with Clause 2) provides that fixed fees depend on the quantum of claims admitted. However, the proviso to Regulation 34B(2) permits the CoC to increase fees based on subjective factors such as process complexity or business scale, creating scope for arbitrary variations with minimal oversight.

Regulation 34A mandates item-wise disclosure of CIRP costs by the RP for approval by the CoC. If not complied with, the CoC can unilaterally fix the fee. Additionally, Regulation 33 allows the applicant, often a FC to fix the initial fee, subject to CoC ratification, presenting a conflict of interest as the same FC later participates in ratifying it.

Further, Regulation 34B(3) and (4) permit performance-linked incentives based on timely resolution and value maximisation. While these are subject to a cap of Rs. 5 crore, the CoC may introduce alternative structures at their discretion.

These fees fall under “insolvency resolution process costs”, which rank highest in the waterfall mechanism under Section 53 of the Code. Hence, arbitrary inflation of IRP/RP fees shrinks the amount available for satisfaction of OC’s claims, which rank far below in priority as compared to resolution costs.

This issue arose in RP of *Aristo Developers Pvt. Ltd. v. The Monitoring Agency* nominated by the CoC⁸¹, where the RP claimed ₹3 crore as a “success fee” post-approval of the plan—despite it never being disclosed in meetings, the IM, or CIRP cost estimates. The AA deemed the fee unjustified, set it aside, and redirected the amount toward unpaid creditors and employees, underscoring how RPs may align with CoC preferences for higher compensation at the cost of impartiality.

9.7 Impact of Collusion

A fundamental objective of the Code is to balance the interests of all stakeholders. Yet, OCs, largely comprising Micro, Small, and Medium Enterprises (MSMEs) employing 60% of India’s workforce and contributing roughly 29% to the Gross Domestic Product (GDP) have suffered, receiving only a paltry 6% median recovery⁸². Such low or nil recoveries force vendors to demand advance payments, choking working-capital starved corporates and eroding trust in the Code.

The core issue lies in RPs misusing their discretion under Regulation 10 to reject OC claims and value them at liquidation value. The Supreme Court of India has clarified that liquidation value under Section 30(2)(b) is the minimum, not the maximum, payment OCs

⁸¹ Jayesh N. Sanghrajka v. Monitoring Agency Nominated by the Comm. of Creditors of Aristo Developers Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 392 of 2021 (NCLAT Sept. 20, 2021), <https://ibbi.gov.in/uploads/order/6022af803a1c250beb393e0d10fc4e25.pdf>.

⁸² NITI Aayog, *NITI Aayog Releases Report on “Designing a Policy for Medium Enterprises”*, PRESS INFORMATION BUREAU (May 26, 2025), <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2131261>.

are entitled to⁸³. Still, aggrieved creditors excluded from the CoC must wait for the AA to address the RP's abuse of power before any resolution occurs.

While the resolution-to-liquidation ratio improved marginally from 0.6 in FY to 0.9 in FY25, this gain was offset by delayed timelines, asset depreciation, and record-low liquidation recoveries of 4%⁸⁴. Worse, once a plan is approved, CST extinguishes all pending claims. Consequently, OCs and even discriminated FCs are turning to alternatives like the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) and Alternative Dispute Resolution (ADR) mechanisms aggrieved by the prolonged delays and low recovery rates offered by the Code⁸⁵. The Code is increasingly being used as a “name-drop” to pressure CDs into payment, as evidenced by the 53% withdrawal rate of OC-initiated cases at the pre-admission stage. This trend shows a steep decline in creditors' faith in the Code.

10 PROPOSED SOLUTIONS

10.1 Pre-Filing Mediation and Arbitration: Most Efficient Alternative for OCs

The Code, under Chapter I, classifies creditors into two categories: FCs and OCs. As explained in Paragraph 5.2.1 of the Bankruptcy Law Reforms Committee Report, FCs are individuals *or entities whose relationship with the organization is purely financial—based on a loan or debt instrument, whereas OCs are those whose claims arise from the supply of goods or services. The IBBI*⁸⁶ recently released their discussion paper on Insolvency Mediation⁸⁷, which appropriately notes that most OC-CD disputes are contractual in nature and can often be resolved without the intervention of the AA through mediation or alternative resolution mechanisms. Unlike FCs, whose interest lies in the restructuring and revival of the CD, OCs are primarily concerned with the recovery of outstanding dues⁸⁸.

This divergence in interests reflects the Code's inherent pro-FC orientation. FCs are granted representation on the CoC and enjoy a higher priority in the waterfall mechanism

⁸³ Gail India Ltd. v. Ajay Joshi, Company Appeal (AT) (Insolvency) No. 492 of 2019 (NCLAT Oct. 4, 2021), <https://ibbi.gov.in/uploads/order/fa8460fefa8cd158bd36a501344344e4.pdf>.

⁸⁴ INSOLVENCY & BANKRUPTCY BD. OF INDIA, REPORT OF THE WORKING GROUP ON GROUP INSOLVENCY (Sept. 23, 2019), <https://ibbi.gov.in/uploads/resources/d2b41342411e65d9558a8c0d8bb6c666.pdf>.

⁸⁵ The Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, <https://www.drtcbe.tn.nic.in/Actsrules/SARFAESI%20AMENDMENT%20ACT%202016.pdf>.

⁸⁶ BANKRUPTCY LAW REFORMS COMM., THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE, VOLUME I: RATIONALE AND DESIGN (Nov. 2015), https://ibbi.gov.in/BLRCReportVol1_04112015.pdf.

⁸⁷ INSOLVENCY & BANKR. BD. OF INDIA, DISCUSSION PAPER ON MEDIATION BY THE OPERATIONAL CREDITORS (OCs) BEFORE APPROACHING ADJUDICATING AUTHORITY (AA) FOR FILING SECTION 9 APPLICATION (Nov. 4, 2024), <https://ibbi.gov.in/uploads/whatsnew/5432fd4873e30cdb2e4ab4802454565c.pdf>.

⁸⁸ *Id.*

during liquidation. In contrast, OCs have no representation in the CoC and are placed among the residual claimants in liquidation. The 2020 amendment, which increased the default threshold for initiating insolvency proceedings to ₹1 crore, further weakened the position of OCs. Unlike FCs, OCs are not permitted to file joint applications, thereby limiting the remedies available to smaller creditors⁸⁹.

Given that insolvency resolution is neither the objective nor within the effective control of OCs, their primary focus remains on debt recovery. In this context, pre-litigation mediation or arbitration emerges as a more expedient and efficient mechanism for resolving contractual disputes prior to invoking formal insolvency mechanisms.

10.2 Higher Success Rate for OC on Adopted Alternative Dispute Resolution

Dispute resolution at the pre-admission stage offers significant potential for success, especially for OCs, when compared to later stages of the process. This is largely due to the procedural time lag between the occurrence of default, the filing of the application, and its admission by the AA after hearing both parties. This interim period serves as a crucial opportunity for the OC and CD to initiate meaningful negotiations and attempt an early, amicable settlement of disputes.

As noted in the IBBI discussion paper on Insolvency Mediation, out of the 25,284 applications filed by OCs under Section 9⁹⁰ up to 30 April 2024, only 3,818 were admitted⁹¹. Nearly 75% were withdrawn or settled before admission, indicating that OCs are generally more focused on debt recovery than on seeking resolution of the CD. This reinforces the potential of pre-insolvency mediation as an effective tool for OCs to reach a mutually agreeable solution with the CD⁹².

In light of this, the authors propose a dual-layered alternative dispute resolution framework comprising a hybrid mediation mechanism and a court regulated arbitration process—as a pre-insolvency recourse. The choice between the two modes of ADR should be guided by the nature of the claim and the mutual preference of the OC and the CD, with the AA determining the most appropriate mechanism in each case.

⁸⁹ BANKRUPTCY LAW REFORMS COMM., THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE, VOLUME I: RATIONALE AND DESIGN (Nov. 2015), https://ibbi.gov.in/BLRCReportVol1_04112015.pdf.

⁹⁰ The Insolvency and Bankruptcy Code, 2016, § 9.

⁹¹ INSOLVENCY & BANKR. BD. OF INDIA, DISCUSSION PAPER ON MEDIATION BY THE OPERATIONAL CREDITORS (OCs) BEFORE APPROACHING ADJUDICATING AUTHORITY (AA) FOR FILING SECTION 9 APPLICATION (Nov. 4, 2024), <https://ibbi.gov.in/uploads/whatsnew/5432fd4873e30cdb2e4ab4802454565c.pdf>.

⁹² *Id.*

10.3 Pre-Insolvency Mediation Model

The authors, in this paper, propose a model for pre-institution insolvency mediation aimed at identifying financial imbalances at an early stage. Early detection of financial distress is critical in preventing insolvency, and mediation can serve as an effective mechanism for timely intervention. In the first stage, businesses facing temporary financial imbalances (lasting up to 15 days) may voluntarily engage in mediation with their creditors. This voluntary mediation is confidential, enabling the debtor and creditors to explore restructuring options without judicial intervention. Various types of mediation may be employed, such as claims mediation for unliquidated claims, single-creditor mediation for specific disputes, plan mediation to resolve restructuring deadlocks, and group mediation for intra-group claims. All mediation agreements, whether verbal or written, must be recorded within three days to ensure enforceability and legal clarity.

If the financial distress persists beyond 45 days, the second stage—reconstruction mediation—becomes relevant. At this point, the mediation process moves into a more structured, court-assisted framework, ensuring legal oversight and compliance. The mediation panel, which includes a judge, a lawyer with relevant expertise, and a financial consultant, will guide the restructuring process. Options such as debt rescheduling, third-party loans on a super-priority basis, or a combination of these measures can be explored to stabilize the corporate debtor. This stage aims to address temporary financial issues and restore the debtor's capacity to generate profits, thereby reducing the need for formal insolvency proceedings.

The third stage involves structured mediation, where creditors must submit standard claims outlining the nature of their financial interest. The mediation process then continues with negotiations, where creditors and debtors attempt to reach an agreement on debt restructuring, ensuring that a feasible and executable plan is developed. The process is designed to be time-bound, with a maximum duration of four months and an optional two-month extension under the Commercial Courts Act, 2015, ensuring that mediation does not become a prolonged substitute for insolvency resolution.

In the final stage, a formal restructuring plan (RP) is submitted to the AA for approval. The RP must offer a higher recovery rate than traditional CIRP proceedings and comply with the requirements under Sections 30⁹³ and 31⁹⁴ of the Code. A mediation panel assists in facilitating creditor negotiations, ensuring that the restructuring plan receives the necessary 66% creditor approval. Once approved by the AA, the mediation settlement becomes binding on all parties. By adopting this four-stage pre-institution mediation model, the

⁹³ The Insolvency and Bankruptcy Code, 2016, § 30.

⁹⁴ *Id.* § 31.

insolvency framework can enhance financial stability, reduce the burden on adjudicating authorities, and enable timely interventions that preserve business value and safeguard stakeholder interests.

10.4 Pre-Insolvency Arbitration Model

Apart from mediation, OCs may consider arbitration with the CD to resolve disputes before the admission of the insolvency application under Section 9. In such cases, the OC may submit an application to the AA. Upon receiving this application, the AA must make a *prima facie* assessment of the arbitrability of the dispute⁹⁵. If the dispute is deemed arbitrable, the AA shall impose a mandatory moratorium, similar to the one under Section 14⁹⁶ of the Code. This moratorium may also apply to the CD's subsidiaries or holding companies, on a case-by-case basis, unlike the current Code, which only imposes a moratorium on the entity facing insolvency.

Since arbitration takes place before the insolvency application is accepted under Section 9, the arbitration proceedings would remain in personam. The AA would govern the proceedings, but the arbitrator can be appointed by the parties in accordance with the Arbitration and Conciliation Act, 1996. The court would first determine whether the dispute is arbitrable by bifurcating the issues into “core” and “non-core” matters⁹⁷. Core issues involve substantive rights under the Code, such as avoidance provisions i.e., transactions entered to defraud the interests of creditors pre-CIRP therefore, could be reversed, undervalued transactions, transactions intended to defraud creditors, and preferential transactions, which must be adjudicated during the CIRP. Non-core issues, which do not invoke substantive rights under the Code, may be resolved if they fall within the scope of an arbitration agreement.

This approach is commonly adopted in the insolvency regimes of France, Singapore,⁹⁸ and the United States.⁹⁹ However, cross-border arbitration, while promoted as an alternative dispute resolution mechanism, does not clearly distinguish between core and non-core issues, creating uncertainty about its application in India due to procedural limitations.

⁹⁵ Centre for Arbitration and Mediation Studies, *SICA Conference on Arbitration & Dispute Resolution*, YOUTUBE (Oct. 17, 2023), <https://youtu.be/6tj-IwJA6T8?si=hEptuhq9GIDPXy-x>.

⁹⁶ The Insolvency and Bankruptcy Code, 2016, § 14.

⁹⁷ ICLG – International Arbitration Laws and Regulations, *USA*, INTERNATIONAL COMPARATIVE LEGAL GUIDES (2024), <https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/usa> (last visited Mar. 26, 2025).

⁹⁸ Centre for Arbitration and Mediation Studies, *SICA Conference on Arbitration & Dispute Resolution*, YOUTUBE (Oct. 17, 2023), <https://youtu.be/6tj-IwJA6T8?si=hEptuhq9GIDPXy-x>.

⁹⁹ ICLG – International Arbitration Laws and Regulations, *USA*, INTERNATIONAL COMPARATIVE LEGAL GUIDES (Sept. 13, 2024), <https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/usa>.

To convince the AA that the disputed claims align with public policy, the OC must demonstrate that the issue is non-core, that arbitration will not result in legal errors, and that arbitration benefits both the OC and the CD. The OC must also show that arbitration is not being used to delay CIRP or liquidation and that it is the most feasible and beneficial alternative. The AA should be particularly vigilant regarding potential abuse of the procedure. If there is doubt about abuse, the presumption should favour arbitration.

Moreover, the AA should assess the objective behind choosing arbitration in insolvency disputes. For instance, arbitration may be preferable if the parties wish to include entities other than the CD or if performance agreements, enforceable only through arbitration, are involved. In such cases, if arbitration serves to provide an adequate remedy for the claimant, it should be supported.

After arbitration is granted by the AA, a market-driven rescue financing model can be implemented. ‘Rescue financing’ (or “DIP financing”) acts as a tool in the restructuring process, where a creditor or third party injects capital to assist in insolvency or restructuring¹⁰⁰. Rescue financing can be adopted during arbitration by mutual consent of the CD and the OC or if it is included in the credit agreement between the parties. In cases where third-party rescue financing is implemented, such a party may receive higher priority in payments under Section 53¹⁰¹ during liquidation, depending on the terms agreed upon in the arbitration agreement. However, rescue financing will typically have precedence over unsecured creditors but remain subordinate to secured creditors, granting it what is known as “Super Priority.”¹⁰²

Section 53¹⁰³ does not invalidate any contractual agreements made by the CD, including those that give certain debts higher priority, as long as the priority does not apply to equally ranked creditors. To promote rescue financing and prevent corporate entities from entering insolvency, an amendment should be introduced to Section 53¹⁰⁴ to include debts owed to a rescue financier alongside debts owed to secured creditors, where the secured creditor has relinquished security as per Section 52¹⁰⁵.

Rescue financing may be initiated by the creditor who holds the largest debt owed by the CD, who would then participate in arbitration to assist in the revival of the CD through debt restructuring or rescheduling. Alternatively, it may involve a group of senior creditors, similar to the US system, where senior creditors hold debt with lower risk compared to

¹⁰⁰ Lydia Tsioli, *Rescue Financing Under a Viability Spotlight*, 22 J. CORP. L. STUD. 843 (2023), published online Jan. 11, 2023.

¹⁰¹ The Insolvency and Bankruptcy Code, 2016, § 53.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* § 52.

“junior debt.” Additionally, a third-party, unrelated to the CD, may provide financing and lead the restructuring process. If a rescue financing agreement is already in place between the CD and its creditors, the process would be easier to undertake during insolvency arbitration.

To facilitate rescue financing, an amendment to Section 53¹⁰⁶ would be beneficial. The rescue financing plan, once agreed upon by the creditor(s) and the CD, must be approved by the AA, ensuring the plan’s feasibility and effective implementation. Since pre-insolvency arbitration involves the CD and creditor(s), the process remains in personam, providing the OC with a better chance to recover its debt and contribute to the restructuring efforts that support the CD’s continuation as a going concern.

10.5 Power to AA to Refer Dispute for Mediation or Arbitration

Under Section 442 of the Companies Act, 2013¹⁰⁷, the NCLT has the power to suo motu refer a dispute to the Mediation and Conciliation Panel maintained by the Central Government. A similar approach could be integrated into the Code, granting the NCLT the authority to suo motu refer insolvency matters to mediation or arbitration at the pre-institution stage, depending on the merits of the case. This provision would allow parties to privately resolve disputes before the admission stage, after which the matter takes on an in rem nature. In addition to promoting voluntary mediation or arbitration, such an amendment would further encourage the use of pre-institution mediation and arbitration. Furthermore, parties who might be disincentivized from pursuing mediation or arbitration for trivial reasons could be mandated by the NCLT, based on the suitability of the dispute for such mechanisms. Ultimately, this recommendation would help alleviate the caseload of the NCLT by limiting its role to referring insolvency disputes for pre-institution mediation.

10.6 Judicial Oversight during Pre-Insolvency Mediation and Arbitration

Judicial oversight is essential to address concerns related to unfair management practices during the restructuring or reconstruction of the CD’s debt, the abuse of power by the rescue financier, and similar issues. However, the role of the AA should be that of an “ultimate arbitrator” rather than merely a “filtering safeguard.” The AA’s responsibility would be to ensure that the arbitration process adheres to due process of law and is conducted in good faith, in the best interest of the parties involved in the arbitration.

¹⁰⁶ *Id.* § 53.

¹⁰⁷ The Companies Act, 2013, § 442.

10.7 Judicial Management

The Code follows a reactive approach to insolvency, whereas the authors propose adopting a proactive approach. If a corporate entity is unable to pay its debts for 75 days or more, the debtor may apply for a judicial management order from the AA. The objectives of such an order would be: firstly, to continue the company as a going concern; secondly, to facilitate a negotiated arrangement between the company and its creditors; and thirdly, to secure a better outcome for asset realization compared to liquidation. The AA may also issue a judicial management order if deemed in the public interest.

Once the AA grants the judicial management order, a statutory moratorium would automatically apply, preventing creditors from filing insolvency applications. Following the order, control of the company's operations would transfer to a judicial manager, who would supersede the company's board of directors. The judicial manager may seek rescue financing plans by issuing an information memorandum for the reconstruction, restructuring, or re-scheduling of debts. The judicial manager would have powers similar to those of an IRP/RP under Sections 18¹⁰⁸ and 25¹⁰⁹ of the Code, and would act on behalf of the company.

Under the supervision of the AA, the judicial manager would be solely responsible for selecting the most viable and efficient rescue financing plan. Rescue financing involves injecting capital to prevent insolvency, and the acceptance of such a plan would solely concern the company, without affecting the rights of other creditors. Therefore, the process would remain a debtor-in-control model, with the management of the company returning to the debtor upon implementation of the rescue financing plan, while the rescue financier would be treated on par with secured creditors under Section 53¹¹⁰.

10.8 Additional Disqualification for IRP/RP

Having addressed the concerns regarding the appointment of the RP, the authors propose incorporating additional disqualifications for the appointment of an IRP/RP. The individual appointed as an RP must be "*disinterested*," meaning they should not be a creditor, equity security holder, or insider of the debtor, a criterion widely adopted in the United States insolvency framework.¹¹¹ The individual must also not possess any financial or personal interest that could impair their capacity to act impartially in the CIRP. Furthermore, the IRP

¹⁰⁸ The Insolvency and Bankruptcy Code, 2016, § 18.

¹⁰⁹ *Id.* § 25.

¹¹⁰ *Id.* § 53.

¹¹¹ 11 U.S.C. § 327 (2018) read with ICLG – International Arbitration Laws and Regulations, *USA*, INTERNATIONAL COMPARATIVE LEGAL GUIDES (2024), <https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/usa> (last visited Mar. 26, 2025) read with Centre for Arbitration and Mediation Studies, *SICA Conference on Arbitration & Dispute Resolution*, YOUTUBE (Oct. 17, 2023), <https://youtu.be/6tj-lwJA6T8?si=hEptuhq9GIDPXy-x>.

or RP must not maintain any association with the CD that could result in direct or indirect remuneration, revenue generation, or debt facilitation, whether through professional services or otherwise. Moreover, such individuals should not have been previously appointed to any position within the CD, nor should they have served in the capacity of an advisor or employee of the CD. They must also not maintain any form of association with the CD, its creditors, or any stakeholder involved in the CIRP. For the purposes of determining an “associate,” reference should be drawn from the definition provided under Section 79 of the Companies Act, 2013. The disqualification criteria proposed herein are in addition to those laid down under Regulation 3 of the CIRP Regulations, 2016 and the relevant IBBI notifications. The authors further recommend that these additional disqualifications be made applicable for a period of one year following the conclusion of the CIRP, particularly in respect of revenue generated by the RP from professional services. Such restrictions should extend to the RP’s engagements with the CD and also encompass its holding, subsidiary, and associate companies, with the definitions of such entities being adopted as per the Companies Act.

Such disqualification should be for the RP for its work profile with the CD including its holding, subsidiary and associated company, the definition for such companies would be the as provided under the Companies Act, 2013. If any professional is disqualified under these criteria, they must submit an affidavit disclosing their connections with the debtor, creditors, or any other party involved in the insolvency. This framework, which aims to promote the independence of the RP, has been widely adopted in the United States and United Kingdom bankruptcy frameworks.¹¹² A strict adherence to these disqualification standards was seen in the *Lehman Brothers* case¹¹³, where all individuals were required to disclose their affiliations. Similarly, in the *In Re Pillontex, Inc.* case¹¹⁴, an advisor to the CD’s board was disqualified from acting as a trustee during liquidation due to prior connections with the debtor. These disqualification standards would be enforceable by the Indian Insolvency Professional Agency (“IPA”).

11 CONCLUSION

To conclude, while the IBC was envisioned as a robust and transparent mechanism for insolvency resolution, recent judicial developments and industry trends have exposed systemic vulnerabilities—particularly concerning the treatment of OCs. The increasing

¹¹² INSOLVENCY PRACTITIONERS ASS’N, CODE OF ETHICS (2020), <https://www.ipa.uk.com>; INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND AND WALES, ETHICAL STANDARDS (2020), <https://www.icaew.com>.

¹¹³ *Lehman Bros. Holdings Inc. v. Joint Administrators of Lehman Bros. Int’l* (Eur.), [2017] UKSC 38.

¹¹⁴ 349 F.3d 711 (2003).

instances of collusion between RPs, FCs, and CDs not only erode the credibility of the process but also compromise the statutory and constitutional rights of OCs. These issues, far from being incidental, stem from structural gaps within the Code itself—especially the preferential tilt towards FCs, the lack of enforceable checks on RP conduct, and the absence of equitable safeguards for OCs.

There is now an urgent need to reimagine the insolvency regime to restore parity among stakeholders. Drawing from comparative practices in jurisdictions such as the United Kingdom, the United States, and Singapore, solutions such as pre-insolvency mediation, court-supervised rescue financing, and statutory recognition of OC-specific remedies merit serious consideration. Furthermore, amendments to Sections 53¹¹⁵ and 27¹¹⁶, along with stricter qualification norms for RPs, could strengthen institutional integrity.

The evolving jurisprudence on RP–FC–CD collusion has sparked essential discourse, and it is imperative that legal reform follows suit to ensure the Code remains true to its foundational promise of equitable and efficient insolvency resolution.

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¹¹⁵ The Insolvency and Bankruptcy Code, 2016, § 53.

¹¹⁶ *Id.* § 27.

CHAPTER 17

Netting Arrangements vs. Insolvency Regime in India: A Tug of War between Finality and Resolution

BHANU SUHALKA* AND AAKRITI**

The Insolvency and Bankruptcy Code, 2016 (IBC) reshaped India's insolvency framework, yet it says little about close-out netting, where contracts are terminated on default and mutual obligations are set off into one net sum. This gap matters as the derivatives market grows, and becomes apparent when a counterparty to a qualified financial contract seeks to net its obligations against a corporate debtor undergoing insolvency.

This paper critically examines the interface between the Bilateral Netting of Qualified Financial Contracts Act, 2020 (Netting Act) and the IBC, i.e., Sections 14, 43 to 51 and 238 of the IBC. Sections 6 and 10 of the Netting Act make close-out netting effective despite insolvency, but Section 238 of the IBC claims the same overriding force, with no stated hierarchy. The IBC lacks an express carve-out for qualified financial contracts. This creates uncertainty, since a broad reading of the moratorium could stay netting or expose it to challenge as a preference. This risks higher capital costs and de facto preference over unsecured creditors.

The United States, the United Kingdom and the European Union protect netting through safe harbour rules, but India has no equivalent in its insolvency law. Without statutory coordination, financial institutions and resolution professionals cannot tell how the two regimes interact.

