

REPORT OF THE INSOLVENCY LAW COMMITTEE

MAY, 2022



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**Ministry of Corporate Affairs
Government of India**

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REPORT OF THE INSOLVENCY LAW COMMITTEE

New Delhi, the 20th May, 2022

To,

The Honourable Union Minister of Finance and Corporate Affairs

Madam,

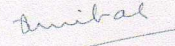
We have the privilege and honour to present this 5th report of the Insolvency Law Committee, set up on 16th November, 2017 (reconstituted on 6th March, 2019 as Standing Committee) to make recommendations to the Government on issues arising in implementation of the Insolvency and Bankruptcy Code, 2016, as well as on the recommendations received from various stakeholders.


2. The Committee has tried to take a comprehensive view while suggesting changes in the Code keeping in mind difficulties being faced by different stakeholders. It has endeavoured to improve the efficiency of the corporate insolvency resolution, liquidation (including voluntary liquidation process) keeping in mind to further the objective of "*the time bound reorganization and insolvency resolution*" and "*maximization of value of assets*" of the Code.


3. We thank you for providing us an opportunity to present our views on the issues arising from implementation of the Insolvency and Bankruptcy Code, 2016 and related matters.

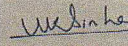
Yours Sincerely,



(Rajesh Verma)
Chairman



(Ravi Mital)
Member

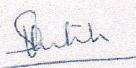

(Sameer Shukla)
Member

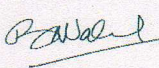

(T.K. Vishwanathan)
Member

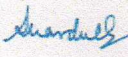

(U. K. Sinha)
Member

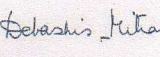

(Saurav Sinha)
Member, RBI



(Atul Kumar Goel)
Member, PNB



(Uday Kotak)
Member

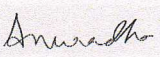

(Bahram Vakil)
Member


(Shardul Shroff)
Member


(President ICAI)
Member


(President ICSI)
Member


(President ICoAI)
Member


(Economic Adviser, MCA)
Member Secretary

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PREFACE

The Insolvency and Bankruptcy Code, 2016 (IBC/Code) has proven to be a transformational economic legislation in a short span of five years since its enactment. The Code has been tested time and again, and jurisprudence has evolved settling many issues faced during its implementation. Together with this, timely interventions by the Government have enabled the development of a robust insolvency resolution framework in India. It has been a constant endeavour of the Insolvency Law Committee (ILC/Committee), constituted by the Ministry of Corporate Affairs (MCA), to monitor the progress and implementation of the Code, consider issues raised by various stakeholders, identify gaps and bottlenecks, and recommend corrective measures for optimal functioning of the Code. Soon after making recommendations for the pre-packaged insolvency resolution framework for MSME corporate debtors, for which amendments to the Code, through an Ordinance, were made in April 2021, the Committee focused on further strengthening and streamlining the processes under the Code.

The ILC is submitting its 5th Report which provides recommendations in respect of the corporate insolvency resolution (CIRP) and liquidation processes. The issues taken up in this report are based on a review of stakeholder suggestions, raised in stakeholder consultations conducted by the MCA and the IBBI or sent as public comments to the MCA. The key recommendations in this Report are as follows:

- (i) *Mandating reliance on information utilities (IUs) for establishing default:* With the development of IU infrastructure, the availability and acceptability of IU data has increased. Reliance on IU records has the potential of expediting the process of proving default, and may thus, avoid delays in admission of CIRP applications. Therefore, the Committee has recommended that certain financial creditors should be mandated to submit IU records with their CIRP application. The Adjudicating Authority (AA) should not seek any other documentation for proving default when IU records are submitted by the applicant. A similar mandate may be extended to operational creditors in due course of time.
- (ii) *Continuation of proceedings for avoidable transactions and improper trading after CIRP:* It has been observed that there is lack of clarity on whether proceedings for avoidable transactions and improper trading can continue after the completion of a CIRP. The Committee discussed that continuation of such proceedings is permitted by Section 26 of the Code and has recommended that a clarificatory amendment may be made to this provision to avoid any doubts in this regard. Further, suitable amendments may be made to the Code to ensure that the resolution plan provides sufficient clarity for the smooth conduct of proceedings

for avoidable transactions or improper trading. This will ensure that there is clarity amongst stakeholders on the manner in which such proceedings will continue after the approval of the resolution plan.

- (iii) *Change in threshold date for look-back period:* The threshold date for the look-back period of avoidable transactions should be altered to cast a wider net for catching such transactions. Consequently, the threshold date should be changed to the date of the filing of application for initiation of CIRP instead of the date of commencement. Further, transactions from the date of filing until the date of commencement should also be included in the look-back period. This will not only help increase the scope of avoidable transactions but will also discourage any perverse incentives for corporate debtors to delay the admission of CIRP applications.
- (iv) *Curbing submission of unsolicited resolution plans and revisions of resolution plans:* It has been observed that there are divergent practices regarding the timeline and manner of submission of resolution plans. Although there are stage-wise timelines provided in the regulations, resolution plans are received by the resolution professional after the stipulated deadlines. In some cases, revisions are made to submitted resolution plans in an attempt to outbid other potential resolution applicants. Such practices lead to divergent practices leading to inconsistencies, delays, and lack of procedural sanctity. Therefore, the Committee has recommended that a mechanism for reviewing late submissions of plans and unsolicited revisions to plans should be laid down in the regulations. Pursuant to the recommendations of the Committee in this regard, some amendments have already been carried out in the CIRP regulations.
- (v) *Timeline for approval or rejection of resolution plan:* Delays have been observed in the disposal of resolutions plans submitted to the AA. Such delays are often caused due to a high number of objections to the proposed resolution plan, or due to a high degree of pendency of cases. Nevertheless, delays at the stage of disposal of the resolution plan are value destructive and discourage prospective resolution applicants from submitting plans. Therefore, the Committee has recommended that AA should dispose the resolution plan within 30 days of receiving it. The AA should record reasons in writing if it fails to dispose the plan within this timeline.
- (vi) *Standard of conduct of the Committee of Creditors (CoC):* The CoC has been entrusted with wide powers under the Code. It is tasked with making key decisions during the CIRP, including the manner of resolving the corporate debtor's distress. Thus, improper conduct by members of the CoC impacts the life of the corporate debtor, and consequently its stakeholders. Given this pivotal role of the CoC, the Committee has recommended that the IBBI should issue guidelines that provide

the standard of conduct for members of the CoC. This may be in the form of guidance that provides a normative framework to members of the CoC about the manner of conducting themselves in processes under the Code.

- (vii) *Stakeholders Consultation Committee (SCC)*: The SCC may play a pivotal role in the liquidation process by giving valuable commercial insights and maintaining oversight over the functioning of the liquidator. Therefore, the Committee has recommended that the liquidator must mandatorily consult the SCC. Accordingly, Section 35(2) of the Code and regulations made thereunder may be suitably amended. Pursuant to the recommendations of the Committee, amendments requiring such mandatory consultation with the SCC have already been made in the regulations.
- (viii) *Secured Creditor's Contribution*: Secured creditors are permitted to step out of the liquidation process by choosing to realise their security interest outside instead of relinquishing it. The Code provides that secured creditors opting to realise their security interest outside the liquidation process are liable to contribute towards CIRP costs. The Committee has recommended that such secured creditors should also be required to contribute towards workmen's dues in the same manner as they would have if they had relinquished their security interest. Workmen are key stakeholders of the corporate debtor and form the backbone of efforts to preserve the business of the corporate debtor, both before and during insolvency proceedings. Thus, contributions made by secured creditors towards their dues should be explicitly provided in the Code by amending Section 52. Further, when a secured creditor steps outside the liquidation process, he should also be liable to pay the liquidator for any expenses incurred by him for the preservation and protection of its security interest. If a secured creditor fails to make the required contributions, its security interest should be deemed to have been relinquished and become part of the liquidation estate.
- (ix) *Voluntary Liquidation Process*: There are varying practices on whether, and on what basis, a voluntary liquidation process can be terminated before the passing of a dissolution order. The Committee has recommended that such termination should be permitted since the process is meant for solvent entities whose business prospects may have changed since the commencement of the process. The Committee has recommended a simple mechanism for terminating a voluntary liquidation process which is akin to the mechanism for commencement of the process. Suitable amendments should be made to the Code to lay down this mechanism so as to ensure that there is consistent practice on termination of voluntary liquidation processes.

- (x) *Operationalizing the Insolvency and Bankruptcy Fund (IBC Fund)*: Section 224 may be suitably amended to empower the Central Government to prescribe a detailed framework for contributions to and utilisation of the IBC Fund.
- (xi) *Additional Changes*: There should be an appellate mechanism for orders issued under section 220 by the IBBI and its disciplinary committee. Such appeals may be filed with the NCLAT. Further, to have a more comprehensive and optimal framework for rules and regulations, Sections 239(1) and 240(1) may be amended to provide that the rules and regulations may be made for carrying out the "purposes" of the Code.

The recommendations of the Committee will further strengthen the insolvency and bankruptcy framework in India by providing clarity and improving processes under the Code. I am confident that these recommendations will go a long way in achieving the objectives of the Code. The Committee will monitor further developments and keep striving to enhance the effectiveness of the Indian insolvency framework.



Rajesh Verma

Secretary, Ministry of Corporate Affairs &

Chairman, Insolvency Law Committee

New Delhi, 20th May, 2022

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ACKNOWLEDGMENTS

The Insolvency Law Committee takes this opportunity to submit the 5th Report after deliberations on various issues to streamline the corporate insolvency resolution and, liquidation including voluntary liquidation processes to further the objectives of the Code. The Committee would like to thank the industry chambers, professional institutes, law firms, academicians and other experts who made valuable suggestions for review of the Code.

The Committee expresses its gratitude to the members of Insolvency Law Committee, for their valuable contribution in the review process, and for their participation in, deliberations including with respect to enabling swifter admission and approval of resolution plan; streamlining the avoidance transactions and allowing termination of voluntary liquidation process, etc.

The Committee acknowledges the research and drafting support provided by the team from Vidhi Centre for Legal Policy comprising of Ms. Aishwarya Satija, Mr. Akash Chandra Jauhari, Ms. Manmayi Sharma, Ms. Devashri Mishra, and Ms. Anjali Ayachil.

The Committee is grateful to Ministry of Corporate Affairs for providing logistical support and would like to make a special mention of the dedicated efforts put in by the team of officers of the Insolvency Division at the MCA comprising of Dr. Anuradha Guru, Economic Adviser, Mr. Satyajit Roul, Joint Director, Mr. Rajan Jain, Deputy Secretary, Mr. Saurabh Gautam, Deputy Director, Ms. Sunidhi Misra, Assistant Director, Mr. Sourav Sardar, Assistant Manager and Ms. Parul Chutani, Research Associate for collating suggestions, facilitating discussions and providing administrative and technical support for the functioning of the Committee.

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LIST OF DEFINED TERMS

BLRC	Report of the Bankruptcy Law Reforms Committee, Volume I, 2015
CA, 1956	Companies Act, 1956
CA, 2013	Companies Act, 2013
CERSAI	Central Registry of Securitisation Asset Reconstruction and Security Interest of India
CIRP	Corporate Insolvency Resolution Process
CIRP Regulations	Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
CoC	Committee/s of Creditors
Code/ IBC	Insolvency and Bankruptcy Code, 2016
Committee	The Insolvency Law Committee
CPC	Code of Civil Procedure, 1908
EoI	Expression of Interest
IBBI	Insolvency and Bankruptcy Board of India
IPA	Insolvency Professional Agency
IU	Information Utility
Rs.	Rupees
Liquidation Process Regulations	Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016
LLP	Limited Liability Partnership
MCA	Ministry of Corporate Affairs
MSMEs	Micro, Small and Medium Enterprises
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
NeSL	National e-Governance Service Limited
RBI	Reserve Bank of India
Report	Report of the Committee

RFRP	Request for Resolution Plan
RoC	Registrar of Companies
SCC	Stakeholders Consultation Committee
SEBI	Securities and Exchange Board of India
Report of the Standing Committee on Finance	Report of the Standing Committee on Finance on the Implementation of the Insolvency and Bankruptcy Code, 2016 (August 2021)
UK	United Kingdom
US	United States of America
VLP	Voluntary Liquidation Process
2020 Report	Report of the Insolvency Law Committee, February 2020

CHAPTER 1 - BACKGROUND

I. INTRODUCTION

- 1.1. The Code was enacted in May, 2016 to consolidate the laws relating to reorganisation and insolvency resolution in India and to ensure a time-bound resolution of insolvency, resulting in maximisation of value of the assets available for stakeholders, promotion of entrepreneurship, ensuring greater availability of credit and balancing the interests of all stakeholders concerned. The provisions relating to insolvency and liquidation of corporate persons came into force in December, 2016, while those relating to insolvency resolution and bankruptcy of personal guarantors to corporate debtors came into effect in December, 2019.
- 1.2. Within one year of implementation of the provisions of the Code relating to corporate insolvency, the Government constituted the Insolvency Law Committee to take stock of the functioning of the newly enacted Code and to make suitable recommendations to ensure its effective implementation. Thereafter, the Committee was re-constituted as a Standing Committee by an office order issued by the MCA on March 6, 2019.
- 1.3. The Committee is chaired by Secretary, Ministry of Corporate Affairs, and members include Chairperson, IBBI; Additional Secretary (Banking), Department of Financial Services; Sh. T. K. Vishwanathan, Former Secretary General of the Lok Sabha and Chairman of the BLRC; Sh. U.K. Sinha, Ex SEBI Chairman; Nominee of the RBI, MD & CEO, Punjab National Bank; Sh. Uday Kotak, MD and CEO, Kotak Mahindra Bank; Sh. Shardul Shroff, Executive Chairman, Shardul Amarchand Mangaldas & Co.; Sh. Bahram Vakil, Partner, AZB & Partners; President, Institute of Chartered Accountants of India; President, Institute of Cost Accountants of India; President, Institute of Company Secretaries of India; and Economic Adviser, MCA (as Member Secretary). The Order of re-constitution of the Committee, along with a list of its members, has been provided in *Annexure I*.
- 1.4. The Committee has played a pivotal role in ensuring that the insolvency framework under the Code could readily address several implementation-based challenges as well as continually be updated in line with changing market realities. In the five years since its implementation, the Code has successfully overhauled the corporate insolvency and liquidation framework in India, helped plug information asymmetries and is appreciated as a key

economic reform that has instilled a significantly increased sense of fiscal and credit discipline.

