भारतीय दिवाला और शोधन अक्षमता बोर्ड
Insolvency and Bankruptcy Board of India

REPORT OF THE COLLOQUIUM ON FUNCTIONING AND STRENGTHENING OF THE IBC ECOSYSTEM

November 2022

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1. INTRODUCTION

1.1 To undertake a comprehensive review exercise of the provisions of the Insolvency and Bankruptcy Code, 2016 (Code/ IBC), the Insolvency and Bankruptcy Board of India (IBBI) had organised a two-day Colloquium on the theme '**Functioning and Strengthening of the IBC Ecosystem'** from November 19 to 20, 2022 in New Delhi. The inaugural session of the Colloquium was presided over by the Hon'ble Minister of Finance and Corporate Affairs, Smt. Nirmala Sitharaman. The Hon'ble Principal Secretary to the Prime Minister, Dr. P. K. Mishra addressed the Colloquium. The Hon'ble Chairperson, National Company Law Appellate Tribunal (NCLAT), Shri Justice Ashok Bhushan; Hon'ble President, National Company Law Tribunal (NCLT), Shri Chief Justice (Retd.) Ramalingam Sudhakar; Secretary, Ministry of Corporate Affairs (MCA), Dr. Manoj Govil also addressed the participants at the Colloquium.

1.2 The IBC is one of the most important economic reforms introduced by the Government. It was noted during the Colloquium that the IBC has been a responsive and receptive economic legislation, having been amended six times since its enactment. It was emphasised that given the importance of the IBC for the health of the economy at large, the insolvency ecosystem should welcome further amendments to the Code that improve its implementation and realise better outcomes for all stakeholders. A point of concern raised during the Colloquium was the adverse market perception or narrative emerging in various forums about the performance of the Code. It was reiterated that such perception or narrative needs to be effectively countered or dispelled by all the stakeholders of the insolvency ecosystem on the basis of concrete evidence backed by data and analytics.

1.3 The speakers at the Colloquium noted that one of the far-reaching spill-over effects of the Code has been the behavioural change effectuated by it. As a result, thousands of debtors are settling their dues even before initiation of insolvency proceedings. Moving forward, it was emphasised during the Colloquium that behavioural change among key players of the IBC ecosystem, entailing strict adherence to the provisions of the Code in letter and spirit, would be critical to its success. Unless stakeholders modify their behaviour to meet the objectives of the Code, any number of modifications in the law itself would not suffice to achieve optimum efficiency in the insolvency resolution processes. To improve the outcomes under the IBC, it was emphasised that there is a need to enhance the quality of resolution professionals (RPs). All stakeholders should observe highest degree of ethical standards. All endeavours should be made to maintain corporate debtors (CDs) as going concerns and liquidation should be treated as an option of last resort.

1.4 It was pointed out during the Colloquium that amendments in the Code and/or regulations may not suffice. The performance of the Code rests on the collective participation of all stakeholders in a non-adversarial manner. From early identification of distress to value maximising insolvency resolution, each stage and activity in the processes under the Code needs constant engagement, willingness and commitment of all the stakeholders. There is a need to ensure that all stakeholders perform their respective roles for successful implementation of the Code.

1.5 The Colloquium noted the credible outcomes under the Code thus far; which have been more than encouraging. Supported by a rich body of jurisprudence, the objectives of the Code have the backing of the Apex Court of the country; which has come out with numerous pathbreaking judgments to resolve the contentious issues in a swift manner. In a short span of six years, the Code has established a thriving ecosystem comprising of more than 4100 Insolvency Professional (IPs), 96 Insolvency Professional Entities (IPEs), three Insolvency Professional Agencies (IPAs) and one novel institution viz. the Information Utility (IU). It has facilitated successful closure of 3946 CIRPs till end of September 2022 viz. 846 by appeal or review or settled; 740 by withdrawals; 553 through resolution plans and 1807 by liquidation. The resolution plans have realised Rs. 2.43

lakh crore for creditors, which is around 178% of liquidation value and 84% of fair value of these CDs. As a result of behavioural change effectuated by the Code, thousands of debtors are settling their dues even before initiation of insolvency proceedings. Till end of September 2022, more than 23,400 applications for initiation of CIRPs of CDs having underlying default of Rs. 7.31 lakh crore were disposed of before their admission.

1.6 In keeping with the past endeavours of the Government to engage with stakeholders who have been at the centre of design of the IBC and upgrades till now, it was imperative that they continued to be constructively involved in designing the new initiatives as well. Stakeholders, including all members of the NCLAT and NCLT; officers of NCLT; financial creditors (FCs) like banks and other financial institutions, resolution applicants; heads of IPAs, IU and Registered Valuer Organisations (RVOs); professionals like Advocates and IPs; academicians and subject experts; and officials of the Ministry of Corporate Affairs (MCA) and IBBI participated in the Colloquium.

Six themes of the Colloquium

1.7 The Colloquium was preceded by a comprehensive review exercise at the behest of the IBBI involving identification of six broad themes under the Code requiring intervention. Each theme was then developed into a base paper in consultation with subject experts, identifying the specific issues within the theme and proposals to correct or rectify the same. The six themes and their respective domain experts are enumerated below:

Sl. No.	Theme	Experts
1	Admission of CIRP applications under the Insolvency and Bankruptcy Code, 2016	Mr. Rajnish Kumar, Ex-Chairman of State Bank of India
		Prof. M. P. Ram Mohan, Associate Professor, IIM Ahmedabad
		Mr. C.H.S.S. Mallikarjuna Rao, Ex-MD and CEO of Punjab National Bank
2	Streamlining Insolvency Resolution Processes	Prof. V. Vijayakumar, Vice Chancellor, National Law Institute University, Bhopal
		Mr. Satish Gupta, IP
3	Recasting of Liquidation and Voluntary Liquidation Processes	Mr. Bahram N. Vakil, Co-founder, AZB & Partners
		Dr. Risham Garg, Associate Professor of Law, National Law University Delhi
4	Enhancing effectiveness of the Adjudicating Authority (AA)	Members of NCLAT and NCLT
5	Role of Service Providers and other Stakeholders – Conduct, Capacity and Timely Conclusion of Processes	Mr. R. Gandhi, Former Deputy Governor, Reserve Bank of India
		Prof. Jayadev M., Professor, IIM Bangalore
6	Next Generation Reforms	Mr. Sumant Batra, Insolvency Lawyer
		Ms. Aparna Ravi, Partner, Samvad Partners

1.8 The base papers on the foregoing themes were prepared after undertaking detailed case studies of dozens of ongoing and concluded corporate insolvency resolution processes (CIRPs), liquidation processes and voluntary liquidation processes to identify specific bottlenecks in the processes that lead to delays in their closure, and less than optimal realisation of value for creditors and other stakeholders. The proposals made in the base papers also encompassed the issues flagged in various orders of the Hon'ble Supreme Court (SC), High Courts (HCs), NCLAT and NCLT as regards implementation of the provisions of the Code.

1.9 The base papers, prepared in consultation with the subject experts, were further discussed with concerned stakeholders at multiple forums, before the same were presented in the Colloquium.

Deliberations at the Colloquium

1.10 The inaugural session of the Colloquium was followed by three presentations (as listed below) as precursor to the deliberations on the six identified themes:

Sl. No.	Subject	Presenters	Objective
1	Setting the context of the Colloquium	Mr. Sudhaker Shukla, Whole Time Member, IBBI	To set the context of the Colloquium and envisaged outcomes.
2	Comprehensive integrated technology platform for the insolvency ecosystem	Mr. Ajay Prakash Sawhney, Former Secretary, Ministry of Electronics and Information Technology (*on behalf of the Ministry of Corporate Affairs*)	To present the technology upgrades required to revamp the insolvency ecosystem's processes and functioning.
3	Creditors' perspective by the Indian Banks' Association (IBA)	Mr. Sunil Mehta, Chief Executive, IBA	To understand the perspective and expectations of the FCs from the Code.

1.11 The stakeholders invited for the Colloquium were divided into six distinct groups, one each for the six identified themes, for deliberations on the proposals made in the base papers and seeking other suggestions. Discussions under each theme were conducted under the sagacious guidance of the member of the NCLAT. Each group comprised of members of the NCLT, officers of NCLT, creditors, IPs, lawyers, resolution applicants and officials of MCA and IBBI.

1.12 The subject experts of the base papers presented the proposals contained therein before their respective group members for further deliberation and finalisation of recommendations. The groups deliberated in detail on each of the recommendations contained in the base paper.

1.13 Subsequently, each Groups' recommendations were presented before all stakeholders who collectively participated on the second day of the Colloquium, to gain wider consensus and iron out differences, if any. After detailed deliberations, the recommendations to amend various provisions of the Code as recommended by each of six groups were endorsed by the Colloquium as a whole.

1.14 The Colloquium concluded with a concrete set of recommendations which were shared in the form of draft report with NCLAT, NCLT and MCA. The comments received from them have been duly taken into account while finalising the recommendations.

1.15 The recommendations advocate for behavioural change on part of the key players of insolvency ecosystem. Apart from nudging behavioural change, the recommendations offer clarity about roles and responsibilities of stakeholders, while enhancing their accountability, thereby culminating into better working of the existing and proposed new processes.

1.16 The proposed amendments to the Code are enumerated in the Chapters to follow, with rationale or justification for each proposal elaborated therein. Chapter 2 presents the recommendations on comprehensive integrated technology platform for the insolvency ecosystem. Chapter 3 presents recommendations regarding admission of CIRP applications; Chapter 4 enumerates the recommendations to streamline the insolvency resolution processes; Chapter 5 presents recommendations to recast the liquidation and voluntary liquidation processes; Chapter 6 elaborates recommendations to enhance the effectiveness of the AA, Chapter 7 presents

recommendations as regards role of service providers under the Code; and Chapter 8 suggests the way forward with recommendations for next generation reforms under the Code.

2. COMPREHENSIVE INTEGRATED TECHNOLOGY PLATFORM FOR THE INSOLVENCY ECOSYSTEM

2.1 The IBC ecosystem needs to harness the use of information technology (IT) to drive the processes in a more efficient and effective manner. The stakeholders of IBC presently work in silos and have their separate fragmented technological platforms. There is need for a comprehensive IT platform that can ensure end-to-end integration and digitisation of the processes and serve as a single source of truth. It was discussed during the Colloquium that an integrated platform would improve the outcomes of the insolvency process including minimising delays, increased transparency, increased participation of resolution applicants, facilitation in effective decision making, maximisation of value etc.

Present challenge - Disintegrated IT platforms

2.2 At present, in the context of processing and storing information of cases under the Code, the databases of following five institutions are the main pillars:

i. Ministry of Corporate Affairs (MCA)
ii. Adjudicating Authorities (NCLT & DRT)
iii. Insolvency and Bankruptcy Board of India (IBBI)
iv. Information Utility (IU)
v. Service Providers under the Code like IPs etc.

2.3 The technological interventions for processing and storing of data are driven by the aforesaid separate institutions / pillars and are restricted to their individual mandates. A brief status of present disintegrated systems of the said five pillars is as follows:

i. **NCLT -** The NCLT has the 'e-courts' platform. It is a solution that the benches use for communications with the participants. It provides a platform for petitioners and respondents to submit their papers online. The Registry carries out scrutiny and confirms these submissions. The members can view the documents online while the case is heard in court or online. The orders are also made available online. The system reflects the status of each petition for stakeholders in the public domain.
ii. **IBBI -** The IBBI has various sub-systems at IBBI Portal and IBBI website in this regard. The process regulations empower the IBBI to use the platform for compliance reporting and monitoring of cases and IPs. The website also acts as a repository of orders, resources for IPs, publications for market and researchers, data on cases, information regarding IPs etc. for use by the public and other stakeholders. It also disseminates public announcements and expressions of interests (EOIs), auction announcements etc. Further, IPAs have websites and online portals for their IP members for registration and other compliance requirements like cost and relationship disclosures.
iii. **MCA -** The debtor companies incorporated under the Companies Act are all a part of the MCA 21 portal of the MCA. This portal enables compliances under the Companies Act at all times including compliances by the IP during insolvency proceedings. It contains information regarding directors, charges, status of insolvency resolution, etc.
iv. **Information Utility -** National E-Governance Services Ltd. **(**NeSL), the only IU registered under the Code, acts as the repository of all debt and default information provided by the creditors. It offers authentication /verification services for such debt and default. It is also an empanelled platform for distressed assets (PDA) offering services for facilitation of work of the IPs.
v. **Insolvency Professionals** - The other key pillar is IPs, who form the fulcrum of all the processes that are laid out in the Code and is an officer appointed by the AA. He is the primary source of information

in terms of the progress of processes being ordered by the AA and responses and impact of law on the market participants at large. However, there is no uniformity in terms of case management software being used by IPs.

2.4 The present challenge is that the interactions between these pillars / institutions still happen through traditional routes and outside the technological systems. The portals/ systems of the institutions are all disparate and mostly work in silos with limited exchange of information.

2.5 This disintegrated nature of the standalone IT platforms being used by these institutions is the major bottleneck for the development of a comprehensive integrated technology platform for the insolvency ecosystem. There is a need for these systems to be integrated and inter-linked to each other in a structured manner to streamline their interactions.

