



Research cum Study on Timeliness & Effectiveness of Litigation under IBC

**Study By
Indian Institute of Insolvency Professionals of ICAI (IIIPI)**



Research cum Study on Timeliness & Effectiveness of Litigation under IBC

Study By

Indian Institute of Insolvency Professionals of ICAI (IIPI)

June 2020





Research cum Study on Timeliness & Effectiveness of Litigation under IBC

Published By

Indian Institute of Insolvency Professionals of ICAI (IIPI)

ICAI Bhawan, P. O. Box No. 7100, Indraprastha Marg, New Delhi - 110002

Website : www.iiipicai.in

Printed By

VIIBA Press Pvt. Ltd., C-66/3, Okhla Industrial Area, Phase-II, New Delhi - 110020

Copyright © Indian Institute of Insolvency Professionals of ICAI (IIPI)

Email: iiipi.pub@icai.in

Disclaimer: The views and opinions expressed or implied in this report are those of and do not necessarily reflect those of IIPI. IIPI is not in any way responsible for the result professional members of any action taken on the basis of views and opinions expressed herein. Material in this report may not be reproduced, whether in part or in whole, without the written consent of IIPI.

CONTENTS

BACKDROP	1-3
PURPOSE OF STUDY	4-5
METHODOLOGY OF STUDY	6
OBSERVATIONS	7-13
CONCLUSION/RECOMMENDATIONS	14-17

BACKDROP

With advent of Insolvency and Bankruptcy Code (IBC) in 2016, considered to be a beneficial legislation and as one of the major economic reforms, the landscape of 'Ease of Doing Business' has significantly improved in India. Besides the stated objectives of saving corporate from distress, value maximisation, promoting entrepreneurship, availability of credit and balancing interests of various stakeholders, the code has successfully brought about desirable behavioural changes among the debtors. The value maximisation principle requires that once an entity is identified with distress as manifested in its default, an urgent and immediate action be taken as enshrined in IBC. The timely action is imperative to avoid further deterioration in the underlying value, either through change in management or sale as going concern. At stake are the interests of multitude of stakeholders with continuity of business being the first and foremost objective, towards preservation of capital and underlying assets. The reliability and efficacy of the 'corporate insolvency resolution process' (CIRP) process, especially as a resolution rather than recovery mechanism, depends inter-alia, on the time bound process which lies at the crux of the entire resolution process. IBC puts the primary responsibility of diligent pursuance of time-bound processes on insolvency professionals and the adjudicating or appellate authority with other stakeholders playing an important contributory roles.

Originally IBC prescribed a maximum period of 180 days for CIRP further extendable by 90 days with approval from adjudicating authority. In actual experience, CIRP took longer than the prescribed time- line for a variety of reasons like delays in the courts owing to infrastructure, frequent litigation, operational delays in processing claims, taking control of corporate debtor (CD), delays in decisions by committee of creditors (COC), delays by resolution professionals (IRPs/RPs), etc. In practice, given the inherent delays, sometimes uncontrollable, the Courts have been allowing for exclusion of time period in litigation in genuine case for the calculation of time-lines as per IBC. In order to have a more disciplined approach, the IBC was amended (in Aug. 2019) to provide for a maximum of 330 days for a CIRP including time taken in legal process, failing which the process would necessarily end into liquidation order. However, recently as per Hon. Supreme Court's judgement in Essar Steel case, the period of 330 days has been deemed to be directory rather than mandatory. Thus Hon. Supreme Court created room for courts to allow extension beyond stipulated 330 days in exceptional circumstances. As per the data available with IBBI, from inception till the end of Dec. 2019, the average no. of days in a CIRP/Liquidation, after and before excluding the time

period allowed to be excluded by the Courts from CIRP process, has been reported as follows.

Avg Time Taken since Insolvency Commencement till	No. of CIRPs Covered	Time taken (days) including Excluded Time	Time taken (days) excluding Excluded Time
Approval of Resolution Plan by Adjudicating Authority	190	394	364
Orders for Liquidation by Adjudicating Authority	780	308	N/A

In this context, it is worth noting that litigation by nature could be either unavoidable or avoidable. First category represents legal interventions as prescribed in the IBC which can be viewed as part and parcel of effective resolution mechanism. Though technically not a litigation for want of litigants, such legal intervention has also been referred to as litigation, for ease of understanding. All other litigations shall fall in the avoidable category which can further be segregated into (i) desirable – those resulting into relief, and (ii) infructuous in nature. As a thumb rule, the infructuous litigations are those which are either quashed by the courts or are met with strictures/cost-orders against the erring party. In stricter sense, any litigation the outcome of which is not commensurate with the time and cost involved, can be considered an infructuous one. In legal jurisprudence, infructuous or vexatious proceeding is one which has little or no basis in law and is invoked to subject the defendant to inconvenience. In this context, vexatious litigants are those individuals who litigate in a manner which leads to unnecessary harm and expense for their opponents, and causes disruption to the justice system.