- 1.5. With the advent of the Covid-19 pandemic and the consequent lockdowns and disruption of economic activity, there were concerns world over that there would be a spate of insolvencies of businesses whose operations were affected by the pandemic. In response, the President of India on June 5, 2020 promulgated the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020, which was replaced by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2020, that *inter alia*, suspended the operation of provisions for initiation of CIRP for a period of one year, in order to help prevent corporations whose business operations were affected by the pandemic, from being pushed into insolvency.
- 1.6. The continued evaluation of the Code by the Committee, and its considered suggestions based on issues highlighted by stakeholder comments and implementation experience, has ensured that the Code has been amended in quick response to emerging issues and in line with changing market realities. Thereafter, in light of the need for a hybrid and alternative insolvency framework for pandemic-affected MSMEs that did not have access to the Code during its suspension, the Committee also gave its recommendations on the design for a pre-packaged insolvency resolution framework as a quick and affordable alternative insolvency resolution mechanism, through its report in July 2021. Based on the suggestions of the Committee, the pre-packaged insolvency resolution process was introduced to the Code as a separate chapter through the Insolvency and Bankruptcy Code (Amendment) Ordinance on April 4, 2021, which was then replaced by the Insolvency and Bankruptcy Code (Amendment) Act, 2021 on August 12, 2021.
- 1.7. Alongside its deliberations and meetings on the pre-packaged insolvency resolution framework, the Committee also looked at issues concerning the CIRP and liquidation process of corporations under the Code. These were deliberated keeping in mind the dynamic nature of these issues and the need for revisiting and resolving certain long-standing issues in the implementation of the Code. The Committee was taken through numerous suggestions and comments provided by stakeholders including issues concerning the admission process and the scope of the moratorium for CIRP; existing and emergent issues concerning avoidance actions and improper trading, as well as those relating to submission of the resolution plan and liquidation of the corporate debtor.

- 1.8. The need for a re-look at these issues concerning the implementation of the CIRP and liquidation processes under the Code also comes at a crucial time - not only has the suspension on CIRP filings been lifted, making the Code open to new insolvency filings, but the Code has also completed five years since its enactment. Over these five years, the Code has solidified its image as a game changing legislation in the field of insolvency resolution. Its implementation has continually strived to achieve the core tenets of time-bound insolvency resolution, value maximisation and of balancing the interests of all stakeholders. Keeping these principles in mind, the Committee has once again made recommendations to ensure effective implementation of the CIRP and liquidation frameworks, and continued access and ease of doing business for corporate entities in India.

II. WORKING PROCESS

- 1.9. The Committee had its first meeting on February 10, 2021 and its second meeting on February 13, 2021. Another meeting of the Committee took place on April 22, 2022.
- 1.10. The MCA had invited comments from the public through an online facility available on the websites of the MCA and the IBBI during the period between December 23, 2021 to January 13, 2022. During its deliberations, the Committee considered the suggestions received in the public comments and through the stakeholder consultations conducted by the MCA.
- 1.11. The MCA engaged the Vidhi Centre for Legal Policy to assist the Committee by providing research on the relevant legal principles and international jurisprudence, and to assist the Committee in drafting this Report.

III. STRUCTURE OF THE REPORT

- 1.12. This Report details the deliberations and recommendations of the Committee in assessing the implementation of the Code. The recommendations address the issues highlighted by the public and stakeholders concerning the CIRP and liquidation processes and avoidance actions and improper trading. The recommendations in this Report review the existing practice and implementation of the Code, having due regard to any related domestic legislation and international insolvency frameworks, and suggest whether there is need for amendment to the provisions of the Code and to its relevant subordinate legislation.

- 1.13. The Report also contains two annexures: **Annexure I**, which is the Order of re-constitution of the Committee dated March 6, 2019 and **Annexure II**, which is a summary of the recommendations made by the Committee.

CHAPTER 2 – RECOMMENDATIONS PROPOSING AMENDMENTS TO THE CODE AND RELEVANT SUBORDINATE LEGISLATION

I. MANDATING RELIANCE ON IUS FOR CERTAIN FINANCIAL CREDITORS

- 2.1. The NCLT, which is the Adjudicating Authority for corporate persons under the Code, is required to admit an application for initiation of a CIRP within fourteen days of receiving it.¹ It is now a settled position of law that this fourteen-day time-period is directory in nature.² Consequently, the Adjudicating Authority is not barred from admitting or rejecting an application after the requisite time-period. In practice, the admission or rejection of most CIRP applications takes a considerably longer time than fourteen days.³ Stakeholders have voiced concerns about such delays and backlog of cases pending admission.
- 2.2. The Committee noted that in the past, measures have continually been taken to help further speedy admission of CIRP. For instance, the Code was amended in 2019⁴ to provide that the Adjudicating Authority shall be required to provide reasons in writing for delay in admission of applications filed by financial creditors. Efforts are also consistently underway to create additional NCLT benches and to fill vacancies.⁵
- 2.3. Nevertheless, delays at the admission stage remain a critical issue in the implementation of CIRP. At the outset, the Committee took note of the importance of timelines under the Code. Jurisprudence on CIRP has clarified that the legislative intent behind such timelines is to prevent delay in hearing

¹ See Insolvency and Bankruptcy Code, 2016, Section 7(4); Section 9(5) and Section 10(4)

² *Surendra Trading Company v. Juggilal Kamlapat Jute Mills Co. Ltd. & Ors.* (2017) 16 SCC 143

³ For instance, a recent study finds that the admission of applications for CIRP takes much longer than the prescribed fourteen-day timeline. See Dr. (Ms.) Neeti Shikha and Ms. Urvashi Shahi, “Assessment of Corporate Insolvency and Resolution Timeline” pg. 16 <<https://ibbi.gov.in/uploads/publication/2021-02-12-154823-p3xwo-8b78d9548a60a756e4c71d49368def03.pdf>> accessed 3 September 2021

⁴ Proviso to Section 7(4) as inserted by the Insolvency and Bankruptcy Code (Amendment) Act, 2019.

⁵ In reviewing the capacity of the NCLT and NCLAT, five new Benches of the NCLT were announced at Jaipur, Cuttack, Kochi, Indore, and Amaravati, bringing the total number of Benches from 11 to 16, and an additional Chennai Bench of the NCLAT was inaugurated. See Press Information Bureau, ‘Finance Minister Smt. Nirmala Sitharaman inaugurates the Chennai Bench of National Company Law Appellate Tribunal’ (25 January 2021) <<https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1692234>> accessed 8 October 2021

and disposal of cases, and has established that time is of essence in a CIRP.⁶ Delays in admission of CIRP applications are value destructive and impede the chances of a successful resolution of the corporate debtor. Given this, the Committee discussed further measures to streamline the admission process to reduce delays.

- 2.4. An application for initiating a CIRP under Sections 7, 9 and 10 depends largely on the evidence of default committed by a corporate debtor. In order to prove default, financial and operational creditors⁷ are allowed to rely on various kinds of documents. One of the ways of proving the existence of a default is by submitting records registered with IUs in this regard.⁸
- 2.5. As per the current law, financial creditors are required to submit financial information to IUs under Section 215. On the other hand, submission of financial information to IUs is optional for operational creditors. This is because operational debts tend to be small or recurring amounts that may not be properly documented and accurately reflected on the records of IUs at all times.⁹ Further, the possibility of disputed debts in relation to operational creditors is also higher in comparison to financial creditors.¹⁰ Additionally, as noted by the Joint Parliamentary Committee when considering provisions of the Insolvency and Bankruptcy Bill, 2015, operational creditors may not have adequate resources to pay a fee to the IU for submission of information.¹¹
- 2.6. The Committee deliberated whether delays at the admission stage can be reduced by facilitating greater reliance on the records of debt and default that are stored and authenticated by registered IUs. It was noted that relying on IU authenticated records that indicate undisputed information of default would enable the Adjudicating Authority to spend less time on verification of default and allow for quicker disposal of CIRP applications. As was explained

⁶ See *Surendra Trading Company v. Juggilal Kamlatpat Jute Mills Co. Ltd. & Or* (2017) 16 SCC 143; *Innoventive Industries Ltd. v. ICICI Bank and Anr.* (2018) 1 SCC 417 7

⁷ Insolvency and Bankruptcy Code, 2016, Section 7(3) and Insolvency and Bankruptcy Code, 2016, Section 9(3) read with Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 2A

⁸ Insolvency and Bankruptcy Code, 2016, Section 7(3)(a), Section 9(3)(d) read with the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017

⁹ Clause 8 of the Notes on Clauses to the Insolvency and Bankruptcy Code Bill, 2015

¹⁰ *Ibid*

¹¹ Lok Sabha, *Report of the Joint Committee on the Insolvency and Bankruptcy Code, 2015* (2016) para 56 <https://ibbi.gov.in/uploads/resources/16_Joint_Committee_on_Insolvency_and_Bankruptcy_Code_2015_1.pdf> accessed 3 September 2021

by the BLRC when recommending reliance on IUs for quick access to verified financial information, “...the record of the liability is readily accessible from a registered IU, and the instance of default is also recorded within, the time taken and the cost to trigger the case of insolvency can be reduced.”¹²

- 2.7. Further, the Code allows financial creditors to rely on various kinds of documents to establish a default as IU infrastructure was just being set in place at the time of enactment of the Code. It was brought to the Committee that, with the passage of time, utilisation of the IU framework has become more robust. Figure 1 below, as sourced from the IBBI Newsletter for January-March 2022, indicates an increasing trend in the amount of information being stored and recorded with NeSL, which is the only registered IU at present. As of the end of March 2022, 5.15 lakh loan records amounting to Rs. 6.82 lakh crores had been authenticated with NeSL.¹³

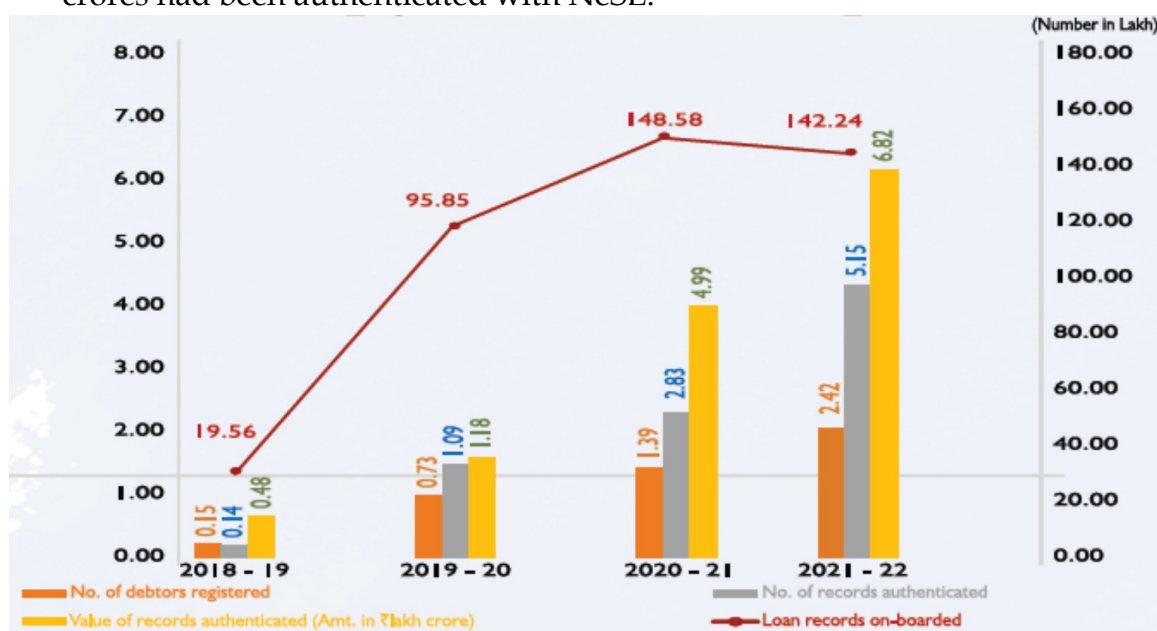


Figure 1

Source: IBBI Newsletter for Jan-Mar, 2022

- 2.8. IUs now have access to the MCA-21 database and CERSAI portals, which not only increases the availability of and access to reliable data for stakeholders, but also enables them to speedily authenticate financial information.¹⁴ Moreover, since December 2017, the RBI has directed all scheduled

¹² Ministry of Finance, *The Report of the Bankruptcy Law Reforms Committee* (2015) para 4.3.2 <https://ibbi.gov.in/uploads/resources/BLRCReportVol1_04112015.pdf> accessed 3 September 2021

¹³ Insolvency and Bankruptcy Board of India, ‘Insolvency and Bankruptcy News: The Quarterly Newsletter of the Insolvency and Bankruptcy Board of India’ (Jan – Mar 2022, Vol. 22) p. 21 <<https://ibbi.gov.in/uploads/publication/08933bb5e16cab360074d3ef1640452a.pdf>> accessed 11 May 2022

¹⁴ Insolvency and Bankruptcy Board of India, Circular No. IBBI/IU/025/2019 dated 07-09-2019

commercial banks, small finance banks, etc. to put in place appropriate systems for submission of financial information to IUs.¹⁵

- 2.9. Such sustained use of IUs has led to the creation of a wider and more robust database of financial information of all entities availing credit. It was, accordingly, felt that steps should now be taken to boost the utilisation of IUs as access to such verified records will reduce the scope of challenges to the veracity of financial information. The Committee discussed that delays at the stage of admission of CIRP applications may be considerably reduced by facilitating greater reliance on IU authenticated records.
- 2.10. Given that banks and financial institutions have developed the practice of submitting information to IUs, the Committee agreed that mandating such creditors to rely only on IU records to establish default may expedite disposal of their applications. **Therefore, the Committee decided that financial creditors that are financial institutions, and such other financial creditors as may be prescribed by the Central Government, should be required to submit only IU authenticated records to establish default for the purposes of admission of a Section 7 application. Where such IU authenticated records are not available, and for all other financial creditors, current options of relying on different documents for establishing default may remain available. Suitable amendments to Section 7 may be made for this purpose.** Further, where creditors submit IU records to prove default, the Adjudicating Authority should dispose of the application speedily and should limit its scrutiny to determining if default for the purposes of commencing a CIRP has occurred.
- 2.11. It was also noted that requiring operational creditors to submit financial information to IUs may be too burdensome at present. **Consequently, the Committee agreed that, with further development of IU infrastructure in due course, it may be considered if operational creditors should be similarly mandated to rely on IU records for establishing default.**

II. EXEMPTIONS FROM THE SCOPE OF THE MORATORIUM

- 2.12. Upon admission of an application under Sections 7, 9 or 10 of the Code, the Adjudicating Authority declares a moratorium for the purposes referred to in Section 14. Under Section 14(3)(a), the Central Government, in consultation with any financial sector regulator or any other authority, has the power to

¹⁵ Notification No: DBR.No.Leg.BC.98/09.08.019/2017-18 dated December 19, 2017 issued by Reserve Bank of India, <<https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11189&Mode=0>> accessed 3 September 2021

notify transactions that may be exempted from the scope of the moratorium provided in Section 14(1). The Committee was called upon to consider whether certain transactions in respect of securities and related proceedings under securities law should be exempted under this provision by the Central Government.