This paper argues that India must adopt a calibrated statutory framework reconciling contractual finality with collective resolution. The proposed framework combines statutes, judicial decisions, regulatory notifications, international standards and comparative legislation with scholarly commentary, ensuring both financial stability and creditor equality.

1 INTRODUCTION

The evolution of India's financial and insolvency jurisprudence has brought to the fore a nuanced legal conundrum i.e. the apparent tension between the principle of contractual

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finality in sophisticated financial markets and the overarching objective of collective insolvency resolution. This conflict is most prominently reflected in the interface between the Bilateral Netting of Qualified Financial Contracts Act, 2020 (“Netting Act”), and the Insolvency and Bankruptcy Code, 2016 (“IBC”). These two laws, though intended to enhance the credit structure of the Indian economy, are based on different conceptual foundations: the Netting Act is motivated by the needs of financial stability, certainty, and containment of systemic risk, while the IBC is based on the postulates of creditor parity, value maximisation, and equitable distribution in collective insolvency procedures.

The Netting Act was passed to align India’s financial regulatory environment with international best practice, specifically the recommendations of the Bank for International Settlements (“BIS”) and the Financial Stability Board (“FSB”).¹² It gives statutory recognition to close-out netting clauses in qualified financial contracts (“QFCs”) so that counterparties can enforce netting rights despite the pendency of insolvency or resolution proceedings. In facilitating the termination of obligations and determination of a single net amount due on default, the Netting Act is vital to the operational integrity of derivatives, repo, and over-the-counter (“OTC”) markets, where the high volume and velocity of transactions necessitate legal certainty and enforceability.³

But it is awkwardly situated in relation to the scheme of the IBC. The IBC puts in place a statutory moratorium under Section 14 on the initiation of the corporate insolvency resolution process (“CIRP”), thus prohibiting all enforcement steps and contractual rights against the corporate debtor. Additionally, its avoidance provisions under Sections 43 to 51 give powers to resolution professionals and adjudicating authorities to reverse preferential, undervalued, or fraudulent transactions executed before insolvency. They are not only key to maintaining value of the corporate debtor but are essential to providing parity among creditors by avoiding a “first-mover advantage” or asset-stripping before resolution.⁴

The result is a jurisdictional and normative tension between two regulatory imperatives. While one is focused on systemic finality in order to avoid cascading defaults in inter-institutional markets, the other demands procedural fairness and group recovery for all creditor classes.⁵ This underlying tension generates hard legal issues: To what degree should the IBC’s moratorium and avoidance powers take a backseat to the netting rights enjoyed under the Netting Act? Should the inviolability of financial contracts be preserved from insolvency proceedings in the interests of maintaining market resilience, or absorbed by the larger aims

¹ Ministry of Corporate Affairs, Notification S.O. 2618(E), Gazette of India, Extra. (Aug. 5, 2016).

² BANK FOR INTERNATIONAL SETTLEMENTS, REPORT ON NETTING SCHEMES, BIS Committee on Payment & Settlement Systems, Doc. No. CPMLd02 (Jan. 1990).

³ ISDA Model Netting Act and Guide (2018).

⁴ FIN. STABILITY BD., THEMATIC REVIEW ON RESOLUTION REGIMES, PEER REVIEW REPORT (2016).

⁵ ISDA, NETTING SUCCESS IN INDIA (2020).

of fair insolvency resolution?⁶ These are not abstract questions; they cut to the heart of insolvency law's dialogue with capital markets, particularly in an economy where sophistication of regulation has to be met by definiteness of doctrine. The growing complexity of the financial system in India, characterized by increases in multi-leg derivative contracts, structured finance instruments, and cross-border obligations, necessitates that the legal framework for defaults should not compromise financial stability or confidence of creditors.⁶

In an attempt to critically examine the functional and normative conflict between the Netting Act and the IBC, we further hope to consider whether a harmonised legal regime can be constructed, one that maintains the enforceability of close-out netting in qualified financial markets, yet does so without jeopardizing the fundamental insolvency goals of value maximisation, creditor parity, and preventing dissipation of assets.⁷

2 CONCEPTUAL FOUNDATIONS AND THEORETICAL FRAMEWORK

The enforceability of netting agreements, especially close-out netting, holds a place of prominence in the structure of contemporary financial markets. Based on both economic sense and legal certainty, netting arrangements help to reduce credit exposure, minimize counterparty risk, and provide for systemic stability, particularly for high-value and high-frequency markets like derivatives, repos, and foreign exchange. From a risk management standpoint, netting facilitates the concentration and offsetting of bilateral obligations between counterparties, thus significantly lowering the gross exposure that would otherwise be present in the case of a counterparty default. In turbulent financial conditions, lack of enforceable netting agreements can lead to contagion risk, where default by one institution can create a domino effect across interlinked institutions, compounding systemic stress. The 2008 financial crisis provided a grim example of how the absence of strong netting protections can incite rampant market disruption. Legal recognition of netting also interacts directly with prudential regulatory regimes, most importantly the Basel III capital adequacy standards, which enable regulated institutions to calculate their risk-weighted assets (RWAs) on a net exposure basis instead of a gross basis assuming netting arrangements are legally binding even in all scenarios, including insolvency. Lack of such enforceability in a jurisdiction increases capital costs for financial institutions, resulting in inefficient allocation of capital and a disincentive to engage in markets in which exposures of this kind are common. At its essence, the legal basis for netting is founded on the *doctrine of finality of financial contracts*, the requirement that rights and obligations under market-standard deals not be perpetually suspended or displaced by ex post insolvency law. Netting supports contractual freedom, gives

⁶ WORLD BANK, PRINCIPLES FOR EFFECTIVE INSOLVENCY AND CREDITOR/DEBTOR REGIMES (2015).

⁷ U.N. COMM'N ON INT'L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW recs. 101–107 (2005).

rise to legal certainty, and adds to operational efficiency, which are essential aspects of deep and liquid markets in finance. In markets with highly developed financial markets, i.e., in the US and UK, netting is accorded safe-harbour status, and these contracts are protected from stay, claw-back, and avoidance provisions under insolvency legislation.

Contrary to the finality and bilateral risk reduction facilitated by netting, the insolvency framework is rooted in the underlying principle that default sets off a transition from separate creditor enforcement to a collective and cooperative process.⁸ The IBC, 2016 is a paradigm change for India's creditor enforcement regime in that it substitutes an array of fragmented recovery mechanisms with a single-window, time-bound insolvency resolution process designed to maximise the value of the assets of the debtor while also ensuring procedural and distributive equity.⁹

The IBC enshrines maximisation of value of the assets of the corporate debtor as a fundamental objective, as reiterated in milestone judgements like *Swiss Ribbons Pvt. Ltd. v. Union of India*.¹⁰ The rationale is that the collective resolution process results in a higher realisation of value in comparison to piecemeal enforcement under various individual creditors. In that regard, the moratorium contained in Section 14¹¹ is a standstill mechanism that maintains the status quo and avoids a dismemberment of the estate of the debtor by disparate enforcement steps. The protections enshrined in IBC find their doctrinal foundation in the equity rule that all creditors in similar circumstances must be treated uniformly, and no one creditor can gain an unfair benefit through acceleration of recovery by side agreements or self-help.¹² Arguably the most important normative divergence between the netting regime and insolvency law is in their paradigms of enforcement. Netting arrangements embody a paradigm of individualistic enforcement, whereby contracting parties anticipate in advance the default effects and shield themselves from the effects of systemic breakdown. Insolvency law, on the other hand, is based on collectivisation of claims, whereby creditor entitlement is pushed into the background by the pursuit of orderly and fair distribution.¹³

This theoretical difference is described in insolvency literature as the “*collective action theory*”, which perceives insolvency as a realignment of bargaining from market-based to court-supervised redetermination of rights for the benefit of all parties involved.¹⁴ As it has been argued by scholars like Thomas Jackson, the “*creditors' bargain model*” necessitates that the

⁸ Rajendra K. Bhutta v. Maharashtra Hous. & Area Dev. Auth., 2020 SCC OnLine SC 292.

⁹ Bhargavi Zaveri & Shivangi Tyagi, *The Indian Insolvency Code: Implementation and Comparative Analysis*, 13 NUJS L. REV. 101 (2021).

¹⁰ *Swiss Ribbons Pvt. Ltd. v. Union of India*, (2019) 4 SCC 17.

¹¹ Insolvency and Bankruptcy Code, 2016, § 14.

¹² *Innoventive Indus. Ltd. v. ICICI Bank*, (2018) 1 SCC 407.

¹³ S. RAJYALAKSHMI & PRASHANT BHUSHAN, *INDIAN BANKING LAW AND PRACTICE* (2022).

¹⁴ *Overview of the Evolving Jurisprudence Under the Indian IBC*, SMU INDIA LAW BLOG (2024).

debtor's estate is treated as a common pool open for distribution in terms of statutory priority and not contractual exceptions that can have disruptive effects on the integrity of the estate.¹⁵

3 THE DOCTRINAL CLASH: FINALITY VS. FAIRNESS

The essential theoretical conflict, then, is between contractual finality (as embodied in the Netting Act) and procedural fairness (as embodied in the IBC). While the former attempts to ensure party autonomy and forecastability, the latter demands fair treatment and process integrity. The Netting Act presumes that financial markets need to be shielded from insolvency-driven disturbance, whereas the IBC considers insolvency to be a public process in which private contracts should give way to public interest values.¹⁶

This doctrinal tension is amplified in QFC cases where counterparties aim to enforce close-out netting rights under a corporate insolvency resolution process (CIRP), and do so potentially outside the scope of the statutory moratorium, and at the expense of the resolution goals. The issue, then, is whether India's insolvency regime is capable of allowing for contractual netting mechanisms within its collective resolution framework without subverting either's governing logic.

4 THE NETTING ACT, 2020

The passing of the Bilateral Netting of Qualified Financial Contracts Act, 2020 (hereafter, the "Netting Act" or "BNQFCA") is a turning point in India's quest to establish a firm legal foundation for its growing financial markets. The law provides statutory recognition and enforceability of bilateral close-out netting arrangements, bringing India in line with international standards that consider such arrangements critical for financial system stability, especially during periods of stress or counterparty insolvency.¹⁷

The Netting Act is applicable to QFCs into which qualified financial market participants, as defined under Sections 2(g) and 2(f) of the Act, respectively, enter. The Central Government, after consultation with the concerned regulatory bodies like the RBI, SEBI, IRDAI, and PFRDA is authorized to notify classes of contracts and participants within the statute.^{18,19} This restricted and limited scope guarantees that netting protections extend only to those market players who deal in regulated and systemically important financial

¹⁵ WORLD BANK, PRINCIPLES FOR EFFECTIVE INSOLVENCY AND CREDITOR/DEBTOR REGIMES (2015).

¹⁶ Anuj Jain, Interim RP for Jaypee Infratech Ltd. v. Axis Bank Ltd., 2020 SCC OnLine SC 237.

¹⁷ RBI Master Direction – Derivatives (2022).

¹⁸ IRDAI Circular: Netting Obligations of Insurers (2021).

¹⁹ SEBI Circular on OTC Derivatives (2022).

segments—banks, NBFCs, clearing corporations, insurance companies, pension funds, and mutual funds—thus balancing regulatory supervision with contractual freedom.

Section 6 of the Netting Act is the pivot of its legal design. It prescribes that close-out netting shall be effective despite the insolvency, winding-up, administration, or resolution proceedings against one of the counterparties. The Act pre-empts the automatic stay or moratorium doctrine that otherwise disables counterparties from ending or enforcing contracts on insolvency in accordance with general corporate legislations or sectoral laws. In particular, the Act preserves netting provisions in “netting agreements” and provides that termination, liquidation, and computation of the net payable or receivable amount shall be valid and enforceable in law notwithstanding other inconsistent enactments including insolvency legislation.

Section 10 of the Act includes a non obstante clause that confers overriding force upon the Netting Act over inconsistent provisions in any other law, regulation, or rule. This is notable in the context of the Insolvency and Bankruptcy Code, 2016 (IBC) too, where Sections 14 (moratorium) and 238 (overriding clause of the IBC)²⁰ have been read widely to prohibit all enforcement steps against a corporate debtor. By passing a sector-specific override, the Netting Act puts QFCs in a ring-fenced position away from the disruptive effects of the insolvency moratorium and similar avoidance provisions. However, this legislative interface finds itself in a space of doctrinal vagueness, especially when other non obstante clauses (such as Section 238 of the IBC) enter into an interpretational tension with one another within judicial trial.²¹

Under the Netting Act, the RBI in January 2021 issued a notification informing different classes of derivatives, repo, and reverse repo contracts as QFCs and selecting scheduled commercial banks, cooperative banks, and primary dealers as eligible financial entities and qualified participants.²² Likewise, SEBI, in its circulars and consultation papers, has resonated with the significance of enforceability of netting for the growth of India’s capital markets and has favoured its introduction through risk management systems for clearing corporations and financial intermediaries.²³ This multi-regulator implementation framework mirrors the concept of cooperative federalism in financial supervision, such that the benefits of netting are provided only within a prudentially supervised environment, thus protecting against the abuse in the system but promoting financial innovation.

²⁰ Insolvency and Bankruptcy Code, 2016, § 238.

²¹ ISDA, INDIA NETTING OPINION (revised by Juris Corp, May 2021).

²² Reserve Bank of India, Notification on Eligible Qualified Financial Contracts, Notification No. RBI/2020-21/64 (Oct. 2020).

²³ Securities and Exchange Board of India, Notification under Netting Act, SEBI/HO/IMD/IMD-I/DOF5/P/CIR/2021/045 (Mar. 2021).

Before 2020, India did not have an explicit statutory regime acknowledging the enforceability of close-out netting. Courts and regulators had been inconsistent in their views, generally considering netting clauses to be dependent upon judicial discretion or subject to overall moratoriums under insolvency or banking legislation. This had the effect of producing a chilling factor for dealing with the Indian derivatives and structured finance markets, particularly by cross-border financial institutions subject to jurisdictions mandating legal certainty of enforceability of netting.²⁴ The lag in enacting netting legislation also deprived Indian financial institutions of realizing netting benefits in regulatory capital calculations and thus weakened the nation's compliance with Basel III norms, as well as artificially increasing capital charges on exposures that were otherwise nettable.

The Netting Act, thus, aimed to address this regulatory gap and announce India's compliance with the Financial Stability Board (FSB) and Bank for International Settlements (BIS) standards, both of which recognize enforceable netting as a central element of a successful financial market infrastructure. By eliminating legal uncertainty regarding netting, the Netting Act facilitates more liquid and deeper derivatives markets, lowers systemic counterparty risk, and improves capital efficiency. Financial institutions are able to determine their exposure on a net basis, thereby maximizing their capital adequacy ratios and risk-weighted asset (RWA) profiles. This directly affects the cost of credit, pricing of sophisticated financial instruments, and the integration of Indian financial markets with international systems. For instance, the lack of netting protection was earlier referred to by international banks and clearinghouses as a hindrance for cross-border access to Indian CCPs and exchanges.

The introduction of the Netting Act also addresses the report of the Financial Sector Assessment Programme (FSAP) done by the IMF and World Bank, which had raised the issue of the non-enforceability of close-out netting as a significant weakness in India's legal framework. By fixing this, India has advanced the cause of compliance with the G-20 reform agenda on derivatives, thereby enhancing its rating in international regulatory benchmarking and risk management assessments.

5 THE IBC FRAMEWORK AND ITS DOCTRINAL AIMS

5.1 Overview of the Insolvency and Bankruptcy Code (IBC)

The IBC, 2016 is a tectonic change in India's insolvency jurisprudence going away from the pre-existing regime of debtor-in-possession to a creditor-in-control regime. Fundamentally, the IBC aims to recover the assets of the corporate debtor to their highest value, achieve

²⁴ ISDA & Trilegal India, *Netting FAQ* (Industry Guidance Note, 2021).

creditor equality, and facilitate time-bound resolution of stressed entities for retention of economic value and prevention of stakeholder erosion. The IBC contemplates a tripartite resolution framework of:

- Initiation of the Corporate Insolvency Resolution Process (CIRP) under Sections 7, 9, or 10.
- Imposition of moratorium and formation of a Committee of Creditors (CoC) with decision-making powers regarding resolution.
- Liquidation and distribution in case of failure of resolution, as per the waterfall mechanism under Section 53, which enshrines a structured priority regime in the release of proceeds.

This collectivized model is premised on inter-creditor coordination, asset value preservation, and non-fragmentation of enforcement actions, which distinguishes insolvency law from general civil or commercial remedies.²⁵ The tension between financial market finality and insolvency collectivism is most acutely felt in the interplay between netting rights under the Netting Act, 2020, and certain foundational provisions of the IBC:

5.1.1 Section 14: Moratorium

This measure grants an across-the-board stay on institution or continuation of proceedings, such as execution of a judgment, decree, or order and transfer, encumbrance, alienation, or disposal of any asset of the corporate debtor. Significantly, the moratorium also precludes repudiation of critical contracts or recovery in security enforcement, hence suspending all individualized enforcement to permit a structured restructuring process.²⁶ In QFCs, this provision would apparently hinder the functioning of close-out netting, by nature, which is activated in default or insolvency events.

5.1.2 Sections 43 to 51: Avoiding Vulnerable Transactions

These provisions allow the Resolution Professional (RP) or Liquidator to invoke preferential, undervalued, extortionate, or fraudulent transactions within a stated lookback period. The essential goal is to retrieve value improvidently parted with and redistribute it fairly among creditors. Automatic close-out netting, in particular, if invoked near the insolvency start date, might conceivably be brought within these provisions as a preference or undervalued transfer, especially where it seems to unfairly favour a counterparty.

²⁵ Amol Baxi, *India's Experience in Insolvency Laws: Learnings for the Global South* (RIS Discussion Paper No. 294, 2024).

²⁶ Section 14 of IBC, 2016: *Moratorium—Meaning, Scope & Case Law*, LEGAL SCHOOL BLOG (2025).

5.1.3 Section 238: Non-Obstante Clause

The overriding clause of the IBC places it above any such inconsistent provision in any other law, presenting a doctrinal dilemma: whether close-out netting rights made enforceable under the Netting Act should be overridden by IBC's collective insolvency regimes. This presents a normative clash between systemic risk management and procedural collectivism.²⁷

5.2 Protection of the Corporate Debtor's Estate vs. Enforceability of Netting Rights

This tension between financial market efficiency and insolvency process sanctity is foundational and jurisprudential. The IBC is intended to ringfence the estate of the corporate debtor, arrest piecemeal enforcement, and enable the CoC to consider resolution strategies in a neutral, value-maximizing forum. It is the “collective process” theory of insolvency law that prioritizes coordinated creditor treatment over individualistic enforcement rights. Conversely, close-out netting is a building block of contemporary financial markets, especially for derivatives, repos, and OTC transactions, where near-instantaneous closure and valuation of reciprocal obligations in case of default are essential to limit counterparty contagion. Netting diminishes systemic risk by fixing exposures, facilitates capital efficiency under Basel III, and prevents the domino effect of deferred settlements.²⁸

The question of core policy here is whether such systemic imperatives are compatible with the IBC's collectivized goals. The Netting Act claims to grant netting rights irrespective of any other legislation, but the IBC's Section 238 does the same thus bringing statutory simultaneity about without explicit hierarchy.²⁹ Without judicial harmonization, this creates interpretive uncertainty over which statute gives way in the case of insolvency. Essentially, the enforceability of netting rights under the 2020 Act needs to be considered in the context of:

- Value preservation vs. value extraction
- Systemic risk externalities vs. fair treatment of creditors
- Efficient market results vs. distributive justice in insolvency

Whether the asset pool of the corporate debtor should be inviolate under resolution or whether qualified financial contracts must be exempted from the clutches of the IBC are issues that continue to be unresolved and living ones in Indian insolvency law.

²⁷ Arjun Sathees, *The Bilateral Netting Law and Its Impact on the IBC*, IBC LAW BLOG (2024).

²⁸ Habib Motani, *Enforceability of Close-Out Netting Is the Single Most Important Legal Reform for Financial Stability*, ISDA Q. (2021).

²⁹ Amol Baxi, *India's Experience in Insolvency Laws: Learnings for the Global South* (RIS Discussion Paper No. 294, 2024).

6 THE CENTRAL CONFLICT: FINALITY VS. RESOLUTION

6.1 Doctrinal Conflict: Autonomy of Netting vs. Collective Insolvency Proceedings

Central to the legal conflict is a basic conflict between contractual finality, particularly in systemically important financial markets, and the collectivist culture of insolvency law under the IBC. The enforceability of close-out netting under QFCs, as authorized by the Bilateral Netting of QFCs Act, 2020 (Netting Act), is based upon the fundamental concept of legal certainty and instantaneous crystallization of obligations often activated by an “event of default,” like insolvency. All these provisions are aimed at enabling non-defaulting financial institutions to complete termination, valuation, and netting of obligations without undue delay or intervention of courts, so as to immunize themselves from further exposure of credit.

In contrast, the IBC contemplates a regime of moratorium under Section 14, where private creditor action enforcement, recovery, as well as even termination is not allowed during the CIRP. The moratorium is the juridical firewall safeguarding the status quo and avoiding dissipation of assets, thereby ensuring an orderly and maximally effective resolution in the interest of all stakeholders as a group.³⁰ This creates a normative conflict: whereas netting arrangements are self-executing and individualistic by nature, insolvency law aims at freezing the estate of the debtor and subjecting all claims to a disciplined, court-monitored waterfall of distribution. The conflict is more pronounced where netting agreements admit close-out termination and netting without judicial intervention, which may compromise *pari passu* treatment of creditors and the resolution process in general. This doctrinal inconsistency is not an abstract one, it carries deep significance for the operation of contemporary financial markets and the stability of the economy at large.

6.1.1 Systemic Uncertainty for SIFIs and Market Participants

The lack of a clearly defined hierarchy between the IBC and the Netting Act gives rise to regulatory uncertainty for Systemically Important Financial Institutions (SIFIs) and institutions that are active in over-the-counter (OTC) derivatives, repo markets, and foreign exchange contracts.³¹ If close-out netting under the IBC moratorium is stayed, counterparties will be discouraged from dealing with institutions under financial duress due to potential exposure and inability to easily unwind positions. In turn, this chilling effect undermines

³⁰ Ghanashyam Mishra & Sons Pvt. Ltd. v. Edelweiss Asset Reconstruction Co., 2021 SCC OnLine SC 313.

³¹ Shardul Amarchand Mangaldas & Co., *Analysis of the Netting Bill* (Firm Report, 2020).

liquidity provisioning, price discovery, and risk hedging mechanisms, especially in the context of interbank markets that rely heavily on netting efficiencies.

6.1.2 *Disruption in Derivative Clearing and Counterparty Exposure*

Without enforceable netting, financial institutions cannot promptly consolidate exposures, leading to gross exposure accounting on balance sheets. This could result in increased capital adequacy requirements under Basel III norms, deteriorating the creditworthiness and market credibility of the affected entity.³² More importantly, it could trigger procyclical effects where mark-to-market losses amplify systemic stress during a financial downturn. In addition, if a clearing member or central counterparty (CCP) cannot close out and net its positions in consequence of the CIRP moratorium, it may have the potential to lead to chain reactions of defaults, cascading through the financial system.³³

6.1.3 *Unequal Treatment and Preference Concerns*

Enforceability of close-out netting in insolvency has the potential to cause *de facto* preferential treatment of financial market participants who are QFC holders as opposed to similarly situated unsecured creditors. Such counterparties can capture value outside of collective process contravening the principle of equitable distribution enshrined in Sections 43–51 of the IBC dealing with avoidance transactions. That brings fundamental issues of horizontal equity and possible abuse of derivative arrangements to avoid insolvency priorities, especially in related party transactions, structured finance, or embedded options. Overall, the unsolved tension between netting finality and insolvency resolution is no legal footnote; its blow reaches the very heart of India's financial regulatory structure. Unless resolved through legislative clarification or judicial interpretation, this tension threatens to undermine both financial stability and the effectiveness of insolvency resolution processes.

7 COMPARATIVE LEGAL ANALYSIS

7.1 United States: Bankruptcy Code and Safe Harbor Provisions

The United States provides one of the most advanced and mature systems reconciling systemic risk mitigation with insolvency resolution. The U.S. Bankruptcy Code preserves “safe harbour” provisions enacted under § 362(b)(6), § 546(e), § 556, § 560, and § 561 that *de facto* immunize QFCs like derivatives, repurchase agreements, and swap contracts from the automatic stay, avoidance actions, and other bankruptcy limitations. § 362(b)(6) excuses

³² ASS'N OF CORP. TREASURERS, CLOSE-OUT NETTING IN PRACTICE: A LEGAL PRIMER (2023).

³³ *Rethinking OTC Derivatives: The Imperative for Legal Reform in India's Financial Landscape*, OXFORD BUSINESS LAW BLOG (2024).

certain financial transactions (i.e., margin payments, settlement payments) from automatic stay. § 546(e) protects settlement payments to or from financial institutions from avoidance as preferential or constructively fraudulent. §§ 556, 560, and 561 allow exercise of contractual close-out netting rights, termination, and liquidation of collateral notwithstanding the debtor's bankruptcy.³⁴ The legislative justification rests in avoiding the domino effect that a refusal to permit netting would initiate in highly interconnected financial markets, especially among systemically important financial institutions (SIFIs). Judges have consistently emphasized that timely close-out of unstable financial derivatives is essential for maintaining market stability and reducing counterparty risk. The U.S. system places financial solidity and risk control above by making QFCs statutorily immune from core insolvency mechanisms such as the stay and claw-back, in light of their system-wide effects.

