

Making IBC the Preferred Resolution Mechanism: Some suggestions evolving from practical experiences



*In the past seven years of its operation, the IBC, 2016 has overcome several hurdles and achieved accolades from various quarters. However, there are still some bottlenecks which needs to be addressed. In the present article, the author, after analysing various CIRP and Liquidation processes under the IBC has proposed certain suggestions to make timely resolution of corporate debtors, effective implementation of their resolution plans and quick liquidations, where it is the only way out. The four-step practical propositions, proposed in the article, seek to address how IBC can become a preferred route for resolution of debt in the Indian business landscape that is dotted with MSMEs. In this article, the author has made some recommendations related to (1) Expediting the process; (2) Improving resolution; (3) Ensuring implementation of the Resolution Plan and (4) Enhancing the contribution of Ips. **Read on to know more...***

“Economic downturns or sectoral issues trigger a chain reaction, making prompt resolution of distressed debt crucial to avoid increased costs for creditors and lowering recovery rates.... The primary reasons for hesitance towards the IBC route are delays, such delays leading to increased resolution costs and the misplaced belief that resolution includes all borrower assets”.– The Bankruptcy Law Committee in its Report¹, 2015.

1. Adaptive Regulatory Framework to Marketplace Dynamics

The Insolvency and Bankruptcy Board of India (IBBI) has established a regulatory framework that is proactive to the change in the marketplace. Dr. M.S. Sahoo, First Chairman, IBBI, has said, “A regulator is often accused of lacking democratic legitimacy. Public consultation is generally used to bridge the democratic deficit².” Such public engagement measures make the regulatory environment adaptive to marketplace dynamics. Keeping pace with change, the regulator has instituted, directly and via IPAs, capacity building initiatives for IPs and other stakeholders with the aim of meeting the overall objectives of the IBC.

¹. The Bankruptcy Law Reform Committee Report 2015 Volume I: Rationale and Design

². Dr. M S Sahoo and CKG Nair, “When the regulated become the regulator” published in Business Standard October 4, 2023



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3. Snapshot of the Distress Debt Numbers

Outstanding credit of Scheduled Commercial Banks³

1. All accounts: ₹1,40,51,320 crores
2. Short to Medium term, Demand Loans, Bills, etc.: ₹66,27,843 crores
3. All accounts (Nos): 342.380 mn
4. Private Corporate Sector accounts (Nos) – 2.019 mn

Gross NPAs to Gross Advances Ratio⁴ – 3.9%

Number of cases pending in NCLTs⁵ – 7058

Number of cases pending in DRT (SARFAESI - Feb 2022)⁶ – ~161,000

April – June 2023⁷ • July – September 2023⁸

Number of new CIRP filed • 248 • 243

Number of new PIRP filed • 200 • 250

Number of new IPs registered • 43 • 41

Drop-out rate % (Registered IPs without AFA) • 42.96 • 45.80

Average number of CIRP per AFA • 1.70 • 1.72

Average number of PIRP per AFA • 0.93 • 0.83

Number of PIRP added per AFA (01.10.2022-30.09.2023) – 0.36

Number of Registered IPs (30.09.2023) – 4371

Number of AFAs (30.09.2023) – 2369

Number of CIRP added per AFA (01.10.2022-30.09.2023)⁹ – 0.47

Number of PIRP added per AFA (01.10.2022-30.09.2023) – 0.36

There are some practical challenges arising out in the current regime and suggestions have been made to address them in this article.

- Most committee reports have acknowledged that the delays arising in the insolvency processes create impediment to its success. The IBBI (Regulator) is mindful of this state and has tried to address it through new tools such as Pre-Packaged Insolvency Resolution Process (PIRP) for MSMEs. Besides, efforts are being made to explore a creditor-led fast track resolution process.

- The second challenge arises from falling recovery through resolution plans that have dropped to 32% cent in some cases and 4% for liquidated realizations.
- The third pain point arises after resolutions are approved but face setbacks in their implementation.
- Finally, the Insolvency Professional (IP) who is the catalyst to ensure the success of an insolvency process should have added opportunities to grow professionally.

3. Four-Step Practical Proposition

3.1. Removing delays associated with insolvency process

IBC proceedings are summary in nature and the term implies expeditious disposal of matters. The timeline for disposal in Corporate Insolvency Resolution Process (CIRP) has steadily increased. A brief snapshot is given in Table- 1.