- 2.13. At the outset, the Committee noted that Section 14(3)(a) provides that Section 14(1) shall not apply to *such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority*. Section 14(1), however, broadly applies to two kinds of situations – first, *proceedings or actions* against the corporate debtor for recovery of debt, security interest or property; and second, *transactions* related to transfer of assets or any legal right or beneficial interests by the corporate debtor. Thus, on a combined reading of Sections 14(1) and 14(3)(a), the Committee opined that the power to grant exemptions under Section 14(3)(a) only applies to the second scenario. In other words, under Section 14(3)(a), the Central Government does not appear to have the power to exempt legal proceedings or actions, but only transactions, agreements, or arrangements.¹⁶
- 2.14. Further, the Committee noted that an effective insolvency law protects the value of the insolvency estate against diminution by the actions of multiple stakeholders to insolvency proceedings and facilitates administration of such proceedings in a fair and orderly manner.¹⁷ A moratorium helps in achieving this purpose and is one of the essential features of the CIRP, which ensures that the assets of the corporate debtor are kept together during the CIRP, and the corporate debtor is continued as a going concern, thus facilitating value maximisation and orderly completion of the CIRP. In this regard the BLRC noted that *“the motivation behind the moratorium is that it is value maximising for the entity to continue operations even as viability is being assessed during the IRP. There should be no additional stress on the business after the public announcement of the IRP.”*¹⁸ Also, as per the notes on clauses to Section 14 -

“The purposes of the moratorium include keeping the corporate debtor's assets

¹⁶ In contrast to the language used under Section 14(3), Section 33(6), which outlines the scope of moratorium in relation to a liquidation order, provides that the moratorium under Section 33(5) shall not apply to *legal proceedings in relation to such transactions* as may be notified by the Central Government.

¹⁷ United Nations Commission on International Trade Law, Legislative Guide on Insolvency Law, (2004) part one, para 25 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf> accessed 10 January 2022

¹⁸ Ministry of Finance, *The Report of the Bankruptcy Law Reforms Committee* (2015) para 5.3.1. <https://ibbi.gov.in/uploads/resources/BLRCReportVol1_04112015.pdf> accessed 3 September 2021

together during the insolvency resolution process and facilitating orderly completion of the processes envisaged during the insolvency resolution process and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default. This also ensures that multiple proceedings are not taking place simultaneously and helps obviate the possibility of potentially conflicting outcomes of related proceedings. This also ensures that the resolution process is a collective one. (Emphasis Supplied)

- 2.15. **Therefore, the Committee recommended that the exemption under Section 14(3)(a) should be exercised only in exceptional circumstances, which may not hinder the smooth conduct of the CIRP and hence, should not be relaxed until found necessary from the implementation experience of the Code.**

III. ISSUES RELATED TO AVOIDABLE TRANSACTIONS AND IMPROPER TRADING

- 2.16. Sections 43-51, 66, and 67 of the Code lay down various transactions that may be avoided by the resolution professional or liquidator (collectively referred to as “**avoidable transactions**”), and the actions that can be taken against erstwhile management for fraudulently or wrongfully trading in insolvency (referred to as “**improper trading**”). These provisions are primarily aimed at swelling the asset pool available for distribution to creditors and preventing unjust enrichment of one party at the expense of other creditors.¹⁹
- 2.17. Stakeholders have suggested that there is lack of clarity regarding certain aspects of proceedings for avoidance of transactions and improper trading. Notably, the Committee undertook a review of these provisions in its 2020 Report and made certain recommendations to boost the effectiveness in their enforcement.²⁰ This includes certain amendments to the Code that the Committee felt would bring necessary clarity in law. For instance, it had recommended amendments to promote cooperation by parties with the resolution professional or liquidator for investigation of avoidable transactions and improper trading; allowing creditors to initiate such proceedings; clarifying power of liquidator to file for improper trading; etc.
- 2.18. The Committee discussed that the MCA may consider enacting amendments pursuant to such suggestions made in the 2020 Report. It also took note of existing issues with the implementation of provisions related to avoidable

¹⁹ See Kristin Van Zwieten, Goode on Principles of Corporate Insolvency Law (5th edn, Sweet and Maxwell 2018) p. 616

²⁰ Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2020) Chapter 3 <<https://www.mca.gov.in/bin/dms/getdocument?mds=cskKdFh%252Bxc9fHec6jre%252Fpw%253D%253D&type=open>> accessed 10 January 2022

transactions and improper trading, as suggested by stakeholders. The discussion of the Committee in this regard is as follows.

i. *Independence of proceedings for avoidance of transactions and improper trading*

- 2.19. It was brought to the notice of the Committee that there is confusion regarding whether proceedings for avoidance of transactions and improper trading can continue after approval of a resolution plan in CIRP. This comes in the wake of a recent decision of the Delhi High Court in *Venus Recruiters Private Limited v. Union of India*²¹ wherein the Court *inter alia* opined that the applications in respect of avoidable transactions do not survive beyond the conclusion of the CIRP and once the CIRP itself comes to an end, an application for avoidance of transactions cannot be adjudicated.
- 2.20. The Code does not provide a deadline for the initiation of proceedings for avoidance of transactions and improper trading (in the context of both CIRP and liquidation). Once filed, the Code also does not prescribe a time limit for conclusion of such proceedings. The CIRP Regulations, however, provide that the resolution professional shall determine if the corporate debtor has entered into any avoidable transactions by the 115th day from the insolvency commencement date and intimate the IBBI of the same.²² It also requires that, by the 135th day from the insolvency commencement date, the resolution professional shall apply to the Adjudicating Authority for appropriate relief.²³ Given that these timelines are directory, this Committee had in its 2020 Report noted that “*prescriptive timelines for initiating proceedings against avoidable transactions and improper trading during the CIRP or liquidation proceedings may not be necessary.*”²⁴
- 2.21. The Committee deliberated whether proceedings for avoidance of transactions and improper trading should be independent of the CIRP proceedings. In other words, if the proceedings for avoidance of transactions and improper trading should be permitted to go beyond the conclusion of the CIRP proceedings. The Committee discussed that hypothetically, if

²¹ *Venus Recruiters Private Ltd. v. Union of India* W.P. (C) 8705/2019 & CM APPL. 36026/2019 dated 26.11.2020

²² Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 35A(2)

²³ *Ibid*, Regulation 35A(3)

²⁴ Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2020) para 4.1 <<https://www.mca.gov.in/bin/dms/getdocument?mds=cskKdFh%252Bxc9fHec6jre%252Fpw%253D%253D&type=open>> accessed 10 January 2022

proceedings for avoidance of transactions and improper trading were not allowed to continue after the conclusion of a CIRP proceeding, it may lead to one of two scenarios -

- First, where the Adjudicating Authority would mandatorily be required to determine the conclusion of avoidance proceedings prior to approval of the resolution plan under Section 31. This would inordinately delay the conclusion of CIRP proceedings, undermining one of the most important objectives of the Code²⁵ - the timely resolution of the corporate debtor.

It is crucial that resolution of the corporate debtor should not be stalled due to the pendency of ancillary proceedings. Investigation and adjudication of avoidable transactions is often time-consuming. It requires a thorough examination of transactions that the corporate debtor undertook in the twilight period prior to commencement of insolvency or liquidation proceedings. This is especially cumbersome in respect of companies whose books and records do not properly document all its past transactions. Further, the resolution professional is also required to assess if a suspicious transaction would meet the requirements of the requisite avoidable transaction or improper trading as set out in the Code. The Supreme Court has laid down a “*volumetric as also gravimetric analysis*”²⁶ that the resolution professional has to undertake prior to filing an application with the Adjudicating Authority for setting aside avoidable transactions.²⁷

Not only the investigation and filing, but the adjudication of such transactions is also a lengthy process. Findings of avoidable transactions and improper trading are not purely objective assessments and involve answering questions of both law and fact. For instance, ascertaining a preference transaction would include determining if a particular transaction falls within the legal fiction created under Section 43(2), or within the exclusions under Section 43(3), etc. Consequently, it may be very difficult to conclude proceedings for

²⁵ *Kridhan Infrastructure Pvt. Ltd. v. Venkatesan Sankaranarayan & Ors.*, [2021] 165 SCL 355 (SC) para 11; *Swiss Ribbons (P) Ltd. v. Union of India*, (2019) 4 SCC 17 para 12; *Innovative Industries Ltd. v. ICICI Bank Ltd.*, [2017] 140 CLA 39 (SC) para 31

²⁶ *Anuj Jain v. Axis Bank Ltd.*, (2020) 8 SCC 401, para 28.1

²⁷ *Anuj Jain v. Axis Bank Ltd.*, (2020) 8 SCC 401, para 28.1

avoidance of transaction or improper trading within the 330-day time limit for CIRP.

- Second, where avoidance applications would be considered infructuous if they have not been concluded before the approval of a resolution plan under Section 31. This would mean that if avoidance proceedings have not been completed before approval of resolution plan, such proceedings shall abate. Since investigation and adjudication of avoidable transactions are often time-consuming, this may allow corporate debtors an escape from reversal of suspicious pre-commencement transactions and permit them to gain undue benefit from them. Thus, this may be susceptible to misuse by errant promoters and management of corporate debtors.

2.22. The Committee noted that both the above scenarios would lead to undesirable outcomes. Consequently, it agreed that allowing proceedings for avoidance of transactions and improper trading to continue after approval of a resolution plan in CIRP would be more efficient. It is perhaps due to this rationale that the Code does not provide any specific timeline for completion of such proceedings. Section 26 of the Code provides that filing of an avoidance application under Section 25(2)(j) by the resolution professional “*shall not affect the proceedings of the corporate insolvency resolution process*”. In its 2020 Report, this Committee had discussed the interpretation of Section 26 and noted that “*as stated in Section 26 of the Code, the filing of an application for avoidance of transactions (excluding improper trading) by the resolution professional shall not affect the CIRP of the corporate debtor.*”²⁸ Given this, it had concluded that proceedings in respect of avoidable transactions may continue beyond the timeline for the CIRP.

2.23. The Committee concurred with its earlier conclusion. It agreed that the Legislature’s intent behind Section 26 was to make proceedings for avoidable transactions independent of the CIRP proceedings. Therefore, an application for avoidable transactions is not restricted by the timelines provided for the CIRP under Section 12 of the Code. **To alleviate any doubts in this regard, the Committee decided that a clarificatory amendment may be made to Section 26 so that the completion of the CIRP proceedings do not affect the continuation of proceedings for avoidable transactions or improper trading. Further, as recommended by the Committee in its 2020 Report, an**

²⁸ Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2020) para 4.2 <<https://www.mca.gov.in/bin/dms/getdocument?mds=cskKdFh%252Bxc9fHec6jre%252Fpw%253D%253D&type=open>> accessed 10 January 2022

amendment should be made to Section 26 to expressly include proceedings related to improper trading.²⁹

ii. *Jurisdiction of the Adjudicating Authority*

2.24. The Committee also considered if a consequential change would be required to clarify the jurisdiction of the Adjudicating Authority to entertain proceedings for avoidance of transactions and improper trading beyond the CIRP period. The language of Section 60 is couched in a wide manner, and all proceedings permissible under Part II of the Code are to be adjudicated by the NCLT.

2.25. As per Section 60(1), the NCLT is the Adjudicating Authority *in relation* to insolvency and liquidation of corporate persons. Section 60(5)(c) provides that the NCLT has the jurisdiction to entertain or dispose of any question of priorities or any question of law or facts, *arising out of or in relation to* the insolvency resolution or liquidation proceedings. The Committee noted that the phrases “in relation to” or “arising out of” are of wide import, thereby extending the jurisdiction of the NCLT on subject matters related to the insolvency resolution of the corporate debtor. Further, the phrase “entertain or dispose of” suggests that the jurisdiction of the NCLT is not limited to entertaining a question of law or fact. Instead, it extends to disposal of such proceedings. Given this, the Committee felt that Section 60 read with Section 26 allows the NCLT to adjudicate over proceedings related to avoidable transactions and improper trading even after the conclusion of the CIRP. **Consequently, it agreed that amendments to Section 60 may not be required in this regard.**

iii. *Manner of conducting avoidance proceedings after conclusion of CIRP*

2.26. The Committee discussed the manner of conducting proceedings for avoidance of transactions and improper trading after the conclusion of CIRP. It noted that the resolution plan in a CIRP provides finality regarding the debts of the corporate debtor. Since any past debts of the corporate debtor stand extinguished if they are not included in the resolution plan,³⁰ any claims against the corporate debtor that are to be pursued after approval of the plan should be specifically preserved. Consequently, the Committee agreed that

²⁹Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2020) para 4.3 <<https://www.mca.gov.in/bin/dms/getdocument?mds=cskKdFh%252Bxc9fHec6jre%252Fpw%253D%253D&type=open>> accessed 10 January 2022

³⁰ *Ghanashyam Mishra and Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.*, 2021 SCC OnLine SC 313, para 95

the manner of conducting proceedings for avoidance of transactions and improper trading after approval of the resolution plan should be guided by the terms of the plan.³¹

- 2.27. A similar practice of preserving the enforcement of certain claims in reorganisation plans is followed in some other jurisdictions as well. For instance, a Chapter 11 plan in the US may provide for retention and preservation of claims against the debtor or its estate where any such claims are to be pursued after plan confirmation.³² This provision is often used to preserve claims in respect of preference and other such transactions of the debtor.³³ The plan will also specify a person who would retain and enforce such claims, who may be the debtor, the trustee, or a representative (who is usually appointed by creditor committees). The main rationale behind requiring an explicit mention of claims that are to be retained in a plan is that *"creditors have the right to know of any potential causes of action that might enlarge the estate – and that could be used to increase payment to the creditors."*³⁴ Accordingly, creditors would factor in avoidance proceedings and the expected return from them while negotiating the terms of the plan. Another reason is that the retention of claims protects causes of actions from extinguishing by virtue of the doctrine of *res judicata* and *judicial estoppel* after the confirmation of the plan.³⁵
- 2.28. The Committee discussed that a similar mechanism may be emulated under the Code. It agreed that **the Code should be amended to mandate that the resolution plan should specify the manner of undertaking proceedings for avoidance of transactions and wrongful trading, if such proceedings are to be continued after approval of the plan. This includes specifying details such as the person who will continue to pursue such proceedings and the manner of payment of the costs of such proceedings.** The subordinate legislation should provide a mechanism for sharing relevant details of any

³¹ The Committee has made a similar recommendation in its last report as well. See Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2020) para 4.1 <<https://www.mca.gov.in/bin/dms/getdocument?mds=cskKdFh%252Bxc9fHec6jre%252Fpw%253D%253D&type=open>> accessed 10 January 2022

³² US Code Title 11 § 1123(b)(3)(B)

³³ William L. Norton III, *Norton Bankruptcy Law and Practice* 3d (October 2021, Thomson Reuters) § 109:12

³⁴ *Harstad v. First American Bank* 39 F.3d 898 (8th Cir. 1994); see also *Enron Corp. v. New Power Co.* (In re New Power Co.), 438 F.3d 1113, 1118 (11th Cir. 2006)

³⁵ Blair Barton, *Broadening the Estate by Avoiding Specificity of Retained Claims- § 1123(b)(3)(B)* (2013, *Fordham Journal of Corporate and Financial Law*) v 19 issue 1

pending avoidable transactions and improper trading with the prospective resolution applicants, so that they can be factored in the plans submitted by them.