7.2 United Kingdom: FSMA and Financial Collateral Regulations

Statutory sanctity is accorded to netting and collateral arrangements by the UK law under a two-tiered regulatory framework.³⁵ The Financial Services and Markets Act, 2000 (FSMA) provides regulatory powers to the FCA and PRA in respect of designated QFCs and prohibits interference with netting and set-off rights during insolvency. The Financial Collateral Arrangements (No. 2) Regulations, 2003, which give effect to the EU Financial Collateral Directive, protect enforcement of security financial collateral arrangements (SFCAs) and title transfer financial collateral arrangements (TTFCAs). Under the UK system:

- Close-out netting rights are safeguarded even in the event of administration or liquidation.
- Financial collateral takers can realize financial collateral (e.g., securities, cash) instantly or without judicial intervention.
- The protection is extended subject to the arrangement being “formalised in writing” and parties being non-natural persons (e.g., financial institutions, pension funds, corporates).

The UK system raises contractual certainty and enforcement of collateral for financial contracts, considering them essential to market confidence, particularly in the post-2008 era.³⁶

7.3 European Union: Directive-Based Harmonisation

The EU's response relies on a set of directives targeting legal harmonisation, to wit:

³⁴ U.S. Bankruptcy Code § 562.

³⁵ Financial Services and Markets Act 2000, c. 8, pt. VII (UK).

³⁶ Banking Act 2009, c. 1, schs. 2–3 (UK).

- Directive 2002/47/EC on Financial Collateral Arrangements³⁷
- Directive 2001/24/EC on the reorganisation and winding-up of credit institutions³⁸
- EMIR (European Market Infrastructure Regulation) and BRRD (Bank Recovery and Resolution Directive)

These instruments together:

1. Acknowledge close-out netting as enforceable, even during resolution or liquidation, regardless of diverging national insolvency regimes.
2. Stress finality of settlement and safeguarding of central counterparties (CCPs) and clearing arrangements.
3. Ensure legal certainty to cross-border financial contracts, avoiding the fragmentation risks that hit the 2008 crisis response.

The BRRD also introduces resolution moratoria, but leaves QFCs outside their scope in order to maintain market functioning and prevent aggravating liquidity stress. EU law has a strong pro-netting tilt, viewing netting enforceability as fundamental to both financial integration and prudential regulation.³⁹

India's enactment of the BNQFC Act, 2020 marks a crucial step towards enhancing financial stability, yet it remains insufficiently integrated with the IBC, 2016. Drawing lessons from global best practices, particularly the U.S. and EU models, three key improvements are necessary: *first*, structured statutory carve-outs must be created within the IBC especially in Sections 14 (moratorium) and 43–51 (avoidance transactions) to safeguard netting rights for qualified financial contracts (QFCs); *second*, India must establish a clearly defined QFC ecosystem by listing eligible instruments like swaps, repos, and forwards, identifying eligible entities such as banks, NBFCs, and central counterparties, and ensuring definitional consistency across the Netting Act, RBI/FEMA regulations, and the IBC; and *third*, any such carve-outs must be counterbalanced by regulatory oversight mechanisms to prevent abuse, such as mandatory pre-registration of netting agreements, disclosure obligations to resolution professionals, and judicial scrutiny of close-outs during suspect periods.⁴⁰ A well-calibrated statutory and regulatory framework can help India harmonize the finality of financial contracts with the collective principles of insolvency resolution, protecting both the rights of individual creditors and the broader stability of the financial system.

³⁷ EU Directive 2002/47/EC on Financial Collateral Arrangements.

³⁸ EU Directive 2001/24/EC on the Reorganisation and Winding up of Credit Institutions.

³⁹ European Banking Authority, Guidelines on the Treatment of Netting Sets.

⁴⁰ Trilegal, *Bilateral Netting of Qualified Financial Contracts Act, 2020* (Legal Update).

8 INDIAN JURISPRUDENCE: TRENDS AND AMBIGUITIES

India's insolvency framework, while relatively nascent, has undergone rapid jurisprudential evolution under the IBC, 2016. At the core of recent interpretative developments lies the dynamic tension between the absolute moratorium envisaged under Section 14 of the IBC and the economic imperatives of modern financial markets particularly concerning QFCs governed by the *Netting Act*.

Indian courts, and notably the Supreme Court, have gradually shifted toward a purposive and functionalist interpretative model. This trajectory has seen an increasing willingness to engage in sector-specific harmonisation, even in the absence of explicit statutory carve-outs. Two significant decisions illustrate the evolving judicial landscape and its implications for the enforceability of netting arrangements in the insolvency context.

In the case of *EPFO v. Jaykumar Pesumal Arlani* the National Company Law Appellate Tribunal (NCLAT) adopted a broad interpretation of Section 14 of the IBC, holding that the moratorium extends even to quasi-judicial and non-coercive proceedings.⁴¹ Notably, the tribunal ruled that assessment proceedings and recovery notices initiated by statutory authorities such as the Employees' Provident Fund Organisation (EPFO) fall within the moratorium's ambit. The ruling reinforced the principle that the corporate insolvency resolution process (CIRP) must not be disrupted by individual claims—regardless of the claimant's statutory or secured status. This decision underlines the judiciary's strong commitment to preserving the integrity of collective resolution, even at the expense of individual enforcement actions. Now if such a blanket interpretation of the moratorium were to be applied automatically to QFCs, it could have the unintended effect of obstructing close-out netting and the enforcement of collateral arrangements. Such an outcome would undermine the legislative intent behind the Netting Act, which was specifically enacted to promote financial stability by protecting netting rights, even during insolvency.⁴²

In the landmark judgment of *Vidarbha Industries Power Ltd. v. Axis Bank Ltd.*⁴³, the Supreme Court held that the adjudicating authority under Section 7 of the IBC retains discretion and is not bound to admit an insolvency application solely on proof of default. The Court emphasised that tribunals may consider extraneous commercial and economic factors such as the financial viability of the debtor, pending legal disputes, or sectoral dynamics before initiating CIRP. This decision represents a doctrinal shift away from a mechanical, rule-based trigger for insolvency. It acknowledges that financial default does not ipso facto

⁴¹ *EPFO v. Jaykumar Pesumal Arlani*, 2021 SCC OnLine NCLAT 268.

⁴² DALVINDER SINGH, *THE LAW OF CLOSE-OUT NETTING IN FINANCIAL MARKETS* (2019).

⁴³ *Vidarbha Indus. Power Ltd. v. Axis Bank Ltd.*, (2022) 8 SCC 352.

mandate insolvency proceedings, particularly where the debtor entity remains commercially viable or is engaged in ongoing legal disputes affecting its financial position.

The Court's nuanced, context-sensitive approach to insolvency triggers may offer a doctrinal foothold to balance QFC enforcement with the broader insolvency framework. By opening the door to context-specific considerations, the judgment creates space for systemic factors—such as financial stability and contagion risk—to inform judicial treatment of close-out netting during insolvency. This, in turn, strengthens the possibility of judicial harmonisation between the IBC and the Netting Act.

These rulings herald a paradigmatic change in the judicial approach to insolvency law away from strict adherence to statutory impediments towards a sophisticated, purposive weighing of contradictory legislative goals. In particular:

- Courts are more and more attuned to the differentiated character of financial creditors, particularly where the creditor is a counterparty to a QFC with systemic ramifications.
- The supremacy of collective resolution under IBC is being challenged, alongside the sector-specific laws: The Netting Act, the RBI Act, and Securities Contracts (Regulation) Act, all are more inclined to promote financial stability and transactional certainty.
- There is a suggested jurisprudence of growing readiness to harmonize IBC's moratorium and set-off mechanisms with the statutory recognition of netting and finality of collateral under the Netting Act, 2020 despite judicial precedent still being inadequately developed in this particular domain.

Notwithstanding these forward-looking developments, Indian jurisprudence still does not have a specific judicial pronouncement on the enforceability of close-out netting during moratorium or of the inviolability of collateral enforcement rights under QFCs. Some issues remain pending resolution:

1. Whether close-out netting can be enforced after commencement of CIRP without inviting Section 14's prohibition
2. Would collateral enforcement under a financial contract qualify as a preferential transaction or extortionate credit under Sections 43 or 50 of the IBC?
3. Can there be an implied statutory override from the Netting Act, or is there a requirement for judicial acceptance of an express carve-out?

The Indian judicial response demonstrates an emergent awareness of the requirement to balance insolvency resolution with financial market stability. But until they are specifically adjudicated or clarified by regulatory notice, QFC counterparties are still at legal risk in insolvency proceedings. The Supreme Court's purposive turn in *Vidarbha* and the broad moratorium reading in *Jaykumar Arlani* need to be harmonized by either legislative reform

or judicial clarification best through a test case considering the interaction between the IBC and the Netting Act.

9 TOWARDS A HARMONISED FRAMEWORK

9.1 Reconciling Netting and IBC Objectives

The key legal trade-off between the finality of close-out netting and the collective resolution goals of the IBC requires a nuanced strategy that balances systemic stability with creditor equality. A pragmatic balance is achieved through delimiting the reach of netting protections with regulatory specificity. As per the Netting Act, the advantages of enforceability are only limited to “QFCs” executed by “Qualified Financial Market Participants” (QFMPs) notified by the concerned authorities. This establishes a definitional corridor which could be used to great effect to ring-fence systemically material financial transactions from insolvency moratoria without derogating the IBC’s moratorium in its entirety.

The deployment of pre-packaged insolvency schemes especially for financial market counter-parties would offer a practical middle path. Such schemes can nest contractual close-out rights within a regulated resolution framework, maintaining transactional certainty while having oversight. Alternatively, sectoral exemptions (akin to Section 18 carve-outs of the Netting Act) can be operationalised for covered financial institutions such as banks, NBFCs, and insurance firms subject to ex-ante regulatory clearances. With the cross-cutting nature of insolvency law and financial regulation, judicial and regulatory convergence becomes paramount in aligning the twin goals of resolution and financial finality. Courts and tribunals, particularly the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) need to pursue a purposive and sectorally informed approach of interpretation to insolvency disputes related to netting arrangements. Specifically, tribunal discretion should be exercised cautiously to preserve close-out netting rights if the following cumulative test is met:

- The requesting counterparty is a properly notified QFMP;
- The financial contract is a QFC under prevailing regulatory notice;
- The invocation of netting is before the onset of the Corporate Insolvency Resolution Process (CIRP) under Section 14 of the IBC;
- No evidence of preferential, undervalued, or fraudulent transaction under Sections 43–45 of the IBC.

Regulators like RBI, SEBI, IRDAI, and PFRDA need to coordinate to frame uniform guidelines for the registration, regulation, and audit of netting arrangements. Sectoral standardisation can discourage opportunistic behaviour and avert systemic contagion, especially

in financially connected ecosystems. In order to institutionalize a harmonized framework, the Indian insolvency regime has to look at statutory changes mirroring international best practices without weakening the creditor-in-rem principle of the IBC.

Some of the legislative interventions could be:

- a. Introduction of a new sub-section of Section 14 under the IBC: This provision can create an exception to the moratorium in respect of enforceable close-out netting contracts, following the safe harbour concepts built into § 362(b)(6) and § 546(e) of the US Bankruptcy Code. It would exempt certain terminations, accelerations, and set-offs related to netting from moratorium prohibitions, subject to QFC conditions.
- b. Codification of Safe Harbor Provisions: Transferring the UK's Financial Collateral Arrangements (No. 2) Regulations, 2003, India can incorporate safe harbour provisions safeguarding netting rights in regulated financial transactions, supported by disclosure and audit trails.
- c. Mandatory Registration of Netting Contracts: A centralised database perhaps under the umbrella of the Insolvency and Bankruptcy Board of India (IBBI) or an appointed financial regulator can be created to mandatorily register all enforceable netting agreements ex ante. This will induce transparency, offer documentary certainty in the event of insolvency, and eliminate post-default opportunism.
- d. Clarificatory Cross-Referencing: The IBC can make non-obstante provisions that recognize the applicability of the Netting Act so that its protections are not inadvertently cut short in the course of CIRP proceedings, hence curtailing judicial fragmentation.

10 CONCLUSION: BALANCING SYSTEMIC FINALITY AND RESOLUTION FAIRNESS

The developing interface between netting arrangements and the insolvency law in India represents a fundamental tension: the demand for transactional finality in finance versus the requirement of fair resolution under insolvency law. This tension is very pronounced where Qualified Financial Contracts (QFCs) and derivative exposures overlap with the moratorium and distribution waterfall under the Insolvency and Bankruptcy Code, 2016 (IBC).

India made impressive strides towards conforming with prudential global norms by passing the Bilateral Netting of Qualified Financial Contracts Act, 2020, and giving legal certainty to close-out netting arrangements critical to reducing counterparty risk and a resilient financial system. But such protections need to be weighed against the IBC's central goal of value maximisation for all stakeholders and upholding the integrity of the collective process of insolvency.

Currently, the law indicates lacunae in harmonisation as well as statutory coordination. The lack of an express carve-out in Section 14 of the IBC in favour of QFCs and associated

netting rights causes potential tension. It leaves scope for interpretative vagueness, especially where automatic close-out netting could be viewed as creditor-specific enforcement and hence at variance with the moratorium under Section 14(1). To progress, India's legal framework needs to develop in three key areas:

- a. Clarity: By codifying express carve-outs of QFCs in the IBC, ideally in a new subsection of Section 14 or similar clause, Parliament can integrate netting enforceability with its overarching goal of systemic stability.
- b. Classification: Distinguishing QFC counterparties from mere unsecured creditors by clear definitions and regulatory regulation can avoid preferential results while maintaining valid risk-reduction instruments in the hands of systemically critical institutions.
- c. Coordination: Strong regulatory dialogue among the Insolvency and Bankruptcy Board of India (IBBI), Reserve Bank of India (RBI), SEBI, and sectoral regulators can result in standardized contractual templates, pre-packaged insolvency regimes, or sector-specific safe harbour rules similar to those in the US (under the Bankruptcy Code) and the UK (Financial Collateral Arrangements Regulations).

Finally, the Indian insolvency landscape cannot be considered in splendid isolation from the risk architecture of the financial system. Netting arrangements, employed within a properly regulated context, add to legal certainty and financial foreseeability. Concurrently, however, the IBC needs to remain a disinterested impartial referee of value maximisation, such that no creditor, no matter how systemically significant, is permitted to compromise the equity and procedural justice of the resolution process. This requires the conscious and doctrinally consistent combining of insolvency and financial regulation, informed by the dual guiding beacons of stability and equity.

* * *

CHAPTER 18

Smart Defaults: An AI – Pre-Insolvency Early Warning System Integrated with India’s Information Utilities

CHIRKANKSHIT BULANI* AND ARYAN SHARMA**

This paper shall advocate for solving the need for a predictive and data driven approach to insolvency in India. While the IBC, 2016 has transformed the landscape, it is noticed that the legislation only arrives into the picture after a significant default has already occurred. As per the data available by December of 2024, more than 8000 CIRPs have been admitted, but with an average lowly rate of creditor recovery at 32.8 percent and nearly 44 percent of closed processes ending with liquidation. In comparison, jurisdictions like EU and UK have begun their integration of AI-powered Early Warning Systems (EWS), enabling timely intervention and reduction in value erosion.

This paper shall intend to propose a roadmap for design and implementation of an AI-powered Early Warning System integrating India’s digital infrastructure including Information Utilities. The proposed system would combine data from GST filings, MCA records, NeSL agreements, Credit Scores with the use of supervised learning models to generate risk scores and explainable dashboards. The paper shall also conduct a critical examination of technical and legal challenges such as data silos, privacy and consent under the DPDP Act, 2023 and regulatory harmonization among other related statutes.

By conducting a comparative analysis with the EU’s Directive 2019/1023, the UK’s Red Flag Alert, and Singapore’s MAS-backed AI systems, the paper shall adjudicate on the feasibility and impact of such a system, while offering a phased implementation strategy beginning with Large Corporate NPA-holders and recommend legal interventions for recognition of AI-EWS outputs as advisory triggers for pre-insolvency mediation or restructuring. It will also comment on algorithmic fairness, stakeholder consultation and effective redressal mechanisms.

By moving towards a predictive insolvency regime from a reactive one, Indian insolvency landscape can prevent value erosion, improve recovery and enhance stability in the framework. The research will provide actionable insights for policy makers, regulators, practitioners, contributing to technological intervention in the current traditional insolvency regime.

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Keywords: Pre-Insolvency Framework, Distress Prediction, AI-Powered Early Warning System

1 INTRODUCTION

The Insolvency and Bankruptcy Code of 2016¹ was a transformative legislation, which reshaped India's approach to corporate distress. It brought India from a debtor-in-control to creditor-in-control model. It intended to streamline corporate insolvency, where there was faster resolution and value maximisation. However, as it currently stands now, IBC takes on a reactive nature. The triggering of the Corporate Insolvency Resolution Process (CIRP) is a reactive measure which can be initiated once the default is above the value of 1 Crore.² This reactive approach often puts the stakeholders on the back seat, only bringing it to notice when a certain amount of damage is unavoidable. What also contributes to the damage is the prolonged litigation which engulfs the CIRP process. The mandate for completing the CIRP process is 330 days as per Section 12(3) of the IBC³ while data from the quarterly newsletter of IBBI for the months of January – March 2025 showed that the average time taken is 597 days.⁴ This particular reactive nature and then the extended timelines taken for CIRP contribute to damages which include value erosion, delays in resolution and sub-optimal recovery for creditors.

The data explains the real story. As of the end of 2024, over 8,175 CIRP cases had been admitted, while a good statistic is that 3,485 cases were closed through either resolution plans or withdrawal, over 2,707 cases were referred to liquidation, with less than half, precisely around 1,274 were fully liquidated. Creditors on an average, only realised 31.4% of their claims, which is equivalent to 162.8% of the liquidation value. With nearly 44% of closed CIRPs ending in liquidation, this stands as a concern among the stakeholders of the system.⁵ This particular data is a reflection of the short-comings of India's reactive insolvency framework, where action is only considered long after the threat becomes imminent and the extended timelines for processes such as the CIRP defeat the purpose of insolvency, which is value preservation and revival of the corporate debtor. An AI-EWS system, as discussed later, can avoid liquidation, but can also help avoid the lengthy process of CIRP, preserving both value and time.

¹ Insolvency and Bankruptcy Code, 2016.

² *Id.* § 4.

³ *Id.* § 12(3).

⁴ INSOLVENCY AND BANKRUPTCY BOARD OF INDIA, QUARTERLY NEWSLETTER vol. 34 (Jan.–Mar. 2025), <https://ibbi.gov.in/uploads/publication/912e97d4d9f96651386541fb7059203b.pdf>.

⁵ *Analysis of Insolvency Cases Under IBC as on 31.12.2024: CIRP Initiation, Closures, Recovery and Yield from Resolution Plan and Liquidation*, IBC LAWS (Mar. 19, 2025), <https://ibclaw.in/analysis-of-insolvency-cases-under-ibc-as-on-31-12-2024-cirp-initiation-closures-recovery-and-yield-from-resolution-plan-and-liquidation/>.

Globally, there is a recognition of the downsides of being purely reactive to corporate defaults, and there is an inclination towards data-driven solutions. Countries in the European Union⁶, the United Kingdom⁷, and Singapore⁸ have explored integration of Artificial Intelligence-powered early warning systems in their insolvency frameworks. These systems hold the potential to predict insolvencies, allowing for timely intervention, thereby improving chances of revival of the corporate debtor instead of liquidation which becomes the norm as value erosion happens. The rapid emergence of digital infrastructure in India such as the National e-Governance Services Ltd. (NeSL) as the country's first Information Utility (IU) under the IBC⁹, presents a ripe opportunity for India to jump on the data-driven bandwagon.

This paper shall be an attempt to prescribe the implementation of an AI-powered Early Warning System (AI-EWS), which shall rely on data from India's information utilities. The system shall endeavour to recognise signs of financial distress before the default occurs, enabling timely interventions by insolvency stakeholders. The analysis shall describe the technical, legal, ethical, and institutional challenges which may accompany such an ambitious exercise, and resolving the lacunae and limitations through phased implementation and necessary regulatory reforms. In the next section, this paper shall highlight how the pre-insolvency situation is lacking in the Indian landscape.

2 THE PRE-INSOLVENCY GAP IN INDIA

While the implementation of the Insolvency and Bankruptcy Code (IBC)¹⁰ has brought upon significant achievements, at present, India doesn't have a mechanism for early pre-insolvency interventions.¹¹ The existing indicators are usually studied in a retrospective sense, such as the Non-Performing Assets (NPAs) or credit ratings. This retrospective perspective only brings in attention when the company has incurred substantial losses and significant value has been eroded, making recovery and value maximisation incredibly challenging.

There are multiple reasons as to why there are delays in addressing financial distress. Firstly, there is reluctance among debtors and creditors. Debtors are wary of the stigma

⁶ Directive 2019/1023, of the European Parliament and of the Council, 2019 O.J. (L 172) 18 (EU) [hereinafter EU Restructuring Directive].

⁷ Corporate Insolvency and Governance Act 2020, c. 12 (UK).

⁸ Insolvency, Restructuring and Dissolution Act 2018 (No. 40 of 2018) (Sing.).

⁹ Nat'l E-Governance Servs. Ltd., *India's First Information Utility Under IBC*, <https://www.nesl.co.in/> (last visited July 26, 2025).

¹⁰ IBC.

¹¹ Antonia Menezes et al., *Under Pressure: Integrating Online Dispute Resolution Platforms into Preinsolvency Processes and Early Warning Tools to Save Distressed Small Businesses*, 45 VIKALPA 79 (2020).

associated with a formal insolvency, and the creditors may opt for evergreen loans or informal restructuring.¹² Secondly, the lack of clear legal framework for pre-insolvency resolution creates a grey area, with no formal mechanisms for debtors in financial distress. Thirdly, given the fact that a debtor essentially loses control of his company when the insolvency process begins, a strong incentive is required for them to avail early recognition options, which do not currently exist within India's legal framework.¹³

2.1 Comparative Analysis: Global Approaches to Early Warning Systems

While India welcomed its insolvency code in 2016, the advanced jurisdictions have recognised the importance of early intervention mechanisms, so goals such as value maximisation and revival of the corporate debtor can be realised. A few examples are:

- *European Union (EU)*: In the EU, the Directive 2019/1023¹⁴ lays down the groundwork for Early restructuring frameworks. It states that these frameworks should assist enterprises to restructure before a default occurs and insolvency begins, thus limiting unnecessary liquidation. The objective is essentially to recognise enterprises which might get sick and encouraging action before enterprises default.
- *Singapore*: The Insolvency, Restructuring and Dissolution Act (IRDA), 2018¹⁵ is the comprehensive legal framework which governs aspects such as corporate and individual bankruptcy in Singapore. The legislation is a big facilitator in pre-default restructuring, with the help of mechanisms such as Schemes of Arrangement (Part 5, Division 5) and Judicial Management (Part 7)¹⁶. Under Section 211B of the Act¹⁷, a company is allowed to apply for a moratorium even if it has not entered formal insolvency, allowing it to restructure without discontinuing operations. In addition to this, the Monetary Authority of Singapore (MAS) is actively engaged in promotion of AI-powered risk prediction tools within the financial sector. The authority has also issued what are called the FEAT Principles in 2018, where FEAT stands for Fairness, Ethics, Accountability, and Transparency¹⁸. The authority has also issued an information paper

¹² M.P. Ram Mohan & Muskaan Wadhwa, *Stigma, Corporate Insolvency and Law: International Practices and Lessons for India* (IIM Ahmedabad Working Paper No. 14701, 2021), <https://ideas.repec.org/p/iim/iimawp/14701.html>.

¹³ M.S. SAHOO & ANURADHA GURU, *INDIAN INSOLVENCY LAW* (2020).

¹⁴ EU Restructuring Directive.

¹⁵ Insolvency, Restructuring and Dissolution Act 2018 (No. 40 of 2018) (Sing.).

¹⁶ *Id.* pt. 5 div. 5 & pt. 7.

¹⁷ *Id.* § 211B.

¹⁸ MONETARY AUTH. OF SING., FEAT PRINCIPLES: PRINCIPLES TO PROMOTE FAIRNESS, ETHICS, ACCOUNTABILITY AND TRANSPARENCY IN THE USE OF AI AND DATA ANALYTICS IN SINGAPORE'S FINANCIAL SECTOR (2019), <https://www.mas.gov.sg/-/media/MAS/News-and-Publications/Media-Releases/2019/FEAT-Principles.pdf>.

in 2024 addressing specific concerns related to use of Artificial Intelligence in financial institutions.¹⁹

- *United Kingdom (UK)*: In the UK, the “Red Flag Alert” system, developed by the Begbies Traynor Group, is a resource for financial health ratings,²⁰ which can correlate to predictions of insolvency risk and alerting if either the customer’s or the supplier’s risk sees an increase. It considers factors like payment behaviour, strength of the balance sheet and other relevant factors.