Scope / Potential of Integrations

(a) Filing of application

2.6 During the insolvency resolution phase, the process starts with the filing of application with NCLT. The application may be withdrawn or admitted or rejected by NCLT. The scope of technology integration at this stage of the process is as follows:

- The process of filing application can be greatly facilitated if the verified records of default flow directly from the IU to NCLT and notices are served electronically to all parties which are already on the platform.
- The process of filing replies, like the process of filing application, can be structured so that the replies are to-the-point and address only relevant issues. This will enable NCLT to frame the issues quickly. This, coupled with quick verification of facts, will facilitate decision making by the NCLT.
- Further, there could be automation of notices by making them template-based.

(b) Interactions of IP with stakeholders

2.7 After admission of application, the process is carried out by the IP and requires interactions with debtors (for taking custody of assets/ records), creditors (for claims), RVs (for valuation of assets), Committee of Creditors (CoC) (for meetings of CoC, agenda, decisions), authorised representatives (AR) of class of creditors, potential resolution applicants [for EOI, Request for Resolution Plan (RFRP), resolution plans] and auction purchasers (for notice, auction). Further, the outcomes of these interactions need to be reported to regulators (IBBI and IPA) and to NCLT (during liquidation).

2.8 All these interactions are conducted by the IPs at various kinds of platforms and information about these processes are stored mainly in excel sheets. In case of friction between two parties in an interaction, there are claims and counterclaims about which version of information is correct.

2.9 If the above interactions are conducted on an integrated platform, the information can flow efficiently and quickly throughout the system. It will help the NCLT in quickly establishing the facts as there will be a single source of truth in the whole system. Another advantage of all the stakeholders being present in the same system will be instantaneous service of notices etc. thereby curtailing process delays at NCLT.

(c) Records of the CD

2.10 IPs face great difficulty in obtaining records from the promoters of the CD and there are disputes raised by both parties about what information has been submitted and what is still pending to be submitted. If the

information is submitted on a single platform, there will be a single source of truth which can be viewed by all parties having access to that information.

2.11 If information is submitted in a timely manner, monitoring would be better and NCLT can quickly decide about the alleged violation of compliances. In fact, all relevant regulators can view the nature of cooperation being extended.

2.12 Predictive coding could be employed to conduct a review of the company's books and records to search for leads. Technology assisted review could retrieve the relevant documents by searching through a large number of documents.

(d) Interaction between stakeholders

2.13 The platform can facilitate interaction between representatives of class of creditors (like homebuyers) and other creditors and allow creditors to watch the progress of their case.

(e) Regulatory oversight

2.14 Regulators will be able to view relevant information about the process at the relevant time. Regulators will be able to detect processes which are facing difficulty. Further, NCLT may also be able to see the difficulty being faced and may give priority to such cases.

2.15 Furthermore, analysis of event logs data will help in process mining and identify the processes and procedures which are bottlenecks along with concrete data. This will help in addressing the bottlenecks at a faster pace.

(f) Market participation

2.16 If the whole ecosystem is on a single portal, it will be able to attract other market players like interim finance providers, resolution applicants and auction purchasers.

Recommendations

2.17 Existing systems are to be examined and upgraded (if required) in order to have a futuristic state of the art platform capable of handling voluminous data. The data models and database designs may be modified, if required, to ensure single source of truth. An incremental approach is proposed for development of a comprehensive overarching technology platform for the insolvency ecosystem. The system should be AI enabled with proper Decision Support System and must have Technology Aided Review (TAR) for an integrated Case Management System.

(a) Study of present framework

2.18 The process is envisaged to start with a detailed study of the present IT systems of NCLT, MCA, IBBI, IU and IPs to identify the gaps in the existing system and make the necessary modifications to enable privilege-wise integration with other systems.

(b) Upgradation of standalone systems

2.19 The standalone IT systems of each of these entities may be upgraded suitably to enable integration on a common platform. A brief snapshot of the features to be upgraded in the present standalone systems is listed in Table 2.1. Figure 2.1 depicts the envisaged incremental approach.

Figure 2.1: Incremental approach towards Integrated Comprehensive System

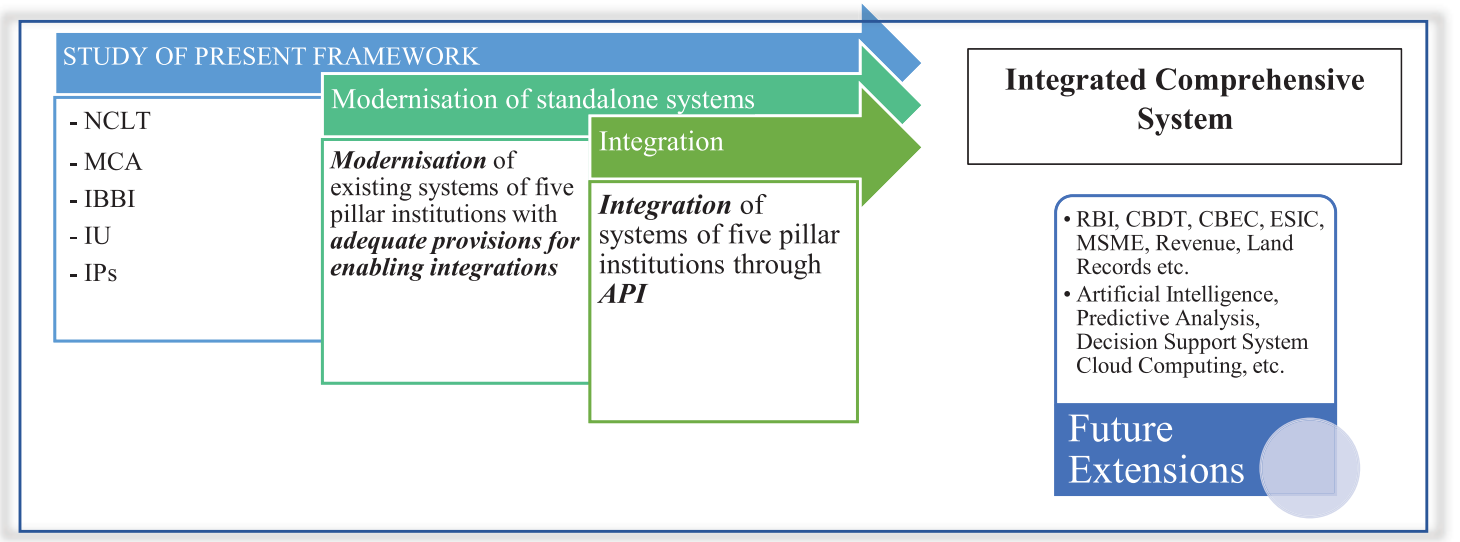

Table 2.1: Snapshot of the modernisation features

Sl. No.	Institution & Platform	Illustrations of proposed modernisation
1	NCLT: E-Courts	• Validation based, machine readable applications • End-to-end digitisation of process • Categorisation and prioritisation of processing of applications based on pre-determined criteria • Technology Aided Review of cases • Artificial Intelligence and Predictive coding to cull out relevant case laws
2	IBBI Portal	• Integration of various sub-systems being used at present and having internal and external interface • Integration with IT platforms of IPAs as well as other stakeholders. • Use of AI for analysis of data for policy inputs
3	MCA21	• Streamlining information related to charges, directors, latest financial statements, loan related CARO reporting, etc. in line with requirements of processes under the Code • AI for predictive analysis of bankruptcy • Virtual Data Room for IBC cases
4	Information Utility (NeSL)	• Streamline the debt and default related authenticated data • Developing portal for submission of authenticated claims through IU • Development of platform for distressed assets for CIRP and Liquidation processes.
5	Insolvency Professionals	• Development of a standardised template for an effective case management system for IPs • ITES on portal for supporting IP in his duties and processing and storing of record.

(c) Integration

2.20 Integration of these standalone platforms through API (Application Programming Interface) to have a comprehensive integrated platform ensuring end-to-end digitisation.

(d) Future engagements / extensions

2.21 Future engagements would be with multiple players:

i. After the aforesaid primary system is developed and becomes functional, a series of future engagements have been proposed to integrate other players like RVs, resolution applicants, auction purchasers, interim finance providers etc.
ii. Categories of creditors like employee/ workmen and MSME vendors may require facilitation. Classes of creditors like homebuyers, debenture holders etc., may require a different level of facilitation. These integrations and facilitation measures may require smaller sub-components within the system.
iii. Further, the IBC platform will need to be linked to IT systems of other institutions such as CBIC in respect of verification of goods and services provided by OCs to the company, CBDT, CBIC, EPFO, ESIC, MSME, etc. so that their claims can flow directly, and transactions of claimants can be verified easily.
iv. The revenue and land records can also be linked to enable verification of the immovable assets.
v. Adoption of emerging technologies like blockchain, Big Data analytics, cloud computing, TAR, machine learning and Artificial Intelligence (AI) may also be considered for suitable deployment as part of future contours in the insolvency ecosystem. Early warning systems for market failure, forecasting of insolvency /defaults, dealing with consumer bankruptcy can be made possible with the use of these technologies.

Leveraging Technology

(a) Artificial Intelligence

2.22 Specific applications of AI include expert systems, natural language processing, speech recognition and machine vision. Use of AI in insolvency is as under:

- *Pre-insolvency:* prediction of insolvency; predictive analysis for corporate bankruptcy using data mining from filings.
- *CIRP:* faster admission; use of AI to analyse CIRP data using Big Data techniques for faster decision making and outcomes; investigation in case of avoidance transactions.
- *Liquidation:* e-auction, claims processing, disbursement, etc.

(b) Big Data

2.23 AI and Big Data analysis tools are increasingly being argued as essential to make sense of the large amounts of available information.

- TAR could be deployed in order to enhance the conduct of review of the company's books and records.
- TAR systems, through a process of 'predictive coding', serve up more relevant material for review at an earlier stage than a more linear human review process otherwise might have enabled. Available data may need to be reviewed for any number of purposes (for example, fraud / regulatory investigations, search orders, litigation etc.)

(c) Cloud Computing

2.24 As insolvency cases entail accumulation of large amounts of information, the fact that large and complex data sets can be easily made available and accessible for analysis in the Cloud can play a key role. Once this material is available, AI tools can then be used to cluster and review to retrieve key information more quickly

and build a robust decision support system. This would bring down costs for IPs and other individuals in the ecosystem.

(d) App based

2.25 This user-friendly ecosystem would include an App allowing authentication of the user through biometric tools and allowing users and practitioners to perform required actions, monitor the entire insolvency process and communicate with the court, through their smartphones.

Conclusion

2.26 Integrated technology platforms for insolvency ecosystems, enabled by AI, Big Data analytics, Cloud Computing etc. have been successfully deployed in jurisdictions of Singapore, United Kingdom and Colombia. Further, private companies such as Obviously.ai build AI as per the requirement of a client on contractual basis. Obviously.ai hatched an innovative website wherein the clients can deploy insolvency prediction mechanism via a no-code automation machine learning tool.

2.27 A comprehensive end-to-end technology solution would cover all the activities in the IBC ecosystem from debt, default filing to implementation of resolution plan. It will increase the efficiency of the whole system by providing a single source of truth to all players. It will greatly facilitate the NCLT to establish facts and decide quickly, with improved outcomes in terms of time and realisations, in line with the vision of Digital India.

3. ADMISSION OF CIRP APPLICATIONS UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

3.1 A unique feature of the Code is time bound resolution of insolvency which distinguishes it from the erstwhile legislations. The Code mandates admission of applications within 14 days with the objective of completion of a CIRP within 180 days. As a first and foremost step towards timely resolution, an early initiation of CIRP prevents asset erosion, loss of business and enterprise value. The issues of delay in admission and adherence to timelines under the Code have been highlighted by the evolving jurisprudence. Further, there have been several instances of delayed filing of applications by creditors after occurrence of default.

3.2 As part of the comprehensive review exercise, the designated Colloquium Group considered the case studies of following CDs to arrive at its recommendations:

i. Krishidhan Seeds Pvt. Ltd.
ii. Asian Colour Coated Ispat Ltd.
iii. City Mall Vikash Pvt. Ltd.
iv. Meghalaya Infratech Pvt. Ltd.
v. Mount Shivalik Industries Ltd.
vi. Shaila Clubs and Resorts Pvt. Ltd.
vii. Medirad Tech Private Ltd.
viii. Colorhome Developers Pvt. Ltd.
ix. Mypreferred Transformation and Hospitality Pvt. Ltd.
x. You Seung Sang Sa India Construction Private Ltd.