2.29. Moreover, the resolution plan should also include the manner of distribution of the recoveries made from the proceedings for avoidance of transactions or improper trading. Relief in respect of avoidable transactions and wrongful trading help restore the status quo prior to the occurrence of such transaction or trading. Accordingly, provisions under the Code allow the Adjudicating Authority to restore the position prior to such transaction or trading by inter alia vesting the recoveries with the corporate debtor. As discussed in this Committee's 2020 Report, although "in most cases it may be better suited to distribute recoveries amongst the creditors of the corporate debtor... factual factors such as - the kind of transaction being avoided, party funding the action, assignment of claims (if any), creditors affected by the transaction or trading, etc. - may need to be taken into account when arriving at a decision regarding distribution of recoveries." . This Committee had, accordingly, recommended that the decision on treatment of recoveries may be left to the Adjudicating Authority. In line with this, the Committee discussed that the resolution plan should also provide the manner of distribution of expected recoveries and the preservation of claims of expected beneficiaries, if such preservation is required, according to the commercial wisdom of the CoC. The Adjudicating Authority should have regard to the decision of the CoC regarding the manner of distribution of expected recoveries when giving final orders in proceedings for avoidance of transactions and improper trading.

2.30. When approving the resolution plan, the Adjudicating Authority should ensure that the plan contains the above details (para 2.28-2.29). Currently, the Adjudicating Authority is already required to be satisfied that a plan contains provisions for its effective implementation, before approving such a plan.³⁶ **The Committee agreed that, along with this, the Adjudicating Authority should also be satisfied that the plan provides sufficient details of the manner of continuation of proceedings for avoidance and improper trading, after its approval.** Where such details have not been provided in the plan, the Adjudicating Authority should direct the resolution professional and CoC to include the same.

iv. *Threshold date for look-back period*

³⁶ Insolvency and Bankruptcy Code, 2016, Section 31(1)

- 2.31. The provisions on avoidable transactions in the Code provide certain look-back periods or suspect periods. For instance, in case of preferential transactions, Section 43(4) provides for a two-year look-back period from the insolvency commencement date for related parties and one-year look-back period for unrelated parties. The threshold for such look-back period is the date of commencement of the CIRP, i.e., the date of admission of a CIRP application.
- 2.32. In practice, the admission or rejection of an application takes longer than the 14-day time limit provided in the Code. Given this, the look-back period for avoidable transactions may not be able to capture a significant portion of transactions that occurred before the filing of a CIRP application. This may reduce the effectiveness of the provisions related to avoidance of transactions. Further, it may also give corporate debtors a perverse incentive to delay admission of CIRP so as to reduce the scope of avoidable transactions. Thus, the Committee discussed if the threshold for the look-back period for avoidance of transactions under the Code should be modified.
- 2.33. In this regard, the UNCITRAL Legislative Guide on Insolvency Law concurs with the observations of the Committee. It notes that the effectiveness of provisions on avoidance would substantially reduce in jurisdictions where the commencement of insolvency proceedings is time-consuming. To remedy this, it suggests that the look-back period may be traced back from the date of the application for commencement of insolvency proceedings. It discusses that -

“The event or date specified by the law will depend upon other design features of the insolvency regime such as the requirements for commencement, including whether there is a potential for delay between the application for, and commencement of, insolvency proceedings. For example, if commencement typically takes several months from the time of application and the suspect period is a fixed period relating back from the effective date of commencement, then several months of that period will be taken up by the period of delay between application and commencement, thus limiting the potential effectiveness of the avoidance powers... To address situations where there is the potential for delay to occur, an insolvency law could stipulate that the suspect

period applies retroactively from the date an application is made...³⁷
(Emphasis Supplied)

- 2.34. Given the above, **the Committee decided that the threshold date for the look-back period for avoidable transactions under the Code should be the date of the filing of application for initiation of CIRP, i.e., the initiation date. Further, transactions from the initiation date until the insolvency commencement date should also be included in the look-back period. In this regard, suitable amendments may be made in Sections 43, 46 and 50.** Further, the Code may clarify that where multiple CIRP applications have been filed and admitted regarding the same corporate debtor, the date of filing of the first such application should be considered as the 'initiation date'.

IV. CURBING SUBMISSION OF UNSOLICITED RESOLUTION PLAN AND REVISION OF RESOLUTION PLANS

- 2.35. During the CIRP, the resolution professional is required to publish an invitation for EoIs calling prospective resolution applicants to submit their EoI.³⁸ After the EoIs are submitted, the resolution professional issues an RFRP which provides the deadline for submitting the resolution plan(s).³⁹ It was brought to notice of the Committee that on certain occasions additional resolution plans are submitted after the deadline in the RFRP, either for the first time or as revision of a plan submitted within the deadline. Such resolution plans are submitted on an unsolicited basis without the consent of the resolution professional or the CoC.
- 2.36. The Committee noted that during the CIRP, the resolution professional is responsible for the conduct of the process⁴⁰ and she is required to invite prospective resolution applicants who fulfil such criteria as may be laid down by her with the approval of the CoC⁴¹. Further, the IBBI is empowered to impose conditions in relation to such invitation⁴² and it has laid down

³⁷ United Nations Commission on International Trade Law, Legislative Guide on Insolvency Law, (2004) part one, para 188 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf> accessed 10 January 2022

³⁸ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 36A(1)

³⁹ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 36B(3)

⁴⁰ Insolvency and Bankruptcy Code, 2016, Section 23(1)

⁴¹ Insolvency and Bankruptcy Code, 2016, Section 25(2)(h)

⁴² Insolvency and Bankruptcy Code, 2016, Section 25(2)(h)

regulations for submission of plans during the CIRP. As per the CIRP Regulations, the resolution plans are submitted through a two-stage process. First, the resolution professional publishes an invitation for EoI and thereafter, the resolution applicants submit their EoI to participate in the resolution process of the corporate debtor.⁴³ An EoI received after the timeline specified in the invitation is to be rejected.⁴⁴ Second, the resolution professional prepares a list of resolution applicants and issues *inter alia* the information memorandum, evaluation matrix and the RFRP along with details of the process and corresponding deadlines.⁴⁵ The resolution applicants are required to submit resolution plans within the specified timeline. Further, the timeline for submission of resolution plans can only be extended by the resolution professional with the approval of the CoC.⁴⁶

- 2.37. The present procedure for submission of resolution plans under the CIRP Regulations has been a result of successive developments to address the issue of late submission of resolution plans. Initially, a resolution applicant was required to submit a resolution plan 30 days before the expiry of the maximum time period permitted for completing the CIRP.⁴⁷ This approach gave the impression that the resolution plan cannot be finalised until 150 days from the commencement of the process. To facilitate early resolution, the resolution applicant was required to submit the plans in accordance with the time given in the invitation made under Section 25(2)(h).⁴⁸ In due course, the IBBI came across instances of submission of resolution plans after the time

⁴³ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 36A

⁴⁴ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 36A(6)

⁴⁵ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 36B(1)&(2)

⁴⁶ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 36B(6)

⁴⁷ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 39(1) dated 30.11.2016 < https://ibbi.gov.in/webadmin/pdf/legalframework/2019/May/1_CIRP%20REGULATIONS301116_2019-05-20%2011:57:13.pdf > accessed on 10 January 2022.

⁴⁸ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016as amended till 31.12.2017<[https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/31%20Dec%202017%20IBBI%20\(Insolvency%20Resolution%20Process%20for%20Corporate%20Persons\)%20Regulations,%202016%20\(Amended%20upto%2031%20Dec%202017\)_2018-01-02%2018:29:04.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/31%20Dec%202017%20IBBI%20(Insolvency%20Resolution%20Process%20for%20Corporate%20Persons)%20Regulations,%202016%20(Amended%20upto%2031%20Dec%202017)_2018-01-02%2018:29:04.pdf)> accessed on 10 January 2022: See Agenda, IBBI Board Meeting dated 01.12.2017 < https://ibbi.gov.in/uploads/meetings/Agenda_2_01122017.pdf > accessed on 10 January 2022

stipulated in the invitation.⁴⁹ This issue of late bids was also recognised by the Government, which noted that the regulations will bring further clarity by laying down mandatory timelines and procedure in this regard.⁵⁰ In this background, the IBBI specified a two-stage process of invitation of EoIs and RFRP and model timelines for each activity.⁵¹

- 2.38. The Committee noted that despite these regulatory developments, resolution plans are received by the resolution professional after the deadline stipulated in the EoI and the RFRP in some instances. Broadly, the Adjudicating Authority and the NCLAT deal with two types of situations in relation to delayed submission of resolution plans.
- (i) First, where resolution plans are submitted after the stipulated deadline and the same are not considered by the resolution professional or the CoC. In certain cases, tribunals have directed the resolution professional or the CoC to consider a resolution plan after the deadlines specified in the EoI or RFRP by giving precedence to the principle of maximisation of value over the procedure laid down by the regulations.⁵² Conversely, in some cases tribunals have upheld the sanctity of the timelines provided under the regulations.⁵³
 - (ii) Second, where despite late submissions, resolution plans are considered by the resolution professional or the CoC. In a recent case,

⁴⁹ See Agenda, IBBI Board Meeting dated 26.06.2018 <https://ibbi.gov.in/uploads/meetings/Agenda_02_26062018.pdf> accessed on 10 January 2022

⁵⁰ Press Information Bureau, Government of India, MCA dated 06.06.2018. Available at: <[https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jun/President%20Approves%20Promulgation%20of%20the%20Insolvency%20and%20Bankruptcy%20Code%20\(Amendment\)%20Ordinance,%202018__2018-06-06%2021:10:49.pdf](https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jun/President%20Approves%20Promulgation%20of%20the%20Insolvency%20and%20Bankruptcy%20Code%20(Amendment)%20Ordinance,%202018__2018-06-06%2021:10:49.pdf)> accessed on 10 January 2022

⁵¹ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 as amended till 03.07.2018 <https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Oct/pdf%20copy%20%20upto%2005.10.2018%20CIRP%20Regulations%202018_2018-10-24%2014:20:10.pdf> accessed on 10 January 2022

⁵² *SBI v. Impex Metal & Ferro Alloys Ltd.* CA(IB) No. 641/KB/2018 in C.P.(IB) No. 176/KB/2018 dated 26.07.2018 (NCLT-Kolkata); *ICICI Bank Ltd. v. Unimark Remedies* MA/1529/2018 in CP/197/2018 dated 21.12.2018 (NCLT-Mumbai); *Asset Reconstruction Company (India) Ltd. v. Shamken Multifab Ltd.* CA No. 63/2019 in CP No. (IB) 133/ALD/2017 dated 21.05.2019 (NCLT-Allahabad). See also *Jitendra Vir Singh v. Lanco Solar Energy Private Ltd.* IA No. 789/2020 in CP(IB) No. 518/7/HDB/2019 dated 09.11.2020 wherein rather than directing the RP or CoC, the NCLT has left it at the option of the CoC to evaluate the option of issuing fresh EoI for ensuring value maximisation as the process was disrupted due to Covid-19 pandemic.

⁵³ *ILabs Hyderabad Technology Centre Pvt. Ltd. v. R. Nagbhushan* IA No. 3341/(ND)/2020 in CP No. (IB) 893/(ND)/2018 dated 15.09.2020 (NCLT-New Delhi); See also *Kalinga Allied Industries India Pvt. Ltd Vs. Hindustan Coils Ltd* CA (AT) (Insolvency) No. 518 of 2020 dated 11.01.2021 wherein a resolution plan was submitted before the NCLT after approval of the resolution plan by the CoC was rejected (NCLAT)

where a resolution plan submitted beyond the stipulated deadline was approved by the CoC, it was held that the tribunals are not vested with the jurisdiction to review commercial decisions of the CoC and the resolution plan was approved.⁵⁴ However, it has also been held that the CoC in its commercial wisdom cannot permit an EoI submitted after the deadline, especially when the resolution professional did not act in a *bona fide* manner and concealed material facts from the CoC.⁵⁵

- 2.39. Similarly, the Committee noted that the CIRP Regulations do not give a right to the resolution applicants to unilaterally revise or improve resolution plans. However, tribunals have in some instances observed that revisions to plans submitted should be considered by the CoC if it is during the CIRP period and a plan has not yet been approved by the CoC. This approach is adopted to ensure maximisation of value available to creditors.⁵⁶
- 2.40. Divergent judicial approaches regarding the submission or revision of plans after stipulated deadlines results in uncertainty in the process. It also disincentivises market participants from abiding by the timelines provided in the CIRP Regulations.
- 2.41. Consequently, the Committee deliberated on the manner of balancing the two principles of value maximisation and sanctity of the CIRP procedure. The primary objective of the Code is to ensure the time-bound resolution of insolvency which will result in maximisation of value of the assets of concerned stakeholders, promotion of entrepreneurship, and ensuring greater availability of credit and balancing the interests of all stakeholders concerned. In order to achieve this objective, the Code has created institutions like the IBBI, insolvency professional agencies, insolvency professionals and IUs. Under the Code, the IBBI is empowered to lay down regulations detailing *inter alia* the procedure for corporate insolvency and liquidation processes. These regulations are made in furtherance of the objectives of the Code and seek to

⁵⁴ *Kalpraj Dharamshi v. Kotak Investment Advisors Ltd.* CA Nos. 2943-2944 of 2020 dated 10.12.2021 (Supreme Court) wherein the Supreme Court overruled the decision of NCLAT in *Kotak Investment Advisors Ltd. v. Krishna Chamadia* CA(AT) (Insolvency) Nos. 344-345 of 2020 dated 05.08.2020 (NCLAT)

⁵⁵ *Dwarkadhish Sakhar Kharkhana Ltd. v. Pankaj Joshi* CA(AT) (Insolvency) Nos. 233 and 333 of 2021 dated 28.06.2021 (NCLAT, Delhi). See also *Kotak Investment Advisors Ltd. v. Krishna Chamadia* CA(AT) (Insolvency) Nos. 344-345 of 2020 dated 05.08.2020 (NCLAT) which was overruled by *Kalpraj Dharamshi v. Kotak Investment Advisors Ltd.* CA Nos. 2943-2944 of 2020 dated 10.12.2021 (Supreme Court)

⁵⁶ *Panna Pragati Infrastructure Pvt. Ltd. v. Amit Pareek*, CA (AT) (Insolvency) No. 515 of 2020, *Binani Industries Limited v Bank of Baroda*, CA (AT) (Insolvency) No. 82 of 2018; *Tata Steel Limited v Liberty House Group Pvt. Ltd* CA (AT) (Insolvency) No. 198 of 2018; and *Dena Bank v. Kuldip Kumar Bassi* Company Petition No. (IB)-50(PB) of 2018 dated 26.10.2020

strike a balance among them. Consequently, insolvency professionals and the Adjudicating Authority are required to ensure compliance of the same.