Further, it could be interesting to understand the nature and frequency of unavoidable interventions by the Adjudicating Authority (NCLT) or other Courts under various provisions of IBC or CIRP regulations, as follows:

Relevant Provision under IBC/ CIRP regulations	Brief Particulars
Sec.12	Timeline for completion of CIRP, within 180 days or as extended upto 270 days and within 330 days (including time taken in legal proceedings).
Sec.12 A, Reg.30A	Applicant/IRP to approach AA for withdrawal of CIRP application post COC approval, etc.
Sec.19(2), Reg.30	RP may approach AA to seek assistance from CD's personnel or local district administration
Sec.22(3)	COC to approach AA for seeking approval for appointing RP in place of IRP
Sec.25 (2)(j)	RP to approach AA for seeking intervention on avoidance transactions as per Chapter III, if any
Sec.27	COC to approach AA for seeking replacement of RP
Sec.30(6), 31	RP to approach AA in respect of approval of resolution plan

Sec.32	Appeal against approval of resolution plan on grounds laid out under Sec.61(3)
Sec.43, 44	RP to approach AA for seeking intervention on Preferential transactions
Sec.45, 46	RP to approach AA for seeking intervention on Undervalued transactions
Sec.47	Creditors may file application to AA to adjudicate upon Undervalued transactions, if not filed by RP
Sec.49	AA to adjudicate upon undervalued transactions for defrauding creditors
Sec.50,51	RP to approach AA for seeking intervention on Extortionate transactions
Sec.61(1),(3)	Appeals to NCLAT against NCLT's orders. Grounds to file appeal against NCLT order approving any resolution plan
Sec.62	Appeals to Supreme Court against order of NCLAT
Sec.64	AA to dispose of applications expeditiously in timeline wherever specified in IBC
Sec.65	AA may impose penalty in respect of fraudulent initiation of insolvency proceeding
Sec.66	RP to approach AA for seeking intervention on fraudulent/ wrongful trading
Sec.68 to 77	Dealing with penalties and offences under different provisions of IBC
CIRP Reg. 16 A	Approaching AA for appointing AR in two days of claims verification
Reg.17	IRP approaching AA certifying COC formation in two days of claims verification
Reg.28	RP to notify to AA in respect of assignment of debt by any creditor and consequent change in COC's constitution
Reg.35A	Timelines for identifying, determining and filing application to AA for avoidance transactions
Reg.39	RP to endeavour to submit resolution plan as approved by COC, to AA atleast 15 days before the maximum timeline permitted under Sec.12
Reg.40A	Laying out the model timelines for various time-bound milestones

Abbreviations: AA: Adjudicating Authority, AR: Authorized Representative, COC: Committee of Creditors, IRP: Interim Resolution Professional, RP: Resolution Professional

— *** —

PURPOSE OF STUDY

Unlike the previous recovery based regime implementable through courts of law, IBC provides a market-based approach where the participants arrive at a workable solution based on commercial principles following equitable principles laid down in the code. Though IBC envisages the role of courts as a supervisor and a facilitator towards equitable insolvency resolution of debtor, some litigation is inevitable given the sensitivity of and impact on multitude of stakeholders involved. There is a perception or general acknowledgement of the fact that during initial phase of IBC regime in India, the litigation would be pivoting around constitutional validity of key provisions, eligibility norms, filing of application for insolvency, verification claims, RP's responsibilities, etc. With passage of time and settling of the jurisprudence, however, the centre of most litigation is likely to tilt towards Preferential, Undervalued, Extortionate and Fraudulent transactions (PUEF or avoidance transactions, in short). Precisely because of this reason coupled with the fact that we are at the nascent stage of IBC regime, we may not compare India-specific experience with global benchmarks. Nevertheless, the international experiences remain relevant for better development of insolvency related jurisprudence in India.

The litigation contributing to the time delays, as part and parcel of CIRP process could arise at various stages viz. before commencement of CIRP, during CIRP process and after approval of resolution plan. The time taken between filing of application till its admission, is primarily a

“In the direction of further improving the CIRP timelines, it could be interesting to understand the timeliness and effectiveness of the litigation involved therein.”

function of legal infrastructure of concerned NCLT. Further, the litigation post approval and during implementation of resolution plan could be the outcome of any gap in the information provided to successful resolution applicant, which ideally should not arise if the all the relevant information is duly disclosed in the IM as administered by the RP. The litigation at this stage could also be due to delinquency by the successful resolution applicant, for which IBC provides for necessary penalties, etc. However, it's CIRP process which is the subject matter of IBC wherein certain model timelines have been prescribed as per CIRP Regulation 40A.