3.3 Furthermore, the Colloquium Group noted the observations of various Courts, pertaining to admission of CIRP applications, in the following case laws:

i. Vidarbha Industries Power Limited Vs. Axis Bank Limited (Civil Appeal No. 4633 of 2021)
ii. Innoventive Industries Ltd. Vs. ICICI Bank and Ors. (Civil Appeal Nos. 8337-8338 of 2017)
iii. Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (Civil Appeal No. 9405-2017)
iv. Ebix Singapore Private Limited Vs. Committee of Creditors of Educomp Solutions Limited & Anr. (Civil Appeal No. 3224 of 2020 and other appeals)
v. Dena Bank Vs. C. Shivakumar Reddy (Civil Appeal No. 1650 of 2020)

3.4 The recommendations emerging from the deliberations have been presented in sections (a) to (h) below.

(a) Use of technology for speedy admissions

3.5 **Recommendation 1:** *AI enabled centralised e-platform dealing with IBC cases from admission to resolution, may be developed for case management before the AA including for;*

i. *The processes at the AA from admission to resolution.*
ii. *To reject / admit the petitions on the platform with minimum number of hearings, etc.*
iii. *To facilitate service of orders/ notices to all the stakeholders in a seamless manner.*
iv. *Access of Application Programming Interface (API) based real time information with IU, MCA and other stakeholders.*
v. *Speedy communication exchange.*

3.6 **Rationale:** Considerable time of AA and other stakeholders is spent in collation, drafting, delivering and processing of the information required for admission of a CIRP application. In the Union Budget 2021-22 (para 82), it was announced that to ensure faster resolution of cases, NCLT framework will be strengthened, and e-Courts system shall be implemented. Going forward, AI enabled platform for AA needs to be developed to handle all the processes including delivery of notices, fixing of hearings, passing of order of admission or rejection, with minimum human interface.

(b) Reducing burden of assessing extraneous evidence and records

3.7 **Recommendation 2:** *The Code may be amended to make it mandatory for all FCs, and OCs having debt and default of Rs. 1 crore or above who propose to file application under section 9 under the Code, to file financial information with IU.*

3.8 **Recommendation 3:** *Section 214(e) of the Code mandates the IU to get the information received from users authenticated by the debtors before storing such information, but there is no reciprocal obligation on the debtors to authenticate information stored by creditors in IU regarding the debts. This leads to uncertainty about authenticity of IU records for the purpose of evidence. Accordingly, the Code may mandate authentication of information by debtor by suitably amending section 215 of the Code.*

3.9 **Recommendation 4:** *To provide that IU record shall be sufficient for the AA to ascertain the existence of default.*

3.10 **Recommendation 5:** *Empower IBBI under section 9(3)(e) to specify any proof for confirming default with regard to an operational debt.*

3.11 **Recommendation 6:** *Section 9(3) may obligate OCs to furnish copies of Form GSTR-1 and Form GSTR-3B (wherever applicable), along with e-way bill. This will serve as proof to establish that the supply of goods/services to the CD had actually taken place.*

3.12 **Recommendation 7**: *Record of default certified by IU shall be the relevant evidence for ascertainment of debt and default. If the record of default from IU is not available, the documents as may be specified by IBBI, shall be the evidence of existence of debt and occurrence of default.*

3.13 **Rationale (for 2 to 7 above):** Use of IU's record of default as conclusive evidence will enable timely admission of applications. The OCs often misuse the process by filing applications based on multiple defective documents as dilatory tactics. Further, the obligation to file financial information was an option for OCs when threshold under section 4 was only Rs.1 lakh. Now, since this threshold has been increased, the OCs with default amount of Rs.1 crore and above shall file financial information with the IU and file application under section 9 along with record of default and dispute.

3.14 **Recommendation 8:** *To make it mandatory for all the OCs to submit a 'record of dispute' issued by the IU, along with the application.*

3.15 **Rationale**: An IU is the repository of all financial information and accordingly it must have information regarding not only the 'existence of debt' but also debts which are under 'dispute'. Accordingly, the information related to disputed debts should also be filed with IU by the OCs. On production of 'record of dispute' from an IU, the AA may accept / reject the application and will not be required to decide the question of 'existence of dispute' between the parties. Permitting this may substantially reduce the time for admission of a section 9 application.

(c) Clarity needed in provisions of the Code

(c.1) Admission of section 7 application

3.16 **Recommendation 9:** *The word 'may' in section 7(5) may be substituted with word 'shall' so as to harmonise the provision of section 7, 9 and 10. As held by the Courts*[1]*, if record of the IU shows that there is a debt and default, it may be clarified that the AA is not required to examine any other factor than the existence of debt and occurrence of default.*

3.17 **Rationale:** Section 9(5) makes it mandatory for AA to admit the CIRP application as it uses the word 'shall', whereas section 7(5) makes it discretionary to admit as it uses the word 'may'. The word 'may' in section 7(5)(a) has been interpreted by SC in Vidarbha case[2] to be giving discretion to AA to admit or reject or keep in abeyance, the application. Further, the provisions of the Code require only ascertainment of existence of debt and occurrence of default. However, in view of Vidarbha judgment, other factors such as solvency and financial health of the CD, are also being examined by AA despite clarification by the Apex Court in this regard. The amendment would reduce time of AA and these additional factors may be taken into account by CoC.

(c.2) Clarity on 14 days being admission time

3.18 **Recommendation 10:** *It may be clarified that overall mandatory timeline of 14 days applies for ascertainment of existence of debt and occurrence of default and admission of application as well.*

3.19 **Rationale:** It has been held that the timeline of 14 days in section 7(4) applies only for ascertainment of default and not for deciding admission or rejection of application under section 7(5). Though the proviso to section 7(4) provides that the decision about existence of default and admission or rejection of application under section 7(5) should be taken within 14 days of receipt of application, the above view is prevailing because the timeline is stated in proviso to section 7(4) and not in 7(5).

(d) Protracted litigation through multiple adjournments, replies, rejoinders, etc.

3.20 **Recommendation 11:** *Considering the huge adjudicatory block, it is an appropriate time to enact standalone Rules of procedure for IBC cases for AA and NCLAT.*

3.21 **Rationale:** Analysis of case studies indicates that pre-admission delays are mainly attributable to the umpteen hearings/ adjournments given to the CDs to file reply/ rejoinders to other parties' multiple adjournments, etc. The Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 are presently incomplete as they require the AA to follow National Company Law Tribunal Rules, 2016 (NCLT Rules) for matters under the Code. Rule 10 of these Rules provides that till such time the rules of procedure for conduct of proceedings under the Code are notified, the applications under the Code shall be filed before the AA in accordance with rules 20, 21, 22, 23, 24 and 26 of Part III of the NCLT Rules. Thus, the applicability of NCLT Rules to the proceedings before AA has led to delays and confusion in the implementation of the IBC. However, the rules must *inter alia* provide for the following:

i. The response should be in prescribed timeline of 7 days with one request of further time upto 7 days at the discretion of AA
ii. No rejoinder or sur-rejoinder after response of CD
iii. It should be the duty of Registry to find defects in the applications at time of scrutiny and notify the same at the first instance, and complete scrutiny within the prescribed time

[1] Order of NCLAT in the matter of *Vipul Himatlal Shah Vs. Teco Industries* (Company Appeal (AT) (Insolvency) No. 470 of 2022); Order of the SC in the matter of *Innoventive Industries Ltd. Vs. ICICI Bank and Ors.* (Civil Appeal Nos.8337-8338 of 2017)

[2] *Vidarbha Industries Power Limited Vs. Axis Bank Limited* (Civil Appeal No. 4633 of 2021)

iv. Registry to be provided with a standard checklist for scrutiny of applications
v. Timelines for rectification of defect /compliance in the application to be prescribed
vi. Condonation of delay on request of settlement only upto 45 days by AA
vii. Limited adjournments and no adjournment (i) on an interlocutory application (IA) of the CD, and (ii) on the ground of OTS / withdrawal.

(e) Discouraging frivolous interlocutory applications

3.22 **Recommendation 12:** *Section 65 of the Code may be amended to include all frivolous applications including interlocutory applications filed under the Code. AA may also be permitted to impose costs on persons filing such applications or documents or false information to misuse and delay the process.*

3.23 **Rationale:** Section 65 provides for penalty in case of filing of fraudulent and malicious CIRP, pre-packaged insolvency resolution process (PPIRP), liquidation and voluntary liquidation applications. So far, this section has been applied in three instances only. Section 60(5) permits filing of any IA before the AA at any stage on various grounds. Several frivolous IAs are filed that clog the AA who is overburdened to deal with them in accordance with rules of procedures by following principles of natural justice. In absence of any penal power to deal with such frivolous IAs, AA is handicapped, and its substantial time is consumed for deciding such applications.

(f) Withdrawal before admission

3.24 **Recommendation 13:** *To bring more sanctity to the withdrawal process, the Code may expressly provide for withdrawal of applications before admission in the manner as may be specified by IBBI.*

3.25 **Rationale:** Currently, the Code is silent about withdrawal of CIRP applications before admission. Further, the data with respect to amount realised pursuant to such withdrawals and settlement is not disclosed in a structured manner.

(g) Streamlining section 10 application

3.26 **Recommendation 14**: *Corporate Applicant (CA) may be mandated to submit all relevant information/ documents that are required for compiling Information Memorandum (IM) along with application for initiation of CIRP. CA to provide copies of information/documents including list of pending investigations/litigations to FCs. Further, IRP will be appointed by the AA. Section 10(3)(b) is to be deleted.*

3.27 **Rationale:** Section 10 application is filed by CD or persons in control or under supervision of the CD. As such, the CA is in control of all relevant information about CD. It is observed that CA files incomplete information along with application and thus, delays the proceedings before AA. The CA may be mandated to submit all relevant information/ documents for preparation/ compilation of IM along with application. IBBI may be enabled to specify this by making Regulations in this regard under section 10.

(h) Prescribing period of limitation under the Code for CIRP applications

3.28 **Recommendation 15**: *The Code may be amended to provide that a CIRP application can only be filed within three years of the date of occurrence of default without any reference to the Limitation Act.*

3.29 **Rationale**: The Code is specific about filing of insolvency application *'when a default has occurred'* (section 7) / *'on occurrence of a default'*. Thus, an early initiation of CIRP is a legitimate expectation from the creditors. The average time taken by FCs in filing CIRP applications post occurrence of default is significantly long. Further, though section 238A provides that the provisions of Limitation Act, 1963 shall '*as far as may be*' will be applicable

to proceedings under the Code. It is observed that substantial time of AA is consumed in determining the legal issues pertaining to interpretation and applicability of provisions of Limitation Act, 1963. For example, determination of what constitutes '*acknowledgment of debt*' and calculation of period of three years from the date of default.

4. STREAMLINING INSOLVENCY RESOLUTION PROCESSES

4.1 The Bankruptcy Law Reforms Committee (BLRC) in its report stated that '*Speed is of essence for the working of the bankruptcy code…. The longer the delay, the more likely it is that liquidation will be the only answer. … From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction.'*. To remove bottlenecks and increase efficacy of resolution process, the Code has witnessed several legislative interventions over the past six years. Each intervention addressed a specific burning issue including insertion of Section 29A, lowering the threshold for voting by CoC, closure of CIRP by approval of CoC, status of homebuyers as 'financial creditors', etc. The two recent amendments, namely, suspension of filing of applications for initiation of insolvency proceedings and the introduction of pre-packaged insolvency resolution process (PPIRP) for Micro, Small and Medium Enterprises (MSMEs), owe their genesis to the pandemic induced concerns specially targeted towards warding off its widespread adverse impact on the stressed assets market.

4.2 As part of comprehensive review exercise, the designated Colloquium Group considered the ensuing case studies as groundwork to arrive at its recommendations for insolvency resolution processes:

i. GCCL Infrastructure & Projects Limited
ii. Supertech Limited
iii. Housing Development and Infrastructure Limited
iv. Reliance Capital Ltd.
v. Tebma Shipyards Limited
vi. Vanguard Credit & Holdings Pvt. Ltd. Vs. Kshitiz Chhawchharia (RP) of Ramsarup Industries Ltd. & Anr. [Company Appeal (AT) (Ins.) No. 1125 of 2019]
vii. Nitin Chandrakant Naik Vs. Sanidhya Industries LLP [Company Appeal (AT) (Insolvency) No. 257 of 2020 & 239 of 2021]
viii. Rainbow Papers Limited
ix. Granite Gate Properties Private Limited
x. Ruchi Soya Industries Limited
xi. Jaypee Kensington Boulevard Apartments Welfare Association and Ors. Vs. NBCC (India) Ltd and Ors.
xii. Dignity Buildcon Private Limited
xiii. Dr. Arun Mohan Bansal Vs. IBBI
xiv. M/s. Dishnet Wireless Limited Vs. Assistant Commissioner of Income Tax (OSD)
xv. K. Sashidhar Vs. Indian Overseas Bank & Ors.
xvi. Rise India Padhopadhao Private Limited
xvii. Saalim Shoes Private Limited Vs. Spectra Kolors

4.3 The recommendations emerging therefrom have been divided into two sections: CIRP and individual insolvency resolution process (IIRP) and bankruptcy process. The recommendations pertaining to CIRP have been further grouped into 6 outcome-based baskets.

A. Corporate insolvency resolution process (CIRP)

Part I: Flexible framework to deal with special cases

(a) Effective use of pre-packaged insolvency resolution framework

4.4 **Recommendation 1:** *The Code may be amended to simplify pre-packaged insolvency resolution framework to enable easy access for companies and delete procedural details from the pre-pack chapter and provide them to be specified. The Code may also provide for its applicability to non-MSME corporates within threshold limit to be notified. Subsequent changes to pre-packaged insolvency resolution process (PPIRP) Regulations may be required.*

4.5 **Rationale:** The PPIRP has not found traction in market, with only three applications being admitted since its introduction in 2021. Stakeholders are of the view that the process involved is too technical and needs to be simplified. There are also other issues such as high threshold of consent of 66% of unrelated FCs for initiation, discretion to CoC to convert the process into CIRP, strenuous requirement of making a declaration that CD has not been subject to avoidable transactions, liability of promoters of the MSMEs as personal guarantors (PGs) stands even after company is resolved, non-applicability to non-MSME CDs, etc.