- 2.42. Although deference to the wisdom of the CoC in commercial matters is an established norm, such commercial wisdom should be exercised as per the procedure laid down by the Code and the regulations. Where the regulations specify the procedure for conducting the CIRP, unless they are *ultra vires* to the Code, participants are required to comply with them. Non-compliance of the same undermines the certainty, predictability and transparency of the process thereby making it unfair for the participants and being detrimental to the development of a market for resolution plans. Since the regulations are framed in furtherance of the objectives of the Code and its provisions, a reliance on its objectives (value maximisation) for non-compliance of the procedure will go against the scheme of the Code.
- 2.43. The report of the Standing Committee on Finance also observed that late and unsolicited plans and revisions to submitted plans are often received after the highest bid is in public domain.⁵⁷ It further noted that the CoCs have significant discretion in evaluating and accepting late and unsolicited plans, and suggested that accepting late plans should not be permitted in order to maintain the sanctity of the proceedings.
- 2.44. Considering the above, **the Committee decided that the regulations should clearly lay down a mechanism for reviewing late submissions of (or revisions to) resolution plans. Further, suitable amendments should be made in the Code to ensure that the procedure provided in the regulations has due sanctity.**
- 2.45. The Committee agreed that the CIRP Regulations may allow the CoC to opt for a Swiss challenge method for considering plans and revisions to plans submitted after the deadline in the RFRP. Through this challenge method, the CoC may consider any unsolicited plans or revisions based on a decided criteria that is based on the commercial viability of the plan. The decision to allow Swiss challenge method and the details thereof should be recorded in the RFRP. Further, the CIRP Regulations may require the CoC to specify, in the RFRP, the number of revisions that are permissible by prospective

⁵⁷ Standing Committee on Finance, *Implementation of Insolvency and Bankruptcy Code - Pitfalls and Solutions*, (2021), p. 28, <<https://www.ibbi.gov.in/uploads/whatsnew/fc8fd95f0816acc5b6ab9e64c0a892ac.pdf>>, accessed 10 January, 2022

resolution applicants and the timeline for such revisions. 'Revisions', in this respect, would not include any clarifications or modifications made pursuant to negotiations with the CoC. Further, the RFRP should provide the last date by which any plans or revisions may be submitted and the CoC not be permitted to consider any plans or revisions after such date. Additionally, the Committee noted that the CoC should provide a reasonable time-period in the RFRP for the submission of resolution plans, in order to provide participants with a fair opportunity to submit their plans before the deadline. This may aid in reducing the number of participants who seek to submit their plans after the deadline in the RFRP.

- 2.46. Pursuant to the above discussions, it may be noted that the IBBI issued a discussion paper in August 2021,⁵⁸ aligned with some of the recommendations made by the Committee. Based on this, amendments have been carried out in the CIRP regulations in September, 2021 which incorporate certain recommendations made by the Committee. This includes amendments to Regulations 36A, 36B and 39 which govern the invitation for EoI, RFRP and approval of resolution plans, respectively.⁵⁹ The amendments have clarified the manner in which modification to the invitation of EoI, the RFRP and the evaluation matrix may be made and to provide a limit on such modifications.⁶⁰ The resolution professional has been enabled to allow modification of a resolution plan submitted under this provision if the RFRP so envisages, but not more than once.⁶¹ Additionally, the manner of making revisions using a challenge mechanism and preventing late and unsolicited plans from being considered by the CoC have also been provided for in the regulations.⁶²

V. TIMELINE FOR APPROVAL OR REJECTION OF RESOLUTION PLAN

- 2.47. The approval of a resolution plan by the Adjudicating Authority is the last step in a CIRP. However, often this last step becomes a significant hurdle to

⁵⁸ Insolvency and Bankruptcy Board of India, Discussion Paper on Issues related to Corporate Insolvency Resolution Process, (27 August 2021) p. 6 <<https://ibbi.gov.in/Discussionpaper-CIRP-27Aug2021.pdf>> accessed 10 January, 2022

⁵⁹ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulations 36A, 36B and 39

⁶⁰ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulations 36A, 36B

⁶¹ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 39

⁶² Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 39(1A) and (1B)

the resolution and rehabilitation of the corporate debtor. The Committee noted that there are significant delays in the approval or rejection of resolution plans by the Adjudicating Authority. The Report of the Standing Committee on Finance has identified delays in approval of the resolution plan by the Adjudicating Authority as one of the main reasons for delays in the insolvency resolution process.⁶³

- 2.48. Such delays can be partly attributed to the applications filed by disgruntled resolution applicants or other stakeholders questioning the distributions contemplated under a resolution plan. Some part of the delay can also be attributed to the heavy caseload before the NCLTs. The Committee noted that such delays are concerning. In any insolvency process, time is of the essence and delays in the process may cause significant erosion of the value of the corporate debtor's assets.
- 2.49. Further, delays also discourage potential resolution applicants from participating in the process as they adversely affect the applicant's commercial assessments. A resolution applicant whose resolution plan is pending approval by the Adjudicating Authority may also attempt to seek modifications to the resolution plan or withdraw it altogether as the commercial basis underlying the resolution plans may change during the pendency of the application for approval of the resolution plan. Not only does this go against the Code's objective of value-maximisation for stakeholders, but it could also trigger the liquidation of the corporate debtor.
- 2.50. While the Hon'ble Supreme Court has disallowed attempts to seek modifications of the resolution plan⁶⁴ or withdrawal of the resolution plan,⁶⁵ the apex courts has also observed that –

"It would also be sobering for us to recognize that whilst this Court has declared the position in law to not enable a withdrawal or modification to a successful Resolution Applicant after its submission to the Adjudicating Authority, long delays in approving the Resolution Plan by the Adjudicating Authority affect the subsequent implementation of the plan. These delays, if

⁶³ Standing Committee on Finance, *Implementation of Insolvency and Bankruptcy Code - Pitfalls and Solutions*, (2021), para 5, <<https://www.ibbi.gov.in/uploads/whatsnew/fc8fd95f0816acc5b6ab9e64c0a892ac.pdf>>, accessed 10 January, 2022

⁶⁴ Committee of Creditors of Amtek Auto Limited Through Corporation Bank v. Dinkar T. Subramanian & Ors., (2021) 4 SCC 457

⁶⁵ Ebix Singapore Pvt. Ltd. v. Committee of Creditors of Educomp Solutions Ltd. & Anr., (2022) 2 SCC 401

systemic and frequent, will have an undeniable impact on the commercial assessment that the parties undertake during the course of the negotiation.”
(Emphasis supplied)

The Court, therefore, called upon the Adjudicating and Appellate Authority under the Code to “endeavour, on a best effort basis, to strictly adhere to the timelines stipulated under the IBC and clear pending resolution plans forthwith.”

- 2.51. Given the above, **the Committee agreed that amendments should be made to Section 31 of the Code to provide that the Adjudicating Authority has to approve or reject a resolution plan within 30 days of receiving it.** This 30-day time-period shall be subject to the overall time-period specified for the completion of the CIRP under Section 12. Further, **where the Adjudicating Authority has not passed an order approving or rejecting the resolution plan within such 30-day time-period, it may be required to record reasons in writing for the same.**

VI. CONFLICTS OF INTEREST WITH PROFESSIONALS

- 2.52. The Code provides for the interim resolution professional/resolution professional to seek the assistance of various professionals in the performance of their duties and confers on them the authority to appoint such professionals as necessary.⁶⁶ The Code also provides for the IBBI to specify the manner of their appointment by way of regulations.⁶⁷ The ability of interim resolution professionals/resolution professionals to engage professionals including lawyers and accountants in the performance of their duties has given rise to concerns regarding the purpose of such engagements, its implications on the costs of the CIRP proceedings, conflicts of interest and related concerns of accountability and transparency. There have been instances where the NCLTs have raised concerns about the large number of people engaged by the resolution professional for providing various services, outsourcing of responsibilities to them, and the exorbitant costs incurred towards fees of the professionals.⁶⁸
- 2.53. The Committee discussed whether there should be oversight or regulation of scenarios involving conflicts of interests between professionals engaged by

⁶⁶ See Insolvency and Bankruptcy Code, 2016, Sections 20(2)(a), 25(2)(d), 54F(3)(e)

⁶⁷ Insolvency and Bankruptcy Code, 2016, Sections 25(2)(d) and 240

⁶⁸ Bank of Baroda and Ors. v. Resolution Professional of Binani Cement Limited in C.P.(IB) No.359/KB/2017, (NCLT, Kolkata Bench) Decision date – 4 May 2018; State Bank of India v. Videocon Industries Limited, (NCLT, Mumbai Bench) Decision date - 8 June 2021

stakeholders in a CIRP. It noted, however, that the current regulations provide several safeguards for this purpose.

- 2.54. The Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, which regulate insolvency professionals provides for a Code of Conduct in the First Schedule. The Code of Conduct contemplates situations involving conflicts of interest and mandates the insolvency professional to act with integrity and objectivity in his professional dealings and ensure decision-making without “*any bias, conflict of interest, coercion, or undue influence of any party.*”⁶⁹ The Code of Conduct also mandates the insolvency professional to disclose any conflict of interests and particulars regarding such conflict to the stakeholders, at any time during the assignment.⁷⁰
- 2.55. Further, Regulation 27 of the CIRP Regulations details the manner in which registered valuers and other professionals should be engaged by the interim resolution professional / resolution professional so as to avoid any conflict of interests.⁷¹ Regulation 27(3) also provides that the appointment is to be done “*on an arm’s length basis following an objective and transparent process*” and prohibits certain categories of persons from being engaged as professionals. These include relatives of the resolution professional, and partners or directors of the insolvency professional entity of which the resolution professional is a partner or director.
- 2.56. The IBBI has also issued a circular dated January 16, 2018⁷² that mandates insolvency professionals to disclose any relationship with professionals engaged by them, and to ensure disclosure of any relationship of the professionals engaged, including with themselves. The circular also stipulates the nature of relationships that should be disclosed and the period within which the disclosures are to be made.

⁶⁹ Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, First Schedule, paragraphs 1, 3, 7-9, 23B

⁷⁰ Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, First Schedule, paragraph 3A

⁷¹ Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, Regulation 27

⁷² Insolvency and Bankruptcy Board of India, *Disclosures by Insolvency Professionals and other Professionals appointed by Insolvency Professionals conducting Resolution Processes* (Circular No. IP/005/2018, 16 January 2018) <[https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/Disclosures-Circular-12.01.2018%20\(1\)-1_2018-01-16%2018:26:45.pdf](https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Jan/Disclosures-Circular-12.01.2018%20(1)-1_2018-01-16%2018:26:45.pdf)> accessed on 10 January 2022

- 2.57. Given the above, **the Committee agreed that further disclosures of conflicts may be provided in subordinate legislation, if required, and that amendments to the IBC for this purpose may not be necessary.**

VII. STANDARD OF CONDUCT FOR THE CoC

- 2.58. The CoC is entrusted with critical commercial decision-making powers in the CIRP under the Code. It not only takes key decisions regarding the conduct of the business of the corporate debtor during the CIRP but is also tasked with the responsibility of assessing the viability of the corporate debtor, and determining the manner in which its distress is to be resolved. Thus, the success of a CIRP hinges on the manner of functioning of the CoC. It was brought to the Committee that there have been a few instances of improper conduct by members of CoCs that have raised concerns amongst stakeholders.
- 2.59. In some instances, the representatives sent by members of the CoC are neither adequately apprised of their role, nor adequately empowered to take decisions. This *“causes delay and allows depletion of value”*⁷³ which goes against two crucial objectives of the Code, i.e., timely resolution and maximization of value available for stakeholders. This is despite a circular issued by the IBBI which provides that members of the CoC should send personnel *“who are competent and are authorised to take decisions on the spot and without deferring decisions for want of any internal approval from the financial creditors.”*⁷⁴ In other instances, the tribunals have noted missteps of CoCs, such as undertaking adjudication beyond their powers⁷⁵, violating legal procedural requirements⁷⁶, etc.
- 2.60. It is also pertinent to note that presently, the conduct and decision making of the CoC is not subject to any regulations, instructions, guidelines etc. of the

⁷³ Jindal Saxena Financial Services Pvt. Ltd. v Mayfair Capital Pvt. Ltd., C.P. No. (IB)-84(PB)/2017, NCLT (Principal Bench). Decision date – 4 July 2018; SBJ Exports & Mfg. Pvt. Ltd. Vs. BCC Fuba India Ltd., C.P. 659/2016, NCLT (Principal Bench). Decision date – 7 June, 2018

⁷⁴ Insolvency and Bankruptcy Board of India, *Notice for Meetings of the Committee of Creditors under section 24 (3) (a) of the Insolvency and Bankruptcy Code, 2016 read with regulation 21 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016* (Circular No. IBBI/CIRP/016/2018, 10 August 2018) <https://ibbi.gov.in/webadmin/pdf/legalframework/2018/Aug/coc%20circular-1_2018-08-10%2019:39:07.pdf> accessed on 10 January 2022

⁷⁵ Rajnish Jain Vs. Anupam Tiwari RP & others, Company Appeal (AT) (Insolvency) No. 519 of 2020, National Company Law Appellate Tribunal New Delhi, Decision Date - 18 December 2020

⁷⁶ STCI Finance Ltd. through Subash Chandra Modi Vs. Parinee Developers Private Limited, IA No.264 of 2021 in CP No. (IB) 4147/MB/2019, National Company Law Tribunal Mumbai Bench Court II, Decision Date - 31 May 2021

IBBI. Unlike insolvency professionals, IUs and IPAs, the IBBI does not exercise regulatory oversight over financial creditors who form the CoC. Given this, stakeholders have suggested that CoCs should be guided by a code of conduct which lays down the expectations that financial creditors are required to meet when acting in the CoC.