In the direction of further improving the CIRP timelines, it could be interesting to understand the timeliness and effectiveness of the litigation involved therein. Besides, it could be useful to differentiate between unavoidable legal interventions as provided in the IBC with avoidable litigation being pursued by litigants due to genuine grievance. The avoidable litigation could also be frivolous or infructuous in nature. It may be interesting to note that IBC being a beneficial legislation and in the interest of all stakeholders, does not mention or define the

terms like plaintiff, respondent, etc. Moreover a better understanding of the cost incurred in CIRP litigation could prompt corrective measures in the direction of making overall CIRP more affordable.

In the backdrop as mentioned above and particularly in the context of timeliness and effectiveness of litigation during CIRP, the research cum study has been undertaken, with the following purpose(s):

- To understand nos. of litigation at various stages of CIRP process with corresponding time taken in such litigation.
- To understand the quality of litigation and the extent of infructuous nature of litigation involved.
- To understand the cost involved in litigation, as a percentage of CIRP cost.
- To solicit suggestions from IP members about further improving the process from litigation perspective.
- Interpreting the data and drawing conclusion for further improvement in resolution process.

— ** —



METHODOLOGY OF STUDY

The methodology adopted for the above research/study is as follows:

- Circulating a questionnaire to IP members of IIIPI requesting responses on the litigation involved during CIRP, that is, since commencement of CIRP till approval of resolution plan. Moreover, the litigation related data was also sought during liquidation as well.
- Dividing the litigation related data into four stages (i) Stage 1- 'from commencement till COC formation' (ii) Stage 2- 'after COC formation till issuance of RFRP', (iii) Stage 3- 'after issuance of RFRP till approval of Resolution Plan', & (iv) Stage 4- during liquidation.
- Each stage was further divided into three categories viz. Unavoidable litigation, Avoidable- Relief, Avoidable-Infructuous. First category represents legal interventions as prescribed in the scheme of IBC and as identified earlier. These are necessary or unavoidable and hence inseparable part of any CIRP process in the current scheme of IBC. Second category represents litigation as the outcome of grievances to one or more stakeholders during CIRP, which results into relief being granted to litigant(s). Such litigation, though avoidable, could still be worthwhile in the interest of balancing interests of stakeholders. Third category represents litigation which does not result in any relief to the litigant(s) and has been quashed by the court(s) at any stage. Being infructuous in nature, such litigation is avoidable.
- The data pertaining to nos. (of litigation) and time period (in days) was sought separately for each category as above with respect to different stages (four) as identified above. The data was supposed to be provided for each category in a mutually exclusive manner. Such data was subjected to sanity-check for obvious inconsistency, before collating and further analysis.
- The participants were requested to provide inputs of costs involved on litigation as percentage of CIRP cost.
- The participants were also requested to provide subjective comments/suggestions to improve the CIRP time-lines with respect to the litigation.

— *** —

OBSERVATIONS

The survey/questionnaire as part of the research/study was shared with IP members of IIIPI. About 100 participants submitted their responses. Of these, data from about 40 responses were ignored due to inconsistencies. The data collected from remaining 60 participants has been tabulated and analysed in the following manner:

A. Tabulation of litigation (nos. and time in days) across the matrix of Stages Vs. Outcome:

Four stages as mentioned earlier are (i) Stage 1 : From commencement till COC formation (ii) Stage 2 : After COC formation till issuance of RFRP, (iii) Stage 3 : After issuance of RFRP till approval of Resolution Plan, & (iv) Stage 4 : Liquidation.

Table : 1

Division of Litigation (Time in days)	STAGE 1		STAGE 2		STAGE 3		STAGE 4		TOTAL	
	Nos.	Time	Nos.	Time	Nos.	Time	Nos.	Time	Nos.	Time
Unavoidable	30	1146	70	4367	36	2639	29	1300	165	9452
Avoidable-relief	29	1171	91	4425	93	1477	63	1535	276	8608
Avoidable-infructuous	18	397	41	2541	31	1378	20	1207	110	5523
TOTAL	77	2714	202	11333	160	5494	112	4042	551	23583

The table as above sheds light upon the absolute overall number of litigations under various categories of matrix in terms of the time taken in respect of 208 CIRP/Liquidation assignments. On an overall basis, time consumed in per litigation works out to 43 days (Total time divided by Total Nos.). Moreover, average time taken in all litigation per CIRP works out to ~113 days (Total time divided by total assignments viz. 208). By this data, we can deduce that on an average there are about 3 numbers of litigations per CIRP. Further explaining the range of data (averaging at 113 days as above), the frequency distribution among the sixty cases representing 208 CIRP/Liquidation assignments, is as follows:

Range of Time period (per CIRP) in Days	Frequency (Nos. of instances)
1-50	20
50-100	18
100-150	7
150-200	4
200-300	5
300-400	3
400-600	1
600-800	1
800-1000	
1000-1200	1
Total	60