The primary hindrance in embracing AI-EWS in Indian jurisdiction is the fragmented data silos among financial and corporate data repositories. Information remains fragmented among entities such as the National e-Governance Services Ltd. (NeSL), which is India’s first Information Utility and a key pillar of Indian insolvency regime, the Goods and Services Tax Network (GSTN), which holds transactional data from GST filings²¹, the MCA21 portal by the Ministry of Corporate Affairs, and last but not the least, the banks, which hold a great amount of information in regards to credit histories and NPA Classifications.

This particular fragmentation of crucial data, is what hinders real-time risk assessment.²² In addition, stakeholder resistance from banks, Insolvency professionals, and judiciary to accommodate new data sharing mechanisms which involve AI based assessment is another crucial factor. This particular resistance stems from concerns such as algorithmic bias, lack of human judgement, which shall be dealt with in detail later in this paper. Now, in the next section, the paper shall analyse the specifics of the proposed AI-EWS.

3 PROPOSAL: AI-POWERED EARLY WARNING SYSTEM (AI-EWS)

This paper proposes an AI-Powered Early Warning System (AI-EWS), which will be an attempt to leverage advanced data analytics based on integrated data sets to recognise patterns and signs of financial distress, exercising a proactive stance rather than a reactive one. Under this particular heading, the paper will analyse the proposal, elaborating upon, firstly, the data sources and their integration, secondly, model design, thirdly, expected outcomes and benefits to stakeholders, and lastly, addressing the resistance to integration of this

¹⁹ MONETARY AUTH. OF SING., ARTIFICIAL INTELLIGENCE MODEL RISK MANAGEMENT: OBSERVATIONS FROM A THEMATIC REVIEW (2024), <https://www.mas.gov.sg/publications/monographs-or-information-paper/2024/artificial-intelligence-model-risk-management>.

²⁰ BEGBIES TRAYNOR GROUP, RED FLAG ALERT REPORT – Q1 2025: UK BUSINESSES UNDER PRESSURE AHEAD OF IMPENDING TARIFF AND TAX CHANGES (Apr. 25, 2025), <https://www.begbies-traynorgroup.com/news/business-health-statistics/red-flag-alert-report-q1-2025-uk-businesses-under-pressure-ahead-of-impending-tariff-and-tax-changes>.

²¹ Tanya Gupta, *What Is GSTN (Goods and Services Tax Network)?*, CLEAR TAX, <https://cleartax.in/s/what-is-gstn/> (last visited Sept. 29, 2026).

²² *Addressing Data Silos with Governance Frameworks in Financial Organizations*, 24 WORLD J. ADV. RSCH. & REVS. (2024).

technology. Before that, the authors shall attempt to explain a hypothetical scenario of how the proposed system will work.

3.1 Hypothetical Example: Scenario Walkthrough

Under this particular heading, the authors shall attempt to explain the scenario through a hypothetical study. This is as follows:

Suppose there exists a company named 'X' which manufactures automobile parts. In the current scenario, the company has displayed the following:

- *GST Portal:* There has been a 40% drop in turnover filings
- *Banking Sources:* There is an increase in utilisation of credit available and frequent cheque bounces in standing transactions.
- *Credit bureau:* The bureau has lowered the credit score with disputes arising.

Then the following steps are carried out:

Step 1: The AI-EWS integrates the following data and runs an in-depth analysis, after which it flags the company as at-risk.

Step 2: When the flagging happens, a confidential alert is issued via the secure portal to involved stakeholders such as the management of the company, the financial creditors and regulatory authorities. However, the company is provided additional information as to how much contribution was given by the factors under consideration to result in an increase in each score. The top management also gets the option for appeal against this score.

Step 3: This is the stage where on the basis of the factors contributing to the score, a stakeholder consultation can be called to discuss performance and restructuring options if need be.

Step 4: If the risk score is contested, independent validation exercise can be initiated by the stakeholders. It is reiterated that no punitive actions are allowed at this stage.

Step 5: The EWS shall continue to update with new data. If the metrics improve, it will de-risk the company and if not, the score shall increase, initiating new notifications to stakeholders.

3.2 Data Sources and Integration

This proposed warning system shall attempt to predict deteriorating financial patterns by training its algorithm on diverse datasets. The proposed system shall intend to rely on a comprehensive set of data, compiled from critical sources such as:

- *GST Filings*: These often provide real-time insights into a company's revenue and expenses. This would allow the warning system to identify distressing patterns.²³
- *MCA Balance Sheets and Annual Filings*: This particular information offers statutory financial health indicators, including profitability, liquidity, and debt levels.²⁴
- *NeSL Agreements and Records of Default*: Serving as one of the most crucial storehouses of information which would be imperative to carry out insolvency, NeSL records shall form the foundational information of the warning system, providing crucial patterns and examples. These can be utilised as training data.
- *Sectoral Trends and Macroeconomic Indicators*: Forming an important data set, any prediction of financial distress cannot be bereft of the macroeconomic understanding of the underlying industry.²⁵ These will allow broader data, which shall contextualize individual performance and identify systematic risks. This will be particularly in context of volatile industries like aviation.

However, compilation of these data sets and then training the algorithm on these shall be a significant undertaking. There shall be technical challenges, including but not limited to incompatibility of systems across various data holders, varying and often outdated data formats, which would not be possible due to the lack of standardized data definitions.²⁶ To address the challenges associated, it calls for a multi-pronged approach. Firstly, is the need for data standardization. As the primary governing body under the IBC, the Insolvency and Bankruptcy Board of India (IBBI) must conduct consultations with different stakeholders and issue clear mandates for data standardization for all involved entities. Secondly, are the concerns regarding data sharing. To that effect, a dedicated committee comprising representatives from the Reserve Bank of India (RBI), the Securities and Exchange Board of India (SEBI), and the Ministry of Corporate Affairs (MCA) and the IBBI must be established under the oversight of IBBI. This particular committee would oversee ethical data governance, transfer and define common standards and protocols.

²³ Neba Bhalla, Rakesh K. Sharma & Inderjit Kaur, *Effect of Goods and Service Tax System on Business Performance of Micro, Small and Medium Enterprises*, 13 SAGE OPEN 1 (2023), <https://doi.org/10.1177/21582440231177210>.

²⁴ M. Krishnamoorthi & Porika Venkatesh, *An Evaluation of Liquidity and Profitability in Selected Indian Companies*, 2017 J. ADV. RSCH. DYNAMICAL & CONTROL SYS. (2017), https://www.researchgate.net/publication/319036971_An_Evaluation_of_Liquidity_and_Profitability_in_Selected_Pharmaceutical_Companies_in_India.

²⁵ Burcu Hacibedel & Ritong Qu, *Understanding and Predicting Systemic Corporate Distress: A Machine-Learning Approach* (IMF Working Paper No. 22/153, 2022), <https://www.elibrary.imf.org/view/journals/001/2022/153/article-A001-en.xml>.

²⁶ ReBIT Publishes GSTN Data Schema for the Account Aggregator Framework, SAHAMATI (June 21, 2023), <https://sahamati.org.in/rebit-publishes-gstn-data-schema-for-the-account-aggregator-framework>.

3.3 Model Design and Validation

After establishment and compilation of required data sets, the next step would be to create the model design. In its essence, the warning system shall employ supervised learning models, which shall be trained on extensive historical insolvency data, which shall comprise of cases of insolvency, liquidation, cases of revival plans being accepted and the time durations along with other relevant factors such as the nature of the industry. These models would be trained to identify patterns of financial distress, drawing correlations between the current entity at hand and cases of other entities at the same stage. These patterns would be based on two key indicators, namely, financial and alternative indicators.

- *Financial Indicators:* These indicators would include key indicators of a business' health, such as Earnings Before Interest, Taxes, Depreciation, and Amortization (EBITDA), declining revenue and ratios such as debt-to-equity and liquidity ratios.
- *Alternative Indicators:* These indicators would be different from pertinent financials, and would include trends such as delayed payments to operational creditors, litigation history, frequent management changes and market sentiment. While difficult to quantify, these factors play a crucial role in initiation of insolvencies under any jurisdiction.

3.3.1 Limitations of AI

However, given the current limitations of artificial intelligence, it is imperative that the models be designed and understood in such a manner that they are robust and reliable. AI Algorithms often suffer from certain limitations, which are explained below:

- *Lack of appropriate data sets or incorrect categorization:* AI algorithms often depend on categorised data sets which includes examples of what they are meant to identify. To explain with an example, if an algorithm is to be trained upon to identify what is an apple, it is often shown multiple pictures of both apples and non-apples (can be anything, an orange or anything for that matter.) The algorithm is rewarded for correctly identifying the apple, and discouraged for identifying other things as an apple. This makes the data sets and their categorization incredibly important. Without these, it might learn wrong associations, show false positives or false negatives where intervention is required.²⁷
- *The Black Box problem:* The Black Box problem is the problem where we are exposed to decision taken by AI, but we aren't aware as to how AI reached that particular decision. The thinking process of the algorithm isn't transparent, and hence, there

²⁷ R. Stuart Geiger et al., "Garbage In, Garbage Out" Revisited: What Do Machine Learning Application Papers Report About Human-Labeled Training Data?, QUANTITATIVE SCI. STUD. (Nov. 5, 2021), <https://arxiv.org/abs/2107.02278>.

cannot be an explanation to the decision it has reached.²⁸ Forming one of the most crucial limitations of current age AI, it is the reason to the suspicion of adoption of AI in industries like healthcare and finance.²⁹

It is crucial that to foster adoption of the EWS, these limitations be resolved or mitigated. In order to do this, firstly, there needs to be a redressal of the data imbalance. Insolvency events are certainly a rare occurrence in comparison to healthy corporate functioning, which can skew data sets, leading the algorithm to categorise all entries as healthy, and still being accurate. This would lead to the algorithm deviating from its actual function. To counter this, techniques like Synthetic Minority Over-sampling Technique (SMOTE)³⁰, can be utilised. This technique allows for creation of a specific minority data set. In simplicity, it captures the specific characters of the minority, which would be the distressed entities in this case. This would allow for the model to accurately predict events which are a rarity in usual nature.³¹

Secondly, trust and explainability is something which is paramount. To counter the black box problem, the solution which warrants exploration is the introduction of explainable AI techniques. Techniques such as SHAP (SHapley Additive exPlanations) values can be integrated within the warning system.³² This technology in its essence, studies the process of thinking employed by the algorithm and determines which factor led to what amount of impact upon a particular response. This can explain which particular information or data set contribute most significantly to a company's risk score, making predictions by AI explainable and actionable.³³

Thirdly, the paper advocates for pilot studies before wide scale implementation of the warning system. The paper advocates for a phased implementation, focusing initially on large corporates and sectors which are volatile and prone to NPAs such as aviation. These pilots shall give an assessment of the limitations of the model, assessing its effectiveness in real world scenarios and quantifying its impact on value preservation.

²⁸ Sheikh Rabiul Islam et al., *Infusing Domain Knowledge in AI-Based "Black Box" Models for Better Explainability with Application in Bankruptcy Prediction* (May 27, 2019), <https://arxiv.org/abs/1905.11474>.

²⁹ Editorial: *Explainable Artificial Intelligence Models and Methods in Finance and Healthcare*, FRONTIERS ARTIFICIAL INTELL. (2022), <https://www.frontiersin.org/articles/10.3389/frai.2022.970246/full>.

³⁰ N. V. Chawla et al., *SMOTE: Synthetic Minority Over-Sampling Technique*, 16 J. ARTIF. INTELL. RES. 321 (2002), <https://www.jair.org/index.php/jair/article/view/10302>.

³¹ W. I. Sabilla & C. B. Vista, *Implementation of SMOTE and Under Sampling on Imbalanced Datasets for Predicting Company Bankruptcy*, JURNAL KOMPUTER TERAPAN 92 (Aug. 2022), <https://doi.org/10.35143/jkt.v7i2.5027>.

³² Christoph Molnar, *Interpretable Machine Learning: A Guide to SHAP*, in INTERPRETABLE MACHINE LEARNING ch. 18, § SHAP (2019), <https://christophm.github.io/interpretable-ml-book/shap.html>.

³³ *Balancing Techniques for Advanced Financial Distress Detection Using Artificial Intelligence*, 13 ELECTRONICS 1596 (2024), <https://www.mdpi.com/2079-9292/13/8/1596>.

3.4 Outputs and Stakeholder Benefits

The AI-EWS is expected to generate quantifiable and actionable outputs in the form of risk scores and explainable dashboards. These outputs can be of great relevance to all concerned stakeholders. For Creditors, both financial and operational, the system can provide alerts, especially when dealing with multiple debtors, and allow to keep trace on potential investments. It can allow for initiating pre-insolvency restructuring discussions and renegotiation of terms. This can improve recovery rate before value erosion occurs. For Debtors, confidential early warnings can act as moments of introspection, where they may seek expert opinions, seek support and restructure opportunities before creditors show up to the door.

For regulators such as IBBI, RBI and other government entities, this data analysis can predict industry slow-downs, both across sectors and in one specific sector, allowing for timely policy intervention. The AI-EWS can also focus on macro-economic data, forming an important source for policy makers and regulators to rely on, aiding them to introduce reform both for the overall landscape and sector-wise. Lastly, the benefits to the Insolvency professionals and the judiciary would include data compilations and deeper insights, which would be valuable for adjudicatory bodies like NCLT. However, in consonance with established principles on adoption of AI in judicial processes, such as those released by the Kerala High Court recently, judicial function must not be delegated to Artificial Intelligence, and human oversight is mandatory at all times.³⁴

3.5 Addressing Resistance

This paper acknowledges the limitations of AI, which are bound to arise in case of adoption of new and upcoming technologies. To reduce this resistance and foster usage of AI-EWS and its engagement in India's insolvency sphere, the paper proposes the following strategies:

- *Stakeholder Engagement:* Forming one of the most crucial strategies, is stakeholder consultation. Without transparent consultation which is continuous in nature, apprehension to the technology is bound to arise. All stakeholders such as banks, corporate debtors, insolvency professionals must be consulted, and clearly conveyed the benefits and limitations of the proposed AI-EWS.
- *Phased Implementation:* It is imperative that the AI-EWS be introduced in a phased manner, where implementation should have volatile sectors and big corporate entities as the primary focus in the first phase. With gradual expansion, improvements and changes can be introduced for better effectiveness and impact.

³⁴ THE HIGH COURT OF KERALA, POLICY REGARDING USE OF ARTIFICIAL INTELLIGENCE TOOLS IN DISTRICT JUDICIARY (July 19, 2025), https://images.assettype.com/theleaflet/2025-07-22/mt4bw6n7/Kerala_HC_AI_Guide-lines.pdf.

- *Collaborative Threshold Setting:* The thresholds, which would trigger a warning to explore pre-insolvency frameworks should be set in accordance with the specific requirements and unique nature of each sector and industry. These must be set in accordance with experts and regulators, ensuring they are practical and relevant.
- *Complementary Role:* One of the most crucial factors to reduce resistance to adoption is to emphasise the complementary role of the AI-EWS. The role of the warning system should be to supplement human judgement, not act as its replacement.

4 LEGAL AND ETHICAL CONSIDERATIONS

The paper under this heading shall attempt to analyse the legal and ethical considerations associated with the use of an AI-EWS. With the adoption of a technology such as Artificial Intelligence, multitude of considerations are bound to arise. This paper will, firstly, analyse the legal foundations, secondly, considerations as to privacy and data protection, thirdly, algorithmic bias and accountability, and then lastly, concerns as to regulatory coordination.

4.1 Admissibility and Legal Foundation

Before the integration of an AI-EWS into India's insolvency landscape, it is imperative to establish a sound foundation in law. This is a critical aspect that these outputs should serve as advisory triggers for pre-insolvency restructuring discussions, and shouldn't be relied on as sole and conclusive evidence for institution of the CIRP. This distinction is important to prevent the EWS from defeating the intention behind IBC and creating unfounded apprehension as to future of corporate enterprises. The formalization of this advisory role shall be accompanied by amendments to existing legislation. As AI-EWS is integrated into the insolvency landscape, the amendments to the IBC³⁵ should clarify upon the advisory nature of the warning system and lay them as grounds for institution of pre-insolvency mediation or restructuring talks, and not as conclusive grounds for initiation of CIRP. Additionally, to corroborate this, amendments to the Bharatiya Sakshya Adhiniyam 2023³⁶ must be made to address evidentiary value of AI-EWS risk scores, providing them a corroborative or indicative nature, in comparison to them getting a conclusive nature of evidence.

4.2 Privacy and Data Protection

As India introduced its first data protection legislation in 2023, with draft rules open for stakeholder consultation in January 2025, any future legislation which integrates usage of

³⁵ IBC.

³⁶ Bharatiya Sakshya Adhiniyam, 2023, https://www.indiacode.nic.in/bitstream/123456789/59406/1/the_bharatiya_sakshya_adhiniyam%2C_2023.pdf.

data must be Digital Personal Data Protection Act (DPDPA)³⁷ compliant. Given that the data which would be utilised to train the EWS would be mostly financial data, the sensitivity of the data warrants that robust data protection measures be put in place, both within design and operation. The following aspects demand consideration:

- *Consent Mechanisms:* The Act elaborates for free, specific, informed, and unconditional consent for processing personal data. For collection of data sets to train the warning system, mechanism for collection of data must abide by the principles and conditions as provided under the Act. As far as consideration of the data exists, the collection of such data without explicit consent may be justified under the potential public interest, which provides an exception under section 7 of the DPDPA³⁸. However, this condition is subject to further development by subsequent judgements, and must balance public interest and individual privacy.
- *Governance:* A very crucial aspect in any kind of processing with personal data involved is data governance. Any data which is utilised by the EWS must be subject to principles enshrined in the Draft National Data Governance Framework Policy (2022)³⁹ and the DPDPA⁴⁰. This would include establishing clear protocols for use, processing and breach of data scenarios, along with implementation of strict audits to ensure public trust and accountability.

4.3 Bias, Fairness, and Accountability

Forming one of the most crucial considerations to use of an AI-EWS is the algorithmic fairness, unbiased data sets and accountability. This is imperative to prevent the EWS from delivering a disproportionate or discriminatory impact, particularly considering the Micro, Small, and Medium Enterprises (MSMEs) and startups, which are vulnerable entities. To ensure safeguards against bias, the paper advocates for independent audits of AI models, along with their underlying data. A public dashboard which displays key performance metrics of the AI-EWS would enhance public trust, foster better adoption of the warning system. Additionally, a dedicated portal for redressal would allow for debtors to seek help against wrongful evaluations. Additionally, usage of insights from the EWS should be

³⁷ Digital Personal Data Protection Act, 2023, https://www.indiacode.nic.in/bitstream/123456789/60377/1/digital_personal_data_protection_act_2023.pdf.

³⁸ Digital Personal Data Protection Act, 2023, § 7, <https://indiankanoon.org/doc/62814281/>.

³⁹ MINISTRY OF ELEC. & INFO. TECH. (MEITY), DRAFT NATIONAL DATA GOVERNANCE FRAMEWORK POLICY (May 2022), https://static.mygov.in/static/s3fs-public/mygov_165363436397687021.pdf.

⁴⁰ Digital Personal Data Protection Act, 2023, https://www.indiacode.nic.in/bitstream/123456789/60377/1/digital_personal_data_protection_act_2023.pdf.

governed by the IBBI model code of conduct for Insolvency Professionals⁴¹, ensuring that they exercise professional judgment rather than delegating their job to AI.

4.4 Regulatory Coordination

Forming at the root of the proposed AI-EWS, is regulatory coordination. This particular warning system relies on regulatory coordination between multiple stakeholders and government entities, such as the RBI, Ministry of Corporate Affairs, IBBI and entities like SEBI. To ensure harmonization, it is imperative that all entities play their parts well. With RBI operating its own EWS for banks⁴², SEBI having mandated disclosures, and MCA monitoring corporate risk, a joint regulatory committee having stakeholders from all these organizations can go for a unified approach to financial distress detection.

5 COMPARATIVE MODELS AND EMPIRICAL EVIDENCE

The paper submits that the concept of an AI-EWS is not theoretical, but is rather inspired from existing mechanisms from advanced jurisdictions. These jurisdictions include advanced insolvency frameworks, such as the EU, Singapore, China, France etc. These have been elaborated upon:

- *European Union (EU)*: the European Union in its EU Directive 2019/1023⁴³ called for member states to adopt a proactive intervention rather than a reactive one, recognising the need for pre-insolvency frameworks. This mandate has caused many member states like Netherlands to explore early restructuring mechanisms, reducing both time taken and value erosion.
- *Singapore*: The IRDA⁴⁴ and Monetary Authority of Singapore (MAS) have attempted to integrate AI based warning systems into overall fintech framework, which assist financial institutions to recognise signs of financial distress and initiate appropriate intervention. This makes the financial landscape more resilient.

⁴¹ Insolvency and Bankruptcy Board of India (IBBI), *Code of Conduct for Insolvency Professionals* (under IBBI (Insolvency Professionals) Regulations, 2016, as amended up to Apr. 3, 2025), <https://www.ibbi.gov.in/en/legal-framework>.

⁴² Reserve Bank of India, Master Direction on Fraud Risk Management in Commercial Banks (July 2024) (mandating mandatory implementation and board oversight of integrated Early Warning System and Red Flagged Account frameworks, with data analytics units, CBS integration, and CRILC reporting), https://www.rbi.org.in/Scripts/BS_ViewMasDirections.aspx?id=12702.

⁴³ EU Restructuring Directive.

⁴⁴ Insolvency, Restructuring and Dissolution Act 2018 (No. 40 of 2018) (Sing.).

- *Italy*: Italy has introduced reforms to its insolvency framework with the Legislative Decree No. 14/2019⁴⁵ and subsequent amendments⁴⁶, which are also called as 2021 Bankruptcy law reforms. These reforms generate automated notifications for stakeholders involved about emerging distress indicators. While the law doesn't mandate the use of an AI-based system, in procedure, technology is widely leveraged to save time and for accuracy.
- *China*: As pilots of leveraging AI for predictions run in China, empirical studies advocate for hybrid AI models, including random forest algorithms combined with evidence theory to provide AI based risk detection within the framework established by Enterprise Bankruptcy Law^{47,48}. These systems enable early alerts and notifications which are data driven.
- *France*: The French Insolvency Law Reforms through its legislations, the “Loi de Sauvegarde” (Law No. 2005-845)⁴⁹ and the “Loi Macron” (Law No. 2015-990)⁵⁰, enabled for pre-insolvency restructuring along with Articles L611-1, L611-2 of French Commercial Code⁵¹. While the legal system doesn't mandate use of AI driven systems, they are widely used by professionals. These allow courts to take intervention measures upon distress notifications.

While these foreign jurisdictions do highlight the importance of an AI-EWS, it wouldn't make a convincing case for its implementation in India. However, India's experiences with its insolvency substantiate the need for an early warning system. Firstly, the Bankruptcy Law Reforms Committee (BLRC) in its 2015 report studied the default vs balance sheet tests, justifying the choice of the default test for providing legal certainty.⁵² There was a recognition for identification of stress indicators, which were skipped in the final code. Secondly,

⁴⁵ Legislative Decree No. 14 of Jan. 12, 2019, Codice della crisi d'impresa e dell'insolvenza (Italy), repealing Royal Decree No. 267 of Mar. 16, 1942, <https://www.gazzettaufficiale.it/eli/id/2019/02/14/19G00007/sg>.

⁴⁶ Legislative Decree No. 83 of June 17, 2022 (Italy) (implementing Directive (EU) 2019/1023 into national law and amending Decree No. 14/2019 to introduce preventive restructuring frameworks, effective July 15, 2022), <https://www.gazzettaufficiale.it/eli/id/2022/07/01/22G00090/sg>.

⁴⁷ Enterprise Bankruptcy Law of the People's Republic of China (adopted Aug. 27, 2006, effective June 1, 2007), English translation published by Supreme People's Court, https://english.court.gov.cn/2015-08/17/c_761434.htm.

⁴⁸ Chi Zhang et al., *A Method for Financial System Analysis of Listed Companies Based on Random Forest and Time Series*, MOBILE INFO. SYS. (2022), <https://doi.org/10.1155/2022/6159459>.

⁴⁹ Law No. 2005-845 of July 26, 2005 (France), Loi de sauvegarde des entreprises (introducing procédure de sauvegarde, a preventive restructuring mechanism analogous to pre-insolvency frameworks), <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000632645>.

⁵⁰ Law No. 2015-990 of Aug. 6, 2015 (France), Loi pour la croissance, l'activité et l'égalité des chances économiques (“Loi Macron”) (establishing procedural reforms such as specialized insolvency courts and cram-down powers in restructuring), <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000030978561>.

⁵¹ Commercial Code (Code de commerce) art. L 611-1–L 611-2 (Fr.), <https://french-business-law.com/french-legislation-art/article-l611-1-of-the-french-commercial-code/>.