2.61. The Committee had previously deliberated on this issue in its 2020 Report and suggested that *“institutional financial creditors should take necessary steps to ensure that their representatives are capable of discharging their duties in a timely and efficient manner.”*⁷⁷ To enable this, the 2020 Report had recommended that–

- (i) Financial institutions should build strong verticals for stressed asset management that go through period performance review. These verticals should be staffed with personnel that have adequate training and expertise.
- (ii) The personnel that represent financial creditors in meetings of the CoC should be sufficiently empowered to take decisions on the spot, and effectively discharge their duties.
- (iii) Industry bodies, like IBA, should develop guidance to help members of the CoC in discharging their duties consistent with the letter and spirit of the Code.

2.62. The Committee took note of the above and discussed that the recommendations made in its last report have not resulted in a change in the conduct of financial creditors in the CoC. It felt that since the CoC drives the CIRP and is given wide powers to utilise its commercial wisdom, such powers should be balanced with adequate accountability. Since the decisions of the CoC impact the life of the corporate debtor, and consequently its stakeholders, it needs to be fair and transparent in its decisions. **Therefore, the Committee agreed that it would be suitable for the IBBI to issue guidelines providing the standard of conduct of the CoC while acting under the provisions governing the corporate insolvency resolution process, pre-packaged insolvency resolution process and fast track insolvency resolution process. This may be in the form of guidance that provides a normative framework for conducting these processes. In order to empower the IBBI to issue such guidelines, the Committee recommended that appropriate amendments may be made to Section 196 of the Code. Further, the Committee discussed that the MCA may consult with relevant financial sector regulators such as**

⁷⁷ Ministry of Corporate Affairs, *Report of the insolvency Law Committee* (2020) para 12.3 <<https://ibbi.gov.in/uploads/resources/c6cb71c9f69f66858830630da08e45b4.pdf>> accessed 3 September 2021

SEBI and RBI, to frame an appropriate enforcement mechanism for the standard of conduct. Several members of the Committee agreed that the IBBI may be most suitable to carry out such enforcement. A discussion paper addressing the standard of conduct has already been issued by the IBBI pursuant to the discussion of the Committee.⁷⁸

- 2.63. The Committee also discussed the scope of the standard of conduct. It noted that the standard of conduct should lay down the rules of procedural fairness and efficiency that the CoC is required to abide by. However, the Committee cautioned that the standard of conduct should not be utilised to expand or limit the substantive powers of the CoC and should not provide guidance that diminishes its commercial wisdom. Additionally, such a standard of conduct should elucidate the role of the CoC vis-à-vis insolvency professionals, in line with the discussion in the 2020 Report of this Committee.⁷⁹

VIII. STAKEHOLDERS CONSULTATION COMMITTEE

- 2.64. In its 2015 Report, the BLRC noted that the swiftness and efficiency of the liquidation process has always been dependent on the liquidator.⁸⁰ Whereas the BLRC designed the CIRP to be driven by creditors of the corporate debtor, the liquidation process is meant to be driven by the liquidator. Thus, the Code does not envisage a creditors' committee in the liquidation process. It does, however, allow creditors to participate in the liquidation process to a limited extent.
- 2.65. The Code currently authorises the liquidator to consult any of the stakeholders who are entitled to a distribution of proceeds and such consultations are not binding on the liquidator.⁸¹ Further, Section 37(2) requires the liquidator to provide financial information to any creditor who requests for the same. In order to provide a formal structure for consultation under Section 35(2), the Liquidation Process Regulations specify the constitution of the SCC. The liquidator is required to constitute the SCC

⁷⁸ Insolvency and Bankruptcy Board of India, *Discussion Paper on Issues related to Corporate Insolvency Resolution Process*, (27 August 2021) p. 1 <<https://ibbi.gov.in/Discussionpaper-CIRP-27Aug2021.pdf>> accessed 10 January, 2022

⁷⁹ Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2020), paras 12.4-12.5 <<https://ibbi.gov.in/uploads/resources/c6cb71c9f69f66858830630da08e45b4.pdf>> accessed 3 September 2021

⁸⁰ Ministry of Finance, *The Report of the Bankruptcy Law Reforms Committee* (2015) para 5.5.9 <https://ibbi.gov.in/uploads/resources/BLRCReportVol1_04112015.pdf> accessed 3 September 2021

⁸¹ Insolvency and Bankruptcy Code, 2016, Section 35(2)

within 60 days of the liquidation commencement date. Where the liquidator differs from the advice of the SCC, she needs to record reasons in writing.⁸²

- 2.66. It was brought to the notice of the Committee that the role of the SCC should be reviewed and suitable provisions should be enacted in the Code to give it statutory recognition.

i. Statutory recognition of the SCC

- 2.67. First, the Committee considered whether there is a requirement to codify the role and powers of the SCC in the statute. Notably, this issue was deliberated by the Committee in its 2020 Report and it agreed that the SCC, as an advisory body, had utility within the liquidator framework under the Code. However, no recommendations were deemed necessary to give statutory recognition to the SCC.

- 2.68. The Committee noted that the SCC is a consultative body which is meant to guide the liquidator on certain key decisions. The regulations provide a detailed framework for the SCC and the practice of seeking consultations from the SCC is regularising. The requirement of constituting a SCC in the liquidation processes has also been upheld by Adjudicating Authorities under the Code.⁸³ **The Committee noted that the practice of seeking consultations from the SCC is already settling. Consequently, the Committee concluded that at this stage there is no gap in the Code requiring the need to statutorily encode enabling provisions for recognition of the SCC.**

ii. Mandatory stakeholder consultation by the liquidator

- 2.69. Section 35(2) of the Code currently empowers the liquidator to consult stakeholders. It was brought to the Committee that conducting such consultation may be made mandatory to ensure more comprehensive oversight over the liquidator. Thus, the Committee deliberated whether undertaking consultations with the SCC should be mandatory or at the discretion of the liquidator. It noted that this would depend on the degree of involvement of creditors and oversight over the liquidator desired at the liquidation stage.

⁸² Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, Regulation 31A. See *Kridhan Infrastructure Pvt. Ltd. v. Venkatesan Sankaranarayan*, CA (AT) (Insolvency) No. 202 of 2020 dated 08.09.2020 (NCLAT) where it was held that unlike the CoC during CIRP, the SCC does not have any power to make any determination and their consultation is not binding on the liquidator.

⁸³ See for instance, Mr. P.C. Gaggar, Liquidator vs. M/s. Multichemical Industries Pvt. Ltd., IA No.06 of 2021 in IA No.18 of 2019 in C.P. (IB)No.03/GB/2018, NCLT Guwahati, Decision date – 9 February 2021

- 2.70. The UNCITRAL Legislative Guide on Insolvency Law acknowledges that it is generally not important for creditors to intervene in proceedings or participate in decision-making during the liquidation process as the process is driven by the liquidator.⁸⁴ However, it notes that creditors may be able to provide valuable expert advice or information on the debtor's business. Further, it notes that it may be desirable for creditors to receive reports on the progress of a liquidation proceeding to boost confidence and transparency. In specific instances, such as the sale of assets in the context of liquidation proceedings, it suggests that creditors may be given a more significant role to play to boost the value of returns from such sale.⁸⁵
- 2.71. It is perhaps due to this rationale that erstwhile insolvency laws in India provided for certain creditor committees in winding up processes. The CA, 1956⁸⁶ and the CA, 2013⁸⁷ provide for the constitution of committees by the liquidator, primarily composed of the creditors, on the directions of the Court/Tribunal. These committees exercise inspection or advisory powers during the winding-up process under the CA, 1956 or 2013, respectively.⁸⁸ The role of these committees was specific to the legislative model adopted therein and the constitution of these committees was at the discretion of the Court/Tribunal. For instance, the committee of inspection under the CA, 1956 was to act with the liquidator, while the advisory committee, under the CA, 2013 advises the company liquidator.⁸⁹
- 2.72. Similar committees are also provided in the liquidation processes of other jurisdictions, which exercise varying degrees of supervision and consultation in relation to the liquidator. The insolvency law of the UK permits creditors to appoint a liquidation committee which sanctions certain powers of the liquidator, including powers relating to sale of the debtor's property.⁹⁰ In Canada, the liquidator is required to give notice to creditors, contributories, shareholders or other members of the company prior to sale of the debtor's

⁸⁴ United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law*, (2004) part one, para 84 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf> accessed 10 January 2022

⁸⁵ *Ibid*, para 82

⁸⁶ Companies Act, 1956, Section 464 and 465

⁸⁷ Companies Act, 2013, Section 287

⁸⁸ A Ramaiya: Guide to the Companies Act, 19th Edn., 2021, Page 5270-5271.

⁸⁹ A Ramaiya: Guide to the Companies Act, 19th Edn., 2021, Page 5270-5271; *See also* Section 464(1) of the Companies Act, 1956 and Section 287 of the Companies Act, 2013

⁹⁰ Insolvency Act 1986, Section 101

assets.⁹¹ In Australia, there exists a general duty on the liquidator to consult with the committee of inspection constituted during the liquidation process.⁹²

- 2.73. The Committee noted that despite some variations in international practice, the constitution of creditor committees during the liquidation process and some form of supervision of the functions of the liquidator, particularly in relation to sale of assets, is a prevalent practice. The requirement for liquidator to consult or seek sanction from such committees prior to performing certain functions was noted to be common in several jurisdictions. The Committee further noted that the SCC, similarly, would be able to offer valuable commercial insight to the liquidator in relation to several matters, including the sale of assets. Simultaneously, it was observed that such committees are, thus, also enabled to act as a check on the actions of the liquidator.
- 2.74. Consequently, the **Committee concluded that Section 35(2) may be suitably amended to provide that the liquidator must mandatorily consult with the SCC so as to ensure that the SCC is able to provide commercial inputs on the functions of the liquidator as well as conduct oversight over the liquidator.** The manner of and issues requiring such consultation may be provided in the subordinate legislation.
- 2.75. Pursuant to the discussions of the Committee above, the IBBI issued a discussion paper,⁹³ wherein amendments to the Liquidation Process Regulations were suggested in order to require the liquidator to consult with the SCC for all significant matters pertaining to the liquidation process. Thereafter, the Liquidation Process Regulations have been amended to provide for the requirement to consult the SCC for appointment of professionals to assist the liquidator and their remuneration,⁹⁴ as well as for sale of assets.⁹⁵

⁹¹ Winding-up and Restructuring Act, 1985, Section 35(1)

⁹² Corporation Act, 2001, Section 80-35

⁹³ Insolvency and Bankruptcy Board of India, *Discussion Paper on Strengthening Regulatory Framework of Liquidation Process*, (27 August, 2021), p. 2<https://ibbi.gov.in/uploads/public_comments/Discussion-Paper27Aug2021.pdf> accessed 10 January, 2022

⁹⁴ Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, Regulation 31A(1)(a) read with Regulation 7

⁹⁵ Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, Regulation 31A(1)(b) read with Regulation 32

IX. CONTRIBUTION BY SECURED CREDITORS

- 2.76. During liquidation proceedings, a secured creditor has an option to realise its security interest under Section 52, rather than relinquishing it to the liquidation estate for distribution in terms of Section 53(1) of the Code.⁹⁶ Where the secured creditor realises their security interest, the amount of CIRP costs is required to be deducted from the proceeds of the realisation.⁹⁷ Such proceeds are required to be transferred to the liquidator and will be included in the liquidation estate.⁹⁸ It was suggested to the Committee that Section 52 should be amended to require secured creditors who choose to realise their security interest outside the liquidation process to – (a) contribute towards workmen’s dues under Section 53(1)(b)(i); and (b) repay the liquidator for any expenses incurred by her for preserving and protecting the security interest of such secured creditors.

i. Contribution towards workmen’s dues

- 2.77. A similar issue was discussed by this Committee in its 2020 Report, wherein it was observed that “*the requirement to contribute to workmen’s dues, as provided in Regulation 21A, recognises that workmen are key stakeholders of the corporate debtor and form the backbone of efforts to preserve the business of the corporate debtor, not just prior to insolvency commencement, but also during insolvency proceedings*”.⁹⁹ While recognising the strong policy justification for protecting the interests of workmen, the Committee refrained from recommending any amendments to the Code and suggested that contributions towards workmen’s due for such secured creditors may be retained in the Liquidation Process Regulations.¹⁰⁰
- 2.78. As per Section 53(1)(b), workmen’s dues for the 24 months’ period prior to the liquidation commencement date are ranked *pari passu* to the debt owed to a secured creditor who has relinquished its security interest. Where the secured creditor decides to realise its security interest outside the liquidation process,

⁹⁶ Insolvency and Bankruptcy Code, 2016, Section 52(1), Section 53(1)

⁹⁷ Insolvency and Bankruptcy Code, 2016, Section 52(8)

⁹⁸ Insolvency and Bankruptcy Code, 2016, Section 52(8)

⁹⁹ Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2020) para 7.10 <<https://ibbi.gov.in/uploads/resources/c6cb71c9f69f66858830630da08e45b4.pdf>> accessed 3 September 2021

¹⁰⁰ Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* (2020), para 7.10 <<https://ibbi.gov.in/uploads/resources/c6cb71c9f69f66858830630da08e45b4.pdf>> accessed 3 September 2021

it ought to balance the interest of the workmen's dues which are ranked equally under the waterfall mechanism stipulated under Section 53. Further, since the requirement to deduct workmen's dues is not specified under Section 52 of the Code, it was highlighted that Regulation 21A has been the subject matter of judicial challenge.¹⁰¹

- 2.79. Therefore, the Committee felt that it is appropriate to clarify the deduction of workmen's dues under Section 52 of the Code. The Committee noted that under the CA, 1956 and 2013 as well, it was explicitly stipulated that the workmen's dues are required to be paid out of the proceeds of realisation of security interest.¹⁰² **The Committee recommended that Section 52(8) of the Code may be amended to state that where the secured creditor realises its security interest outside the liquidation process, the amount payable towards the workmen's dues, as it would have shared in case it had relinquished its security interest, shall be deducted from the proceeds of such realisation.**

ii. Contribution towards expenses for security interest

- 2.80. Where a secured creditor chooses to realise its security interest outside the liquidation process, such realisation would not be immediate. The security interest of such a secured creditor would require to be preserved and protected until such realisation takes place. Given this, liquidators may have undertaken certain expenses to preserve or protect the security interest of such a secured creditor. In such an event, it was suggested that the secured creditor ought to pay the liquidator for expenses incurred for this purpose.
- 2.81. It may be noted that the provisions of CA 1956 and 2013 contain similar provisions which provide that the liquidator's expenses towards preserving and protecting the security interest are required to be paid out of the proceeds of realisation of security interest.¹⁰³ Further, the legislative intent in the insertion of this provision in the CA, 1956 reflects that it was considered proper for the secured creditor to pay for such expenses incurred towards the

¹⁰¹ See *Andhra Pradesh State Financial Corporation vs. S. Rajendran, Liquidator of Krishna Industrial Corporation Ltd.* IA/1205/2020 (SR No. 1267 of 2020) in CP/1053/IB/2018 and IA/39/2021 in CP/1053/IB/2018 (NCLT, Chennai) Decision date - 4 June 2021

¹⁰² See Sections 529 and 529A of the Companies Act, 1956 and Sections 325 and 326 of the Companies Act, 2013.