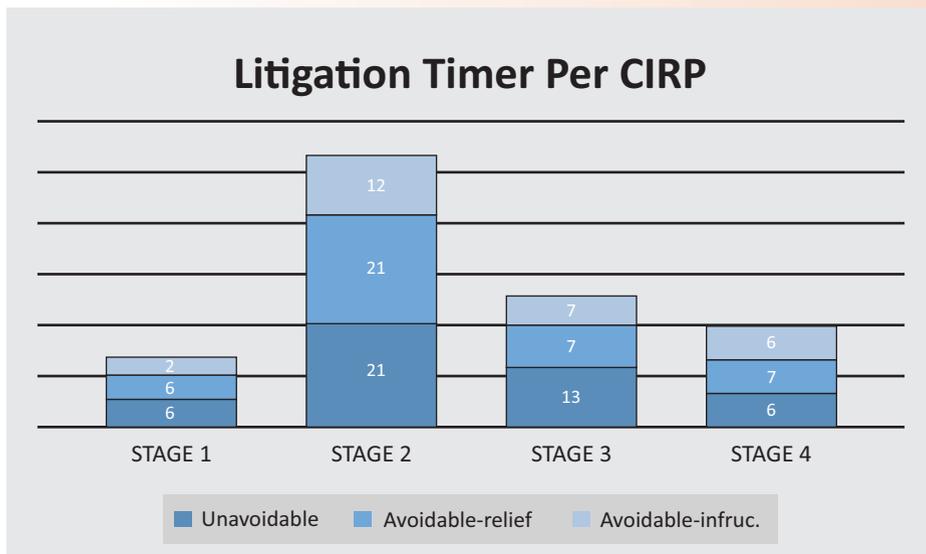
Separating the liquidation related period (per assignment) and only focussing on first 3 stages pertaining to CIRP process, on an average, it takes about 94 days to attend to the legal interventions or other litigation. The said period of 94 days works out to 52% of the prescribed period of 180 days for a CIRP. However, to draw any further insights from above data, the same has been diced and sliced in relative terms in the following segments.

B. Litigation time per CIRP: The table/chart below focusses on the stage-wise break-up of average time taken (in days) in litigation per CIRP (i.e. 113 days as mentioned previously). The same has arrived at by dividing the time mentioned in the table 1 above by the nos. of CIRP/Liquidation assignments involved (208 nos.) and rounded off:

Table : 2

(Time in days)	STAGE 1	STAGE 2	STAGE 3	STAGE 4	TOTAL
Unavoidable	6	21	13	6	45
Avoidable-relief	6	21	7	7	41
Avoidable-infructuous	2	12	7	6	27
TOTAL	14	54	27	19	113

Figure : 1



As highlighted in table/chart above, overall it takes an aggregate of 113 days per CIRP across different litigation. The data for stage-wise litigation per CIRP shows the range of time taken being highest at 55 days (Stage 2) to lowest at 13 days (Stage 1). However, looked at from output-based perspective, the time taken is highest at 45 days for unavoidable litigation and lowest at 27 days for avoidable- infructuous litigation, constituting about 24% of total time in litigation. Another interesting analysis would be to juxtapose the litigation period (per CIRP) under Stage 1 (till COC formation), 2 (after COC till RFRP) and 3 (after RFRP till approval of plan), as against the ideal time as per scheme of IBC:

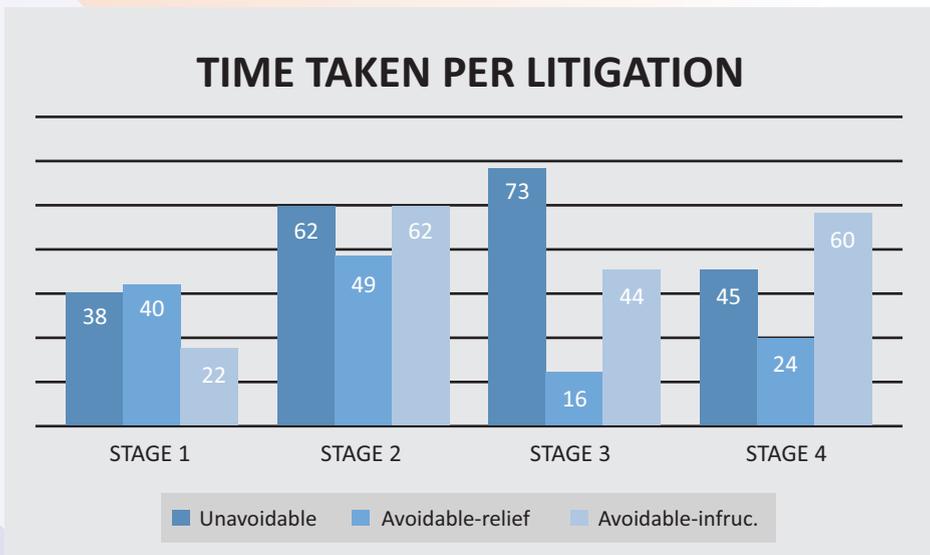
Stage-wise Nos. of days	Period as per IBC (ref. CIRP regulation 40A)	Period taken under various Litigation
Stage 1	30	13
Stage 2	75	55
Stage 3	75	26
Total	180	94

C. Analysis of time taken per Litigation: The table/chart below tabulates the average time taken in each litigation, arrived at by dividing the time (in days) by corresponding nos. of litigation, mentioned in Table 1 above.