Table -1: Timeline for disposal of CIRP cases

Phases/ Stages	As on 30.09.2023 (Days)	As on 31.03.2022 (Days) ¹⁰
From Insolvency Commencement Date (ICD) to Resolution Plan Approval	867	533
[Excluded period]	[143]	[83]
From ICD to Liquidation Order	630	414
Average for concluded CIRP	749	474
From LCD to Final Report	589	487

Timely execution is in the law, but practical implementation is critically desired whether it is at the stage of admission or plan approval¹¹. The above table suggests that timelines are stretching beyond days even as the NCLTs have allowed exclusion period that was an average of 83 days as of March 31, 2022, to now 143 days as on September 30, 2023.

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These exclusions, as observed by the NCLAT in the matter of *Quinn Logistics India*¹², are for good grounds and

³ RBI, Quarterly Statistics June 2023

⁴ Press Release: 2023-2024/493, Financial Stability Report, June 2023 dated 28.06.2023

⁵ IBBI Newsletter July-September 2023

⁶ The Hindu, businessline Mumbai July 19, 2022

⁷ IBBI Quarterly Newsletter (IBBIQN) April-June, 2023

⁸ IBBIQN July-September, 2023

⁹ IBBIQN July-September, 2022

¹⁰ IBBIQN January-March, 2023

¹¹ Standing Committee on Finance (2020-2021), Seventeenth Lok Sabha, Thirty-Second Report, August 2021

¹² *Quinn Logistics India Company Appeal (AT)(Ins) No 185 of 2018*

unforeseen circumstances. In a case followed by the author, the matter was listed on 50 occasions out of which on 17 occasions, the bench noted for adjournment 'due to paucity of time'; on 13 occasions orders were directed for procedural reasons such as progress. Beyond the obvious choice to add bench strength of the NCLT members, other suggestions include:

(a) **Streamlining litigation process:** Summary proceeding broadly include plaint served upon the respondent, issue of notice, pleadings, and arguments (including written submissions). Hence there is the preparatory stage followed by the exploratory stage. Benches prioritize cases through a display of colour-codes in cause-lists for matters pertaining to admission, Resolution Plan approval and Liquidation yet there are undesirable extensions.

(i) The matters listed in the ordinary list find limited time as complete board for the day is not disposed. The reasons ascribed could be – the bench presided over limited time or the number of critical matters to be dealt with. There are several Interlocutory Applications (IAs) filed for procedural issues under the IBC. These procedures may be dealt with independently or via an institutional mechanism which will save crucial judicial time.

(ii) All the benches needn't deal with all kinds of cases. The very purpose of having technical members forming the quorum suggest that there could be sector specialization. Expertise of benches could be sector-specific such as real estate, power, airlines, auto, Original Equipment Manufacturer (OEM), complex capital & debt structures, and Cross Border operations. Greater understanding through past professional experience and application of technology would aid in expeditious disposal of cases. The NCLT's 'Case Information System' may include a summary sheet for the parties to submit in compliance of various stages. Procedural issues should be de-linked to the judicial process.

(iii) The IBC may define an institutional mechanism for certain statutory process -related filings.

Progress reports, replacement of IP, CoC decisions and requests for extensions are generally accepted by the Adjudicating Authorities (AAs). The IBBI may develop a mechanism of 'exceptions' where the AA would rule on matters that are 'non-ordinary' and the same mechanism could be incorporated in related IBBI Regulations.

(iv) Procedural IAs should be rule-based and be heard via Video Conferencing. This will help to lower the physical burden on NCLT's infrastructure.

(b) IPs to upgrade legal skill sets

(i) IPs should be involved in the drafting stage of the applications and ensure that applications are filed with greater legal scrutiny. Applications, not following the laid down jurisprudence, are bound to be promptly rejected and thus waste judiciary's time.

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(ii) Jurisprudence is ever evolving. From an IP's perspective, database, and index of judgements on the IBC ecosystem are equally important.

(iii) IPs should ensure proxy appearances by counsels are discouraged. '*Buying time*' contradicts the objective of IBC and adds to the delays.

(c) IPs' involvement before filing of insolvency application

IP who is engaged by the creditor and is proposed in Section 7 application should actively participate at the pre-filing stage. This allows preparation for early and quick understanding of the business operations and ensuing challenges. For instance, under the Chinese insolvency laws, the entire bankruptcy process is mainly controlled by the Administrator which helps in improving the effectiveness of the system¹³.