⁵² MINISTRY OF FINANCE, GOV'T OF INDIA, THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE: VOLUME I – RATIONALE AND DESIGN ch. 4.3 (2015).

as far as data driven decisions in the financial sector is concerned, the Indian example of State Bank of India (SBI) substantiates the benefits of data driven decisions. SBI being the largest public sector bank, it has implemented its own EWS in regards to NPA data, where the system assesses risk in accounts, and alerts to make early intervention possible.⁵³ This is a clear application of benefits of data driven mechanisms. Additionally, in plethora of cases of Indian insolvency, such as Jet Airways⁵⁴ and Bhushan Steel⁵⁵, it is observed that protracted delays often lead to value erosion which cannot be prevented, warranting a pre-insolvency intervention. This can only be possible and feasible with the use of an AI-EWS.

The comparative jurisdictions coupled with domestic experiences lay down strong grounds for adoption of an AI-EWS. These systems can greatly enhance the financial landscape, allowing for a better insolvency framework.

6 INSTITUTIONAL & REGULATORY RECOMMENDATIONS

For the implementation of an AI-EWS, a concerted effort is required on the institutional and regulatory fronts. To that extent, the paper makes the following recommendations:

- *Legal Reform:* In regards to legal reforms to Indian statutes, the paper recommends, firstly, amending the IBC 2016⁵⁶ for formal recognition of the outputs and dashboard associated with the AI-EWS as corroborative evidence. The outputs should hold only advisory weight in affecting the decision to start pre-insolvency talks. Secondly, concurrent amendments shall be made to the Bharatiya Sakshya Adhiniyam 2023⁵⁷. These amendments would ensure that AI based outputs hold a corroborating value instead of a conclusive one. Thirdly, the IBBI regulations must be updated to mandate data standardization, sharing and storage protocols among stakeholders. This is imperative for the functioning of the AI-EWS.
- *Data Governance:* Forming a crucial part of given recommendations, is the compliance of the procedure of creation and usage of the AI-EWS with data privacy regulations. The paper recommends that data collection and processing should be DPDPA⁵⁸ compliant, complying with data collection and retention policies. Secondly, data

⁵³ STATE BANK OF INDIA, ANNUAL REPORT 2020–21 (Credit Monitoring), <https://sbi.bank.in/corporate/AR2021/assets/PDF/English/11-3-Core%20Operations.pdf>.

⁵⁴ Jet Airways (India) Ltd. v. State Bank of India, Company Appeal (AT) (Insolvency) No. 707 of 2019 (NCLAT Sept. 26, 2019).

⁵⁵ Comm. of Creditors of Bhushan Power & Steel Ltd. v. Tata Steel Ltd., Company Appeal (AT) (Insolvency) No. 1063 of 2019 (NCLAT Feb. 17, 2020).

⁵⁶ IBC.

⁵⁷ Bharatiya Sakshya Adhiniyam, 2023, https://www.indiacode.nic.in/bitstream/123456789/59406/1/the_bharatiya_sakshya_adhiniyam%2C_2023.pdf.

⁵⁸ Digital Personal Data Protection Act, 2023, § 7, <https://indiankanoon.org/doc/62814281/>.

governance must be done as per prescribed standards, with regards to data localization, procedures to be followed in case of data breach. This is crucial due to sensitive nature of financial data.

- *Regulatory Oversight:* The paper stresses on the need of regulatory oversight and exercise of expert judgement on use of AI-EWS models. The paper recommends that, firstly, a robust framework must be established for certification and validation of AI-EWS models, with set standards for model accuracy, fairness, regular audits and mandatory pilot projects. Secondly, the paper reiterates the need for a joint regulatory committee made from representations from stakeholders for better coordination and data sharing.
- *Stakeholder Engagement:* This paper highlights the crucial nature of stakeholder engagement before the implementation of AI-EWS, with development of capacity building programmes organised with Insolvency Professionals, Financial Institutions like banks, Adjudicating authorities, Educational Institutions and the like. This would be crucial to educate the stakeholders as to how to interpret the outputs and results given by the AI-EWS as well as its limitations. Secondly, regular channels need to be established for continuous stakeholder consultation to resolve grievances and gather feedback as to the functioning of the AI-EWS.
- *Pilot Implementation:* The next recommendation pertains to phased implementation of the AI-EWS. Acknowledging the size of the undertaking as well as the limitations of technology, it is imperative that the project goes through a phased implementation, primarily restricted to specific sectors and big corporates in the first phase. This will allow for redressal of issues that may arise before the AI-EWS is implemented nationwide. Additionally, the phased rollout must be accompanied by clearly defined metrics for evaluation of pilot projects, such as reduction in value erosion, reduction in time etc.
- *Ethical Safeguards:* The paper recommends upholding ethical safeguards as to transparency, grievance redressal and professional standards. The performance metrics of the AI-EWS must be shared with utmost transparency in accordance with applicable law, along with establishment of an efficient redressal mechanism for debtors to challenge their risk scores. Additionally, professional standards in regards to insolvency professionals and judiciary must be upheld when interacting with the AI-EWS.
- *International Collaboration:* The paper recommends adoption of best practices from international jurisdiction with modifications if required by the Indian landscape. Also, global standards, both in respect of financial systems and AI governance must be upheld to position India as an accountable AI power.

7 LIMITATIONS AND MITIGATION STRATEGIES

While the paper advocates for adoption of an AI-EWS, it also acknowledges the limitations of technology and procedural issues that may arise with it. To that extent, the paper suggests mitigation strategies which may eliminate the limitations to a great extent. These are:

- *Data Integration Challenges:* Forming one of the foremost challenges in establishing AI-EWS, is the character of legacy systems and outdated data formats for India's legal and financial data. The data is in fragmented format and exists in various data formats across various information hubs such as the MCA, GSTN, NeSL etc. This is a particular challenge as this data needs standardization before algorithms are trained on it. To mitigate this particular challenge, the paper recommends a phased rollout strategy, firstly using readily available data, and subsequently mandating data standardization for better unification of data silos existing across various authorities. These mandates must have clear timelines and specifications.
- *Stakeholder Resistance:* Forming one of the foremost challenges to implementation of AI-EWS, is resistance from stakeholders. Stakeholders like banks would be apprehensive due to privacy concerns and regulatory obligations, debtors would be apprehensive of stigma of risk scores, as well as apprehension from judges and insolvency professionals towards use of AI and technology. To mitigate this, the adoption may be incentivised by tangible benefits and implementation of capacity building programmes to increase awareness and familiarity to tech related aspects of AI-EWS. It must be communicated clearly that AI is being used to supplement, not supplant.
- *Regulatory Overlaps:* As highlighted earlier, the AI-EWS would function by coordination of multiple government agencies, which risks regulatory overlaps. This might result in confusion over the management, and result in conflicting guidelines and jurisdictional overlaps. To mitigate this, the authors recommend establishment of a joint regulatory committee (IBBI-RBI-SEBI-MCA), which can mandate clear protocols for data standardization, sharing, storage and protection. This will allow for a unified approach.
- *Ethical Risks (Bias, Fairness, Accountability):* As adoption of AI technology takes the front lead, it is imperative to acknowledge the ethical use of AI and implement necessary safeguards in use of AI models. AI models can suffer from biases on basis of their creation and data sets they are trained on, which can lead to discriminatory outcomes. This can be particularly damaging for vulnerable entities like MSMEs. To mitigate this, the authors recommend continuous audits of AI model for bias detection and development of transparent reporting mechanisms to explain the AI-EWS better. This will allow for better adoption of the AI-EWS.

- *Credit Access Risks:* There might be an apprehension among debtors that high risk scores might reduce their credit limits, stifling business ecosystem. This is also true when even though recovery is possible, still credit availing ability is restricted. To mitigate this, the authors recommend regulatory prohibition on misuse of EWS scores, mandating human review and comprehensive assessment. The EWS must facilitate revival of the corporate debtor, not be used for punitive measures against them.

8 CONCLUSION AND FUTURE OUTLOOK

As things presently stand, the Indian insolvency landscape has seen a turn for the better after the introduction of the IBC in 2016. However, with the advent of new technologies, a new era of insolvency is at the horizon, and with the introduction of AI-powered Early Warning System (AI-EWS) for its insolvency landscape, India can stand at the forefront. By using this, it can significantly convert a reactive framework to a pro-active one, which prevents value erosion and not only prevents the liquidation of the corporate debtor, but prevents the lengthy value-eroding CIRP altogether. The current approach, which enables the mechanisms after a lot of value has already eroded, results in delays, suboptimal outcomes, and doesn't leave much incentive for creditors to make their focus on the revival of the corporate debtor.

Taking lessons from advanced jurisdictions can greatly aid India's AI-powered Early Warning System (AI-EWS) and provide a solid foundation of principles to build it on. Lessons can be taken from jurisdictions such as EU, UK and France and modified to fit special needs of India's insolvency landscape. With the use of its own digital infrastructure which is seeing a boom currently, India can let go of traditional approach and approach the new age of insolvency.

However, as highlighted earlier, no technology comes without its own limitations, and the same must be said for this. There will be a plethora of challenges such as data integration, ethical use of AI, regulatory coordination and more. However, these can be addressed with the use of modern technologies and a proactive intent and management. It must be ensured that AI remains in an advisory role, its bias be limited to a minimum and data privacy principles are upheld. These will build trust in the system and encourage people to adopt it.

With a meticulously planned system, phased implementation, along with stakeholder consultation and grievance redressal, India can overcome the challenges it faces and make a system which can be an inspiration for countries in Asia, Africa and South America. This

will set a new global benchmark, with India being the harbinger of new age of technology-based insolvency landscape.

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CHAPTER 19

The Next Frontier of Insolvency: Private Equity, AIFs, and Transformation of India's Distressed Assets Market

AVIRAL JAIN* AND ADITI BANSAL**

The Indian Stressed Assets market has undergone prominent change in its landscape since the transformation of the legislative intent with the implementation of Insolvency and Bankruptcy Code, 2016 (IBC). Long gone are the days when only Asset Reconstruction Companies (ARCs) historically dominated the market for stressed assets and debts, with various other key market players emerging from the shadows including that of Private Credit Funds as well as Alternative Investment Funds (AIFs), backed by domestic as well as global financial giants. Prominent players such as Edelweiss, Kotak, BlackRock, Varde Partners, and Brookfield, who earlier had nothing to associate with this industry, have started emerging as key actors in acquiring and financing distressed assets through various innovative structures that blend debt, equity, and securitization.

This paper aims to critically examine the expanding role of sophisticated investors in the resolution ecosystem, following their influence as highlighted in the recent landmark transactions, including that of Dewan Housing Finance Corporation Ltd, Videocon Industries, Reliance Infratel, and Srei Infrastructure Finance. These transactions bring forward the growing appetite of alternative capital pools to invest in stressed assets, bringing much needed liquidity and operational expertise to distressed companies. However, this growing trend also brings forward the inherent regulatory and policy gaps existing in the current regime. One of the prominent gaps including that of eligibility of AIFs and Private Credit Funds which remains challenged under the ambit of Section 29A, and that the regulatory oversight of the IBBI, RBI and SEBI over the acts of such players, gives rise to significant uncertainty amongst these market participants. Additionally, valuation disputes, potential conflict of interests, and misalignment between investors return expectations and equitable creditor recoveries raise important concerns over the fairness and transparency over the whole process.

Analyzing the same through comparative studies with foreign jurisdictions, including that of US and UK, wherein the private credit funds and AIFs have long played an integral role in the distressed assets market,

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this paper would further aim to argue as to how India needs to evolve further to incorporate this shifting landscape into its regime. The analysis would aim to provide the necessity of clear eligibility norms, harmonized disclosure obligations, and creation of a regulatory sandbox to test innovative resolution strategies that can responsibly integrate sophisticated investors into India's insolvency regime.

This paper would aim to highlight both the opportunities AIFs and Private Credit Funds present along with the inherent challenges posed by them, and the need to bring about reforms to enable IBC to fully realize its potential as a dynamic and inclusive platform for resolving financial distress in India's increasingly complex credit markets.

Keywords: Insolvency, Stressed Asset Resolution, Alternative Investment Funds, Private Credit Funds

1 INTRODUCTION

The Indian Stressed Assets Market, being one of the largest across the world, standing at an unprecedented USD 150 Billion¹, has been poised as one of the sectors with insurmountable growth and expansion. Since implementation of Insolvency and Bankruptcy Code, 2016², the Indian regime has been provided with a structured regulatory mechanism aiming to provide specifically for stressed assets and insolvent organizations, providing for a comprehensive way of resolution to protect the quality of assets and conserve the future of the organization. However, IBC, along with it, has also brought about a shift in the market participation and it has been for the good.

Before the implementation of IBC, the regulatory framework which largely governed the insolvency and liquidation regimes, failed to provide a set of guidelines required to be followed and that no set regulatory framework was set. And in the midst of all this, Asset Reconstruction Companies (ARCs) benefitted the most. While the companies tried to navigate the unstructured process of insolvency and liquidation, the ARCs would much rather step-in to buy distressed assets/NPAs in peanuts and benefit out of the whole process. Even though, after the implementation of IBC, it was ARCs who initially came out in the forefront as the lone survivor in the distressed assets market, with growing structural process and enhancement in the way of resolution of distressed assets, the market is witnessing new market participants entering this field with an aim of acquiring distressed assets, and these are none other than the Private Equity Funds, and Alternative Investment Funds.

With the primary focus of restructuring of distressed assets, and saving the assets quality being one of the foremost and fundamental aim of the legislation, the increased market participation from such funds would prove to be uniquely and inherently important and for

¹ Anchal Jindal & Vaibhav Gupta, *Stressed Assets Resolution in India: Present and Future*, IBC LAWS (May 22, 2020), <https://ibclaw.in/stressed-assets-resolution-in-india-present-and-future-by-cs-anchal-jindal-adv-vaibhav-gupta/>.

² The Insolvency and Bankruptcy Code, 2016.

the growth of market altogether. The shift in landscape, owing to increase in the distressed asset market and the better quality of assets being classified as distressed, have led to increased participants flocking the market with these credit and equity funds leading the race with deep pockets and willingness to acquire what the market has best to offer. However, this increased willingness of these funds to participate presents itself with various unanswered questions that pose a big challenge in the regulatory regime as well as the procedural aspect of the same.

This paper would undertake to answer the very main question which looms in the industry with the participation from these funds, which is that as to what extent can Alternative Investment Funds (AIFs) and Private Credit Funds be effectively and fairly integrated into India's insolvency resolution regime under the IBC, given the current legal, regulatory, and market constraints. In furtherance of which, the paper would also aim to answer as to what role these funds play in the resolution of major distressed assets under the IBC regime and as to how Section 29A of the Code could potentially create barriers for these funds to act as a resolution applicant. Along with that, the paper would also aim to answer as to how the other regulatory institutions, such as SEBI and RBI, would govern these sophisticated investors aiming to venture into the distressed assets market and if any overlap or gaps exists in their governance over these funds. Further, this paper aims to draw upon a comparative study from the like jurisdictions of the US and the UK and as to how the distressed assets markets have been captured majorly by these funds.

Hence, through this, this paper would aim to answer all these questions that surround the participation of these funds into the distressed assets markets and how the market forces actually interact with these participants and as to how the legislative and secretarial compliances play over the allow them to further into the market.

2 CHANGING LANDSCAPE OF THE STRESSED ASSET RESOLUTION IN INDIA

The Indian asset market has ever expanded with various policies and incentives targeted at maximising the utilization capacity of the assets market in India and that viable push to the industries is provided to capitalize on the same. However, with the increased push for asset capitalization, this aspect of Indian market attaches yet another flawed procedure with it. With lack of entrepreneurial skillset and that lack of various infrastructural support and logistical support, various business entities are facing insolvency or bankruptcy owing to such lack of facilities and the failure to bank on the available resources. This has led to inevitable increase in the distress of the assets and failure to optimize the same at the fullest.

An Economic Survey shed some light on the twin balance sheet problem of rising indebtedness of the Indian firms along with rising non-performing loans in the Indian banking

system during 2015-16.³ It drew the attention towards the rising distress in the asset quality of the business entities in the Indian jurisdiction and the lack of the legislative intent towards working towards or maintaining the same.

With the implementation of the IBC, 2016, it was aimed that the said issue will be legally and impactfully tackled with the help of the set rules and procedure and with professionals specializing in the same field to provide for ease and better utilization of the regulation put in place. The Code aimed at revitalizing the staggering debt market in India reeling under the enormous pressure of NPAs, bad debts, and banking frauds.⁴ Over the years, the impugned legislation gained support from all the market participants and that it has provided to rescue the looming debt spiral in the Indian Inc, providing for the assets quality to improve and NPAs to fall, and overall increase the health of the market.

It has been observed, over the time, that the Code has opened and paved the way for investors looking for business expansion through a process which is time-bound, information intensive and ends with a plan that is binding on all stakeholders. With the regulation coming into force and ensuring progress in the resolution process of NPAs, there has been a rise in genuine interests amongst the investors in the distressed assets investment markets with their inherent 'buy low-sell high' potential. Businesses have been on a hunt since 2016 for buying good underlying assets with potential for a turnaround at a reasonable valuation.⁵

However, apart from the shift in the trends of provisioning to save the asset quality, the market participation has also seen a shift in the trends. Along with the ARCs, the oldest participants in the market of distressed assets, various business units have also started venturing into this field and the new entrants to the market include the PE Funds and AIFs, who have shined as the saviours in the recent circumstances, approaching the market with deep-filled pockets and with the aim of acquiring control over the distressed assets of the target company and saving them from going insolvent or bankrupt with an actual clean slate as an ancillary objective achieved in the process, providing for the most optimized way of acquiring control and managing the target company.

With the increase in establishment of specialized AIFs operating in the field of insolvent and distressed assets markets with specialization in identifying, targeting, acquiring, and operating the distressed assets, the AIFs are targeting the market to optimize and capitalize on the distressed assets and NPAs with turnaround potential promising higher returns

³ Chairperson, IBBI, *IBC: Developing a Market for Distressed Assets*, IBBI, <https://ibbi.gov.in/uploads/resources/b7d255fa23b6d70f3dda575e9ec0dfae.pdf>.

⁴ SAM, *Distressed Asset Opportunities in India*, SAM, <https://www.amsshardul.com/wp-content/uploads/2019/09/Reports-IBC-Distressed-Asset-Opportunities-in-India-July2019.pdf>.

⁵ Chairperson, IBBI, *IBC: Developing a Market for Distressed Assets*, IBBI, <https://ibbi.gov.in/uploads/resources/b7d255fa23b6d70f3dda575e9ec0dfae.pdf>.

multiplying the investments. On a similar footing and with the same aims and objectives, the PE Funds are also expanding in the impugned market.

Hence, it can be easily deduced that the landscape of the distressed markets is rapidly changing with the new market entrants and hence, there is nothing wrong in stating that it is changing. The only question which looms is that if it is changing for the good or for bad.

3 STRUCTURING DISTRESSED ASSETS: THE FUNDS' WAY

There has been recent news of acquisitions such as that of debt-ridden Hotel Leelaventure by Brookfield. One thing common amongst all these strategic acquisition or procurements of the management by these entities is that the acquiring entities are all either PE Firms or AIFs gaining control over the business units that are strategically failing or have been found to be indebted, and are approaching IBC for a resolution.

As has been repeatedly highlighted that the PE Funds and AIFs, amongst the other participants, are increasingly venturing into the distressed assets markets, it is important to understand as to how these funds are actually aiming and acquiring these assets and are achieving the aim they set out with.

The PE Funds, majorly foreign entities have started venturing into the Indian distressed assets markets for it is something that has provided with vast options and variety to these entities. These fund houses, those who participate actively in the distressed assets markets, are more interested in acquiring controlling stake in companies undergoing insolvency and that these opportunities seem conducive for cherry picking their targets as they acquire the entire company/assets at throwaway prices similar to a shopper splurging on one of those 'shopping carnivals' with discounts.⁶

These PE Firms like picking controlling stake into and pave their way for an exit rather than depend on the promoters.⁷ Further, PE Firms also come to aid to ailing firms suffering through CIRP and give a hope of revival through picking up sizable equity stake and earn returns after it comes to a position wherein it can stand itself.⁸ These organizations provide requisite monetary support to distressed assets and aim for revival which in turn benefits the ailing company as well as the economy at large.

Further, after the Covid pandemic, emergence of PE Funds specifically focused on stressed and battered assets primarily aiming to make strategic investments and revival of distressed assets, have led the market for they have structured and fully functional team

⁶ Ashish Parwani, *Key Factors That Should Guide PE Funds While Investing in Companies Through IBC Route*, INC42 (Feb. 21, 2021), <https://inc42.com/resources/key-factors-that-should-guide-pe-funds-while-investing-in-companies-through-ibc-route/>.

⁷ *Id.*

⁸ *Id.*

specializing in these kinds of investments and that they make such strategic moves keeping in mind the overall market conditions which helps the company benefit out of such investments and give a leeway for revival.⁹

Further, the foreign PE Firms are also finding it attractive to infuse capital into India and target companies undergoing resolution process and obtaining control over them through acquiring the distressed assets and providing financial and infrastructural support to revive them and reap benefits out of such strategic acquisitions. These foreign entities bring in valuable expertise in asset restructuring and turnaround management, strengthening India's financial capabilities. The participation boosts market confidence and signals faith in India's economic prospects and regulatory framework which further attracts investments.¹⁰ On the other hand foreign funds are also drawn towards the Indian markets owing to potential of high returns driven by valuation gaps and diverse investment avenues available with them. This strategic entry into India's expanding financial sector allows for a long-term presence, bolstered by a regulatory framework offering clarity and transparency.¹¹ These foreign investments contribute largely towards the job preservation, economic expansion, and a more resilient financial sector, through fostering a more mature and sophisticated financial ecosystem and promoting best international practices, ultimately driving long-term growth and stability.

Hence, it can be easily deduced that these Fund houses are more drawn towards this market with the aim of strategically acquiring the companies facing distress and have non-performing assets over its books of accounts and that these funds acquire the same with the target of refinancing them and disposing them off later after acquiring a sizable chunk of profits on the initial investments made by them. Hence, the specialized PE Funds, using the strategic acquisition and later exiting the position strategically is the methodology adopted by them to make profits and it's a long-term game that they lock into.

Apart from these organizations, another type of business that has recently made a name into the impugned market is that of Alternative Investment Funds (AIFs). It is pertinent to note that AIFs are divided into three categories of funds based on the activities they undertake and as under the Category I of AIFs, a separate type of fund has been identified, termed as Special Situations Funds (SSFs). These SSFs are essentially investment funds that focus on the distressed assets, turnaround opportunities, and event driven investments.¹² They

⁹ *Id.*

¹⁰ Dhananjay Jain, *Opening India's Stressed Assets Market: A Necessary Catalyst?*, MONEY CONTROL OPINION (Apr. 4, 2025), <https://www.moneycontrol.com/news/opinion/opening-india-s-stressed-asset-market-a-necessary-catalyst-12984569.html>.

¹¹ *Id.*

¹² Perna Jain & Paras Pradhan, *Regulatory Framework of Special Situation Funds in India* (May 21, 2025), <https://ibclaw.in/regulatory-framework-of-special-situation-funds-in-india-by-perna-jain-and-adv-paras-pradhan/>.

play an important role in restructuring financially troubled companies and were brought into existence by the SEBI as a part of the AIFs for capitalizing on the unique, non-recurring opportunities to typically invest in the companies facing financial or operational challenges but have a potential of recovery and growth.¹³

Since being heavily regulated by the SEBI, the AIFs have a special permissible area wherein they can enter into financially and invest into the market. Even for SSFs, they have a permissible investment area, as approved by the SEBI, to invest into and have certain minimum threshold which are required to be adhered to.¹⁴ There are also conditions laid down by SEBI which provides that these AIFs are supposed to operate only in the distressed assets markets and are not allowed to obtain funds for any other purpose. Along with that, the SEBI also reserves the power to set the limit of investments and further thresholds with regards to the investments into the fund.¹⁵

There are various roles that these SSFs play into the market, for they facilitate the corporate turnarounds, enhance the market liquidity and debt resolution, support M&A and PE transactions and encourage FDI and global capital inflow.¹⁶ The SSFs focus on event-driven strategies, for they have an opportunistic approach to seek undervalued assets or distressed securities, aiming for high returns by investing at a discount and profiteering from recovery or restructuring.¹⁷ Since, it takes time to unfold the actual opportunities, SSFs are more long-term focused. Along with that, since these funds operate similar to that of Hedge Funds and PE Firms, particularly in their focus on turnaround strategies and value extraction, many SSFs engage in active management, working closely with the company's management to influence restructuring decision or operational improvements.¹⁸

Hence, it can be easily deduced that the introduction of SSFs as an AIF into the distressed assets markets, have allowed infrastructural investors, including foreign entity to participate in the impugned market, and that in the recent times, there is no doubt as to how SSFs are playing an increasingly crucial role in India's evolving distressed asset market.

Further, it is important to highlight the fact that, post Covid pandemic, the distressed assets market has witnessed a paradigm shift into the market participants, and how it has shifted into the likings of PE Funds and AIFs, who have emerged as the proud market leader in the distressed assets market and as to how they are controlling the flow of the

¹³ *Id.*

¹⁴ Stratage Law Partners, *Special Situations Alternative Funds*, STRATAGE LAW PARTNERS (Jan. 27, 2022), <https://www.stratage.in/special-situations-alternative-investment-funds-2/>.