Table : 3

Time per Litigation (Days)	STAGE 1	STAGE 2	STAGE 3	STAGE 4	TOTAL
Unavoidable	38	62	73	45	57
Avoidable-relief	40	49	16	24	31
Avoidable-infructuous	22	62	44	60	50
Average	35	56	34	36	43

Figure : 2



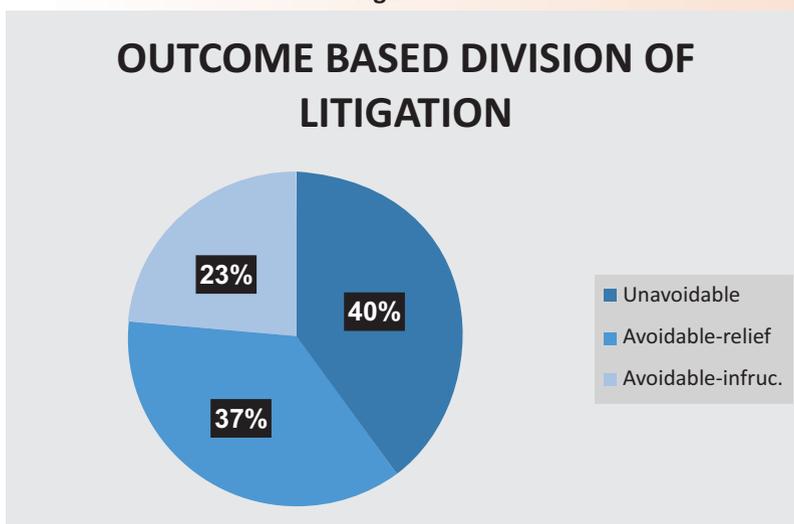
The table/chart attempts to examine time taken in each litigation across different stages. Overall, any single litigation, on an average, takes 43 days (range between 16 to 73 days) to complete. However, if looked at stage-wise, the time taken is highest 56 days (range between 49 to 62 days) at stage 2, while for all other stages it takes about 35 days. Looked at output-based division, the time taken is highest 57 days (range between 38 to 73 days) for unavoidable litigation, followed by 50 days (range between 22 to 62 days) for avoidable (infructuous). Overall, Stage 3 – Unavoidable litigation takes longest time of 73 days, whereas the least time (16 days) is taken for Stage 3 – Avoidable (relief) litigation.

D. Inter-se share of litigation basis the outcome: In the table and the corresponding pie-chart below, the relative share of different 'outcome based litigation' across all 208 assignments has been examined.

Table : 4

Outcome Based Division of Litigation	Total Time Taken (days)	Share (in %)
Unavoidable	9452	40
Avoidable-relief	8608	37
Avoidable-infructuous	5523	23
Total	23583	100

Figure : 3



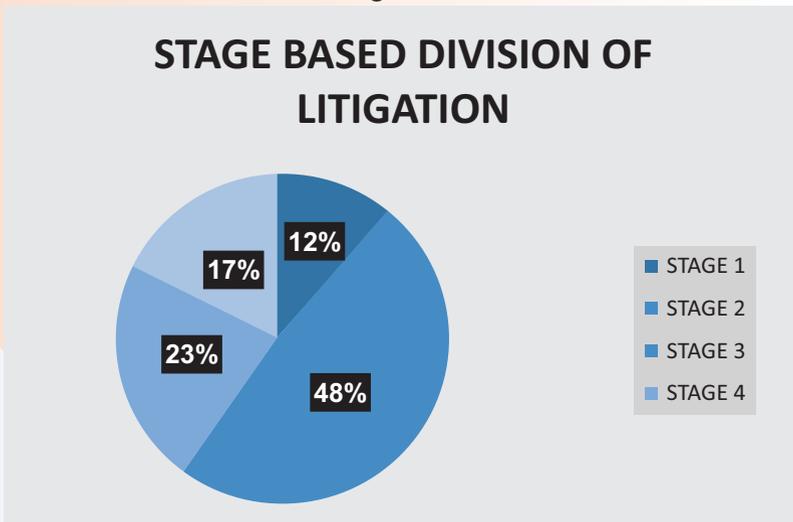
The above analysis shows that unavoidable litigation constitutes maximum 40% of the total time taken across various litigation, followed by avoidable (relief) at 37% and avoidable (infructuous) at 23%. The last category, though with least share, constitutes a significant portion in the overall pie.