¹⁰³ See Companies Act, 1956, Section 529(2) and Companies Act, 2013, Section 325(2)

asset during the pendency of the liquidation proceedings and before the sale of the asset.¹⁰⁴

- 2.82. Given this, **the Committee recommended that Section 52(8) should be amended to require a secured creditor, who stepping out of the liquidation process, to pay the liquidator for any expenses incurred by her for the preservation and protection of the security interest before its realisation.** The rationale underlying this requirement is that such amounts for preservation or protection of the security interest would have been borne by the secured creditor had no liquidation process been ongoing. Since a secured creditor choosing to realise its security interest is stepping out of the liquidation process, she should be liable for expenses related to its security interest as it would have if the liquidation process was not initiated.

iii. Consequences of non-compliance

- 2.83. It was suggested to the Committee that a provision may be inserted to provide for effects of non-compliance with the required contributions to be made by the secured creditor in respect of insolvency resolution process costs, liquidator's expenses incurred towards protection and preservation of the security interest and workmen's dues. The Committee deliberated that in certain cases, creditors may evade or delay the required contributions which would lead to a deficit in the estate for meeting workmen's dues and liquidator's expenses in relation to the security interest. In case of such deficit, the distribution of proceeds from the sale of assets under Section 53 would be adversely affected and/or delayed. Similarly, there may be deficits in meeting CIRP costs in the absence of requisite contributions to be made by the secured creditors who have been part of the CIRP proceedings. Therefore, the Committee agreed that in order to enforce the requirements to contribute against secured creditors, it would be advisable to provide that their security interests should be presumed to be relinquished to the liquidation estate in case of failure to comply.
- 2.84. Accordingly, **the Committee recommended that Section 52 should be amended to provide that where the secured creditor fails to make the required contributions, his security interest shall be deemed to have been relinquished and considered to be a part of the liquidation estate.** Further, it recommended that where such security interest has been realised, the

¹⁰⁴ See Ministry of Finance, *The Companies Act Amendment Committee Report, 1957*, para 182, <<https://indianculture.gov.in/report-companies-act-amendment-committee>>, accessed on 10 January 2022

proceeds of realisation will be also considered to be a part of the liquidation estate.

X. VOLUNTARY LIQUIDATION PROCESS

i. Requirements for initiation of VLP of an LLP

- 2.85. Section 59 of the Code provides for the VLP of corporate persons and lays down the procedural and substantive requirements for initiation and conduct of the VLP. While most sub-sections of Section 59 provide for the conditions and requirements of a VLP in relation to a 'corporate person', the text of sub-sections (3) to (5) primarily make reference only to a company. Taking note of this, certain stakeholders pointed out to the Committee that it appears as if the conditions and procedural requirements provided under sub-sections (3) to (5) of Section 59 only apply to a company and not to an LLP. Therefore, it was brought to the notice of the Committee that procedural safeguards for initiating a VLP in respect of LLPs should also be explicitly provided under the Code.
- 2.86. The Committee went through the scheme of the VLP provided under Section 59 and noted that under Section 59(1), the right to liquidate voluntarily is provided to all 'corporate persons'. Further, sub-sections (2), (6), (7) and (9) of Section 59 also make reference to 'corporate person'. The phrase 'corporate person' is defined under Section 3(7) and it includes a company or an LLP.¹⁰⁵ Given this, the Committee concluded that provisions of Section 59 apply to all kinds of corporate persons including LLPs.
- 2.87. Further, the Committee noted that sub-section (3) to (5) of Section 59 only provides for the procedure for initiating VLP. Section 59(3) which provides for conditions for initiating a VLP for a corporate person registered as a company is *without prejudice to* Section 59(2) which lays down that the IBBI shall have power to specify the conditions and procedural requirements for the VLP of a corporate person. A harmonious construction of the two sub-sections makes it clear that the power of the IBBI to specify conditions and procedural requirements for corporate persons other than a company is saved and is not taken away by the explicit stipulation in relation to a company under Section 59(3).¹⁰⁶ Therefore, the IBBI has the power to specify conditions

¹⁰⁵ Insolvency and Bankruptcy Code, 2016, Section 3(7)

¹⁰⁶ See *Amir Shad Khan v. L. Hmingliana*, (1991) 4 SCC 39

and procedural requirements for the VLP of a corporate person other than a company.

- 2.88. Furthermore, Section 59(3) acts as a guiding force for specifying conditions and procedural requirements for a VLP of an LLP. Pursuant to the same, Regulation 3 of the IBBI (Voluntary Liquidation Process) Regulations, 2017 specifies conditions and procedural requirements for initiation of VLP of corporate persons other than a company. These are similar to the conditions and procedural requirements stipulated in Section 59(3). In practice, a VLP is initiated by an LLP based upon the procedure laid down in the regulations. **In light of this, the Committee was of the view that providing an explicit reference to an LLP in Section 59 is a technical issue and an amendment to address the same is not required at present.**

ii. *Termination of VLP*

- 2.89. Section 59 provides for a VLP for solvent corporate persons who have not committed default. While the provisions of Section 59 of the Code provide for the initiation and conduct of a VLP and the dissolution of the corporate person, they are silent on the midway termination of a VLP. It was accordingly brought to the notice of the Committee that a procedure for midway closure of a VLP either through withdrawal or termination of the VLP should be explicitly provided under the Code.
- 2.90. The Committee noted that the VLP commences pursuant to a declaration from the majority of the directors, special resolution or resolution of the members of the company and approval of the creditors representing two-thirds in value of the debt of the company.¹⁰⁷ Subsequently, it is intimated to the RoC and the IBBI.¹⁰⁸ Further, it's a public process and the liquidator that is appointed is required to make a public announcement of the same.¹⁰⁹ Post-commencement, the procedure for the conduct of the VLP is similar to the liquidation process under Chapter III of Part II of the Code.¹¹⁰ Once the affairs of the corporate person are completely wound up, the liquidator files an application to the Adjudicating Authority for dissolution of the corporate person, and

¹⁰⁷ A similar procedure is specified for LLPs.

¹⁰⁸ Insolvency and Bankruptcy Code, 2016, Section 59(4)

¹⁰⁹ Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017, Regulation 14 of the

¹¹⁰ Insolvency and Bankruptcy Code, 2016, Section 59(6)

thereafter, the Adjudicating Authority by an order dissolves the corporate person.

- 2.91. Subject to the approval of the creditors, if any, the VLP is deemed to commence from the date of passing of the member's resolution.¹¹¹ Thereafter, the liquidator *inter alia* takes over control of the corporate person¹¹² and holds the liquidation estate as a fiduciary for the benefit of all the creditors¹¹³. Passing of the members' resolution results in alteration of the status of the corporate person¹¹⁴, and once the members' resolution is duly passed it confers the status of being in liquidation¹¹⁵. Prior to the enactment of the Code, erstwhile insolvency laws permitted staying the voluntary winding up processes.
- 2.92. Under the CA, 1956, Section 466 conferred powers upon the court or tribunal to stay winding-up either altogether or for a limited time where the company is being wound-up by the court or tribunal. Section 518 of the CA, 1956 extended these powers to the stay of voluntary winding up proceedings and courts exercised these powers where the circumstances were fit to justify the stay of the voluntary winding-up proceedings either temporarily or indefinitely.¹¹⁶ A similar approach is also adopted in the UK under the Insolvency Act, 1986.¹¹⁷ The Committee noted that these provisions were even extended under the CA, 2013, however, the power to stay (either temporarily

¹¹¹ Insolvency and Bankruptcy Code, 2016, Section 59(5)

¹¹² Insolvency and Bankruptcy Code, 2016, Section 59(6) read with Section 35 (1)(b)

¹¹³ Insolvency and Bankruptcy Code, 2016, Section 59(6) read with Section 36(2)

¹¹⁴ *Thomson v. Henderson's Transvaal Estates Limited* [1908] 1 Ch. 765

¹¹⁵ *Ross v PJ Heeringa Ltd* [1970] NZLR 170 at pp.172-173

¹¹⁶ *Voluntary Liquidator, Dimples Pvt. Ltd. v. Registrar of Companies* (1978) 48 Comp Cas 98 (Delhi HC); *Purohit V.B. v. Gadag & Jambukeshwara* (1984) 56 Comp Cas 360 (Karnataka HC); *Dhankari Investments Ltd. v. Official Liquidator* (2006) 132 Comp Cas 749 (Allahabad HC); *Shaan Zaveri v. Guatam Sarabhai Private Ltd.* (2009) 150 Comp Cas 499 (Gujarat HC). See also *In re Punjab Co-operative Bank, Ltd.* AIR 1919 Lah 305

¹¹⁷ *McPherson's Law of Company Liquidation* 4th Ed. - It was suggested in answer to a query in the Law Journal that a company in the course of a members' voluntary winding up could be brought out of liquidation by the simple expedient of passing a resolution to that effect, and it was sought to justify this opinion on the ground that winding up in this form commences with a resolution of the company and has always been regarded as a domestic concern. But this overlooks the fact that even voluntary liquidation effects an alteration in the status of the company and the suggestion itself is contrary to authority and to views held in official quarters. It therefore appears that a judicial stay of proceedings must also be obtained in voluntary liquidation, whether it is a members' or a creditors' winding up, and this necessitates an application under s.112 (Insolvency Act, 1986 (UK)) for the exercise by the court of its powers in compulsory winding up. There can be no doubt that s.147 (Insolvency Act, 1986 (UK)) applies to voluntary winding up as well as compulsory winding up. The section can be invoked at any time during the winding up of a company.

or permanently) the winding up proceedings were omitted by amendment through the provisions of the Code.

- 2.93. The Committee noted that the VLP is meant for solvent corporate persons who choose to liquidate themselves. In a dynamic market economy, it is commonplace for markets to evolve quickly. Thus, the financial and economic circumstances of a corporate person may change after the initiation of a VLP. For instance, a new business opportunity may arise as a result of an economic turnaround. Such scenarios would warrant the termination of the VLP. Even currently, the NCLT has already permitted termination of VLP¹¹⁸ (before dissolution) in a few cases.
- 2.94. Consequently, **the Committee felt that a mechanism for terminating the VLP before dissolution should be provided in the Code.** Such a mechanism would ensure that termination is not undertaken on an *ad hoc* basis and procedural requirements for termination are statutorily encoded.
- 2.95. Further, the Committee noted that the Code provides a simple mechanism for initiation of a VLP which does not involve the Adjudicating Authority. It agreed that a similar mechanism should be followed for termination to enable corporate persons to have an easy exit from the VLP, thereby promoting ease of doing business. Therefore, **the Committee decided that the corporate person should pass a special resolution for terminating the VLP. Where the corporate person owed any debts to creditors on the date of such resolution, approval of creditors representing two-thirds in value of such debt should also be availed.** Within seven days of the requisite approvals, the liquidator should inform the IBBI and the RoC that the VLP is terminated. Pursuant to this, **the VLP will be deemed to have been terminated on the date on which such information is provided to the RoC and the term of the liquidator will come to an end.**
- 2.96. In order to intimate the IBBI regarding termination of the VLP, the subordinate legislation may provide a form to be submitted, which would contain details including (a) a confirmation from the liquidator that due process has been followed, (b) a statement with reasons and explanation of change in conditions which warrants termination of the VLP, and (c) consequences of termination such as payment of liquidation costs or manner

¹¹⁸ See Insolvency and Bankruptcy Board of India, *Discussion paper on Voluntary Liquidation Process*, (24 November 2020) <<https://www.ibbi.gov.in/uploads/whatsnew/2020-11-24-220856-5s2gc-9b3239ee87bc1d4a25681366e53b0f14.pdf>> accessed 10 January, 2022

of returning the liquidation estate to the corporate person. The Committee consequently agreed that suitable amendments should be made to Section 59 to provide the above mechanism for termination of VLP.

XI. OPERATIONALISING THE IBC FUND

- 2.97. Section 224 of the Code provides for formation of the Insolvency and Bankruptcy Fund, or '**IBC Fund**', for the purposes of insolvency resolution, liquidation and bankruptcy of persons under the Code. Similar provisions for funds were provided in erstwhile insolvency statutes, such as under Section 269 of CA, 2013 and Section 441C of CA, 1956. The provisions related to both these funds were not notified. It was brought to the Committee that the IBC Fund has not been utilised under the Code. Consequently, the Committee decided to consider revisions to Section 224 to enable its use for the purposes of insolvency, liquidation and bankruptcy processes under the Code.
- 2.98. The Committee noted that the current design of the IBC Fund does not incentivise contributions to it and provides very limited ways of utilising the amounts contributed. Firstly, contribution to the Fund is voluntary and may be made by the Central Government in the form of grants and by any person who voluntarily wants to make such contribution. The Committee discussed that incentives may need to be built or mandates may be required for contributions to the Fund, as it may not be feasible to expect voluntary contributions otherwise. Secondly, the purposes for which the IBC Fund will be utilised are limited. Section 224(3) allows persons who have contributed to the Fund to withdraw it, to the extent of their contribution.
- 2.99. Consequently, **the Committee agreed that suitable amendments may be made to Section 224 to allow the Central Government to prescribe a detailed framework for contribution to and utilisation of the IBC Fund.** For this purpose, the Government may undertake a review of the design of funds in other statutes like the Investor Protection and Education Fund under Section 11(5) of the Securities and Exchange Board of India Act, 1992 and the Investor Education and Protection Fund under Section 125 of the CA, 2013.
- 2.100. Further, the Government may consider building incentives or mandates in order to enable regular contributions. Sources for contributions to the Fund may also be expanded. Additionally, the utilisation of the Fund may be bolstered and wider uses may be identified. For instance, the Fund may be used to meet the expenses of resource-strapped insolvency proceedings, including payment of workmen's dues; pursuing avoidance action proceedings, etc.