(b) Effective use of fast-track resolution process

4.6 **Recommendation 2:** *A simplified and flexible fast-track mechanism for resolving corporate persons with asset size of up to Rs. 100 crore may be considered. The Code may enable that a flexible creditor led resolution mechanism be specified with necessary variations from the CIRP.*

4.7 **Rationale:** The requirements/ steps under fast-track process (FTP) barely differs from the regular CIRP, except for timelines and thus has had no takers. The CIRP procedures such as detailed public claims collection process, meetings of creditors, inviting resolution plans may be *'too complex, lengthy and expensive for micro and small business debtors, which are characterized by low value, low sophistication and low complexity.'*. In some cases, small companies may not be able to withstand the costs of running this process and there is a high risk that the value of their business would begin 'evaporating' on the advent of insolvency proceedings. Accordingly, there is need to have a simplified FTP for small CDs.

(c) Improving outcomes in real estate cases

4.8 **Recommendation 3:** *The Code may provide that a resolution mechanism tailor-made to address the needs of the real estate sector be specified with necessary variations from the CIRP, including project wise admission and resolution, delivery of completed house to homebuyers during CIRP, allowing homebuyers to become Resolution Applicants etc. Further, Real Estate Regulatory Authority may be given the role as a regulator on the lines of role given to financial regulator for CIRP of financial service providers.*

4.9 **Rationale:** A large number of real estate cases have remained unresolved for long period of time as the current framework of CIRP is not conducive to address the issues specific to this sector. In real estate cases, CDs have multiple projects that are at different stages of construction. The prospective resolution applicants (PRAs) are more inclined to take over the projects closer to completion than those at early stages of construction. There exist situations where the default is related to one particular project, while the other projects are on track but the initiation of CIRP puts the other projects also under duress. Several experiments have been attempted by courts to address these issues through reverse CIRP and project-wise resolution. Thus, there exists a pressing need to have a separate resolution mechanism for real estate sector.

Part II: Flexibility in resolution approach for value maximisation

(d) More flexible resolution plans

4.10 **Recommendation 4:** *The Code may be amended to enable CoC to resolve the functional parts of the business separately through one or more resolution plans and enable the unviable/ non-functional parts of the assets to be liquidated*

by allowing other modes of sale like slump sale, sale of parcel of assets or standalone assets during CIRP after the options for selling it as a going concern either in whole or parts have not yielded result.

4.11 *In view of the above, there may be no need to provide 'Sale of the CD as going concern' under Regulation 32(e) of Liquidation Regulations. This may be deleted as recommended by the Standing Committee on Finance on 'Implementation of Insolvency and Bankruptcy Code – Pitfalls and Solutions'.*

4.12 **Rationale:** Standing Committee on Finance on 'Implementation of Insolvency and Bankruptcy Code - Pitfalls and Solutions' in its report has recommended that:

"Actual experience has shown that bidders may be interested in selected business units or assets, rather than the entire business. A combination of bidders taking different business units or assets may well be far superior to one bidder acquiring the entire business from the CoC. However, the resolution professional does not currently have the flexibility within the IBC to dispose of the corporate defaulter across multiple bidders.

The CIRP Regulation 37 does allow the resolution professional much more flexibility in developing a resolution plan across multiple bidders each taking different pieces of the corporate defaulters. Regulation 37 of the CIRP Regulations permits transfer of all or part of the assets to one or more persons and sale of all or part of the assets as part of a resolution plan. IBC is clearly the Parliamentary Statute while the CIRP Regulations are delegated subordinate legislation. Accordingly, ***the Committee recommends that the IBC be amended to clarify that the resolution plan can be achieved through any of the means prescribed under Regulation 37 of the CIRP Regulations."***

4.13 Further, if the resolution fails, the company goes to liquidation wherein various modes of sale are available. However, sale through these modes may be carried out even during the resolution process as it is also a market facing process. This will have the advantage of cost and time efficiency in early closure of the process.

(e) Intermingling of assets of the CD and guarantor

4.14 **Recommendation 5:** *The Code may be modified so that any asset(s) belonging to promoters/ guarantors without which a meaningful resolution of CD is not possible, and which are already mortgaged/ charged to creditors for securing the loan of CD, can be made part of resolution estate with the consent of mortgage/ charge holder alone without any need for obtaining consent of promoter/ guarantor separately. Changes, if any, required in other laws like SARFAESI Act, 2002 may be enabled to operationalise the same.*

4.15 **Rationale:** In many CIRP cases, the CoC faces the issue of intermingling of assets of CD and corporate guarantors / PGs especially where the factory land belongs to promoter/ guarantor, and the building and plant and machinery belongs to CD. Such cases prove to be very difficult to resolve as the land is not part of the resolution.

(f) Resolving inter-connected entities

4.16 **Recommendation 6:** *The RBI may lay down guidelines that where the default has happened in inter-connected entities and creditors are common, the insolvencies may be initiated together with a common RP so that they are at the same stage and effective coordination is possible. In such cases, the Code may enable concurrent conduct and procedural coordination of their CIRPs through coordination in CoCs of CDs and a common RP.*

4.17 **Rationale:** There are situations where one company is linked to one or more companies in terms of operations and finances and dealing with them together will result in synergies in operation and value realisation. Few of such companies may have defaulted together. Though the Code does not explicitly provide for dealing

with such cases together, the AA has attempted to consolidate the CIRPs in such cases, e.g., Videocon Industries, Adel Infra etc. on account of higher possibility of revival and better value realisation. In these cases, CIRPs of these CDs is being conducted by one IP and are being carried out concurrently which enables procedural coordination and synergy for value maximisation.

Part III: Increasing productivity and removing uncertainty

(g) Clarity in treatment of security interest created from Statute

4.18 **Recommendation 7:** *An explanation may be added to the definition of "Security interest" clarifying that the security interest will be created only when the same is on account of a transaction with the corporate debtor and not by unilateral action of any authority. The Code may be amended to explicitly state that section 53(1)(e)(i) covers all dues, i.e., both secured and unsecured dues owed to Central Government, State Government and local authorities.*

4.19 **Rationale:** The Supreme Court in the matter of State Tax Officer Vs. Rainbow Papers Limited vide order dated September 06, 2022 held that *"the State is a secured creditor under the GVAT Act. Section 3(30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is created. Such security interest could be created by operation of law. The definition of secured creditor in the IBC does not exclude any Government or Governmental Authority."* It can then be extended that all dues emerging out of statutes such as EPF Act, tax laws, etc. which provide for attachment of property, may have to be considered as secured creditors. A careful reading of the definition of 'security interest' under the Code states that it is an interest created by way of a transaction and therefore there is an element of agreement on the part of asset holder while giving rights to the other party. This is missing in case of unilateral action by the Government authorities. Further, 'transaction' as defined under the Code clearly lays out that it includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the CD. Thus, it is clear that the same is linked to a consensual transaction between the parties.

4.20 The departure from the definition of 'security interest' in SARFAESI Act and RDB Act is intentional. Besides, even there, by insertion of section 26E in SARFAESI Act and section 31B in RDB Act, security interest of the government has been placed at a lower footing than the security interest of the financial creditor. Further, the priority given to debts owed to Central and State Governments in section 53 is in line with the recommendation provided in the BLRC Report. The BLRC report provided for keeping the right of the Central and State Government in the distribution waterfall in liquidation at a priority below the unsecured FCs in addition to all kinds of secured creditors for promoting the availability of credit and developing a market for unsecured financing (including the development of bond markets). If the intent of the lawmakers (and thus, the construct of IBC) was to treat the government authorities at the same pedestal as secured creditors, then the purpose of having a separate rank for Government dues would not have been envisaged. The intention behind this is to give benefit of payment to other creditors who have taken risks while giving loans or providing debts.

(h) Preparation and approval of resolution plan in two separate parts dealing with inflow and outflow of money

4.21 **Recommendation 8:** *The Code may be amended to provide that the resolution plan be structured in two parts wherein Part-A deals with the selection of resolution applicant and inflow of money while Part-B will deal with distribution i.e., outflow of money. Part A and Part B of the plan may be approved by the AA simultaneously or severally.*

4.22 *The Plan will distribute up to liquidation value as per section 53 and then surplus over liquidation value between all creditors in the ratio of their unrealised claim. The CoC may vary the distribution in favour of OCs who are not participating in CoC on the grounds of equity for reasons to be recorded.*

4.23 *In situations, where the resolution plan has curable defect, it may be clarified in the Code that the plan be sent back to the CoC for removing the defect in the plan.*

4.24 **Rationale:** Structuring the resolution plan in two parts will enable AA to first deal with the litigation in respect of Part A of the plan or any other dispute which affects the choice of resolution applicant so that inflow of money to CD and creditors can take place and CD may start functioning again. The undisputed amount to various stakeholders may then be distributed as per Part B of the resolution plan and the disputed amount may be kept in an escrow account. The amount in escrow account may be distributed after the litigation in respect of distribution attains finality. It may also be provided that the proceeds will not be distributed to stakeholders against whom avoidance applications have been made and are pending adjudication, until the avoidance applications are disposed.

4.25 RP has been mandated to ensure that OCs and dissenting FCs are given minimum entitlement in consonance with the payment as per waterfall. The distribution of proceeds from a resolution plan is decided by the CoC and the resolution applicant based on negotiations and is envisaged as a product of commercial wisdom of the CoC. The Apex Court has held that the Courts do not have powers to intervene in matters of commercial wisdom. However, distribution of proceeds has been a matter of litigation. Though the Code provides that the manner of distribution in the resolution plan may consider the order of priority amongst creditors as per section 53(1), it is not mandatory and therefore, disputes arise on the distribution of proceeds which are not perceived as fair. Another challenge is that OCs generally perceive the distribution as unfair as they are at the bottom of waterfall.

4.26 Providing more equitable distribution will help in reducing disputes. Creditors are entitled to liquidation value as per the waterfall mechanism provided under the Code, which governs resolution also. It can be construed that any amount in excess to liquidation value belongs to the CD, not to any particular class of stakeholder. A logical consequence of this would be to distribute the additional value beyond liquidation value to the benefit of all the stakeholders. Therefore, to protect the interest of creditors which are near the bottom of the waterfall and are not represented in the CoC, distribution of surplus of resolution value above liquidation value will ensure equity and reduce disputes.

4.27 A study of IAs filed reveals that most applications are challenging the distribution proposed under the plan, amount of claim admitted, etc. which are essentially related to distribution of money. If the plan is separated in two parts and the part dealing with the selection of plan and inflow of money is approved first, the implementation of plan can start with, resulting into operationalisation of CD. The plan dealing with distribution can also be approved subject to disputes related to distribution. Undisputed amount can be distributed, and disputed amount can be kept in an escrow account and be distributed after settlement of disputes.

4.28 Section 31(2) provides that AA may reject the plan if is satisfied that the resolution plan does not confirm to the stipulated requirements. Section 33(1)(b) requires that where the AA rejects the resolution plan for non-compliance of the stipulated requirements, it shall pass an order requiring CD to be liquidated. The basic objective of the Code is resolution. Therefore, if the resolution plan has a curable defect, it may be sent back to CoC for removing the defect.

(i) Challenge mechanism to improve value of resolution plan

4.29 **Recommendation 9:** *The Code may be amended to mandatorily use a challenge mechanism while considering the resolution plan. A modified version of Swiss Challenge to be made available to CoC in which the provisions akin to PPIRP will exist.*

4.30 **Rationale:** It has been observed that in majority of the cases, the resolution plan approved by the CoC is challenged before courts by the unsuccessful PRAs stating that they have given a better offer or finding fault with the approved plan. A transparent way of affording an opportunity to the unsuccessful PRAs will help reduce such litigation, enable timely closure, and maximise value. A modified Swiss Challenge mechanism has been provided in the PPIRP framework. The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) were amended in September 2021 to enable the CoC to choose any kind of challenge mechanism while considering the resolution plans. However, the same is not mandatory. Thus, there is a need to provide this in the Code.

(j) Providing mechanism for monitoring implementation of plan

4.31 **Recommendation 10:** *The Code may provide for constitution of monitoring committee for smooth handover of the CD to the successful resolution applicant (SRA). CoC to be empowered for constitution of the monitoring committee, which may have IP as the member who may or may not be the IP who acted as the RP during CIRP. The CoC may decide the other members of the committee which shall include nominees from the CoC and the resolution applicant. It is envisaged that the Committee shall perform the function of monitoring and supervising the implementation of resolution plan till the expiry of the term of the resolution plan. The Committee shall ensure statutory compliances during the implementation of resolution plan. The Committee shall update the AA, FCs and the Board on a quarterly basis with the status of implementation of the resolution plan. While approving the resolution plan, CoC will also decide upon the terms of appointment of the Monitoring Committee. Fee of the IP will be determined by following a transparent process as may be specified.*

4.32 **Rationale:** When the IBC was enacted, it was not envisaged that implementation of resolution plan would take long time in certain cases. It was also not envisaged that the formal process of handing over the reins of the CD would not be immediate. To counter this problem, in several cases, the AA, while approving the plan, orders for constituting a Monitoring Committee to ensure smooth implementation of the plan. The RP is made part of such committee since he already knows the business of CD and nitty-gritties of the resolution plan and continues to report back to the AA in case of any contravention of the plan. However, monitoring committee as a concept does not find place under the Code. The same is needed to smoothen the process of hand over and provide checks and balances.