E. Inter-se share of stage-wise litigation: In the table and the corresponding pie-chart below, the relative share of different 'stage-wise litigation' across all 208 assignments has been examined.

Table : 5

Stage-wise Division of Litigation	Total Time Taken (days)	Share (in %)
Stage 1 (till COC)	2714	12
Stage 2 (COC-RFRP)	11333	48
Stage 3 (RFRP-Plan)	5494	23
Stage 4 (Liquidation)	4042	17
TOTAL	23583	100

Figure : 4



The above analysis shows that Stage 2 (After COC formation till RFRP issuance), constitutes maximum 48% of the total time taken across various litigation, followed by Stage 3 (till approval of plan) at 23%, Stage 4 (liquidation) at 17% and Stage 1 at 11%. This analysis alludes to the Stage 2 as the key contributor to the litigation, hence the need to train the focus here for corrective measures.

F. Subjective Comments

Moreover, as part of the survey, the participants were requested to provide subjective comments and suggestions for improving the legal processes involved in insolvency resolution. The participants were also posed question on the estimated cost of litigation as a proportion of overall 'CIRP cost'. After due analysis, the feedback from participants has been enlisted below, divided in three categories:

(I) Relating to infrastructure

- (a) The wait for listing (for hearing) post filing of applications, followed by delay/pendency in court hearings, have been identified as main contributors to overall time taken in litigation.
- (b) The frequent stays given by higher courts, during appeals, add to the timelines.
- (c) Enhancing the number of courts within a jurisdiction facing more delays, can help ease the pendency.
- (d) Procedure of filing application, is cumbersome and needs improvement.
- (e) Electronic submissions/hearings can be considered as an alternative in place of physical presence currently required in courts.

(II) Design of Law

- (a) IBC can be suitably ring-fenced from other corporate/other laws operating in same sphere.

- (b) Incorporating the alternative of 'mediation' within IBC, can be considered.
- (c) The scheme of law should keep the court-driven interventions, to the minimum.
- (d) Following an institutionalized CIRP process in the direction of standardization of CIRP processes.
- (e) Imprisonment and penal provisions against litigants involved in infructuous litigation.

(III) Procedural Improvements

- (a) Upper cap can be placed on the number of assignments, a resolution professional can undertake.
- (b) Live monitoring of CIRP processes by IBBI or IPA, can improve the compliances thus cutting down the reasons of litigation.
- (c) Better awareness of IBC law among various stakeholders including Govt. departments, to take care of litigation resulting from lack of knowledge or misinterpretation of the law.

IV. Cost of Litigation

(a) As per the participants, the cost of litigation as a proportion of overall CIRP cost largely varies from 10% to 50%. It may be mentioned that CIRP cost has various components including IRP/RP remuneration, support services, going concern cost, cost of professionals, interim finance cost, cost of litigation, etc. and can vary depending upon circumstances of each case. As per a separate analysis based on cost-disclosures (1925 nos. Form ii and 852 nos. Form iii disclosures by IRPs and RPs respectively) from the CIRPs conducted so far, the average cost of litigation per CIRP works out to Rs.18 lacs per CIRP. This estimate has been arrived at by totalling 'litigation cost' and 'cost of legal professionals' in the forms as mentioned above, before averaging the same. Extrapolating such cost across all CIRPs so far (till Dec.'2019, about 3000 nos.) and using the inter-se proportion for different categories of litigation, the overall cost involved in such litigation can be presented as follows:

Considering the fact that thousands of fresh applications are in pipeline, the high

Outcome based Division of Litigation	Share (in %)	Cost of Litigation (Rs.crore)
Unavoidable	40	216.0
Avoidable-relief	37	199.8
Avoidable-infructuous	23	124.2
TOTAL	100	540.0

proportion of litigation cost as mentioned above highlights the plight, scope and need for further all-encompassing improvement in legal delivery model.

From the perspective of World Bank's 'Ease of Doing Business' ranking and particularly in the

4

CONCLUSION/RECOMMENDATIONS

context of ease of Insolvency, the timeliness and cost of insolvency process, inter-alia, form the key components of any insolvency regime. Moreover, the value maximisation objective of IBC can be served much better if the time taken in CIRP is minimised. As a matter of fact, the legislative responses in the wake of Covid-19 pandemic, to amend the IBC by suspending certain provisions, shall insulate the distressed businesses from forced insolvencies and/or undesirable litigation. Though the insolvency law has settled to a great extent with passage of time and after many legal pronouncements, the litigation remains one of the concerns adding to cost and time during a CIRP. Hence it's worthwhile to fathom the cause-effect relationship contributed by various factors at play. Besides addressing the challenge of legal-delivery infrastructure, there definitely seems a scope for improvement in many other but related aspects. It may be pertinent to note here that besides existing 15 NCLT benches (including principal bench at Delhi), in July 2019, setting up of additional 25 single and division benches was announced, at various places including Delhi, Jaipur, Kochi, Chandigarh and Amravati. Most of these are yet to be made operational, post which the legal infrastructure may improve substantially. Further, in respect DRT related infrastructure, in the context of ensuing personal insolvency regime, recently (in Feb. 2020) Mumbai High Court highlighted the issue while delivering orders in two separate cases filed by International Asset Reconstruction and Kotak Mahindra Bank respectively. The said orders, while directing the DRT to expedite the cases, remarked that money of financial institutions was stuck before various agencies where adjudications have not taken place due to lack of manpower and infrastructure.