¹⁵ *Id.*

¹⁶ Prerna Jain & Paras Pradhan, *Regulatory Framework of Special Situation Funds in India* (May 21, 2025), <https://ibclaw.in/regulatory-framework-of-special-situation-funds-in-india-by-prerna-jain-and-adv-paras-pradhan/>.

¹⁷ *Id.*

¹⁸ *Id.*

same, for they have started actively acquiring NPAs with huge potential and started banking on them for reaping profits out of such positions.

4 REGULATORY AND LEGAL IMPLICATIONS

The regulatory regime governing the resolution process of insolvent and bankrupt companies has so far developed a proper structural flow of whole process and have provided a substantial and comprehensive solution to the insolvent and distressed companies to resolve their debts and provide them a fresh start. The Code has imbibed all these aspects into the procedural compliances to give this into effect.

However, the Code has also mandated some aspects to be checked off by the entities before allowing them to properly acquire the distressed companies and give them a platform for turnaround. Section 29A of the Code provides for persons not eligible to be resolution applicants and that this section has elaborated and laid down proper aspects that need to be adhered to before becoming a successful resolution applicant. The section provides that a person is barred from being a resolution applicant if they have guaranteed the debt of any firm under the insolvency or liquidation under any jurisdiction and also have barred any entity who is also an undischarged insolvent in any jurisdiction. This bars out PE Firms and AIFs who have lent any guarantee to the insolvent company and this is essentially aimed at disqualifying most global PE Funds, especially those specializing in acquiring and financing troubled assets from submitting a resolution plan under the Code.¹⁹

Along with this, they have also restricted related party from being qualified as successful resolution applicant, and over the years, one thing that has become crystal clear is that there is no set definition of a related party and that this may preclude any fund who is even remotely attached to any promoter or a director leading to them being qualified as a related party. This also provides for a very ambiguous and wide interpretation of the related party and further a disqualification of any fund failing to establish no connection.²⁰

Hence, it can be easily deduced that this impugned section makes it difficult for the PE Funds and AIFs to demarcate themselves as not a related party and that, even though it is highlighted to provide for a proper safeguard against flawed applications, it makes the process redundant for the funds specializing in distressed assets markets might find themselves in a deadlock for not being able to qualify as a resolution applicant. This clause provides for

¹⁹ Jayshree P Upadhyay & Deborshi Chaki, *IBC Ordinance May Disqualify Global Private Equity Funds*, MINT (Nov. 30, 2017), <https://www.livemint.com/Industry/33T3lCHzQ1YM3neIq4bsyJ/IBC-ordinance-may-disqualify-global-private-equity-funds.html>.

²⁰ *Id.*

these funds to master themselves in proper corporate structures and that structure themselves in such a way to avoid failing as a resolution applicant.

Beyond the Insolvency and Bankruptcy Code, there are various other regulations that play a vital role in this specific aspect and needs to be adhered to so as to avoid any overlapping of the laws and proper implementation of the procedure. RBI plays a key role in the current circumstances, for they provide for comprehensive guidelines and procedural compliances to be achieved by the entities that are bringing about foreign capital into India, especially foreign PE Funds and AIFs. The Foreign Direct Investment in India is heavily regulated and that all the compliances as laid down by RBI are required to be strictly followed. Along with that, RBI over time has also released various guidelines targeting the ARCs and SSFs to enhance the regulatory regime over such entities along with making provision for these entities to operate and not escape or subsume any legislative procedure as laid down. Hence, all the PE Firms and AIFs have to keep in mind the regulations placed by RBI in their respective industries as well as for any inflow of foreign fund as capital into India, increasing a check on such investments, along with the IBC.

Further, SEBI aims to govern the AIFs and has over time laid down various regulations and guidelines which governs the AIFs. Since SSF is essentially an AIF and have been structured in such a form to qualify as one, it is necessary for it to also adhere to such guidelines as laid down governing them and hence forms another road-block in the acquisition of distressed assets by the AIFs specializing in it. Hence, it can be stated that the AIFs face a huge challenge of regulatory compliance in acquisition of distressed assets.

Hence, it can be easily deduced that due to multiplicity of the laws and regulations governing these specific organizations, the specific industry poses a wide-spread challenge for the funds to actively acquire the distressed assets and rework on them to reap benefits and profits out of them. However, it is also essential to note that this sector is heavily regulated owing to the strategic importance of such regulations for they aim to govern the entities dealing in the distressed assets, which forms essential to the core of the economy.

Hence, even though it is a divided opinion of the market participants over the multiplicity of the regulations governing them, it cannot be further argued that the regulations are indeed in place and it is a necessity to comply with all of them, in order to legally function and process and to achieve the outcome set out.

5 THE GLOBAL COMPARATIVE ANALYSIS

The PE Funds and AIFs getting involved in the distressed assets market is something that is not only visible in India, but has become a world-wide trend for these entities are finding

a very enriching and profitable domain in the distressed assets market and are aiming to reap the last bit of benefit from all these entities.

PE Funds and Hedge Funds have emerged as key players in the U.S. distressed assets markets, particularly under the Chapter 11 proceedings, wherein their strategic involvement has shaped restructuring outcomes and market behaviour. Almost 90% of the large Chapter 11 filings between 1997 and 2007 indicated involvement of Hedge Funds somehow, reflecting their dominance in the impugned market. This data includes approximately half of all distressed debt trading, one-third of leveraged loan trading, and one-quarter of high-yield bond trading during that period, demonstrating a wide-spread market integration.²¹ Their influence stems not only from financial clout but also from tactical positioning within the capital structure, often acquiring unsecured debt, which serves as the “fulcrum security,” allowing them to steer the reorganization process toward favourable equity positions.²² The strategy is frequently operationalized through the “loan-to-own” model, where hedge funds acquire debt with the express goal of converting it into controlling equity post-restructuring. In Northwestern Corporation’s Chapter 11 case, hedge funds like Oaktree and Avenue Capital used this strategy to convert senior unsecured notes into 92% equity in the restructured firm, achieving a recovery rate of nearly 90%.²³

Empirical evidence supports the argument that such funds can promote efficiency in bankruptcies: their presence correlates with greater likelihood of emergence from Chapter 11, improved recoveries for junior creditors, and more favourable outcomes for equity holders. These gains often result from hedge fund-driven initiatives such as CEO turnover, adoption of Key Employee Retention Plans (KERPs), and the breaking of exclusivity rights in plan filing.²⁴

Recovery trends also show relatively favourable performance in U.S. restructurings, with recovery rates on defaulted corporate bonds in Chapter 11 cases often exceeding those seen in sovereign or international proceedings, further affirming the role of structured private capital in efficient resolution.²⁵

On the other hand, in the UK, private equity firms and alternative investment funds (AIFs), including hedge funds, are central players in the distressed assets landscape, particularly through their participation in pre-pack administrations. A pre-pack occurs when the

²¹ Wei Jiang, Kai Li & Wei Wang, *Hedge Funds and Chapter 11*, COLUMBIA BUSINESS SCHOOL, https://business.columbia.edu/sites/default/files-efs/pubfiles/4130/Hedge_funds_ch_11.pdf.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Manmohan Singh, *Recovery Rates from Distressed Debt: Empirical Evidence from Chapter 11 Filings, International Litigation, and Recent Sovereign Debt Restructurings* (IMF Working Papers, Aug. 1, 2003), <https://www.imf.org/en/Publications/WP/Issues/2016/12/30/Recovery-Rates-From-Distressed-Debt-Empirical-Evidence-From-Chapter-11-Filings-International-16487>.

sale of a distressed company's assets is negotiated prior to its entry into administration and effected immediately upon appointment of administrators, often facilitating swift business rescue while preserving value.²⁶ Since the 2000s, this mechanism has grown increasingly common, specifically for the SMEs restructuring, with private capital playing a key role.

To address transparency concerns, the UK introduced regulations in 2021 requiring that transactions to connected parties (which may include funds or private equity buyers already engaged with the distressed firm) must be approved by creditors or accompanied by an independent “evaluator” report confirming the reasonableness of the deal. These reforms aim to bolster stakeholder confidence while ensuring the continued viability of pre-packs as rescue instruments.²⁷

Recent data shows a dramatic increase in pre-pack usage, from 201 cases in 2021 to 628 in 2024, a 212% rise. Sales to connected parties have also surged, from 106 in 2021 to 395 in 2024, underlining the growing role of fund-backed buyers in such deals. In this environment, AIFs and private credit vehicles serve as critical sources of capital and continuity, stepping in promptly to acquire and stabilize distressed businesses, even though within an evolving framework designed to ensure accountability and fairness.²⁸

Hence, it can be easily deduced that PE Funds and AIFs have long played a key role in the developed markets of the distressed assets, including that of the UK and the US, and one thing that can be deduced is that these entities play a key role, regardless of the jurisdiction, for they are someone with good capital available to be infused quickly and the strategic expertise in their professionals who are well trained in operationalizing such structures. Hence, it is easy to deduce that these entities play a key role in the distressed assets markets and that it is about time that the Indian markets also opt for providing a key role to these entities to acquire and strategically place companies under the governance of the professionals who have the required expertise to reap benefits out of such assets by providing them a turnaround.

6 CONCLUSION AND THE WAY FORWARD

The Indian distressed assets markets stand at crossroads. The emergence of AIFs and PE Funds plays a dominant role in the market, signalling towards a structural transformation as

²⁶ Jacqueline Ingram & Damilola Odetola, *United Kingdom: Core Elements of a Pre-Pack Administration*, GRR (Mar. 4, 2022), <https://globalrestructuringreview.com/guide/the-art-of-the-pre-pack-archived/edition-2/article/united-kingdom-core-elements-of-pre-pack-administration>.

²⁷ Richard Tett, Adam Jones & Yoonji Lee, *UK Regulations on Pre-Pack Administrations Come into Force* (May 3, 2021), <https://transactions.freshfields.com/post/102gwuk/uk-regulations-on-pre-pack-administrations-come-into-force>.

²⁸ Jo Milner & David Buchler, *July 2025 Newsletter: UK Connected Party Pre-Packs Soar*, BUCHLER PHILLIPS (July 16, 2025), <https://www.buchlerphillips.com/july-2025-newsletter-uk-connected-party-pre-packs-soar/>.

to how the insolvency resolution is approached in India. These sophisticated investors have brought about much needed capital infusion along with operational turnaround expertise in the global best practices in the distressed assets restructuring, as evident from the cases like DHFL, Srei Infra, and Reliance Infratel.

However, the regulatory framework governing their participation, particularly under the IBC, remains as a significant roadblock. The current interpretation of the related party and disqualification criteria, while rooted in safeguarding the resolution process, inadvertently, excludes the entities that could otherwise bring about an efficient and meaningful restructuring. The lack of nuanced eligibility framework leaves too much ambiguity and restricts the competition.

In order to ensure that the Indian markets can harness the capabilities of these funds, a few regulatory reforms are necessary to be incorporated, which includes provision for clarity to be provided on Section 29A and removal of any ambiguity placed on the restriction of participation of Funds specializing in acquiring insolvent companies and distressed assets. Further, regulatory harmonization is essential to be done in order to avoid any duplicity of laws and overlapping of jurisdictions. Further, an enablement of regulatory sandbox has formed as a necessity for distressed assets transaction and management along with institutionalization of the role the SSFs play. Along with this, a need is felt for establishment and maintenance of a proper platform for distressed assets, in furtherance of Ease of Doing Business and proper exchange of information, enhancing the focus of the market participants.

In sum, India must now recognize that to fully unlock the value of the distressed assets market, regulatory reform must evolve. While safeguarding the sanctity of the resolution process remains priority, fostering an inclusive regime where capital and competence are welcomed will ensure that the IBC achieves its vision and not just as a mechanism of recovery, but as a platform for economic rejuvenation. The successful models of the U.S. and the U.K. provide vital templates and it is time for India to adapt them to its unique context.

CHAPTER 20

The Creditor Conundrum: An Analysis of the Treatment of Dissenting Creditors during Insolvency Proceedings of Financial Institutions in India

KARMANNYA SINGH RAIZADA* AND AYAN VERMA**

This research paper explores the Indian legal framework including Insolvency and Bankruptcy Code (IBC) 2016, Companies Act 2013, Reserve Bank of India (RBI) Act, and associated regulations governing treatment of dissenting creditors in financial institution insolvencies. It highlights the critical distinctions in treatment between key creditor classes like financial vs. operational, secured vs. unsecured and across different types of companies including those limited by shares vs. those limited by guarantee.

The paper analyses the regulatory frameworks covering four categories of financial institutions, viz., Non-Banking Financial Companies (NBFCs), Fintech Entities, Public Financial Institutions, and Statutory Financial Institutions. NBFCs are governed under the ambit of RBI's regulations and fall under the Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019 (FSP Rules), with insolvency initiated solely by the regulators. Fintech entities, lacking dedicated legislation, are subject to RBI's scale-based regulatory framework, with their digital asset structures posing unique challenges. Public and statutory financial institutions, such as SIDBI, are primarily governed by institution-specific statutes, though IBC provisions may apply during debt restructuring.

Furthermore, the paper delves into judicial contradictions concerning dissenting creditors, particularly the unresolved tension between allowing secured creditors to enforce security interests and prioritizing proportional recoveries. Judicial interpretation in cases like Jaypee Kensington Boulevard v. NBCC and India Resurgence ARC Private Limited v. Amit Metaliks Limited illustrates these ambiguities, with the pending DBS Bank v. Ruchi Soya Industries Ltd. case poised to clarify whether dissenting creditors can claim security value. Lastly, the paper draws a comparative analysis with best international practices, referenced to highlight lacunas.

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Key regulatory gaps identified include asymmetric protections for operational creditors, inconsistent security rights, institutional fragmentation for fintechs, and limitations in cross-class cramdown tools. The paper concludes by advocating for reforms that integrate security value assessments into Section 30(2)(b) of the IBC, enhance operational creditor representation in the Committee of Creditors (CoC), and align FSP Rules with global best practices to foster a more equitable and efficient insolvency ecosystem in India.

Keywords: Insolvency and Bankruptcy Code, Dissenting Creditors, Financial Institutions

1 INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (IBC)¹ has radically reformed India's insolvency regime by centring creditor rights and ensuring time-bound resolution of defaults.² While the IBC treats most corporate debtors uniformly, financial institutions occupy a special place as they are regulated entities whose failures can threaten systemic stability. When a financial institution undergoes insolvency, its creditors, which are classified variously as financial, operational, secured, or unsecured, often face a complex interplay of statutory rights. Of particular concern are dissenting creditors, i.e., those who do not agree with a proposed resolution plan. The Code's requirement that a majority of the Committee of Creditors (CoC) must approve any plan, usually 66% by value, means that minority creditors can be effectively "crammed down" by the majority plan.

This raises fundamental issues vis-a-vis

- (i) How must dissenting creditors be treated under law?
- (ii) What entitlements do they have if a plan is approved?
- (iii) How does this vary by creditor type and by type of institution?

This paper explores these questions in depth. It surveys the statutory landscape of IBC's definitions of creditors and its provisions on resolution, particularly Section 30(2)(b)³ and the liquidation waterfall in Section 53,⁴ as well as any sector-specific adaptations. It then examines judicial interpretations, especially recent cases affecting dissenting financial creditors and secured creditor rights. It also undertakes a cross jurisdictional comparison and identifies the practical challenges, such as asymmetric protection of operational creditors or ambiguities in security rights, that appear under the current legal regime. Finally, based on this international analysis, it suggests reforms and best practices that could better balance creditor protection and the Code's goal of maximizing value for all stakeholders.

¹ The Insolvency and Bankruptcy Code, 2016.

² CMS IndusLaw, *Swiss Ribbons and Its Implications – The Supreme Court on the Constitutionality and Key Provisions of the Insolvency & Bankruptcy Code*, MONDAQ (Feb. 12, 2019), <https://www.mondaq.com/india/insolvencybankruptcy/781154/swiss-ribbons-and-its-implications-the-supreme-court-on-the-constitutionality-and-key-provisions-of-the-insolvency-bankruptcy-code>.

³ The Insolvency and Bankruptcy Code, 2016, § 30(2)(b).

⁴ *Id.* § 53.

2 ISSUES RAISED

Insolvency of financial-sector debtors raises multiple interlinked issues:

- A. *Creditor classification and voting rights*: The IBC classifies financial creditors (FCs) and operational creditors (OCs) differently.⁵ Only financial creditors like banks, NBFCs, bondholders, etc. sit on the CoC and vote on plans, whereas operational creditors, like suppliers, vendors, tax authorities, etc. have limited rights. How this difference affects dissent is a key concern.⁶
- B. *Secured vs. unsecured status*: Secured creditors can enforce collateral under Sections 52⁷ and 53⁸ of the Code, while unsecured creditors cannot. During CIRP, the moratorium prevents enforcement, however, after liquidation, secured creditors may choose either to relinquish security to the estate or to realize it outside the estate.⁹ This, however, begs the question as to how a dissenting secured creditor should be treated if a plan purports to extinguish its security.
- C. *Minimum payment guarantees*: Section 30(2)(b)(ii) was amended in August 2019¹¹ to guarantee dissenting financial creditors at least the value they would receive under liquidation as per section 53.¹² This “*liquidation value*” protection is fraught with issues, i.e., should it be measured on a collective or per-creditor basis, and, what if the creditor enforces security outside of liquidation?
- D. *Financial vs. operational creditor priorities*: Historically, operational creditors often fared poorly under insolvency laws. The IBC initially gave operational creditors a limited guarantee, at least the higher of 15% of liquidation value or liquidation share, but the Supreme Court clarified that financial creditors have no similar statutory minimum beyond what their security yields.¹³ This asymmetry between Operational Creditors and Financial Creditors has been highly controversial.
- E. *Financial institutions (FIs)*: Different categories of financial institutions have different legal natures. Banks are typically regulated by the RBI and use special resolution tools,

⁵ *Id.* § 30(2)(b).

⁶ Katyayni Singh & Arijit Mishra, *From Right to Dissent to Success of the Resolution Process: Reinforcing Cramdown with Fairness and Equitability* (Apr. 11, 2025), <https://rmlnlulawreview.com/2025/04/11/from-right-to-dissent-to-success-of-the-resolution-process-reinforcing-cramdown-with-fairness-and-equitability/>.

⁷ The Insolvency and Bankruptcy Code, 2016, § 52.

⁸ *Id.* § 53.

⁹ Trilegal, *Treatment of Secured Creditors During CIRP*, LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=eea13235-68a9-4519-9cf6-fa14c7e1343c> (last visited July 20, 2025).

¹⁰ *India Resurgence ARC Private Limited v. Amit Metaliks Limited*, 2021 SCC OnLine SC 409.

¹¹ The Insolvency and Bankruptcy Code (Amendment) Act, 2019, § 6.

¹² Bharucha & Partners, *Protection of Dissenting Financial Creditors on Insolvency*, LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=987189cd-6c80-48d7-8284-bb62f2200341> (last visited July 21, 2025).

¹³ *Jaypee Kensington Boulevard Apartments Welfare Ass’n v. NBCC (India) Ltd.*, (2022) 1 SCC 401.

whereas NBFCs (Non-Banking Financial Companies), Fintech Lenders, Public Financial Institutions, like IFCI and SIDBI, and Statutory Financial Institutions, like EXIM Bank and NABARD, may be corporate debtors under IBC or subject to tailored rules. The question arises as to how these distinctions affect the rights of dissenting creditors.

These issues create a conundrum for dissenting creditors in financial-institution insolvency. The rest of this paper analyses each facet, drawing on legislation, regulations, case law, and comparative practices to fully flesh out the challenges and practical solutions.

3 STATUTORY ANALYSIS

3.1 Types of Creditors

The IBC's definition of "creditor" is extremely broad as it includes financial creditors, operational creditors, secured creditors, unsecured creditors, and decree-holders.¹⁴ In practice, the key categories are:

- A. *Financial Creditors (FCs)*: Those Creditors to whom a "financial debt"¹⁵ is owed (e.g. loans, bonds, deposits, guarantees).¹⁶ Banks, NBFCs, PFIs and other lenders typically fall here. All FCs of the debtor constitute the Committee of Creditors (CoC) and exclusively vote on plans.¹⁷
- B. *Operational Creditors (OCs)*: Entities owed for goods/services provided, like, trade creditors, or for other statutory dues, i.e., "Operational Debt"¹⁸ fall under the definition of OCs.¹⁹ OCs are not members of the CoC. They have limited participatory rights including the right of being paid or having their interests provided for in the plan, but they cannot block a plan by voting against it.^{20,21}
- C. *Secured vs Unsecured Creditors*: A secured creditor has a security interest, like a mortgage, pledge or charge,²² over a debtor's asset.²³ The Code recognises secured creditors may

¹⁴ The Insolvency and Bankruptcy Code, 2016, § 3(10).

¹⁵ *Id.* § 5(8).

¹⁶ *Id.* § 5(7).

¹⁷ *Id.* § 21.

¹⁸ *Id.* § 5(21).

¹⁹ *Id.* § 5(20).

²⁰ Swarnendu Chatterjee, Hussanpreet Kaur Dhaliwal & Shivani Kumar, *Fair and Equitable Distribution Clauses in Resolution Plans – Is Section 30(2)(B) of Insolvency and Bankruptcy Code, 2016 Being Illusory for Operational Creditors*, 2022 SCC OnLine Blog Exp 52.

²¹ Vidushi Puri, *Distinction in Treatment of Financial Creditors vs. Operational Creditors*, IBC LAWS (Jan. 9, 2023), <https://ibclaw.in/distinction-in-treatment-of-financial-creditors-vs-operational-creditors-by-vidushi-puri/?print-posts=print&print=pdf>.

²² The Insolvency and Bankruptcy Code, 2016, § 3(31).

²³ *Id.* § 3(30).

enforce or relinquish collateral.²⁴ An unsecured creditor has no collateral. Operational creditors are typically unsecured, but financial debt can also be unsecured, e.g. unsecured bonds.

- D. *Companies limited by shares vs. guarantee*: This corporate form affects capital structure. A company limited by shares has equity share capital, whereas a company limited by guarantee has members who promise to contribute a nominal amount upon winding up. In insolvency, a guarantee company has no equity shareholders to absorb losses, so all surplus goes to creditors. However, the IBC treats both forms similarly, both types of creditors are defined irrespective of company form,²⁵ and the usual voting thresholds of 66% of financial creditor value for plan approval shall apply.²⁶ The practical difference is only that a guarantee company usually has no equity. The Code's waterfall in liquidation simply flows through to creditors with no equity distribution step.²⁷

4 TYPES OF FINANCIAL INSTITUTIONS

- A. *NBFCs (Non-Banking Financial Companies)*: Under RBI regulation, NBFCs (including housing finance companies) accept deposits or lend and are licensed by RBI. As of 2019, NBFCs/HFCs with assets more than or equal to ₹500 crore have been notified as “financial service providers” (FSPs) for insolvency purposes.²⁸ This means if such an NBFC defaults, its insolvency resolution is governed by the FSP Rules (2019) rather than the standard corporate rules.²⁹ The FSP Rules modify terminology, e.g., “corporate debtor”, “financial service provider”, “resolution professional”, “administrator”,³⁰ and procedures and involve the RBI as “appropriate regulator”.³¹ The Rules also contemplate special treatment of third-party client assets held by FSPs.³² However, apart from those notified NBFCs, other NBFCs would go through normal CIRP. In any case, as lenders they are financial creditors with voting power; as debtors they are

²⁴ Bharucha & Partners, *supra* note 12.

²⁵ The Insolvency and Bankruptcy Code, 2016, § 3(12).

²⁶ *Id.* § 30.

²⁷ Manisha Arora & Pranav Ashutosh, *Swiss Ribbons Pvt. Ltd. v. Union of India: The Constitutionality of IBC Upheld, Understanding the Procedural Aspect and the After-Effects*, IBC LAWS (Feb. 22, 2021), <https://ibclaw.in/swiss-ribbons-pvt-ltd-v-union-of-india-the-constitutionality-of-ibc-upheld-understanding-the-procedural-aspect-and-the-after-effects-by-ms-manisha-arora-and-mr-pranav-ashutosh/>.

²⁸ Insolvency and Bankruptcy (Insolvency and Liquidation Proceedings of Financial Service Providers and Application to Adjudicating Authority) Rules, 2019, G.S.R. 852(E).

²⁹ *Id.* r. 5.

³⁰ *Id.* r. 4.

³¹ *Id.* r. 3(c).