Part IV: Rationalising distribution to improve fairness and resolvability

(k) Proceeds for dissenting FCs

4.33 **Recommendation 11:** *Section 30(2)(b) of the Code may be amended to allow an equitable distribution of resolution amount irrespective of the assent or dissent by an FC.*

4.34 **Rationale:** Presently, the dissenting FCs have been given a minimum entitled amount which will be payable as per waterfall in the event of liquidation of the CD. This amount is a hypothetical amount as the same is out of liquidation value which will arise in future as the present stage is that of voting on the resolution plan. At present, market practice is to consider this future liquidation value as the liquidation value of CD determined at ICD. In cases, where value of resolution plan received is also lower than the liquidation value at ICD, FCs have incentive to dissent as they are likely to get higher value if they dissent. This pushes the CD into liquidation. The requirement of cash payment on priority to dissenting creditors (Hon'ble Supreme Court's order in the matter of Jaypee Infratech Ltd.) is an additional incentive to dissent. Such incentives need to be removed to raise the possibility of resolution.

(l) Reinstating the CIRP

4.35 **Recommendation 12:** *The Code may enable that the CIRP be re-initiated from the stage of inviting fresh/ matching bid from the remaining resolution applicants, in cases where implementation of the plan does not start in-effect, or the SRA does not take control within the accepted time in the approved resolution plan. Also, the reversion to CIRP from liquidation should be possible in cases where the business is being run as a going concern.*

4.36 **Rationale:** The Code provides for liquidation in cases where the SRA could not implement the resolution plan. However, in many such cases, the CD is a functioning company and is pushed to liquidation because of unsuccessful resolution applicant. Also, in several cases, the fortune of the sector changes dramatically and the CD which was being liquidated may now find several resolution applicants. In fact, concept of 'going concern sale' during liquidation was evolved by judiciary seeing a functioning company with several employees. In such cases, it should be able to attempt the CIRP process rather than being forced into liquidation. UNCITRAL Legislative Guide on Insolvency Law as well as several international jurisdictions provide for conversion from reorganisation process to liquidation process and vice-versa, at any stage.

Part V: Incentivising resolution applicants and providing a level playing field

(m) Mitigating conflict-of-interest for enhancing credibility of resolution process

4.37 **Recommendation 13:** *Amend the Code to provide that an FC who intends to present a resolution plan must declare its intention to the CoC beforehand and then recuse itself from deciding the parameters of the evaluation matrix. Further, such FC shall have no participation and / or voting rights in CoC, from that date onwards.*

4.38 **Rationale:** Section 30(5) provides that the resolution applicant may attend the meeting of the CoC in which the resolution plan of the applicant is considered, provided that the resolution applicant shall not have a right to vote unless such resolution applicant is also an FC. However, an FC, who is also a resolution applicant, can participate in the meeting where resolution plans are discussed and can even vote. This creates a conflict-of-interest situation as it would be playing a role in formulation of the evaluation criteria and submitting the plan.

(n) Disclosure of fair value in information memorandum (IM) and discussion of valuation methodology with CoC

4.39 **Recommendation 14:** *Amend the Code to provide that valuers should explain the valuation methodology to CoC before finalisation of their reports. Valuation reports with fair value be shared with all PRAs by making it part of IM. Valuation reports with fair value and liquidation value be shared with CoC after obtaining confidentiality undertaking.*

4.40 **Rationale:** Previously, regulation 36(2)(j) of the CIRP Regulations required the RP to disclose the liquidation value in the IM. However, after finding that several resolution plans were close to liquidation value, provision about disclosure of liquidation value in the IM was omitted vide notification dated December 31, 2017. At present, the members of CoC are provided fair value and liquidation value after obtaining confidentiality undertaking and after the receipt of resolution plans. Since this information is primarily available only with the IP and valuers, it creates an information asymmetry. It also dissuades resolution applicants at large, to participate who fear that some other resolution applicants may have better information. So, disclosure of valuation reports with fair value will attract more serious bidders and result in better value. Further, disputes by CoC members can be minimised if the valuation methodology is discussed by the valuers with them before finalisation of valuation reports, and valuation reports are shared with them.

(o) OC to honour agreement with CD for residual life of agreement

4.41 **Recommendation 15:** *Amend the Code to provide that subsisting agreements essential to the business of the CD shall continue if the payment of the past liability has been made as per the approved resolution plan and current dues are being paid by the CD.*

4.42 **Rationale:** At present, moratorium under section 14 ensures that all services, licence, permit, registration, quota, concession, clearance, or a similar grant or right given by any authority shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues. However, the resolution applicants are facing difficulties from OCs with whom CD has subsisting agreements as they are not complying with the agreements for the residual life because of the extinguishment of their pre-insolvency liability on account of insolvency. On account of such difficulties, lower value is being assigned to resolution plan by the applicant. If it is ensured that the agreements would be operational for the remaining life, it will attract more resolution applicants with higher resolution value.

(p) Protection to resolution applicant post implementation of resolution plan

4.43 **Recommendation 16:** *Amend the Code to clarify that the protection will be available against any future proceeding in respect of the actions of the CD prior to approval of resolution plan by the AA in case of change in management. However, the protection will not be available to the suspended directors and promoters of the CD.*

4.44 **Rationale:** Section 32A of the Code provides that liability of a CD for an offence committed prior to the ICD shall cease, and the CD shall not be prosecuted for such an offence from the date of approval of resolution plan. However, in the case of *M/s. Dishnet Wireless Limited Vs. Assistant Commissioner of Income Tax (OSD),* Hon'ble Madras High Court held that the proceedings under IBC cannot dilute the rights of the Income Tax Department to reopen the assessment under section 148 of the Income Tax Act, 1961 even after the approval of the resolution plan. So, section 32A has been interpreted to extinguish only the past liability and not as a bar for initiating new proceedings for the past actions. Thus, it requires clarification.

Part VI: Streamlining the CIRP

(q) Clarity on computation of voting share and treatment of abstention

4.45 **Recommendation 17:** *Amend the Code to compute voting share as the financial debt owed to the concerned FC to the financial debt owed to members of the CoC.*

4.46 **Rationale:** Section 5(28) states "voting share" means the share of the voting rights of a single FC in the CoC which is based on the proportion of the financial debt owed to such FC in relation to the "financial debt owed by the corporate debtor". This definition of voting share includes the share of financial debt held by related parties of the CD which will be used in the denominator while computing voting share, but it is contradicted by the fact that related parties cannot vote as they are not part of the CoC.

(r) Incentivising interim finance providers

4.47 **Recommendation 18:** *The RBI may include interim finance in priority sector lending. Further, the Code may be amended to enable the interim finance provider to participate in CoC meetings without voting rights where the interim finance is above the specified threshold.*

4.48 **Rationale:** The Code provides that interim finance be accorded priority alongside the process cost and be paid in priority. However, this incentive is insufficient to attract creditors. Further, the interim finance provider though providing turnkey finance does not form part of the process or is adequately informed about its progress.

This is more so where the provider is not a member of the CoC.

(s) Enhancing the role of Authorised Representative (AR) and RP

4.49 **Recommendation 19:** *Amend the Code to enhance the duties of the AR to help real estate allottees take up their matters and allow suitable fees to be specified for the same. Also, amend the code to clarify that IRP/ RP will adjudicate the claims.*

4.50 **Rationale:** The real estate allotees being creditor in class are heterogenous groups and face coordination problems in forming views. If they are not satisfied with the decision of CoC on any matter and want to represent before AA, they face difficulty in taking up the matter with AA as it is not clear who can represent them. They also need a person who will coordinate to help in forming views and agenda items for the meeting, take up their grievances with RP and CoC, guide them to select the best plan and keep them informed about the progress of CIRP and approval of plan. At present, RP can only collate the claims while the liquidator can adjudicate the claims. In practice, when RP does not admit a claim, the action is challenged in NCLT by filing an IA. However, since the role is not clear, at times, the reasons for non-admission are not made clear and it leads to delay in adjudication of these cases. Role of the RP needs to be made clear.

(t) Creating disincentives for frivolous litigation

4.51 **Recommendation 20:** *Create disincentives for frivolous litigation in the form of costs which are proportional to the damage caused by frivolous litigation. Also provide disincentives for filing wrong information including wrong claims.*

4.52 **Rationale:** Since the management loses control of the CD upon its admission, the management opposes the admission vehemently. Most of the replies and IAs filed are to prolong the admission so that the company remains under the present management enabling them to siphon off money. Hence, there is a need to create strong disincentive for frivolous litigation. Such disincentives should be in the form of cost which should be proportional to the value lost because of the delay caused by frivolous litigation, say, higher of the loss incurred by the CD or increase in liability of the CD during the period of frivolous litigation. Similar disincentives be created for frivolous challenge to the successful resolution plan and other frivolous IAs.

4.53 Further, at times, stakeholders submit incorrect information. Submission of wrong information and claims leads to delays as time is taken to establish correct facts. Disincentives need to be created for submission of wrong information.

(u) Addressing non-cooperation by promoters

4.54 **Recommendation 21:** *If the AA determines that promoters have not cooperated deliberately, a maximum penalty of Rs. 1 lakh per day may be levied or they be made ineligible under section 29A. Also, power of contempt available with NCLT as per section 425 of the Companies Act, 2013 may be extended to IBC as well.*

4.55 **Rationale:** Non-cooperation by erstwhile promoters, suspended directors, employees and workmen of the CD, in handing over records and assets has been a key challenge in timely conduct of CIRP. IPs are forced to file applications under section 19(2) of the Code seeking appropriate directions against them. Strong disincentives need to be provided to make them cooperate with the process.

B. Individual Insolvency Resolution and Bankruptcy Process

(a) Removal of provision of interim moratorium

4.56 **Recommendation 1:** *The Code may be amended to dispense with the concept of interim moratorium for the*

insolvency of PG to CD. The moratorium under section 100 shall start after the admission of application in a similar way as provided under CIRP of the CD.

4.57 **Rationale:** The interim moratorium provides that all legal actions or proceedings pending in respect of such debt shall remain stayed, and creditors shall not initiate any legal action or proceeding in respect of such debt. It ensures that insolvency process progresses without interruptions. In the matter of *Amrit Kumar Patel*, the PG had filed an application under section 94 of the Code for initiation of his insolvency resolution. The AA observed that the PG has filed this application with an ulterior motive to avail the benefit of interim moratorium to stall the recovery proceedings, under section 96 of the Code. PG cases are big ticket cases, intricately connected with CD and are financially and legally savvy and are, therefore, more likely to abuse the provision.

(b) Making meeting of creditors mandatory under section 106

4.58 **Recommendation 2:** *Amend section 106 of the Code to make the meeting of creditors mandatory.*

4.59 **Rationale:** The PG submits the repayment plan under section 105 to the RP. The RP prepares a report on the payment plan and submits to the AA. In the report, the RP recommends the necessity of calling the meeting of the creditors. Where the RP recommends that the meeting of creditors is not required to be summoned, he states the reasons for the same (say, cases with very small default amounts where the cost of involving creditors will be higher than the default). The intent of the provision is to provide speedy resolution in low value cases. However, keeping the complex nature of the PG cases, which are very distinct compared to the other individuals, the meeting of the creditors may be made mandatory in PG matters.

(c) Providing for action to be taken when repayment plan is not submitted by PG

4.60 **Recommendation 3:** *To provide an enabling provision for termination of the IRP in case of non-submission of the repayment plan by the PG in a reasonable time period, corresponding amendments to section 121, 122 and 123 of the Code may be required.*

4.61 **Rationale:** Section 105 mandates the PG to submit a repayment plan consisting of a proposal to the creditors for restructuring his debt or affairs. However, there may be a situation where the PG does not submit a repayment plan as envisaged therein. At present, there is no provision to move ahead if the repayment plan is not filed.

(d) Fraudulent transactions/ trading or wrongful transactions/ trading

4.62 **Recommendation 4:** *In order to contain the fraudulent trading/ transactions by the PGs to CDs/ individuals, it is necessary to have a separate provision for fraudulent transactions/ trading in Part III of the Code with a look back period which can extend up to the date of invocation of guarantee.*

4.63 **Rationale:** In the bankruptcy process, the Bankruptcy Trustee (BT) is empowered to file an application before the AA for an order in respect of an undervalued transaction, preference transaction or extortionate credit transactions under section 164, 165 or 167, respectively, of the Code. The BT shall identify such transactions and file applications to the AA for appropriate order. However, the Part III of the Code does not provide the provision for fraudulent transactions/ trading or wrongful transactions/ trading as provided under section 48 or 66 of the Code for the corporate processes.

(e) Exempting avoidance application from moratorium under insolvency and bankruptcy process of PGs

4.64 **Recommendation 5:** *The Code may be amended to enable filing and hearing of avoidance application against PGs*

during CIRP despite the moratorium in place due to initiation of insolvency and bankruptcy process against the PG.

4.65 **Rationale:** It is seen that once insolvency process of PG is initiated, the moratorium comes into force and affects adjudication of avoidance applications filed against the guarantor.