“Though the insolvency law has settled to a great extent with passage of time and after many legal pronouncements, the litigation remains one of the concerns adding to cost and time during a CIRP.”

In this direction, the study conducted as above reveals certain important aspects of the underlying issues. Through the study, an effort has also been made to explore the psychological dimension of our unique business-socio environment, in the quest to understand the leading reasons contributing to CIRP related litigation. By dissecting the litigation related data to differentiate the unavoidable litigation from avoidable litigation and within the latter, differentiating between desirable litigation from undesirable or infructuous, alluding to psychological factors at play, it would be easier to apply focus on corrective measures differently and effectively. One cannot but notice the sizeable infructuous/avoidable litigation as a proportion of overall litigation time and cost. Such litigation could arise due to the issues pertaining to legal-interpretation or psychological reasons viz. tendency to hold on, personal egos/grudges, to exact revenge or to inflict injury, etc. The courts in India have time and again noticed the malaise of infructuous litigation. In the context of IBC, Hon'ble Supreme Court, in the case of Mobilox Innovations Private Limited v. Kirusa

Software Private Limited, was concerned with the question of existence of a dispute or a suit or other proceedings. The Hon'ble Supreme court held that the dispute, existence of which is claimed ought not to be spurious, mere bluster, plainly frivolous or vexatious and that such a pre-existing dispute could be pursued. It is worth noting that IBC provides for penalty by the Adjudicating Authority (u/Section 65) against the infructuous litigation in respect of initiation of CIRP/Liquidation fraudulently or with malicious intent for any purpose other than for the resolution of insolvency or liquidation. In other frivolous proceedings, remedial actions by the courts can generally be in the form of strictures or 'cost orders' against the erring party.

“The Court went on to state that a vexatious proceeding is one which has little or no basis in law and its effect, whatever its intention, is to subject the defendant to inconvenience.”

Even in English law, the tort of malicious proceedings is now being accepted even in civil proceedings and not just criminal proceedings as has been the case hitherto. In the context of English law, vexatious litigants have been defined as individuals who litigate in a manner

which often leads to unnecessary harm and expense for the unfortunate opponents, and causes disruption to the justice system. In *Attorney General Vs Barker*, the English & Wales High Court particularly described the characteristics of vexatious individuals:

“The hallmark usually is that the plaintiff sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon thereby imposing on defendants the burden of resisting claim after claim; that the plaintiff relies on potentially the same cause of action ... against successive parties who if they were to be sued at all should have been joined in the same action; that the claimant automatically challenges every adverse decision on appeal; and that the claimant refuses to take any notice of or give any effect to orders of the court.” The Court went on to state that a vexatious proceeding is one which has little or no basis in law and its effect, whatever its intention, is to subject the defendant to inconvenience.

On the other hand genuine grievances contributing to litigation (avoidable-relief) can be generally traced to reasons like non-application of equitable principle, (lack of) code of conduct by those at helm, legal-misinterpretation and so on. Taking the cues from the findings of the study, following section enumerates recommendations for improving the legal-delivery platforms and timelines, under three sections requiring different approach basis the underlying causes as indicated above:

A. Unavoidable Litigation:

In the context of and given the need for some unavoidable or necessary legal intervention in the current scheme of IBC, following recommendations/suggestions have been put forth. While some of these recommendations can probably be implemented over short term, others may take longer to take roots:

(i) Though the need for better legal infrastructure in terms of NCLT benches, has been acknowledged, the increased usage of automation and technology can well compensate for infrastructural gaps in short run, besides being user-friendly. There are many areas amenable to automation viz. filing application online, hearings over video conference, delivery of judgements in pre-determined template, etc. In fact courts have already taken effective steps

in this direction, using technology and artificial intelligence.

(ii) IBC is a beneficial economic legislation providing market forces leeway to decide the best course of rescuing a business in a commercially viable manner. Though legal interventions at times are the only recourse available, it is worth examining as to whether legal pronouncements can be short based on a pre-determined check list.