¹³ IBBI Navdrishti "Emerging Ideas on IBC" 2023 p.32

3.2. Improve Resolution and Aid Recovery

(a) Solving the Avoidance Muddle will Propel the IBC

As of September 2023, 1025, avoidance applications seeking to recover an aggregate amount of over ₹3,19,000 crores had been filed with the NCLTs. However, orders have been passed in only 203 cases with an extremely low claw back rate of ~11%. Data available from the RBI¹⁴ states that short to medium term loans extended to businesses for their working capital constitute ~47% of the total credit extended by the SCBs.

- (i) Non-cooperation by promoters/management applications to be disposed by the NCLTs within specified timelines. Not handing over books of accounts and records should be considered as intent to defraud creditors. This requires an amendment in the IBC.
- (ii) Counter party & regulatory records to be accepted as primary evidence where promoters/management are non-cooperating. This can be ensured by amending IBC and related Regulations.
- (iii) Determination of avoidable transactions by IP raises a big challenge. The IP should ensure that bona fide transactions are not treated as avoidable actions. It is commonly observed that there is non-cooperation by the promoters. Therefore, if much time has lapsed from the transaction dates, the ex-management/promoters of the CD should be made responsible for establishing the fairness of doubtful transactions.
- (vi) Financial forensics could make use of advanced Machine Learning (ML)/ Block chain technologies to identify impugned vulnerable transactions¹⁵ from large datasets which would greatly reduce professional costs. Capacity building is already a developing practice and should be provided further impetus. Avoidance transactions require a critical understanding of financial transactions, forensic methodology, evidence gathering and reporting. In Technovaa¹⁶ matter the avoidance applications were dismissed for lack of evidence as well as undue

reliance placed on the forensic report that was full of disclaimers and did not make any definite observation.

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(b) The Word Liquidation Devalues the Enterprise

Liquidation is a terminal state and therefore is the scavenging tool for 'bounty-hunters'. It leads to a huge markdown of enterprise value that in some cases exceeds 30% to fair value. In the 85 CIRPs that yielded resolution plans, June-September 2023, the Liquidation Value was ₹9,456.75 crores as against corresponding Fair Value of ₹15,579.98 crores. The introduction of the Scheme of Arrangement and Compromise (Scheme) is a welcome notification¹⁷. However, the number of cases settled under IBC vide approval of scheme have been limited. The Liquidation Period to final report has incrementally increased from 487 days in March 2022 to 589 days in September 2023. International experiences point towards greater success via rehabilitation and creditor-debtor compromise. The other problem encountered during Liquidation is the lack in ease of assignment of "Not Readily Realizable Assets".

IBC should be a three-stage formal restructuring process i.e., CIRP, the Scheme and Liquidation resulting in compulsory dissolution. The enterprise value under CIRP and Scheme phase will remain closer to the Fair Value. Presently, Regulation 2B of the IBBI (Liquidation Process Regulations) 2016 provides for powers to make compromises or arrangement with creditors under Section 230 of Companies Act, 2013. The provisions may be adopted under new regulations separate from the Liquidation Process Regulations. The Scheme is considered a restructuring tool distinct from the terminal dissolution of a company.

¹⁴ RBI, Quarterly Statistics June 2023

¹⁵ Avoidable transactions under section 43, 45, 50, 49 and 66 of the Code

¹⁶ Technovaa Plastic Industries IA 618 of 2019 in CP(IB) 189/9/NCLT/AHM/2018

¹⁷ Notification No. IBBI/2022-23/GN/REG. 093, dated 16.09.2022

NCLTs should prioritize resolution under the above proposed Scheme at par with Resolution Plan approval process.

- (i) Regulations¹⁸ provide for assignment of Not Readily Realizable Assets (NRRAs). However, practically it is challenging. Statutory bodies such as “Bad Bank” which could be an intermediary parking bay until litigation is settled.
- (c) **MSMEs are the Sweet Spot**

As mentioned, the Indian business space is dominated by MSMEs. The Financial Stability Report puts the gross non-performing assets (GNPAs) of the SCBs at 3.9% of the 342 million credit accounts. The total number of corporate accounts where credit has been extended is over 2 million. IBC's resolution numbers suggest higher recoveries are enjoyed by MSMEs without accounting for the amounts realized/realizable from avoidable actions.