5. RECASTING OF LIQUIDATION AND VOLUNTARY LIQUIDATION PROCESSES

5.1 The BLRC in its report under the section *'A time-bound, efficient Liquidation'* observed that *"In India, it is widely accepted that liquidation is a weak link in the bankruptcy process and must be strengthened as part of ensuring a robust legal framework."* In accordance with this guiding thought, the regulatory framework of liquidation process has been strengthened on several occasions during the last six years, with key interventions including (a) providing for constitution of stakeholders' consultation committee to guide and supervise the liquidator, (b) eliminating arbitrage opportunity for realisation over relinquishing security interest by secured creditor, and (c) streamlining auction process. To curtail delay in voluntary liquidation, the Board clarified that liquidator is not required to seek any No Objection Certificate (NOC) from the income tax department as part of compliance in the process and significantly compressed the timelines for the process.

5.2 As part of the comprehensive review exercise, the designated Colloquium Group considered the case studies of following CDs as bedrock to deliberate and work out its recommendations:

For liquidation process

i. Basukinath Agro Private Limited
ii. ABG Shipyard Limited
iii. Bharati Defence and Infrastructure Limited
iv. IVRCL Limited
v. Tecpro Systems Limited
vi. Surana Power Limited
vii. Gujarat Oleo Chem Ltd.
viii. Akshaya Imaging Systems Private Limited
ix. Sunder Agromills Private Limited
x. Sharma Kalypso Ltd.
xi. Lanco Infratech Limited

For voluntary liquidation process

i. Ikon Real-Tech Private Limited
ii. Nirpender Logistics Private Limited
iii. E-Comm Opportunities Private Limited
iv. Bucks Marketing Private Limited

5.3 The recommendations emerging therefrom have been divided into two ensuing sections pertaining to liquidation process and voluntary liquidation process. The recommendations pertaining to liquidation process have been further put into 4 outcome-based baskets: (I) Expediting the process, (II) Empowering the stakeholders, (III) Clarity to stakeholders on security interest related issues, and (IV) Streamlining the process.

A. Liquidation process

Part I: Expediting the process

(a) Enabling direct dissolution

5.4 **Recommendation 1:** *Section 33(2) of the Code may be amended to explicitly provide for direct dissolution of the CD, on the recommendation of CoC.*

5.5 **Rationale:** If there is no recoverable / meaningful asset of the CD and the affairs of the CD do not require any further investigation, the CoC during the CIRP may be explicitly empowered to recommend direct dissolution (instead of liquidation) of the CD, to AA. Such a provision would provide much-needed clarity to stakeholders and may incentivise the CoC to explore sale of maximum assets of the CD during the CIRP itself and hence, avoid liquidation process to the large extent.

(b) Eliminating duplicate activities from liquidation process

5.6 **Recommendation 2:** *The duplicate activities such as invitation, submission and verification of claims, etc. may be removed from liquidation process by amending sections 35 and 38 to 42 of the Code and making suitable amendments in IBBI (Liquidation Process) Regulations, 2016 ('Liquidation Regulations').*

5.7 **Rationale:** Liquidation is invariably a result of the failure of resolution, yet various process related activities are repeated therein despite many of them having already been completed during the resolution process, leading to duplication of efforts, wastage of time and financial resources, process delay, and avoidable litigation.

(c) Doing away with compromise or arrangement

5.8 **Recommendation 3:** *Reference to section 230 of the Companies Act, 2013 may be removed from Schedule XI of the Code. Corresponding change may be carried out in section 230 of the Companies Act, 2013.*

5.9 **Rationale:** Of the large number of cases where precious time was wasted on account of exploring compromise or arrangement, only eight liquidation processes have witnessed closure by way of compromise or arrangement, while taking an average period of 466 days and total realisation of only 87% of liquidation value as compared to 98% in other closed cases. Thus, the initiation of auction of assets of the CD gets delayed, in general, on account of this provision. Further, insertion of section 29A in the Code has made the provision for compromise or arrangement infructuous in majority of cases. Even otherwise, a section 29A eligible promoter may like to submit a resolution plan and get the approval with 66% CoC votes rather than securing 75% votes on compromise during liquidation. One further opportunity available to all promoters is withdrawal under section 12A during CIRP and therefore, there may not be any need to provide more such opportunities.

(d) Treatment of pending litigations

5.10 **Recommendation 4:** *Section 33(5) may be amended to provide that the leave of AA is required for continuing any suit or legal proceeding by or against a CD undergoing liquidation. For deciding such application, the AA may take the recommendation of the CoC. Further, section 54 may be amended to provide that the application for dissolution of CD or closure of process may be filed by the liquidator, as decided by the CoC, before the AA subject to sufficient provisioning to meet the obligations arising from any pending litigation, as per section 53 and deciding the manner of handling such litigation post dissolution (and undisputed amount may be distributed to stakeholders). The manner in which such funds are to be kept and distributed may be specified by the Board.*

5.11 **Rationale:** Under section 33(5), there is no bar on the resumption of any pending suit or legal proceeding. This leads to revival of old cases that were filed against the CD and were not being pursued due to moratorium during CIRP, causing undue hardship, especially when the CD does not have adequate funds to defend such proceedings. ILC, in 2020 report, had recommended that the amendments be made in section 33(5) so that, apart from proceedings under section 52, the leave of the AA is required for continuing any suit or legal proceeding by or against a CD undergoing liquidation. Further, the recommendation would enable early closure of process, if sufficient provisions are available for pending litigation.

(e) Strict timeline for liquidation process

5.12 **Recommendation 5:** *Section 54 may be amended to provide that the liquidation process shall be completed within one year. Specific timeline may be stipulated for AA to adjudicate on applications seeking liquidation and dissolution under sections 33 and 54.*

5.13 **Rationale:** The Code provides that the CIRP shall mandatorily be completed within a period of 330 days. Unlike the CIRP, the Code has not stipulated any timeline for completion of liquidation process, though this gap has been filled by IBBI (Liquidation Process) Regulations, 2016 (Liquidation Regulations) which provides a timeline of one year. To nudge the liquidator, creditors, and other stakeholders to act swiftly for early completion of process, there is a need to include firm timeline for process closure and adjudication of applications seeking liquidation and dissolution of CD, in the Code.

Part II: Empowering the stakeholders

(f) Empowering CoC to supervise liquidation process akin to CIRP

5.14 **Recommendation 6:** *The CoC constituted during CIRP shall continue and supervise the liquidation process, by making amendment in section 35 of the Code.*

5.15 **Rationale:** The CoC has been provided under the Code to take decisions in respect of the CD during CIRP and the supremacy of CoC's commercial wisdom is now a well settled jurisprudence. The Code does not provide for any mechanism for oversight, monitoring and guidance of liquidation, akin to that provisioned for CIRP through CoC. Sub-section (2) of section 35 of the Code only provides that, "*The liquidator shall have the power to consult any of the stakeholders entitled to a distribution of proceeds under section 53*". However, it also provides that any such consultation shall not be binding on the liquidator.

5.16 Consequently, the issues of commercial nature, which should rest within exclusive domain of the CoC, get litigated before AA and hence result in undue burden on AA**.** The presence of such an empowered body shall not only encourage the creditors to participate effectively in the liquidation process but also enhance the accountability of liquidator as its recommendations on critical matters shall be binding on the liquidator.

(g) Appointment / replacement of liquidator

5.17 **Recommendation 7:** *Section 34 of the Code may be amended to provide that the CoC may recommend appointment of any IP (including the incumbent RP), as liquidator. Further, section 34 may also provide that the creditors may recommend liquidators' replacement by a majority vote of not less than 66% during the process.*

5.18 **Rationale:** The RP gets a fee approved by the CoC during the CIRP. Upon failure of resolution, the CD moves into liquidation where the same RP continues as liquidator in most of the cases. Hence, an IP working as RP and liquidator gets remunerated during both CIRP and liquidation process, and his remuneration has first claim on realized proceeds. This may create a perverse incentive, wherein an IP, rather than being outcome agnostic, can be more inclined to push the CD into liquidation to earn extra fee.

5.19 The Code and the Regulations made thereunder bestow various powers on the CoC which *inter alia* includes appointing the Interim Resolution Professional (IRP) as RP, supervise their functioning and conduct, and in the event, the conduct of the RP is not up to its satisfaction, replace the RP, under section 27 of the Code. However, there is no provision to provide for replacement of liquidator even if circumstances warrant, during liquidation process. The absence of the provision creates imbalance of power. The proposed amendments would enfranchise the creditors to appoint liquidator of their choice.

Part III: Clarity to stakeholders on security interest related issues

(h) Rights and duties of secured creditors

5.20 **Recommendation 8:** *The option to realise secured assets by the creditors (outside the Code) under section 52 may be removed for all creditors except those secured creditors who had exercised the right of enforcing security interest prior to the initiation of CIRP but their rights were curtailed on account of imposition of moratorium under IBC. Such an option should be exercised within 14 days of initiation of liquidation process. In such circumstances, their rights and duties shall be governed by the Code, i.e., if a secured creditor proceeds to realise security interest, it shall be liable to pay its share of expenses towards insolvency resolution process cost (IRPC), liquidation costs, and workmen dues.*

5.21 **Rationale:** The Code provides primacy to collective reorganization of corporate persons as it maximizes the value of assets of such persons and balances the interest of all stakeholders. However, if the secured creditor chooses to realize the secured assets and walks away with the critical portion of assets without following the holistic approach, the whole process suffers in terms of realization and timelines. Further, regulation 21A of the Liquidation Regulations provides for deemed relinquishment of security interest if the secured creditor does not intimate its decision about relinquishment or realization within 30 days. However, the liquidator, in practice, waits for the decision of secured creditor for a much longer period.

5.22 The Code expressly provides for payment of IRPC only by a secured creditor, who proceeds to realize security interest outside the liquidation estate under section 52. Section 53, however, accords highest priority to payment of liquidation cost (along with the IRPC) and the same priority to workmen and secured creditors dues, if the secured creditor relinquishes the secured asset. Therefore, an arbitrage opportunity based upon the extent of net realization has been created under the Code wherein if a secured creditor relinquishes, it shall contribute its share of IRPC, liquidation cost and workmen dues and if it realises the security interest, it shall contribute to IRPC only.

5.23 Further, the secured creditor chooses to realize secured asset(s) on its own to have control over the realisation process. As the excess/ shortfall in realisation is reflected in the liquidation estate or the claims, the secured creditor never walks out of the process in essence. Since the proposed amendments herein adequately empower the creditors to monitor the process and further raises the accountability of liquidator, there may not be any need to provide option of realization to secured creditors.

(i) Avoiding stalemate situation if more than one secured creditor holds *pari passu* charge

5.24 **Recommendation 9:** *If secured creditors holding 60% of value in secured debt decide to relinquish or realize security interest (similar to relevant provision in SARFAESI Act, 2002), such decision shall be binding on other pari passu charge holders.*

5.25 **Rationale:** In some liquidation processes, wherein there are more than one secured creditor having *pari passu* charge over asset(s) of the CD, some secured creditor(s) having relatively smaller share in the value of secured debt may decide not to relinquish the security interest, while the remaining secured creditor(s) decide to relinquish. The liquidators in such stalemate situations are unable to proceed with the sale of encumbered assets.

(j) Treatment of priority of charge

5.26 **Recommendation 10:** *An explanation may be inserted in section 53(2) to provide that the valid inter-creditor/ subordination agreements between secured creditors shall continue to govern their relationship during liquidation.*

5.27 **Rationale:** It is a basic premise of an insolvency law that creditor cannot enjoy greater rights in an insolvency proceeding than they would enjoy outside it. In 2018, the ILC concluded that valid inter-creditor and

subordination provisions are required to be respected in the liquidation waterfall and there is no requirement to amend the Code. In 2020, ILC observed that despite clarification provided in 2018 report, the confusion regarding the applicability of Section 53(2) on inter-creditor agreements among secured creditors have persisted. It, therefore, recommended that a necessary clarification may be provided by inserting an Explanation under Section 53(2).

(k) Secured creditors be secured to the extent of value of security interest

5.28 **Recommendation 11:** *An explanation may be inserted in section 53 to clarify that secured creditors relinquishing security interest shall be secured to the extent of value of security interest.*

5.29 **Rationale:** Under section 53(1)(b), secured creditors who have relinquished their security interest stand second highest in priority (along with workmen dues) in distribution waterfall. This priority is provided to *"debts owed to a secured creditor in the event such secured creditor has relinquished security"*. Since this does not specify whether such debts owed are limited only to the value of the secured portion of the creditors' debt, there exists some confusion in the market as to whether secured creditors who have relinquished should recover to the extent of the underlying value of their security interest, or to the extent of their entire debt. ILC, in its 2020 report, had agreed that the priority for recovery to secured creditors under Section 53(1)(b)(ii) should be applicable only to the extent of the value of security interest relinquished by the secured creditor. Though the ILC did not recommend change in the Code taking the issue as clear, the stakeholders have expressed difficulties in practice.

Part IV: Streamlining the process

(l) Continuation of PUFE proceedings

5.30 **Recommendation 12:** *Section 54 of the Code may clarify that the completion of liquidation process shall not affect the pending PUFE application before AA. The CoC may decide the manner in which such pending PUFE applications will be pursued, as may be specified.*

5.31 **Rationale:** In several liquidation processes, the liquidators are not filing application for dissolution of the CD / closure of the process due to pending avoidance application with the AA, which take considerable time for disposal. Further, there is lack of clarity as to how these applications would be dealt with post dissolution of the CD. The proposed amendment would avoid unwarranted dragging of process for pending PUFE proceedings.