³² *Id.* r. 10.

corporate debtors subject to IBC, without separate deposit insurance or priority as NBFC depositors are treated as unsecured financial creditors.³³

- B. *Fintech Companies*: There is no single legal definition of “Fintech” under Indian law. In practice, many Fintech lenders, e.g., digital lending apps, peer-to-peer platforms, etc., operate under existing frameworks such as NBFC registrations, payment bank licenses, or SEBI/NPCI registrations. A Fintech engaged in lending will usually be treated as an NBFC or similar entity if RBI-licensed; otherwise, it is an ordinary corporate debtor. As creditors, Fintech firms, if they hold financial debts, count as financial creditors. As debtors, they have no special insolvency provisions beyond IBC or limited segments as has been illustrated in the new Digital Lending Guidelines which impose obligations on recovery practices but do not alter insolvency rights.³⁴ The key point is that the Code’s treatment of creditors applies equally, whether a lender is a traditional bank or a Fintech NBFC, it is a “financial creditor” if it holds a financial claim.
- C. *Public Financial Institutions (PFIs)*: PFIs are defined under Companies Act, to include entities like the Life Insurance Corporation, India Infrastructure Finance Co., NABARD, SIDBI, EXIM Bank, etc., i.e., Central or state-government-owned FIs or FIs established by statute.³⁵ Such institutions often act as lenders to industry and would be financial creditors under IBC. The IBC specifically includes “public financial institution” in its definition of financial institution.³⁶ As creditors in any insolvency, PFIs have no special privileges beyond being financial creditors. If a PFI itself became insolvent, it would also be treated as a corporate debtor under the Code, although their government ownership means any resolution likely involves government intervention.
- D. *Statutory Financial Institutions (SFIs)*: These are entities constituted by specific Acts of Parliament, e.g., EXIM Bank, SIDBI, SBI, etc. They are typically government-owned banks. In insolvency, SFIs are treated as financial creditors. For instance, State Bank of India (a scheduled bank) can be a financial creditor and CoC member. If an SFI itself were a debtor, its statutory status might raise complexities. For example, in the case of banks, RBI-driven frameworks usually handle failures, but if IBC applied, the FSP Rules could be invoked under Section 227.³⁷

³³ Shaktikanta Das, *Insolvency and Bankruptcy Code – Towards Achieving Full Potential* (Jan. 11, 2024), <https://www.bis.org/review/r240117f.pdf>.

³⁴ Reserve Bank of India (Digital Lending) Directions, 2025, RBI/2025-26/36, Reserve Bank of India, 2025.

³⁵ Companies Act, 2013, § 2(72).

³⁶ The Insolvency and Bankruptcy Code, 2016, § 3(14)(c).

³⁷ *Id.* § 227.

For SFIs that are banks, their insolvency and winding-up procedures are primarily governed by the Banking Regulation Act, 1949.³⁸ This Act provides a comprehensive set of provisions for the suspension of business and winding up of banking companies, with the High Court having jurisdiction and the RBI playing a crucial role. For Insurance companies, their insolvency framework is limited to the Insurance Act, 1938.³⁹ The Insurance Regulatory and Development Authority of India (IRDAI) is the primary regulator for the insurance sector, responsible for regulating and licensing insurance and reinsurance companies.⁴⁰

The Insurance Act, 1938, provides for the winding up process of insurance companies, which must be carried out in accordance with the provisions of the Companies Act, 2013. While insurance companies are indeed FSPs, they are not currently covered by the FSP rules notified under Section 227 for their own insolvency and thus remain primarily governed by the Insurance Act. The Act includes provisions for financial plans to rectify deficiencies, and in certain circumstances, allows for government acquisition of undertakings if management is detrimental to public interest.⁴¹ For other SFIs not explicitly covered by the Banking Regulation Act or the Insurance Act, their insolvency would typically be governed by their specific enabling statutes. If such statutes are silent on insolvency or winding-up, and the institution is incorporated as a company, the general winding-up provisions of the Companies Act, 2013, might apply. However, the IBC's primary focus remains on corporate debtors, and specialized financial institutions often fall under sector-specific regulatory frameworks for their own resolution.

In summary, all such institutions, whether NBFC or statutory bank, are “financial institutions” under IBC and their creditor claims fall under the Code’s creditor hierarchy without separate treatment.

5 GENERAL TREATMENT UNDER THE CODE

Under the IBC, all creditors of a defaulting corporate debtor (including financial institutions) are subject to the insolvency resolution process. The key statutory provisions are:

- A. *Initiation and CoC formation:* Any financial creditor (alone or jointly) can file for Corporate Insolvency Resolution Process (CIRP),⁴² and once admitted, the CoC is constituted of all financial creditors. Operational creditors cannot be CoC members.

³⁸ Banking Regulation Act, 1949.

³⁹ The Insurance Act, 1938.

⁴⁰ ICLG, <https://iclg.com/practice-areas/insurance-and-reinsurance-laws-and-regulations/india> (last visited July 10, 2025).

⁴¹ Pranav Prakash, *An Analysis of the Insolvency Framework for Insurance Companies in India*, IJ, <https://indialawjournal.org/an-analysis-of-the-insolvency-framework-for-insurance-companies-in-india.php> (last visited July 19, 2025).

⁴² The Insolvency and Bankruptcy Code, 2016, § 6.

- B. *Voting thresholds*: A resolution plan must be approved by 66% of the CoC (by voting share). This majority binds all creditors, including any dissenters.
- C. *Contents of resolution plan*: Section 30(2) mandates certain provisions, i.e., payment of insolvency costs, priority of operational creditors, etc.⁴³ Notably, after amendment, a plan must provide that dissenting financial creditors receive a payment not less than what they would get in liquidation.⁴⁴
- D. *Waterfall on liquidation*: If CIRP fails, liquidation under Section 53 governs distribution:⁴⁵
 - (a). insolvency and liquidation costs.
 - (b). secured creditors' debts (remaining amounts after enforcement).
 - (c). workmen's dues.
 - (d). employee wages.
 - (e). government dues.
 - (f). operational creditors.
 - (g). remaining unsecured creditors (often equity is last).

The Supreme Court has noted that this scheme accords primacy to secured claims (invariably the preserve of financial creditors), while unsecured claims (operational creditors) are given the lowest priority.⁴⁶

Because of the above, the “general” treatment of creditors depends on their classification. A few specific points of comparison:

- A. *Secured vs Unsecured*: Secured creditors may either relinquish their security to the liquidation estate and claim a share of proceeds or enforce it outside the liquidation estate.⁴⁷ If a resolution plan is approved, the moratorium halts enforcement, but after liquidation (or in the plan exit), secured creditors can still choose their path. Meanwhile, unsecured creditors (including many operational creditors) have no collateral and are only guaranteed liquidation-value-equivalent payment, but only if they are dissenting financial creditors. Operational creditors have a guaranteed share of proceeds up to 15% of liquidation value or actual claim higher, but that rule was effectively struck down by the Supreme Court where the Court held that only operational creditors have a right to liquidation value payment, not financial creditors.⁴⁸

⁴³ *Id.* § 30(2).

⁴⁴ The Insolvency and Bankruptcy Code (Amendment) Act, 2019, § 6.

⁴⁵ Harshit Gupta, *Waterfall Mechanism: Basic Structure of the Insolvency and Bankruptcy Code, 2016*, IBC LAWS (May 13, 2024), <https://ibclaw.in/waterfall-mechanism-basic-structure-of-the-insolvency-and-bankruptcy-code-2016-by-harshit-gupta/>.

⁴⁶ *Swiss Ribbons Pvt. Ltd. v. Union of India*, (2019) 4 SCC 17.

⁴⁷ The Insolvency and Bankruptcy Code, 2016, § 53.

⁴⁸ *Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh*, (2020) 11 SCC 467.

- B. *Companies limited by shares vs by guarantee*: The Code makes no special distinction in most provisions for the company's form. Both types can undergo CIRP and liquidation. The practical difference is that a company limited by guarantee has no share capital and therefore usually no equity or debenture holders with all creditors in liquidation sharing the assets without equity super-priority. Approval thresholds apply to guarantee companies as well. Because there are no shares, the issue of "shareholders' residual rights" doesn't arise in a guarantee company. Otherwise, secured vs unsecured and priority rules work identically.
- C. *NBFCs (FSPs) vs others*: For notified NBFCs (large ones), the CIRP is run under the FSP Rules. These rules generally replicate the Code's provisions with some modifications. Crucially, however, Section 30(2)'s requirements still apply, unless specifically modified by notification. Thus, dissenting creditors of an NBFC have the same formal entitlements as under the Code, but the process is administered under the FSP Rules. The FSP Rules also address third-party assets, viz., customer funds in possession of the FI, the government is to notify how those are handled.⁴⁹
- D. *Public/Statutory FIs as debtors*: If a PFI or SFI (like EXIM Bank) were the corporate debtor, there is no explicit exemption in IBC. In practice, such institutions rarely fail because of government backing. Their winding up and liquidation is governed by their specific statutes, but if nothing as such is provided, then the Code does not preclude CIRP for them with any creditor applying for the same as is the case for any other corporate entity. The Code defines "corporate debtor" as any company, limited liability partnership, or partnership firm, so a statutory FI is covered. Thus, their creditors (many likely to be other FIs or governments) would fall under CoC vote. There is no separate "bankruptcy law" for DFIs akin to the BR Act for banks, so IBC would govern.

In summary, the IBC's statutory framework applies broadly across creditor types and FI types, subject to the FSP modifications. The key consequences for creditors are:

- A. CoC is in control with only financial creditors voting
- B. An inflexible majority rule: a plan approved by 66% of FCs binds all dissenting creditors. This negatively affects the dissenting creditors who may only get the guaranteed minimum.
- C. The Waterfall priority: secured and insolvency costs are paid first, while unsecured (operational) creditors are last; and

⁴⁹ Cyril Amarchand Mangaldas, *The Road to Resolution of Financial Service Providers: A Firm First Step*, INDIA CORPORATE LAW (Nov. 19, 2019), <https://corporate.cyrilamarchandblogs.com/2019/11/road-to-resolution-of-financial-service-providers-a-firm-first-step-ibc/>.

- D. statutory fixes for dissenters, notably, Section 30(2)(b)(ii) to protect dissenting FCs from receiving less than in liquidation.

These provisions set the stage for how courts have interpreted dissenting creditor rights, as discussed next.

6 JUDICIAL ANALYSIS

6.1 Dissenting Financial Creditors under Section 30(2)(b)

Prior to the August 2019 amendment, Section 30(2) of the Code did not explicitly protect dissenting financial creditors (DFCs). The original Code simply said a plan “shall provide for the payment” of operational creditor debts as specified by the Board, under Regulation 39⁵⁰, and other criteria⁵¹, without mentioning DFCs. In practice, this meant all financial creditors, whether dissenting or consenting, received plan payouts at the majority’s discretion. Early cases exploited this ambiguity.

For example, *Accord Life Spec. Pvt. Ltd. v. Orchid Pharma Ltd*⁵² held that a plan must not give any creditor less than liquidation value, but this was later overruled by the Supreme Court in *Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh*⁵³. The SC in *MahaSeamless* clarified that only operational creditors are guaranteed liquidation value under Section 30(2) as there is no statutory minimum for financial creditors beyond what their security yields. Thus, pre-2019, DFCs had no specific guarantee of value.

Recognizing this gap, the Parliament amended Section 30(2)(b) to require that a plan provide for the payment of DFCs “not less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation”⁵⁴. In other words, dissenting financial creditors must be paid at least their “liquidation value”. On liquidation, a secured creditor can either (i) relinquish security and get a pro-rata share of assets under Sec.53; or (ii) keep/enforce security under Sec.52 and Sec.53. The amendment thus protects DFCs by locking in the better of these options, preventing a majority from lopping their share.

⁵⁰ IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, reg. 39, IBBI/2016-17/GN/REG004.

⁵¹ N. Arora & S. Bansal, *Securing the Rights of Dissenting Financial Creditors*, SNG & PARTNERS (Mar. 4, 2024), https://sngpartners.in/outside_perspective/securing-the-rights-of-dissenting-financial-creditors/.

⁵² *Accord Life Spec Pvt. Ltd. v. Orchid Pharma Ltd.*, Company Appeal (AT) (Insolvency) Nos. 761 & 762 of 2019 (NCLAT Nov. 13, 2019).

⁵³ *Maharashtra Seamless Ltd. v. Padmanabhan Venkatesh*, AIR 2020 SC 3779.

⁵⁴ *Government Has Strengthened IBC with Six Amendments and 122 Regulatory Reforms Since Its Inception*, PIB (Apr. 1, 2025, 6:29 PM), <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2117411>.

This amendment remains subject to judicial interpretation. The Supreme Court in *Jaypee Kensington Boulevard Apartments Welfare Assn. v. NBCC India Ltd.*⁵⁵ clarified that payment to a DFC must be in money and limited to the liquidation value of the security interest only, not the entire debt. The Court struck down a plan clause that extinguished secured creditors' mortgages without payment, reiterating that security interests cannot be wiped out without compensation. However, the Court left open how exactly the "liquidation value" must be calculated or satisfied. In other words, DFCs are guaranteed the value of their security interest e.g. proceeds of sale, but not any deficiency beyond that.

Internationally, similar ideas prevail: e.g., UK and US law allow a plan to bind a dissenting class only if no dissenting member is "worse off" gets at least liquidation value⁵⁶. The OECD and World Bank principles stress treating dissenting classes fairly. India's amendment follows this global norm, but implementation issues persist.

7 JUDICIAL TREATMENT OF SECURED VS. UNSECURED RIGHTS

Several recent cases have clarified the scope of secured creditors' rights in insolvency. In *Anuj Jain v. Axis Bank*⁵⁷, the SC held that a third-party mortgage by a group company not indebted itself does not create a 'financial debt' on part of the debtor, so those mortgage-holders could not sit on the CoC as financial creditors. However, they were recognized as secured creditors of the debtor's assets. The Court did not prescribe their treatment in a plan, leaving them under the ambit of Sec.52 and Sec. 53 rights.

In *Jaypee Kensington v. NBCC* the SC refused to allow a plan to extinguish security without payment. This affirms that security rights survive CIRP unless fully accounted⁵⁸. The SC also reiterated that secured creditors must be given the option under Sec.52 and 53. In *Vistra ITCL v. Dinkar*⁵⁹ the Court stated that secured creditors "cannot be treated worse off or inferior to the treatment given to OCs or DFCs". In effect, a secured DFC may either relinquish and share liquidation proceeds or keep its collateral. The Court suggested that, minimally, a DFC should receive the liquidation value of its security interest, aligning with Section 30(2)(b).

These judicial developments illustrate a juxtaposition. On one hand, the insolvency process and CoC driven plan push for a collective settlement and on the other, secured lenders

⁵⁵ *Jaypee Kensington Boulevard Apartments Welfare Ass'n v. NBCC (India) Ltd.*, AIRONLINE 2021 SC 224.

⁵⁶ Scott Atkins, *The World Bank Insolvency Principles: A Framework to Build More Effective Insolvency and Restructuring Processes in Australia*, NORTON ROSE FULBRIGHT (Oct. 2021), <https://www.nortonrosefulbright.com/en-au/knowledge/publications/dcc93bca/the-world-bank-insolvency-principles-a-framework-to-build-more-effective-insolvency>.

⁵⁷ *Anuj Jain v. Axis Bank*, AIRONLINE 2020 SC 279.

⁵⁸ Trilegal, *supra* note 9.

⁵⁹ *Vistra ITCL (India) Ltd. v. Dinkar Venkatasubramanian*, Civil Appeal No. 3606 of 2020 (SC May 4, 2023).

demand that their statutory rights to collateral enforcement not be overridden. The current trend, as per the SC, is to allow secured creditors to enforce their security in liquidation even if they dissented, provided they still receive the liquidation-share guaranteed by law.

8 OPERATIONAL VS. FINANCIAL CREDITORS

Although not dissenting in the same sense since OCs have no vote, operational creditors' treatment is a frequent challenge. The IBC initially assured OCs of at least the liquidation value of their claims via Regulation 38⁶⁰ under Sec 30(2)(b) pre-amendment. However, the Supreme Court curtailed this, as stated above in *MahaSeamless* and held that such a guaranteed minimum value applies only to OCs⁶¹. The effect was that OCs could not demand more than their liquidation share and, in many plans, often received much less, or nothing, because plans allocate value to financiers.

Academics note this creates asymmetric protection: operational creditors cannot vote and have only a bare minimum guarantee, often not sufficient to recover all claims, whereas financial creditors enjoy full voting power and now a statutory floor for dissenters. This disparity has been criticized. Indeed, a recent study observed that the promise of liquidation-value payment to OCs, and to DFCs, can perversely incentivize creditors to liquidate a firm rather than restructure it⁶².

In summary, judicial analysis shows secured financial creditors have strong rights (they may enforce security and are guaranteed liquidation-value payment), while unsecured creditors (mainly operational) have weak rights (no vote, no secured lien, no equivalent guarantee). The Code's "fare" to dissenters is weighted heavily in favour of secured financial lenders. The Code and courts have tried to balance these interests by ensuring at least liquidation-value returns, but critics argue the balance still tilts toward financing institutions.

9 INTERNATIONAL BEST PRACTICES

Examining foreign insolvency regimes offers guidance. Two key principles emerge globally:

- A. *Class Fairness (No-Worse-Off Rule)*: Many jurisdictions allow a plan to bind dissenting classes only if each dissenting claimant would not receive less than in the next-best alternative, which is often liquidation. For example, the UK's restructuring plan procedure explicitly mandates that any dissenting class is "no worse off" under the plan

⁶⁰ IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, reg. 38, IBBI/2016-17/GN/REG004.

⁶¹ *Jaypee Kensington*, (2022) 1 SCC 401.

⁶² Singh & Mishra, *supra* note 6.

than in the relevant alternative like usually winding up⁶³. Under UK Companies Act 2006 §901G⁶⁴, the court can sanction a cross-class cram-down if it finds that “none of the members of the dissenting class would be any worse off” than in liquidation⁶⁵. Similarly, under US Chapter 11, Section 1129(b)⁶⁶, dealing with the cram-down provision, requires that at least one impaired consenting class exists and that each dissenting class gets at least what it would in liquidation, i.e., the “best interest of creditors” test. A US debtor must pay secured dissenters in full (or provide indubitable equivalent) and must not treat any dissenting class unfairly⁶⁷.

- B. *Protected Collateral Treatment*: In many systems, secured creditors’ rights are protected during restructurings. For instance, US bankruptcy allows secured creditors to credit bid their liens in a sale or require adequate protection⁶⁸. In the EU Bank Recovery and Resolution Directive (BRRD), unsecured creditors and shareholders bear losses before insured deposits. The OECD/IMF “Key Attributes” for bank resolution also emphasize creditor write downs (bail-in) while depositors up to insured limits stay protected. The Indian FSP Rules’ approach (consulting regulators, possibly adopting modifications) reflects global practice of specialized regimes for financial firms.

10 CASE STUDY

UK and Singapore: Singapore’s restructuring plan law explicitly contemplates cross-class cram-down with a no-worse-off safeguard. The UK’s recent introduction of the “statutory restructuring plan”, similar to US Chapter 11 reorganization, shows that courts can override dissent if fairness is ensured. In practice, the UK courts have approved plans binding single dissenters when the plan provides the alternative liquidation share. For instance, in *Solar EPC Ltd* [2022], the High Court allowed cram-down because the one dissenting creditor got the same as in liquidation. The RMLNLU analysis notes that cross-class cram-down in US, UK, Singapore helps prevent holdouts and achieve reorganizations, provided dissenters’ interests are protected.

⁶³ Osborne Clarke, *When Are Dissenting Creditors ‘No Worse Off’ Under an English Restructuring Plan?*, OSBORNE CLARKE (Sept. 19, 2023), <https://www.osborneclarke.com/insights/when-are-dissenting-creditors-no-worse-under-english-restructuring-plan>.

⁶⁴ The Companies Act 2006, c. 46, § 901G (UK).

⁶⁵ Radhika Goel, *Cramming Down of Non-Consenting Class of Creditors: The UK Regime*, 4 INDIAN J.L. & LEGAL RSCH. (2022).

⁶⁶ 11 U.S.C. § 1129(b).

⁶⁷ P. Leake & S. Elberg, *Insolvency 2024: USA*, CHAMBERS & PARTNERS, <https://practiceguides.chambers.com/practice-guides/comparison/909/14700/23017-23018-23019-23020-23021-23022-23023-23024> (last visited Aug. 4, 2025).

⁶⁸ American Bankruptcy Institute, *The Indubitable Equivalent and Giving Debt for Dirt: Can a Debtor Force a Secured Creditor to Take Less than All of Its Collateral in Satisfaction of Its Debt* (2003), <https://www.abi.org/abi-journal/the-indubitable-equivalent-and-giving-debt-for-dirt-can-a-debtor-force-a-secured> (Aug. 5, 2025, 4:40 PM).

11 CRITICAL ANALYSIS – CHALLENGES AND OPPORTUNITIES

Even after reforms, several challenges and discrepancies persist for dissenting creditors in Indian insolvency:

11.1 Asymmetric Protection for Operational Creditors

Operational creditors fare relatively poorly. Not only can they not vote on plans, but their guaranteed recovery is minimal. Post-amendment, both DFCs and OCs have a statutory floor under Section 30(2)(b). Despite earlier rules under Regulation 38, the Supreme Court's interpretation means OCs are treated like ordinary unsecured creditors. In practice, OCs often get zero in approved plans, as seen in *Essar Steel*⁶⁹. Critics argue this imbalance is unfair: OCs supply the debtor's business yet have almost no clout under IBC. As stated above, assuring liquidation-value to OCs, as was once the case, was intended to protect them, but current law leaves them vulnerable and even incentivizes liquidation over rescue. Remedies proposed include giving OCs (even a small) voting stake or strengthening their liquidation-value guarantee.

11.2 Inconsistency in Security Rights

The Code's treatment of secured creditors is not fully aligned with theoretical expectations. On one hand, Sections 52 and 53 preserve enforcement rights. On the other, during CIRP the moratorium bars any foreclosure or sale until plan approval or liquidation. The Supreme Court's emphasis in *Jaypee Kensington* and *Visra* judgement was that security cannot be wiped out by a plan without compensation.

However, practitioners point out scenarios where DFCs could still be disadvantaged: for example, if multiple creditors share collateral, unilateral enforcement by one may be hindered in practice. The phrase in *Jaypee Kensington* "extent of value receivable" suggests only actual realizable value counts. There is ambiguity: (i) if the CoC values the security at X, but actual market sale yields less, is the DFC's minimum X or actual sale price; and (ii) The Code's Section 30(4) that allows CoC to consider security value in voting provides little actual guidance on how to allocate security proceeds in a plan.

Critics have noted that without clearer rules, secured DFCs might end up effectively treated like unsecured if valuations are uncertain. The "integrated security value assessment" debate is whether liquidation-value guarantees should be computed on the full security value or on an admitted claim basis. The larger bench reference in *India Resurgence* indicates this

⁶⁹ *Comm. of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta*, (2020) 8 SCC 531.

issue is unresolved, but commentators urge that at minimum the guaranteed payout should match the notional liquidation value.

12 INTEGRATED SECURITY VALUE ASSESSMENT UNDER SECTION 30(2)(B)

The Code's guaranteed payment to DFCs (Sec.30(2)(b)(ii)) is defined in terms of Section 53's distributions – but this presumes liquidation as the reference. The need to “integrate” security valuation (i.e. to ensure the secured DFC gets at least the liquidation value of its collateral) is underscored by recent analyses. The Supreme Court's Jaypee Kensington ruling hinted that DFCs only get the value of their security interest, not the full debt. But commentators observe that this should be interpreted per claim. Otherwise, a secured creditor could be left with a shortfall larger than planned, effectively penalizing them.

As stated above, compelling DFCs to accept below liquidation value of their security puts them “at par with unsecured creditors,” undermining lending confidence. A holistic or “integrated” view would calculate each DFC's entitlement by treating the hypothetical liquidation of the debtor, distributing sale proceeds pro rata as given under section 53, and ensuring the DFC gets that amount. This is arguably what the Code intends by Sec.30(2)(b), but practice has varied. Clarifying this, for example, by requiring plans to list the liquidation value per DFC could reduce conflict.

13 FSP RULES VS. GLOBAL BEST PRACTICES

The FSP Rules, 2019 align with global approaches that treat financial firms differently. For instance, the FSP Rules allow the government and RBI to specify modifications, acknowledging that a financial firm might need different treatment. So far, India's implementation has been limited.

In contrast, other jurisdictions ensure that critical functions like deposit-taking or payment systems are protected above other creditors. India's rules do not yet explicitly provide depositor preference or insurance, an area where global practice and Bank Resolution Directives could inspire reform. However, the FSP rules do require consultation with regulators, which could enable India to adopt features like “bail-in” of unsecured creditors if deemed systemic. Best global practice would also suggest maintaining separate resolution funds or insurance schemes to cover retail creditors akin to deposit insurance which India lacks.

In summary, the framework of the FSP Rules is consistent with international thinking, but India has an opportunity to further refine its approach by, for example, defining depositor priorities and coordination mechanisms.

14 WAY FORWARD BASED ON BEST PRACTICES

Drawing from the above analysis and international norms, we suggest the following reforms and practices:

Adopt Cross-Class Cram-Down Safeguards: Explicitly empower courts (or the tribunal) to sanction restructuring plans over dissenting classes provided no dissenting class is “worse off” than in liquidation. This principle already exists in other jurisdictions and is implicitly present in our Sec.30(2)(b) for secured DFCs. India could borrow language from the UK’s CA 2006 §901G or the US “best interest” test. For example, the NCLT could be directed to compare a dissenting class’s payout under the plan with the hypothetical liquidation share, ensuring fairness. The intent is to prevent holdouts while protecting dissenters’ minimum entitlements.