Table - 2: CIRPs Yielding Resolution Plans

CIRPs Yielding Resolution Plans				
Number of CIRPs	Period	Total admitted Claims (₹ Crs)	Total Realizable Value (₹ Crs)	Realizable Value as Percentage of Admitted Claims
808	Till 30.09.2023	991815.55	315937.2	31.85
185	01.10.2022 -30.09.2023	183513.13	66758.62	36.38
35	Large cases*	90927.33	19324.95	21.25
150	MSMEs	25299.31	7687.61	30.39

* Removing 8 outliers where percentage of realizable value is high.

There is an overarching need for insolvency law to resolve distress debt within the MSME segment.

- (i) **Institutional promotion of Pre-Packs among financial creditors:** Benefits of Pre-Pack are underlined in NCLT's observation in *Garodia Chemicals Ltd* matter which states, “the legislative intent behind the introduction of PPIRP in the IBC was to provide an alternative process for resolution of the stress of corporate MSMEs due to their unique nature of business and simpler corporate structures”.¹⁹
- (ii) The creditor led resolution approach has been suggested by an expert committee constituted by the

IBBI to cover a wider spectrum of corporate debtors on similar lines as the PPIRP for MSMEs.

This fear of losing could be mitigated by assigning a greater restructuring professional role to the IP who presently is primarily engaged in administering the process. The promoter requires handholding by experts.

However, the success of these formalized processes majorly operating in the informal domain (hybrid workouts²⁰) would completely hinge on intangibles such as process simplification and eradication of 'fear of losing' by the promoters. This fear of losing could be mitigated by assigning a greater restructuring professional role to the IP who presently is primarily engaged in administering the process. The promoter requires handholding by experts.

3.3. Ensuring Resolution Plan is implemented

- (i) **Monitoring of approved Resolution Plans:** There should be a mechanism to ensure rigorous and sustained monitoring for effective implementation of resolution plans approved by the AA in its letter and spirit. Such a monitoring of the implementation of the resolution plans becomes crucial in certain cases that demand longer implementation period. Failure in implementation of a Resolution Plan allows the AA to pass the Liquidation order which may harm the interests of stakeholders.
- (ii) There are instances of government departments raising claims upon applicants for the period prior to the approval of Resolution Plan thus causing delay and unnecessary hardships²¹ in resolution of the CD.
- (iii) The IBC, 2016 may arm the NCLT with specific provisions for enforcement of the Resolution order under Section 60(5) in lines with Section 105 of the US Bankruptcy Law²² that provides powers to enforce or implement court orders or rules or to prevent an abuse of process.

3.4. Insolvency Professionals as 'Pillars' should be Specialists

Insolvency as a profession is gaining prominence as several educational initiatives, including university courses, insolvency academies, graduate programs etc.,

¹⁸ Regulation 37A of Liquidation Process Regulations

¹⁹ *Garodia Chemicals Ltd CP(IBPP) No. 02 of 2023 Mumbai*

²⁰ World Bank Group, A Toolkit for Corporate Workouts January 2022

²¹ *Ruchi Soya Industries IA 2281 of 2021 in CP(IB) No. 1371 & 1372 MB of 2017*

²² <https://usbankruptcycode.org/chapter-1/section-105-power-of-court/>

are pullulating. When the Banking Law Report envisioned the IP as a “*crucial pillar*” it certainly did not imply a “*generalist*” who would be engaged in a bit of diverse professional engagements. The purpose of placing limitations on the IP via Code of Conduct²³ clause on “Occupation, employability and restrictions” was with pivotal need to have specialists. Specialization places an onerous responsibility on the profession to keep the IPs gainfully employed in insolvency and restructuring. Employment analogously necessitates continuing professional competence and to maintain efficient management systems leading to costs associated with practice. The IP is compelled to pay-out costs associated with a reasonable office, professional fee, CPEs, membership to various professional forums, subscription of journals and other periodicals.

(a) Creating more opportunities for IPs

More than 7,000 corporate debtors, as of September 30, 2023, have been admitted under insolvency processes would seem miniscule to the over 1,61,000 with DRTs and many more where bankers resolve or settle matters directly. The potential upside for the IBC is great, considering the distress in MSMEs and that the numbers of large cases²⁴ are less than 10% of all the cases (as on 30.09.2023).

Concerns about ease of coordination have been mitigated by the AA in the case of Monica Jajoo wherein it was decided that the proceedings of the CD and Personal Guarantor should be before the same NCLT but as separate cases.