B. Voluntary liquidation process

(a) Allowing midway closure of process

5.32 **Recommendation 13:** *Section 59 of the Code may be amended to provide that the closure of voluntary liquidation process may be carried out by the corporate person (CP) subject to the same requirements as for initiation of the process, i.e., by way of a special resolution and approval of creditors representing two-thirds in value of the debt where the corporate person owes any debt. If such approvals are obtained, the liquidator may be required to make a public announcement of closure of process and intimate concerned authorities such as the IBBI and the registrar. Also, the time limit for the voluntary liquidation process may be fixed. In cases where the process needs extension, the liquidator should seek approval of AA, otherwise the process may terminate automatically on lapse of period.*

5.33 **Rationale:** There could be instances where the CP initiated the voluntary liquidation process when the financial prospects were on the downside, however, a business opportunity may arise subsequently during the currency of process. However, the Code is silent on the withdrawal or closure of the process after its initiation. In spite of this, voluntary liquidation process of thirteen CPs have been withdrawn / cancelled (as on September, 2022). Of these thirteen cases, the CP withdrew/ cancelled the process by passing a special resolution in nine

cases and approached the AA to cancel the process in the remaining four cases. The proposed amendment would lay down a guided path for withdrawal of the process, for the stakeholders on ex-ante basis and provide much needed clarity.

6. ENHANCING EFFECTIVENESS OF THE ADJUDICATING AUTHORITY

6.1 The AA is one of the most important pillars of the insolvency ecosystem. The smooth functioning of the AA, with optimal capacity and infrastructure, is critical to achieve the objective of timely resolution and value maximisation of stressed assets.

Expansion in jurisdiction of NCLT over time

6.2 The NCLT was established under section 408 of the Companies Act, 2013 with effect from June 01, 2016, to exercise and discharge the functions under the Companies Act, 2013. With effect from December 01, 2016, the jurisdiction of NCLT was extended to discharge the functions of AA under the Code. Subsequently, with effect from December 01, 2019, when the provisions relating to PGs to CDs came into force, the additional jurisdiction under sections 94 and 95 of the Code were also entrusted to NCLT.

6.3 With its growing ambit of jurisdiction, the NCLT has been making its best endeavours to ensure that the processes initiated under the Code meet the desired objectives and results, including during the COVID-19 pandemic period. A large number of cases have been disposed by the NCLT since its inception and amount of more than Rs.10 lakh crore has come back into the system / been resolved.

Concerns regarding pendency and delays

6.4 In recent times, concerns have been raised by several stakeholders, judiciary as well as the 32nd Report of Standing Committee on Finance, about the judicial delays in resolution process under the Code. As on September 30, 2022, a total of 12,918 cases under the Code, were pending at various stages with the NCLT and resources worth around Rs.7.5 lakh crore is blocked in the insolvency process from a total of around Rs.18 lakh crore worth transactions pending in those cases. Apart from the main applications, the NCLT is also burdened with thousands of pending IAs.

6.5 Based on analysis of data and feedback from stakeholders, the designated Colloquium Group identified the following challenges being faced by the AA in disposal of matters:

i. **Limited institutional capacity** – At present, there are 16 benches of NCLT with the approved strength of 62 members and there are large number of vacancies. Further, there is a vacancy of around 270 officers and support staff against sanctioned strength of 330. Most of the staff are outsourced and regular staff are minimal. The lack of numbers with respect to court /benches and members is further accentuated by the lack of adequate infrastructure facilities.

ii. **Interlocutory Applications (IAs)** – As noted above, the NCLT is burdened with a large number of IAs, especially those filed by various stakeholders, namely, claimants whose claim has been rejected, homebuyers, related party IAs, PUFE transactions, IAs for approval of resolution plan, for objection on resolution plan, for invoking bank guarantee, for liquidation of CD, for dissolution of CD, etc. which require a detailed order involving considerable judicial process and adjudication. It has also been observed that frivolous IAs are filed with an intention to derail/ delay the CIRP.

iii. **Procedure related** – For matters under the Code, the NCLT has to follow the procedures laid down in NCLT Rules which have been framed for the purposes of Companies Act, 2013. There are no separate complete rules for IBC.

6.6 Based on the above analysis, the recommendations of the designated Colloquium Group are enumerated in the sections to follow.

(a) Filling up vacancy of Members

6.7 **Recommendation 1:** *The vacancy of the members in the NCLT should be filled immediately and expeditiously.*

6.8 **Recommendation 2:** *President, NCLT may be included in the Selection* Committee *for selection of Members.*

6.9 **Recommendation 3:** *The tenure of member of NCLT should be fixed at five years from date of appointment, and the upper age limit of 65 years be increased to 67 years as in other tribunals. Since there are large number of vacancies in NCLT. This provision should be extended to existing members also.*

6.10 **Rationale:** At present, 16 benches of NCLT have a total overall sanctioned strength of 63 members (including President). However, there are large number of vacancies as on date. Filling up vacancies is essential for distribution of increased workload amongst more members.

(b) Increase in number of courts

6.11 **Recommendation 4:** *More number of courts are needed in a phased manner to dispose cases and clear pendency in a time bound manner and also to handle the future needs.*

6.12 **Recommendation 5**: *The space constraints in the existing benches of the NCLT should be urgently addressed.*

6.13 **Rationale:** There are around 41,000 cases including IAs and Companies Act, 2013 cases pending (as on July 31, 2022) with NCLT in 16 benches having 28 courts functioning. Ideally, one Court can handle around 500 cases (including main case and IAs) annually. Beyond 500 cases in a court, the NCLT will not be able to dispose of the cases in a time bound manner which would defeat the very objectives of the Code. Thus, there is a need to increase the number of courts. The detailed depiction of requirement of courts across benches of NCLT is presented at **Annexure 1** of this report**.** Further, there is a need to address the constraints of space in existing Benches.

(c) Filling up staff vacancies and increasing number of posts

6.14 **Recommendation 6:** *The vacancies in support staff across NCLT benches should be expeditiously filled up, and additional staff be sanctioned for existing courts and for courts proposed to be set up in phased manner.*

6.15 **Rationale:** There is a vacancy of around 270 officers and support staff in the NCLT benches. Such a capacity void limits the capacity of NCLT in hearing matters expeditiously. Further addition of new posts of officers and support staff is needed for efficient functioning of the existing benches. Consequent to desirable increase in number of courts, the number of support staff would require to be further augmented.

(d) Dedicated benches of Tribunal (AA) for IBC

6.16 **Recommendation 7:** *Need for special benches to fast track cases by combination of members from different benches at the discretion of the President.*

6.17 **Rationale:** The Standing Committee of Finance had suggested that dedicated benches of Tribunals solely for insolvency matters may be created and institutional capacity of AA benches be enhanced accordingly. Further, there is a need to have specialised benches for sectors such as MSMEs, Real Estate, Infrastructure, etc with requisite domain expertise and fast track benches for specific cases. This will ensure timely disposal of applications related to insolvency. With such specialised benches, the process of disposal of certain type of applications by AA, will also become standardised over a period of time.

(e) Research support and training

6.18 **Recommendation 8:** *A quality support system in the form of professional research associates may be provided to the members of the AA. A minimum of 4 research assistants, including 1 from commerce/MBA/GIP/CA/CS/ICWA field should be attached to each court.*

6.19 **Recommendation 9:** *The appointment of research assistants on contract basis should initially be done for 1 year which may be extended by 2 years at a time. Such outsourced/ contractual staff should be allowed to appear in selection process for permanent vacant posts.*

6.20 **Recommendation 10:** *Regular training/ workshops / colloquiums including training in National Judicial Academy Bhopal and National Law Universities to upgrade the skills of members of NCLT in line with changing market dynamics may be provided.*

6.21 **Rationale**: Quality research inputs and regular capacity building initiatives for members will aid speedier disposal of matters due to availability of in-depth analysis of cases and up-to-date skill set of members.

(f) Use of technology

6.22 **Recommendation 11:** *AI enabled centralised e-platform dealing with IBC cases from admission to resolution, may be developed for case management by the AA including;*

i. For the processes at the AA, from admission to resolution.
ii. Rejection / admission of petitions on the platform with minimum number of hearings etc.
iii. For service of various orders/ notices to all the stakeholders on the same day.
iv. Access to Application Programming Interface (API) based real time information with IU, MCA and other stakeholders.
v. Case allocation to Benches
vi. For speedy communication exchange.
vii. Machine assistance for preparation of order / judgment

6.23 **Recommendation 12:** *A mechanism should be created for filing of pleadings, documents, etc in digital manner which shall be in a uniform editable format.*

6.24 **Recommendation 13:** *Technology may be utilised to simplify the work of Registry through provision of submission of standardized applications with bookmarking to enable quick scrutiny, and delivery of notices to parties through online system.*

6.25 **Rationale**: Considerable time of AA and other stakeholders is spent in collation, drafting, delivering and processing of the information required for admission of a CIRP application. In the Union Budget 2021-22 (para 82), it was announced that to ensure faster resolution of cases, NCLT framework will be strengthened, and e-Courts system shall be implemented. Going forward, AI enabled platform for AA needs to be developed to handle all the processes including delivery of notices, fixing of hearings and passing of order of admission or rejection, with minimum human interface.

(g) Interface with Other Systems

6.26 **Recommendation 14:** *The NCLT should have access to the records maintained by other government agencies as following –*

i. MCA21 to make phone number and email id of companies mandatory
ii. MCA21 to make available companies data on real time basis to NCLT.

iii. The record of debt and default status and issue of notice to Debtor(s) maintained by NeSL to be integrated with NCLT e-filing system.

iv. The proceedings of the court can be live streamed for greater transparency.

(h) Discouraging frivolous applications

6.27 **Recommendation 15:** *The application fee for initiation of CIRP may be increased on the lines of fee applicable in similar proceedings before DRT.*

6.28 **Recommendation 16:** *The fee for filing interlocutory applications under the Code may be increased.*

6.29 **Rationale:** The fee for filing CIRP application under section 7 and 10 of the Code is Rs. 25,000/- whereas the fee for filing a section 9 application is Rs. 2,000/- only. This fee was prescribed when the default threshold under the Code was Rs.1 lakh. In comparison to the fee charged for applications for recovery of debt before Debt Recovery Tribunals (DRTs), the application fee under the Code is on the lower side.[3] Further, the disposal of IAs requires considerable time and effort as speaking orders are to be passed by the AA. It unduly adds to the burden of the AA. Therefore, necessary steps are required to be taken to discourage frivolous IAs.

(i) Other recommendations

6.30 **Recommendation 17:** *Based on the exclusive requirements for meeting the desired objectives of the Code, an exclusive set of rules may be prescribed under section 239 (1) for matters to be dealt by NCLT, while deciding cases under IBC.*

6.31 **Recommendation 18:** *In order to enable a speedy resolution of matters pending before the AA, management of applications at the level of Registry, for listing of cases is required which includes enhancement of role of Registry to scrutinise application for its completion in all respects and completion of pleadings.*

6.32 **Recommendation 19**: *In order to enable time bound resolution of complex cases which generally involve large amounts, prioritization in listing of cases on the basis of default amount or admitted claims should be done.*

6.33 **Recommendation 20**: To *ensure more effective audits (including forensic) for better recovery, there is a need for developing protocols to enable the resolution professional to take custody of accounting and commercial data from the outgoing management at the initiation of CIRP to prevent filing of multiple applications.*

6.34 **Recommendation 21**: *In order to achieve the objective of decriminalisation, section 235A of the Code may be suitably amended to provide that if any person contravenes any of the provisions of this Code or rules or regulations made thereunder, for which no penalty is provided in this Code, AA may be empowered to impose penalty which shall not be less than one lakh rupees but which may extend to three times the amount of the loss caused, or likely to have caused or amount of unlawful gain made on account of such contravention.*

[3]DRTs fee for application is dependent on the total amount of debt to be recovered with maximum fee being capped at Rs. 1,50,000/-.

7. ROLE OF SERVICE PROVIDERS AND OTHER STAKEHOLDERS - CONDUCT, CAPACITY AND TIMELY CONCLUSION OF PROCESSES

7.1 The Code provides a framework for functioning for various stakeholders and service providers under the Code *viz.* the CoC, Stakeholders Consultation Committee (SCC), IU, RVs and IPs. To meet the emerging requirements of the market and the Code going forward, the need is felt to enhance the performance of service providers to drive optimal outcomes. Performance enhancement is further to be balanced with strengthening of the enforcement mechanism of the regulator to ensure adherence with the provisions of the Code by all service providers. In this context, this chapter of the report identifies various challenges that have emerged in the conduct and capacity of service providers and presents a case for review of the legislative framework under the Code to address impediments in the insolvency resolution process.