Clarify Security Value Guarantees: Legislation or regulations should clarify how to compute a dissenting secured creditor’s minimum payout. A clear rule would be: each dissenting secured creditor must receive at least the liquidation proceeds attributable to its security interest (i.e. its pro rata share if the debtor’s assets are sold and distributed under Sec.53). This guards against undervaluation. The NCLT/NCLAT could be given guidance (or the insolvency regs amended) to require plans to specify the liquidation value of each DFC’s security interest.

Incorporate Select Operational Creditor Protections: While full equalization is politically unlikely, modest tweaks could address OC grievances. For instance, granting operational creditors limited voting rights (perhaps a separate class vote on the plan) or enhancing their liquidation preference would reduce the sense of unfairness. The IBBI itself has proposed letting OCs vote on their share of proceeds. Alternatively, ensure that Section 30(2)(b)’s minimum payment rule covers all creditors (including operational), though with different calculations, as some have suggested.

Harmonize with Financial Regulatory Regimes: The government should continue to expand the FSP framework. As recommended by the IMF, important financial sector entities (public-sector banks, insurance companies, fintech payment companies, etc.) could be notified under Section 227 with tailored insolvency rules. At minimum, a Memorandum of Understanding between the MCA/IBBI and regulators (RBI/SEBI) should delineate how pending cases (like a scheduled bank’s default) are handled whether by IBC or under special acts. Incorporating elements like depositor insurance, resolution funds, and priority for small depositors (as seen in BRRD/FDIC) can ensure systemic stability.

Enhance Valuation Transparency: The insolvency process should strengthen asset valuation standards, especially for security. Requiring professional valuations and disclosure of liquidation estimates (as the Board’s CIRP Regulations do) helps all creditors understand

their positions. Section 30(2)(b) could explicitly reference valuation protocols. In international practice, independent appraisals are common for reorganization; India should continue enhancing the role of registered valuers.

Codify “No Vested Rights” Principle with Limits: The Supreme Court in *Swiss Ribbons* endorsed that no one has a vested right to property once CIRP begins. While this supports plan finality, it also underscores the need for statutory guarantees to dissenters (which Sec.30 now provides partially). India might codify that all creditors (not just operational) get at least their liquidation claims – either by expanding Sec.30(2)(b) or by refining the liquidation waterfall. This aligns with the fairness ethos and international standards.

Implementing such measures would make the IBC’s approach to dissenting creditors more predictable and equitable, while still maintaining the Code’s goal of creditor-driven reorganizations.

15 CONCLUSION AND SUMMARY OF RECOMMENDATIONS

The insolvency of financial institutions in India spotlights the delicate balance between facilitating corporate rescue and protecting creditor rights. As this analysis shows, the IBC has evolved to recognize the plight of dissenting financial creditors, most notably through Section 30(2)(b)(ii) guaranteeing liquidation value but gaps remain. Operational creditors are relatively under-protected, secured creditors face ambiguities in enforcement during resolution, and the interplay with sectoral regulation is still nascent. Courts have begun to fill these gaps (e.g. *Jaypee Kensington*, *Vistra ITCL*), but fundamental tensions persist.

In line with global best practices, reform should focus on ensuring that no dissenting creditor is left worse off by a resolution plan. This means codifying a clear “no worse off” test for all creditor classes, refining how security values are assessed, and harmonizing insolvency procedures with financial regulation (including explicit bail-in and depositor protections). Giving even limited participatory rights to operational creditors and clarifying FSP insolvency rules would further balance the scales.

Ultimately, the “creditor conundrum” cannot be solved by one side alone. A robust insolvency regime must allow efficient resolution of distressed financial firms and safeguard the legitimate entitlements of minority creditors. By continuing to learn from judicial experience and international norms, India can refine the IBC to achieve this equilibrium protecting lending institutions’ security interests and dissenting creditors’ claims without unduly hampering the collective resolution process.

CHAPTER 21

The Issue of Primacy: An Intersection between the Insolvency and Bankruptcy Code, 2016 and the Prevention of Money Laundering Act, 2002

SAMRIDHI SAHAY* AND MEENAKSHI SINGH**

In the influential work “Law as a Means to an End”, the German jurist argued that the sole purpose of law is not to ensure individual liberty but to establish equilibrium between the individual principle and the social principle. The Prevention of Money Laundering Act, 2002 (“PMLA”) was enacted by the legislature to curb the usage of illegal money obtained from criminal activities, referred to as proceeds of crime. The legislature enacted the Insolvency and Bankruptcy Code, 2016 (“IBC”), to ease the insolvency process for companies. It has revolutionized the procedure in order to preserve the interests of the creditors while also giving the corporate debtor a clear opportunity to start afresh on a clean slate. The announcement of a moratorium period is a fundamental change in the present Act, as it protects the interests of both the creditor and the corporate debtor. This provision is in contrast with the PMLA.

At this juncture, the court has, on several occasions, sought to resolve the conflict between proceedings under the IBC and the PMLA. The problem arises when a company that has opted for the insolvency process is found to be involved in money laundering. At present, the settled law gives primacy to insolvency proceedings. The assets attached by the ED under a provisional order must be released for the Corporate Insolvency Resolution Process (“CIRP”). The authors argue in the present paper that the current scheme defeats the purpose envisaged by the legislature under the PMLA and serves the economic interests of the corporate debtor solely. Both legislations must be read harmoniously, and the insertion of the 2020 amendment has made the imbalance between the laws quite apparent.

The paper is divided into seven chapters. Firstly, the authors will explain the nature of proceedings undertaken under the PMLA (Section 2). Secondly, the authors will briefly examine how the IBC has introduced changes to the country’s insolvency regime (Section 3). Thirdly, the authors will discuss the interpretation of the non-obstante clause in the two legislations (Section 4). Fourthly, the authors will analyse the effect of the “2020 amendment” under the IBC and how it seeks to address the primacy dispute between the two legislations (Section 5). Fifthly, the authors will analyse the leading judgment on this aspect to identify gaps in the interpretation of both laws (Section 6). Lastly, the authors will put forward arguments

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in favour of giving a harmonious interpretation to both legislations, so that neither statute jeopardises the intent of the other (Sections 7 and 8).

Keywords: PMLA, Insolvency, Harmonious Interpretation, Moratorium

1 INTRODUCTION

The Prevention of Money Laundering Act, 2002 (“PMLA”) was enacted by the legislature to serve a public purpose. It aims to curb the use of illegal funds obtained through criminal activities, known as the proceeds of crime. The impact of profits derived from such activities is catastrophic for a nation, as they create a vicious cycle that further facilitates the funding of more heinous crimes. The Act vests the Enforcement Directorate (“ED”) with the authority to provisionally attach the properties of companies where it has reason to believe that a person has proceeds of crime and that such property is likely to be transferred or concealed. The ED issues this provisional attachment order before the completion of the pending investigation. The rationale for this is that the corporate debtor might dispose of or transfer the asset, making it difficult for the authorities to trace. It can thus be seen as a caveat provision intended to preserve the property intact.

On the other hand, the Insolvency and Bankruptcy Code, 2016 (“IBC”) was enacted by the legislature to streamline the insolvency process for companies. It has revolutionised the procedure by safeguarding creditors’ interests while also providing the corporate debtor with a clear opportunity to start afresh on a clean slate. The Act repeals earlier insolvency laws and has brought about a paradigm shift from the ‘debtor in possession’ regime to the ‘creditor in control’ regime.¹ The IBC scheme allows for the timely resolution of insolvency proceedings and empowers the adjudicating authority to order a moratorium to preserve the company’s assets. This helps in treating the corporate debtor as a going concern.² The announcement of a moratorium period is a fundamental change, as it protects the interests of both the creditor and the corporate debtor, which stands in contrast to the PMLA. At this juncture, the courts have, on several occasions, attempted to resolve the conflict between proceedings under the IBC and the PMLA. The problem arises when a company that has opted for the insolvency process is found to be involved in money laundering.

Before the 2020 Amendment to the IBC, the courts had delivered varying interpretations regarding the primacy to be given in cases of conflict. Section 238 of the IBC contains a non-obstante clause, granting it an overriding effect in the event of any inconsistency with other laws in force at the time. However, the judiciary’s stance on this issue has not been unanimous.

¹ Chitra Sharma v. Union of India, (2018) 18 SCC 575, ¶ 26.

² Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta, (2021) 7 SCC 209, ¶ 2.

At present, the settled law gives primacy to insolvency proceedings. The assets attached by the ED by a provisional order³ have to be released for the corporate insolvency resolution process (“CIRP”). The interests of the corporate debtor and the creditors are being protected by giving the IBC an overriding effect over the PMLA. The authors, in the present paper, will argue that the current scheme defeats the purpose envisaged by the legislature under the PMLA and caters solely to the economic interests of the corporate debtor. Both legislations must be read harmoniously, and the insertion of the 2020 amendment has made the imbalance between the laws quite apparent.

2 NATURE OF PROCEEDINGS UNDER THE PMLA

Money laundering is the process of channelling money obtained from an illegal activity into a legitimate financial source in a manner that makes it difficult to trace its origin. There are three stages by which ‘tainted money’ is converted into ‘untainted money’. The stages involve placement, layering and integration.⁴ PMLA empowers the adjudicating authority to attach the properties of a person that are the proceeds of crime.⁵ To constitute the offence of money laundering under Section 3 of the PMLA, there must be proceeds of crime. The term ‘proceeds of crime’ means any property derived or obtained directly or indirectly by any person as a result of criminal activity.⁶ The ED provisionally attaches this property under Section 5(1) of the Act.⁷ The offence of money laundering depends on a predicate or scheduled offence whose proceeds are shown to be untainted by the offender. The Act aims to protect the property from being disposed of by the offender, and this is where the provision for attachment assists in carrying out the proceedings smoothly without being concerned about its probable disposal.

The provisional orders by the adjudicating authority are then confirmed under Section 8 of the Act. There exists a separate set of proceedings before the adjudicating authority, and to carry out its functions, the Act has bestowed it with powers similar to those of a civil court.⁸ The attachment orders are indicative that there may be a chance the accused is associated with the crime. The orders are merely a preventive measure taken by the authority to protect property, and they do not prove the offender’s guilt. The accused is tried in special courts⁹, which run parallel to the proceedings before the adjudicating authority. The nature

³ *Id.* ¶ 3.

⁴ M.C. MEHANATHAN, *LAW ON PREVENTION OF MONEY LAUNDERING IN INDIA* ch. 2 (3d ed. 2022).

⁵ *Id.* ¶ 2.

⁶ *United Nations Global Programme Against Money Laundering*, IMOLIN (Aug. 8, 2023), <https://www.imolin.org/imolin/gpml.html>.

⁷ *Id.* ¶ 3.

⁸ Prevention of Money Laundering Act, 2002, § 11.

⁹ *Id.* § 44.

of the crime of money laundering is cognizable and non-bailable,¹⁰ and the proceeding is thereby criminal in nature. Thus, two sets of proceedings run in parallel. One in which the ED assesses the property attached, and the other in which the special courts try the accused for the offence of money laundering.

There is a conundrum in interpreting the nature of proceedings undertaken by the adjudicating authority, the ED. A bare reading of Section 11 of the PMLA will reveal the civil nature of the proceedings.¹¹ It gives the adjudicating authority the power of a civil court, as provided under the Code of Civil Procedure, 1908. It has further been held by the National Company Law Tribunal that proceedings initiated by the adjudicating authority are civil in nature and, as such, cannot be exempted from the moratorium under Section 14 of the IBC.

However, there have been several instances in which tribunals and courts have held that attachment proceedings under the PMLA are criminal in nature. The NCLAT, in the case of *Varsana Ispat v. Deputy Director, Enforcement Directorate*¹², held that the application of Section 14 of the IBC¹³ does not override the attachment proceedings undertaken by the ED, since it relates to proceeds of crime and cannot be understood in isolation as merely a preventive order with civil consequences. Section 14 of the IBC does not apply to the act having the essence of a crime or any of its proceeds. Later, the Hon'ble High Court, in the case of *Directorate of Enforcement, Delhi v. Axis Bank*,¹⁴ opined that the attachment proceeding under the PMLA is a "*civil sanction which runs parallel to investigation and criminal action vis-a-vis the offence of money laundering.*"¹⁵

3 INSOLVENCY AND BANKRUPTCY CODE, 2016 – A MEANS TO AN END

Before the enactment of the IBC, there was no comprehensive legislation governing companies in the insolvency process. Companies that were not performing well or were distressed found it difficult to exit the business. As a result, the IBC was enacted in 2016, serving as the country's umbrella legislation governing insolvency and bankruptcy proceedings. There have been several legislations before the IBC, such as *the Recovery of Debts Due to Banks and Financial Institutions Act, 1993* ("DRT")¹⁶, which provided for the establishment of Debt Recovery Tribunals for the recovery of unpaid debts by the companies, helping the financial institutions suffering from non-performing assets. *The Securitisation and Reconstruction*

¹⁰ J. Sekar v. Union of India, (2018) 145 SCL 637, ¶ 36 (Del.).

¹¹ Prevention of Money Laundering Act, 2002, § 11.

¹² Varsana Ispat Ltd. v. Deputy Director, Directorate of Enforcement, 2019 SCC OnLine NCLAT 236.

¹³ Prevention of Money Laundering Act, 2002, § 14.

¹⁴ Directorate of Enforcement v. Axis Bank, 2019 SCC OnLine Del 7854, ¶ 147.

¹⁵ *Id.* ¶ 171(i).

¹⁶ Recovery of Debts Due to Banks and Financial Institutions Act, 1993, § 3.

of *Financial Assets and Enforcement of Security Interest Act, 2002* (“SARFAESI Act”)¹⁷ also provides a remedy for secured creditors to recover their loans without judicial intervention.

However, with the enactment of the IBC, the legislators have addressed earlier issues surrounding the insolvency provisions, providing for the timely wrap-up of insolvency proceedings and a ‘moratorium period’ to preserve assets from depletion and carry on the business as a going concern.¹⁸ The Act has empowered the resolution professional under Section 25(2)(a) to take possession of the assets of the corporate debtor to ensure the same. After the announcement of the moratorium period, the resolution professional takes charge of the assets.

It is at this juncture that the IBC provisions come into conflict with the PMLA. Once a moratorium is announced, the property, if in the ED’s custody, must be released to give effect to the insolvency proceedings. This is because of the overriding provision, which gives primacy to insolvency proceedings over any other law for the time being in force. The arrangement is such that creditors’ interests are given greater primacy over criminal acts. There is a moral dilemma in paying off debts with property that could be the proceeds of crime. It is believed that the law is not harmoniously balanced to coexist with both legislations.

4 INTERPRETATION OF THE NON-OBSTANTE CLAUSE

A non-obstante clause is an internal aid for the interpretation of legislation, which is resorted to when there exists a conflict between two or more statutes. In *Union of India v. G.M. Kokil*, it was stated to be a legislative device used to preclude the operation and effect of all contrary provisions.¹⁹ It gives an overriding effect to the proceedings under one statute, thereby resolving the conundrum that existed between the legislations. However, there could also be a situation in which both statutes in question contain a non-obstante clause; this is not uncommon, given the multiplicity of legislation in the country.

As we are aware, there exists a non-obstante clause in both the IBC²⁰ and the PMLA.²¹ The issue is which piece of legislation would have primacy over the other. The court has addressed this issue in *Solidaire India Ltd. v. Fairgrowth Financial Services Ltd.*²² and has resolved the issue enumerated above. The Apex Court held that, in assessing the effect of non-obstante clauses in the Sick Industrial Companies Act, 1985, and the Special Court Act, 1992,

¹⁷ The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, § 13(1).

¹⁸ Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta, (2021) 7 SCC 209.

¹⁹ Union of India v. G.M. Kokil, 1984 Supp. SCC 196, ¶ 11.

²⁰ The Insolvency and Bankruptcy Code, 2016, § 238.

²¹ Prevention of Money Laundering Act, 2002, § 71.

²² Solidaire India Ltd. v. Fairgrowth Fin. Servs. Ltd., (2001) 3 SCC 71.

the newer legislation prevails over the older statute. The Court reasoned that the legislature is well-equipped to enforce existing laws and that, when it enacts a new piece of legislation with a non-obstante clause, it signifies that Parliament does not want the older laws to have an overriding effect over the new law.

Section 238 of the IBC²³ contains a non-obstante clause that gives it an overriding effect over any other law prevailing at the time in the event of any conflict. On the other hand, Section 71 of the PMLA²⁴ contains a non-obstante clause that bars any other law from overriding the PMLA. The issue arises when the ED attaches the property of an offender against whom CIRP has commenced. The question is whether the moratorium period under the IBC should take precedence over the proceedings under the PMLA against the property.

The objectives of the two statutes differ, and therefore, a balance has to be maintained between them. The courts must not be ignorant of the fact that there must be a reason why the legislature inserted an overriding provision under the PMLA, and that it is not without purpose. The IBC calls for the timely resolution of insolvency proceedings and the securing of creditors' interests. In contrast, the PMLA is a special legislation enacted to address the offence of money laundering and to trace and dismantle the illicit sources of tainted money, which can further stimulate crime on a global scale.

The current interpretation calls for a straightjacket approach, which fails to address the above aspects. The settled position, as interpreted from the ruling of the court in the *Solidaire case*²⁵, gives primacy to the IBC proceedings and accords them an overriding effect over the PMLA. However, the jurisprudence surrounding the same is much more complex than the current interpretation, since the judgment fails to take into account the contextual circumstances and the intent behind the given legislation. Therefore, the current view calls for a review of the decision.

5 INSERTION OF SECTION 32A UNDER THE IBC: HAS THE BATTLE OF PRIMACY BEEN RESOLVED?

One of the underlying objectives of the IBC is to ensure the timely resolution of insolvency proceedings so that the corporate debtor can start afresh. In furtherance of this purpose, and also to address inconsistencies with the PMLA, Parliament introduced the 2020 amendment, which inserted Section 32A into the IBC.²⁶ This provision provides that there exists no liability of the corporate debtor for any offence committed before the commencement

²³ *Id.* ¶ 24.

²⁴ *Id.* ¶ 25.

²⁵ *Id.* ¶ 26.

²⁶ The Insolvency and Bankruptcy Code, 2016, § 32A.

of the CIRP. It further protects the property of the corporate debtor by prohibiting any proceedings against it once the CIRP has commenced. The CIRP process is initiated when operational creditors file an application before the NCLT for insolvency proceedings against the corporate debtor. It commences when the NCLT admits the application. Once a resolution plan is approved under Section 31 and control of the corporate debtor changes hands, the corporate debtor enjoys immunity from liability for prior offences, and that immunity extends to its property. This means that if there is a provisional attachment order under the PMLA, the Enforcement Directorate must release the property to allow the insolvency process to proceed.

However, a bare reading of Section 32A suggests that this immunity applies only after the commencement of the CIRP, leaving certain questions unresolved regarding the legal position before the resolution plan is approved. Although the amendment shields the corporate debtor, it preserves the liability of promoters and directors for continuing offences, thereby aligning with the overarching purpose of the PMLA. The judiciary has upheld the validity of Section 32A in the case of *Manish Kumar v. Union of India*.²⁷

6 DOES THE CASE OF RAJIV CHAKRABORTY, RP OF EIEL V. DIRECTORATE OF ENFORCEMENT FINALLY PUT AN END TO THIS CONUNDRUM?

The case of *Rajiv Chakraborty, RP of EIEL v. Directorate of Enforcement*²⁸ comprehensively dealt with this issue. First, whether the ‘proceedings’ under the PMLA are civil in nature and, if so, whether the same would be affected by Section 14 of the IBC. Second, which of the Acts would prevail over the other, given that both have a non-obstante clause in Section 238 of the IBC and Section 71 of the PMLA, respectively? Lastly, how the insertion of Section 32A has changed the landscape of the operation of both laws.

To resolve the first issue, the meaning of the term ‘proceedings’ with respect to the PMLA was considered by the Court. It was found that the act of attaching the assets of the corporate debtor cannot be solely termed as civil proceedings. Further, in support of the above, under Section 5 of the PMLA, there is a prior requirement that a report concerning the scheduled offence must be forwarded to the magistrate or a complaint must have been filed before the provisional attachment of assets. Therefore, insofar as interpretation goes, the provision must not be understood in isolation and must be read in consonance with other provisions of the Act.

Coming to the second issue, regarding the primacy to be given to the non-obstante clauses in both legislations, the Court considered the timing of their entry into force and

²⁷ *Manish Kumar v. Union of India*, (2021) 5 SCC 1.

²⁸ *Rajiv Chakraborty Resolution Professional of EIEL v. Directorate of Enforcement*, 2022 SCC OnLine Del 3703.

applied the principle that the later Act shall prevail. The Court, on this reasoning, held that, since the IBC was enacted later, it would prevail over the PMLA. It is important to underscore that this is not an inviolable rule and should be applied only when there is an apparent conflict between the two legislations. It should be noted that there is no explicit inconsistency between the provisions of the two statutes; the issue arises only concerning their enforceability. They are not, *per se*, inconsistent, and both serve their distinct purposes.

Lastly, while the Court asserted that Section 32A of the IBC serves as the terminal point for provisional attachment proceedings once the corporate insolvency resolution process has begun, this creates a slight imbalance, tilting more towards giving effect to the IBC's provisions.

While the case has succinctly addressed some persistent issues, a lacuna remains that reignites the need to revisit the matter. In our opinion, the PMLA is special legislation that serves public welfare, and subordinating its interests can jeopardise the interests of the nation's people. While Section 32A is an important provision that settles the law, as held in *Rajiv Chakraborty*²⁹, whether it actually balances or harmoniously interprets both legislations is a question worth raising.

7 WAY FORWARD

The issue surrounding both the IBC and the PMLA goes beyond mere statutory interpretation; it concerns the legislative prioritization of one over the other. It should be borne in mind that a particular law is enacted with a specific intent, and every other branch of government must ensure, in its rulings, that such intent is upheld. The current judicial trend of giving primacy to the IBC, particularly after the insertion of Section 32A, appears heavily tilted towards safeguarding economic revival at the expense of criminal accountability. It is crucial to ensure that the resolution process does not become a "safe harbour" for laundering illicit gains under the garb of the CIRP.

8 STRUCTURAL REFORMS TOWARDS A MORE BALANCED APPROACH

8.1 Coordination between NCLT and ED

1. The legislature should expressly mandate a coordination mechanism between the Adjudicating Authority under the IBC and the ED under the PMLA. Before releasing attached assets for the CIRP, the NCLT should require the ED to certify that such

²⁹ *Id.*

release will not frustrate ongoing criminal proceedings or risk the dissipation of evidence.

8.2 Differentiation between ‘Clean’ and ‘Tainted’ Assets

1. Resolution Professionals under the IBC must be statutorily empowered—and obligated—to identify assets suspected to be proceeds of crime. Clean assets should be included in the insolvency pool for creditor recovery, whereas tainted assets must remain under the ED’s control until a judicial decision is made. This ensures creditors are protected without undermining the PMLA’s core purpose.

8.3 Section 32A Must Be Applied Conditionally

The application of Section 32A can be made conditional upon the following:

1. a. Complete disclosure of any pending PMLA proceedings against the corporate debtor.
2. b. Seeking court approval after a preliminary determination that the assets in question are not directly linked to the proceeds of crime.

9 CONCLUSION

The intersection between the Insolvency and Bankruptcy Code (IBC) and the Prevention of Money Laundering Act (PMLA) in India presents a significant legal challenge, particularly in cases involving the provisional attachment of assets. Both laws serve distinct objectives: the IBC aims to maximise the value of a debtor’s assets for the benefit of creditors and economic recovery. At the same time, the PMLA seeks to prevent and penalise money laundering by seizing the ‘proceeds of crime’. The conflict arises when assets under insolvency proceedings are simultaneously attached by the Enforcement Directorate under the PMLA, leading to delays and disruptions in the resolution process.

On paper, there may be no dispute, as there is nothing per se conflicting between the two laws. However, a closer examination reveals a genuine conundrum. To resolve this, a clear legal demarcation, improved coordination between insolvency professionals and enforcement agencies, and the exercise of judicial discretion to balance creditor interests with anti-money laundering enforcement are essential. The proposed reforms can help India establish mechanisms to harmonise the application of both laws, ensuring the smooth functioning of insolvency resolutions while upholding the objectives of criminal law enforcement.

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The Evolving Landscape of Insolvency Law in India

Contemporary Issues and Policy Perspectives

The Insolvency and Bankruptcy Code, 2016, set out to give India a consolidated, time-bound framework for resolving financial distress. Ten years on, the Code sits at the centre of Indian commercial law, and its hardest questions now arise at its edges: where debtors hold assets abroad, where disputes are already before arbitral tribunals, where enforcement agencies have attached the same property, and where the process itself can be turned to unfair ends.

The essays in this volume arise from the International Conference on insolvency law organised by the Insolvency and Bankruptcy Law Division of Rajiv Gandhi National University of Law, Punjab. They examine pre-packaged insolvency for MSMEs and the risks of fraud and phoenixing within it; cross-border and group insolvency under the UNCITRAL Model Laws; the interaction of insolvency with arbitration, money-laundering law and taxation; the independence of resolution professionals and the position of dissenting and operational creditors; and newer questions raised by ESG, private capital and early-warning systems built on artificial intelligence.

The collection identifies gaps in the present framework and sets out proposals for reform. It is written for students, researchers, practitioners, insolvency professionals and policymakers.

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