(iii) Currently there are a number of matters where IRP/RP/Liquidator, with or without approval from COC, need to approach Adjudicating Authority for final approval, etc. Given the initial or nascent phase of IBC in India, having a strict regime seems to be need of the hour. In long term, however, with settled jurisprudence coupled with matured participants, role of courts can be limited only to very important matters like admission of application and final approval of resolution plan, while delegating the other/procedural matters like RP under the supervision of IBBI and concerned IPA.

(iv) Drawing experience from developed markets like USA, UK, and Australia and after gaining more experience, pre-pack insolvency can be incorporated in the IBC as another alternative. This could truncate overall timeline to a great extent towards achieving value maximisation objective, allowing the market forces to act optimally within the precincts of defined law and with certain checks and balances. As a matter of fact, pre-pack insolvency is already being discussed at various forums, formally and informally.

“Role of court can be limited only to very important matters like admission of application and final approval of resolution plan.”

B. Avoidable-Relief:

The suggestions put forth in the 'part A' above would equally to improve the delivery/time under this category. Moreover, some additional suggestions are mentioned below:

(i) Taking care of the misinterpretation of law as one of key reasons, it will be worthwhile to spread better awareness about the facets of insolvency law among multiple stakeholders viz. Govt. authorities, market participants, lenders, MSME vendors, house owners, deposit holders and so on. Though many awareness programs have been undertaken by IBBI, IPAs and other forums, the efforts can be more pointed and continuous. The outreach through mocks or otherwise, can also be increased to the universities, law schools and business schools. The recent national quiz on IBC related knowledge, launched by IBBI, is one such interesting step.

(ii) The law cannot probably take care of all eventualities in a dynamic economic or business environment and provide for the same. There are bound to be gaps and grey areas, which need to be identified upfront and dealt with proactively thus the nipping the issues in the bud. An effort must be made to identify the gaps in the current scheme of IBC and regulations, which lead to litigation. The procedural improvements like provision of appointment of authorized representative by operational creditors, can go a long way towards easing of the resolution process/mechanism.

(iii) Moreover pending the legislative changes to plug the gaps, which often takes time, it is

incumbent upon the stakeholders to act responsibly which calls for following best practices voluntarily. In fact, 'best practices' is an area that requires further and close examination of many IBC provisions and feedback of practitioners on their practical utility. Conduct of COC proceedings, relationship between RP and COC, appointing professionals and avoidance transactions are a few such areas that provide fodder to litigation, if not dealt with in the right earnest.

(iv) Besides sprucing legal systems, the infrastructure and quality of service at the end of resolution professionals also need to be beefed up. CIRP being a time bound process, any

“Taking the cue from ‘nudge theory’ of socio-economic behaviour and in the context of Section 29A of IBC, a duly calibrated provision can be inbuilt for existing promoter to be able to resume the ownership of CD.”

lapse for want of timely action, can lead to unnecessary litigation. While usage of advanced technology in managing CIRPs can be quite useful, the broad-basing the assignments over a large number of professionals can also help reducing the strain on the system.

C. Avoidable-Infructuous:

Though spreading awareness of law can help control the need for litigation to an extent, the chief reasons for such litigation are psychological in nature as indicated earlier. Following suggestions, therefore, can be of help:

(i) Any CIRP process is marked by innumerable inter-personal interactions, especially in the backdrop of a distressed corporate debtor and consequent anxieties running high across the board. Working in such challenging environment calls for a sensitized and humane approach by the stakeholders, especially the RP and COC being at the forefront. This also alludes to the need for special training of such stakeholders around softer/behavioural aspects to be able to perform their functions most maturely. Such approach could stem the tide of infructuous litigation to some extent.

(ii) During any CIRP, basis the feedback from the practitioner RPs, seeking cooperation from the existing promoter of CD seems to be the leading cause of discordance, many a times leading to avoidable litigation. The reasons for such non-cooperation are obvious and psychological in nature. Taking the cue from 'nudge theory' of socio-economic behaviour and in the context of Section 29A of IBC, a duly calibrated provision can be inbuilt for existing promoter to be able to resume the ownership of CD. In effect this would be tantamount to a hybrid of 'debtor in possession' and 'creditor in control' models and may not suit resolution of larger businesses. In case of smaller/MSME businesses given their peculiarities, this would not only elicit positive response from the promoters, but would take care of most of the litigation as well.]

(iii) The litigation which is absolutely frivolous in nature, can be made onerous and expensive by incorporating stringent penal provisions. This could bring about positive change in behaviour among infructuous litigants.

— *** —



Indian Institute of Insolvency Professionals of ICAI (IIPI)

(A Section 8 Company & Wholly Owned Subsidiary of ICAI and Registered as an IPA with IBBI)

Regd. Office: Post Box No: 7100, ICAI Bhawan, Indraprastha Marg, New Delhi - 110002

Admin. Office: ICAI Bhawan, 8th Floor, Hostel Block, A-29, Sector-62, Noida - 201309

Phone: +91 120 3045960, Email: ipa@icai.in, Website: www.iipticai.in