XII. ADDITIONAL CHANGES

i. Appeal from orders under Section 220

- 2.101. The IBBI and its disciplinary committee have the power to pass various orders under Section 220 pursuant to disciplinary proceedings conducted by the IBBI. The Committee noted that the Code currently does not provide a mechanism for appealing such orders and discussed that in the absence of specific provisions for appeal of orders under Section 220, persons affected by such orders would have to rely on writ jurisdiction of the High Courts and the Supreme Court. This may be a time-consuming process and may be inconvenient for appellants as well as the IBBI.
- 2.102. Given the above, **the Committee agreed that the Code should provide a mechanism for appealing orders issued by the IBBI and its disciplinary committee under Section 220.** The Code currently provides that appeals from orders of the IBBI under Sections 201 and 210 will be made to the NCLAT.¹¹⁹ Thus, **the Committee suggested that appeals from orders under Section 220 may be filed with the NCLAT as well, and suitable amendments should be made to the Code for the same.**

ii. Scope of subordinate legislation

- 2.103. Sections 239(1) and 240(1) respectively provide the general power for making rules and regulations under the Code. It was brought to the notice of the Committee that these provisions are limited to permitting the making of subordinate legislation for the carrying out the “provisions” of the Code. This power limits the making of subordinate legislation for filling gaps in the Code that are not envisaged by the provisions of the Code.
- 2.104. The Committee noted that different economic laws adopt different approaches for limiting the scope of subordinate legislations. While some laws¹²⁰ allow subordinate legislation making only for the “provisions” of the respective Acts, certain other laws cast a wider ambit for this purpose. For instance, the SEBI Act, 1992¹²¹, the Competition Act, 2002¹²², and the Real Estate (Regulation and Development) Act, 2016¹²³ permit the making of

¹¹⁹ Insolvency and Bankruptcy Code, 2016, Sections 202 and 211

¹²⁰ See for instance, Insurance Regulatory and Development Authority Act, 1999, Section 24(1)

¹²¹ SEBI Act, 1992, Section 30(1)

¹²² Competition Act, 2002, Section 64(1)

¹²³ The Real Estate (Regulation and Development) Act, 2016, Section 85

subordinate legislation for the “purposes” of the respective laws rather than “provisions”.

- 2.105. The usage of the word “purposes” rather than “provisions” provides a wider power to regulatory bodies and the Central Government to legislate on matters that may not have been envisaged at the time enacting the statute. The Committee discussed that such gap filling through subordinate legislation is a necessary exercise in an economic law that deals with dynamic and evolving markets. Given this, **the Committee agreed that Section 239(1) and 240(1) may be amended to allow subordinate legislation making for carrying out the “purposes” of the Code.**

ANNEXURE I: CONSTITUTION OF THE COMMITTEE

No. 30/3/2019-Insolvency Section
Government of India
Ministry of Corporate Affairs

5th Floor, A wing
Shastri Bhawan, New Delhi
Dated: 06.03.2019

ORDER

Subject: - Re-Constitution of Insolvency Law Committee as Standing Committee for review of implementation of Insolvency & Bankruptcy Code, 2016

The provisions relating to insolvency resolution for corporate persons (Part II of the Insolvency and Bankruptcy Code, 2016), regulation of insolvency professionals, agencies, information utilities and establishment of the Insolvency and Bankruptcy Board of India (the Board) (Part IV of the Code) and Miscellaneous provisions (Part V of the Code) have been brought into force, in phases. Part III of the Code, which deals with insolvency resolution and bankruptcy for individuals and partnership firms is yet to be commenced. Two amendments in the code has been done so far based on the stakeholder's consultation and Insolvency Law Committee (ILC) recommendations. Further ILC has submitted its report on Cross-Border Insolvency.

2. The provisions of the Code are evolving as a result of various judicial pronouncements and amendments made in the Code. Keeping in view the dynamic nature of the issues involved in the implementation of the Code pertaining to the corporate insolvency resolution process, the corporate liquidation process and to address new issues viz cross border insolvency, individual insolvency, group insolvency, avoidance action, Boards investigation powers & regulatory functions etc, it was considered prudent to have an advisory body for guidance & stakeholders consultations on the issues of implementation of code on continuous basis.

3.. Accordingly, in supersession of the Order No 35/14/2017 dated 16.11.2017, the Government hereby re-constitutes the Insolvency Law Committee as Standing Committee for review of implementation of Insolvency & Bankruptcy Code, 2016 consisting of following members:-

1.	Secretary, Ministry of Corporate Affairs	Chairperson
2.	Chairperson, IBBI	Member
3.	Additional Secretary (Banking), Department of Financial Services	Member
4.	Sh. T.K. Vishwanathan, Former Secretary General, Lok Sabha and Chairman BLRC	Member
5.	Sh. U.K Sinha, Ex SEBI Chairman	Member
6.	Nominee of RBI not below the rank of Executive Director	Member
* 7.	Sh. Sunil Mehta, MD & CEO Punjab National Bank	Member

8.	Sh. Uday Kotak, President Designate, CII and MD&CEO Kotak Mahindra Bank	Member
9.	Sh. Shardul Shroff, Executive Chairman, Shardul Amarchand Mangaldas & Co.	Member
10.	Sh. Bahram Vakil, Partner, AZB & Partners	Member
11.	President, Institute of Chartered Accountants of India (Vice-President in his/her absence)	Member
12.	President, Institute of Cost Accountants of India (Vice-President in his/her absence)	Member
13.	President, Institute of Company Secretaries of India (Vice-President in his/her absence)	Member
* 14.	Joint Secretary (Insolvency), Ministry of Corporate Affairs	Member Secretary

3. The Committee will analyze the functioning & implementation of the Code identifying issues impacting the efficiency and effectiveness of the corporate insolvency resolution and liquidation framework prescribed under the Code and make suitable recommendations to address such issues. The Committee will also study the insolvency resolution and bankruptcy framework for individuals and partnership firms and make recommendations for its successful implementation. The Committee may also make any other relevant recommendation as it may deem necessary.

4. The Chairperson of the Standing Committee may also invite or co-opt practitioners, experts (subject specific) who have knowledge or experience of insolvency framework, law and economics and representatives from other regulators or Ministries. The Committee may also consult other stakeholders as part of its deliberations.

5. The non-official members of the Committee shall be eligible for travelling, conveyance and other allowances as per extant government instructions, to be decided by Chairperson of the Committee. Secretarial/technical support to the Committee will be arranged by Ministry of Corporate Affairs or Insolvency and Bankruptcy Board of India.

6. The Committee shall submit its recommendation to Ministry from time to time as directed by Chairperson of the Committee.

7. This issues with the approval of Competent Authority.


(Rakesh Tyagi)
Director

To

All members

Copy to:- PS to CAM

PS to MoS, CA

PPS to Secretary, MCA

Governor, RBI with the request to nominate a member

Secretary, DFS

PS to AS, CA

* Note: On subsequent developments (superannuation/transfer) Sl. No. 7 was modified as MD & CEO, Punjab National Bank and Sl. No. 14 as Economic Adviser, MCA.

ANNEXURE II: SUMMARY OF RECOMMENDATIONS

S. No.	Topic/Provision	Summary of Recommendations
1.	Mandating Reliance on IUs for Establishing Default	<p><i>i. Reliance on IU records to expedite disposal of applications for financial creditors</i></p> <p>Financial creditors that are financial institutions and such other financial creditors as may be prescribed by the Central Government, should be required to submit only IU authenticated records to establish default for the purposes of admission of a Section 7 application (Para 2.10.).</p> <p>Where such records are unavailable, and for all other financial creditors, the current option of relying on different documents for establishing default may remain available. Suitable amendments to Section 7 may be made to this end (Para 2.10.).</p> <p><i>ii. Reliance on IU records for operational creditors</i></p> <p>In due course, operational creditors may be similarly mandated to rely on IU records for establishing default (Para 2.11.).</p>
2.	Exemptions from Scope of Moratorium	<p>Since moratorium is an essential feature of the CIRP (Para 2.14.), the power to grant exemptions under Section 14(3)(a) should be exercised only in exceptional circumstances, which may not hinder the smooth conduct of the CIRP and hence, should not be relaxed until found necessary from the implementation experience of the Code (Para 2.15.).</p>
3.	Issues related to Avoidable Transactions and Improper Trading	<p><i>i. Independence of proceedings for avoidance of transactions and improper trading.</i></p> <p>Considering lack of clarity in the interpretation of Section 26, a clarificatory amendment may be made to this provision to elucidate that the completion of the CIRP proceedings does not affect the continuation of proceedings for avoidable</p>

		<p>transactions or improper trading (<i>Para 2.23.</i>).</p> <p>In line with the 2020 Report, an amendment should be made to Section 26 to expressly include proceedings related to improper trading (<i>Para 2.23.</i>).</p> <p><i>ii. Jurisdiction of the Adjudicating Authority</i></p> <p>Further, the Committee observed that Section 60 when read with Section 26 suggests that the NCLT has jurisdiction on matters related to insolvency proceedings of the corporate debtor and is not limited to a question of law but extends to disposal of proceedings. Hence, amendments to Section 60 are not required in this regard (<i>Para 2.25.</i>).</p> <p><i>iii. Manner of conducting avoidance proceedings after conclusion of CIRP</i></p> <p>The Code should be amended to mandate that the resolution plan should specify the manner of undertaking proceedings for avoidance of transactions and wrongful trading, if such proceedings are to be continued after the approval of the plan (<i>Para 2.28.</i>). This includes specifying details such as the person who will continue to pursue such proceedings and the manner of payment of the costs of such proceedings (<i>Para 2.28.</i>).</p> <p>Resolution plans should also provide the manner of distribution of expected recoveries and the preservation of claims of expected beneficiaries, if such preservation is required (<i>Para 2.29.</i>). The Adjudicating Authority should have regard to the decision of the CoC regarding the manner of distribution of expected recoveries when giving final orders in proceedings for avoidance transactions and improper trading (<i>Para 2.29.</i>).</p> <p>When approving a resolution plan, the Adjudicating Authority should be satisfied that the plan provides sufficient details of the manner of continuation of proceedings for avoidance and improper trading after its approval (<i>Para 2.30.</i>).</p>
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		<p><i>iv. Threshold date for look-back period</i></p> <p>Threshold date for the look-back period for avoidable transactions under the Code should be the date of the filing of application for initiation of CIRP (Para 2.34.).</p> <p>Further, transactions from the initiation date until the insolvency commencement date should also be included in the look-back period. In this regard, Section 43, 46 and 50 should be suitably amended (Para 2.34.). Where multiple CIRP applications have been filed, the initiation date may be clarified to mean the date of filing of the first CIRP application (Para 2.34.).</p>
4.	Curbing Submission of Unsolicited Resolution Plans and Revisions of Resolution Plans	<p>The regulations should clearly lay down a mechanism for reviewing late submissions of resolution plans or revisions to resolution plans (Para 2.44.).</p> <p>Pursuant to the recommendation of the Committee, certain amendments have been carried out in the CIRP Regulations (Para 2.44.). Further, suitable amendments should be made in the Code to ensure that the procedure provided in the regulations has due sanctity. (Para 2.44.).</p>
5.	Timeline for approval of resolution plans.	<p>Section 31 should be amended to provide that the Adjudicating Authority should approve or reject a resolution plan within 30 days of receiving it (Para 2.51.). This time period shall be subject to the time period specified for the completion of the CIRP in Section 12 (Para 2.51.).</p> <p>Section 31 of the Code should further be amended to require the Adjudicating Authority to record reasons in writing for cases where the Adjudicating Authority has not passed an order approving or rejecting the resolution plan within the stipulated time (Para 2.51.).</p>

6.	Conflicts of Interests with Professionals engaged by stakeholder	In view of the requirements provided in the CIRP Regulations and a circular issued by the IBBI, no amendment to the Code is necessary at this juncture (<i>Para 2.57.</i>).
7.	Standard of Conduct of the Committee of Creditors	It would be suitable for the IBBI to issue guidelines providing the standard of conduct of the CoC while acting under the provisions governing the CIRP, pre-packaged insolvency resolution process and fast track insolvency resolution process (<i>Para 2.62.</i>). This may be in the form of guidance that provides a normative framework for conducting these processes (<i>Para 2.62.</i>). Appropriate amendments may be made to Section 196 of the Code to empower the IBBI to issue such guidelines (<i>Para 2.62.</i>). The MCA may consult with relevant financial sector regulators such as SEBI and RBI, to frame an appropriate enforcement mechanism for the standard of conduct (<i>Para 2.62.</i>).
8.	Statutory Recognition of Stakeholders Consultation Committee	<p><i>i. Statutory Recognition of the SCC</i></p> <p>Currently there is no gap in the Code requiring the need to statutorily encode enabling provisions for recognition of the SCC (<i>Para 2.68.</i>).</p> <p><i>ii. Mandatory Stakeholder Consultation by the Liquidator</i></p> <p>Section 35(2) should be amended to provide that the liquidator must mandatorily consult with the SCC (<i>Para 2.74.</i>).</p>
9.	Secured Creditor's Contribution	<p><i>i. Contribution towards Workmen's Dues</i></p> <p>Section 52(8) should be amended to state that where the secured creditor realizes its security interest outside the liquidation process, the amount payable towards the workmen's dues, as it would have shared in case it had relinquished its security interest, shall be deducted from the proceeds of such realization (<i>Para 2.79.</i>).</p>

		<p>ii. <i>Contribution towards Expenses for Security Interest</i></p> <p>Section 52(8) should be amended to require a secured creditor, stepping out of the liquidation process, to pay the liquidator for any expenses incurred by her for the preservation and protection of the security interest before its realization (Para 2.82.).</p> <p>iii. <i>Consequences of non-compliance</i></p> <p>Where a secured creditor fails to make the required contributions recommended above, its security interest should be deemed to be relinquished and made a part of the liquidation estate (Para 2.84.).</p>
10.	Voluntary Liquidation Process	<p>i. <i>Requirements for initiation of VLP of an LLP</i></p> <p>Providing an explicit reference to an LLP in Section 59 is a technical issue and an amendment to address the same is not required at present (Para 2.88.).</p> <p>ii. <i>Termination of VLP</i></p> <p>A mechanism for terminating the VLP prior to dissolution should be provided in the Code (Para 2.94.).</p> <p>The corporate person should pass a special resolution or members' resolution for terminating the VLP (Para 2.95.). If the corporate person owed any debts to the creditors on the date of such resolution, approval of creditors representing two-thirds in value of such debt should also be availed (Para 2.95.). Within seven days of the requisite approvals, the liquidator should inform the IBBI and the RoC that the VLP is terminated (Para 2.95.). Pursuant to this, the VLP will be deemed to have been terminated on the date on which such information is provided to the RoC and the term of the liquidator will come to an end (Para 2.95.).</p>

11.	Operationalizing the IBC Fund	Suitable amendments may be made to Section 224 to allow the Central Government to prescribe a detailed framework for contribution to and utilization of the IBC Fund (<i>Para 2.99.</i>).
12.	Additional Changes	<p>i. Appeal from orders under Section 220</p> <p>The Code should provide a mechanism for appealing orders issued under section 220 by the IBBI and its disciplinary committee (<i>Para 2.102.</i>).</p> <p>ii. Scope of subordinate legislation</p> <p>Section 239(1) and 240(1) may be amended to allow subordinate legislation making for carrying out the “purposes” of the Code (<i>Para 2.105.</i>).</p>

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**Ministry of Corporate Affairs
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