Personal insolvencies: Proposal²⁵ to manage CIRP and personal insolvencies by the same IP postulates the benefit of information availability and coordination of processes over the need for independence. However, such benefits shall negatively impact the number of cases managed by individual IPs. Personal guarantors have multiple creditors and crossholdings in assets. Hence information availability with corporate debtors may not be such a critical factor in managing the personal insolvency process. The benefit analysis should favor “more-work-to-more-IPs” with added benefits of independence and sharper focus in case management.

²³ First Schedule under Regulation 7(2)(h) of IP Regulations

²⁴ Admitted claims >Rs. 1000 crores

²⁵ IBBI Discussion Paper, dated 27.09.2023

- (i) Regulate sharing of information by the IPs in CIRP and PPIRP.
 - (ii) Concerns with regard to ease of coordination have been mitigated by the AA in the case of *Monica Jajoo*²⁶ wherein it was decided that the proceedings of the CD and Personal Guarantor shall be before the same NCLT but as separate cases.
- (b) Removing 'overweight cases' in the creditor selection process**

There is a Latin maxim '*aequitas est quasi aequalitas*', fundamental notion of equality and impartiality. Thus, equitable opportunities for all IPs should be elementary. The past conduct of the IP in managing or being engaged in the IBC assignments should be the crucial deciding factor. Though creditors may not be compelled but advisors may provide guidance.

- (i) The statement of problem in the IBBI Discussion Paper²⁷ on appointment of Insolvency Professional Entities (IPEs) as IPs states, “*the resolution professional tends to outsource his functions to other persons such as Insolvency Professional Entities, Process advisors etc.*” This reasoning may hold true for large cases, however, in cases where the companies are non-operational or have admitted claims less than ₹500 crores, there should be limitations on appointment of IPEs. This is because the creditors, particularly Public Sector Banks (PSBs) tend to provide weightage to IPEs or IPs that are associated with them.
 - (ii) Another selection criterion of being 'sector-specialist' may be misconceived as the CIRP is a process-oriented resolution mechanism. The '*objectivity*' and '*impartiality*' of IPs should be tested if s/he is familiar or close to market participants on account of his/her past employments.
- The 'objectivity' and 'impartiality' of IPs should be tested if s/he is familiar or close to market participants on account of his/her past employments.**
- (iii) Compulsory professional training for fresh IPs should be made mandatory under practicing IPs

²⁶ Monica Jajoo CA (AT) (Ins) No. 1344 & 1345 of 2022

²⁷ IBBI Discussion Paper, dated 14.06.2022

before being eligible for AFA to manage assignments.

- (iv) Selection criteria that 'piggyback' on in-house support services in a market-driven profession should not be a differentiator where the reasonableness of costs is doctrinal.

(c) Insolvency costs

Let's consider a few facts:

- The IBBI has structured fee for IPs in CIRP and Liquidation cases, even then there is litigation with respect to costs leading to judicial delays.
- The number of new CIRPs in the last one year (Oct 22–Sept 23) was 1,169 of which 670 were withdrawn, settled or plan approved. Thus, the incremental number is incontrovertibly low compared to the number of IPs holding AFAs.
- About 52% of the businesses as of September 2023 are under Liquidation and will close soon.
- Personal insolvency matters, until recently, were stayed by NCLTs.
- The fee and subscriptions collected, as per IBBI Accounts for YE 2021-22²⁸ had plateaued before the introduction of IP Regulation²⁹ in later part of 2022 wherein IBBI while increasing fee introduced ad

valorem (0.25%) of the realizable value payable to creditors under an approved Resolution Plan.

In the backdrop of such marketplace realities some practical suggestions would find relevance.

- (i) Delay in settlement of insolvency costs by creditors can partially be addressed if claims were to be admitted along with fee, to ensure that the IBC needs to be amended. The fee could be established as a percentage of the claim value thus discouraging inflated or contestable claims. To determine the percentage, the basis could be ascertained from available data on costs with the regulators. This would also ensure equality by distributing the burden of costs to all the creditors.
- (ii) There are several instances where processes for various uncontrollable reasons get into an impasse. It was the case with over 2,200 personal insolvencies, where the appointed IPs were not paid by the creditors. Understandably fee is contractual in nature, however, as the IBBI has mandated minimum fee for CIRP, here too fee structure could be advised for unavoidable circumstances allowing ease of working and reducing litigations. It is also suggested to make provisions for appearance fees, fee as per work categorization and out of pocket reimbursements.



²⁸ IBBI Annual accounts (2022-23)

²⁹ Regulation 7 of the IP Regulations and Regulation 31A of the CIRP Regulations