7.2 As part of the comprehensive review exercise, the designated Colloquium Group considered the following case studies, where the courts made observations on the conduct of CoCs, as basis to work out its recommendations:

i. Andhra Bank Vs. Sterling Biotech Ltd. and Ors, (order dated March 11, 2019 of the NCLAT)
ii. Bank of Baroda, Vs. Mr. Sisir Kumar Appikatla, & Ors (order dated July 20, 2020 of the NCLAT)
iii. CIRP of Jindal Saxena Financial Services Pvt. Ltd. Vs. Mayfair Capital Private Limited (order dated July 04, 2018 of the NCLAT)
iv. SBJ Exports & Mfg. Pvt. Ltd. Vs. BCC Fuba India Ltd. (order dated July 06, 2018 of the NCLAT)
v. STCI Finance Ltd. through Subash Chandra Modi Vs. Parinee Developers Private Limited (order dated May 31, 2021 of the NCLAT)
vi. CIRP of Bhushan Power & Steel Ltd.

7.3 The recommendations emerging from the deliberations in the Colloquium have been presented in sections (a) to (d) to follow.

(a) Conduct of CoC

7.4 **Recommendation 1:** *There is a need to have a Code of Conduct for CoC and IBBI may be empowered, by way of amendment to the Code, to issue a Code of Conduct by regulations. As regards the enforceability of the Code of Conduct, deliberations may be made with stakeholders as to which body will enforce it against the creditors. The Code of Conduct may be issued only after decision is taken regarding its enforceability.*

7.5 **Rationale**: Based on examination of case studies, certain issues concerning conduct of CoC members were observed. Such issues involved non-adherence to the provisions of the Code and Regulations by CoC namely, allowing ineligible persons to participate in resolution, booking inadmissible expenditure to the CIRP cost, deputing representative to CoC meetings without proper delegation of authority etc. The Code of Conduct for the CoC will bring clarity in the roles and conduct of their members while steering behavioural change in them and enhance their accountability.

(b) Enhancing the role of IU

7.6 **Recommendation 2:** *The Code may be amended to provide for mandatory submission of financial information with IU by all FCs, and OCs having claims above Rs.1 crore who propose to file application under section 9 under the Code, to file financial information with IU (refer para 3.7 above)*

7.7 **Recommendation 3:** *The Code may be amended to provide for mandatory submission of Record of Default (RoD), issued by IU along with application, by the (i) FCs and (ii) OCs.*

7.8 **Rationale (for recommendations 2 to 3):** The filing of RoDs along with application by creditors is not a mandatory requirement under the Code and as a result, the AA relies on multiple documents for ascertaining the default, causing delays in admission. The financial information of the IU needs to be strengthened by ensuring submission of debt and default information by all FCs/ OCs in order to enable IU to issue RoD effectively. The strengthening of IU in this regard would eliminate delays and disputes and will enable timely admission of applications by AA.

(c) Regulation of valuation

7.9 **Recommendation 4:** *Section 247 of the Companies Act 2013 be amended to empower IBBI to regulate Valuers by way of framing regulations.*

7.10 **Rationale:** The IBBI regulates Valuers as a delegated authority under the Companies (Registered Valuers and Valuation) Rules, 2017. A study of 15 valuation reports was conducted, wherein a third valuer was appointed by the RP, the study indicated that the difference between the lowest and highest valuation estimates for 'Fair Value', was more than 100 percent in as many as 13 out of 15 cases (87%) in the valuation estimates submitted by two Valuers. The difference in valuation is largely attributable to the lack of uniformity of approach followed by Valuers in the absence of well-defined standards. Presently, the IBBI lacks powers to issue regulations in this regard. If the IBBI is empowered to do so, the same would allow development of Valuation Standards and enhance the enforcement mechanism of IBBI as regards RVs. This would effectuate better value realisation under the Code and enhance accountability of RVs.

(d) Service providers and effective disciplinary mechanism

7.11 **Recommendation 5:** *The Code may be amended to introduce the definition of "service provider" to include IP, IPA, IU, IPE, RV, RVE and RVO, in section 3 and the Inspection, Investigation and Disciplinary Action provisions contained in Chapter VI of the Code to be applied against a Service Provider.*

7.12 **Recommendation 6:** *Segregate the inspection and investigation provisions under the Code which is presently used interchangeably under section 218 of the Code.*

7.13 **Recommendation 7:** *The Code may be amended to enable IBBI to issue Show Cause Notice (SCN) if there is sufficient material available on record without undertaking an inspection/ investigation under section 219 of the Code.*

7.14 **Recommendation 8:** *The Disciplinary Committee (DC) may be a single member committee and Chairperson to be a part of DC by inserting clarification in section 220 of the Code.*

7.15 **Recommendation 9:** *The NCLAT may be empowered to hear appeal against DC orders.*

7.16 **Rationale (for recommendations 5 to 9):** For effective enforcement mechanism under the Code, the following is to be provided for:

i. Service provider definition, though defined under Inspection and Investigation Regulations, it needs to be provided under the Code to include all the entities *viz.* IP, IPE, IPA, IU, RV, RVE, RVO, to enable IBBI to apply its inspection/investigation and DC powers across these entities. The same is currently not available in respect of IPE, RV, RVE and RVO.
ii. Inspection and Investigation powers of IBBI needs to be segregated under the Code which is presently used interchangeably in section 218 of the Code. Further, as per scheme of the Code, IBBI cannot issue SCN without inspection. Certain cases do not require inspection where sufficient evidence is available to proceed without the same.
iii. The Code defines DC to consist of Whole Time Members (WTMs) and which is read as plural in

terms of numbers of the DC. DC orders passed by a single WTM or Chairperson are challenged by affected parties alleging that a single member cannot form DC.

iv. Appellate mechanism is presently not provided under the Code against DC orders.

8. NEXT GENERATION REFORMS

8.1 The Code has completed six years since its enactment in the year 2016 and like any other economic law is evolving over a period of time. The BLRC while recommending the insolvency regime, recommended a gradual approach in the context of emerging challenges and best practices across the jurisdictions, keeping in view the status of stabilisation and maturity of insolvency processes. In this context, this chapter of the report proposes three frontier areas, adoption of which in other jurisdictions, has brought about visible changes in terms of efficient delivery and robust outcomes and stakeholders consider that timing is perfect to adopt the same in India specific nuances:

I. Application of mediation in corporate insolvency situation
II. A creditor-led resolution approach as an alternative to CIRP
III. Cross border insolvency

(I) Application of mediation in corporate insolvency situation

8.2 Insolvency proceeding is not an adversarial process. Yet, disputes arise between parties, clogging the cause list of AA with matters which parties can potentially resolve amicably. Mediation is one such voluntary structured negotiation process by which the parties can resolve their disputes by using specialised communication and negotiation techniques assisted by a neutral third party known as the mediator, through 'persuasion' and 'party-driven solutions'.

8.3 As per available data, till September 2022, more than 23400 applications for initiation of CIRPs of CDs having underlying default of Rs.7.31 crore were resolved after filing of application but before their admission. Even after commencement of CIRP, 846 cases have been closed on appeal or review or settled and further 740 cases have been withdrawn under section 12A, which shows that there is ample scope for using mediation for settling disputes.

8.4 The Colloquium Group deliberated extensively on possible benefits and concluded that mediation offers a speedy and cost-effective solution, while adopting a confidential procedure; greater degree of party control and flexibility; informal nature of proceedings; preservation of business relationships and mutually satisfactory solutions.

8.5 In addition to the known benefits of mediation, the designated Colloquium Group considered the following case studies wherein in the absence of specific provisions for mediation in the Code, the AA had exercised inherent powers where the creditors and suspended board members wanted to settle the matter after initiation of insolvency proceedings:

i. Parvinder Singh Vs. Intec Capital Ltd. & Anr. (Order dated December 06, 2019 of NCLAT)
ii. Mr. Harish P. Vs. M/s. Chemizol Additives Pvt. Limited (Order dated June 08, 2020 of NCLT) and Sodexo India Services Pvt. Ltd. Vs. Chemizol Additives Pvt. Ltd. (Order dated February 22, 2021 of NCLAT)

8.6 The Group deliberated on the possible use of mediation at various stages of the processes under IBC *inter alia* including:

- Pre-insolvency commencement stage viz. prior to the commencement of formal insolvency proceedings both under sections 7 and 9 of the Code with an aim to reach a settlement or a restructuring agreement;

- Pre-packaged, pre-arranged resolution process and pre-default resolution stage;
- Resolve disputes pertaining to quantum of claims, classification of creditors and inter-creditor disputes like priorities in security interest, distribution of realisations among creditors, etc.;
- avoidance transactions;
- cross border and group insolvency proceedings.

8.7 Some implementation concerns were raised during deliberations in the Group with respect to the use of mediation in post-admission stage particularly in the context of *in-rem* proceedings as its potential cannot be fully utilised. It was mentioned that its utility in jurisdictions having creditor-in-control regimes may be limited as section 29A under the Code technically prohibits negotiations with ineligible promoters. However, the Group was apprised that in several jurisdictions having creditor-in-control dispensation, traction for mediation is growing.

8.8 **Recommendation 1:** *The Group recommended that best practices as prevailing in other jurisdictions should be examined expeditiously. Further, the proposed mediation framework shall be time bound and cost effective. An Expert Committee in this regard may be constituted by the Board to undertake a quick study and to propose recommendations. The following key issues need to be addressed while framing the mediation framework:*

- *Choice of mediation to be mandatory or voluntary*
- *Creating space for mediation within the timelines specified by the Code*
- *Circumstances under which a case can be referred for mediation*
- *How to enforce mediation outcomes*
- *Who will bear the cost of mediation*
- *What would be the mechanism for serving the notices*
- *Choice of neutral mediator*
- *Infrastructure support*

8.9 *Keeping in view that Mediation Bill is already pending in the Parliament and given the fact that IBC has not been proposed to be out of its ambit, it is necessary to spell out the broad contours of the framework. The Group recommended that it is the most opportune time to be ready for early roll-out of mediation process in the context of the Code. For its early fructification, the group recommended that an enabling provision for use of mediation in various processes under the Code may be introduced, leaving its details to be specified by the Board.*

8.10 *Further, as part of the roll-out strategy, a cadre of mediators may be trained simultaneously to assist the parties in negotiation and resolution of disputes in various stages, before and after admission of insolvency proceedings.*

(II) A creditor-led resolution approach as an alternative to CIRP

8.11 With passage of time, alternative options for resolution of stress and restructuring of a firm must be explored. In an increasingly dynamic economic environment, firms are faced with unique challenges and risks which in turn have a bearing on their financial health. A sound and forward-looking insolvency system must provide a wide range of options for resolution of stress. The combination of a pre-insolvency workout support procedure with a strong restructuring procedure for a (near) insolvent CD can offer a sufficient procedural framework for business rescue.

8.12 In this backdrop, it was proposed to introduce an alternative mechanism for resolution of stress by way of a pre-arranged out of court arrangement having sanctity under the Code. This form of resolution process may be termed as 'Creditor-led Resolution Approach (CLRA)'.

8.13 The proposed framework draws inspiration from the RBI's Prudential Framework for Resolution of Stressed Assets dated June 07, 2019 (RBI Circular) which provides for informal out of court framework for resolution of stressed assets. However, the out of court workout under the RBI Circular does not have a statutory backing. While the resolution plan approved under the RBI Circular is contractually binding on the creditors involved, other stakeholders may not accept the plan as binding on them.

8.14 The group deliberated on the broad contours of the proposed CLRA framework and recommended that it should combine the benefits of RBI Framework with statutory backing to make the out-of-court resolution process more effective and provide greater certainty to the resolution plan approved by creditors by requiring its sanction by AA and thus, becoming binding on stakeholders.

8.15 Advance jurisdictions are experimenting with the CLRA framework and the concepts around inter-creditor agreements, IP assisting the processes and pool of industry experts giving their inputs for taking an appropriate decision for the resolution of the CD have gradually settled. The approach of pre-pack prior to admission also recognises the merit of debtor-in-possession approach and a similar dispensation, to begin with, can be effectively used in the CLRA framework.

8.16 **Recommendation 2:** *The Group agreed that CLRA proposes an out-of-box solution and there is a reasonable case to move towards its conceptualisation and implementation. Keeping this in view, the Group recommended that an enabling provision for CLRA under the Code may be introduced, for cases of default up to a limit as prescribed by the Central Government. It may provide that a detailed framework of CLRA will be specified by the Board.*

8.17 *Meanwhile, the Group recommended that for its early roll-out, an Expert Committee may be constituted by IBBI for making recommendations regarding the procedural details and solutions on certain issues such as treatment of moratorium (interim or full-fledged), applicability of section 29A, market discovery of prices and cram-down provisions.*

(III) Cross Border Insolvency

8.18 The Code presently does not contain a comprehensive framework for cross border insolvency. Sections 234 and 235 of Code only enable the Central Government to enter into bilateral agreements with foreign countries for enforcing the provisions of the Code and issuance of letter of request by the AA to a court or an authority of such country, where evidence or action is required in relation to assets of CD, debtor or PG of CD situated in that country.

8.19 In the last six years of the Code's functioning, it is worth noting that no bilateral agreements have been entered into pursuant to the enabling provision in Section 234. It is also worth noting that the mechanism available under the Civil Procedure Code 1908 for enforcing foreign judgments is not sufficient for insolvency matters as it is not broad enough to cover all types of orders (including interim orders) in insolvency proceedings.

Background work and case studies

8.20 To assess the need for a cross-border framework under the Code, the ILC examined the same and submitted its report on October 16, 2018. The report recommended the adoption of the UNCITRAL Model Law on Cross-border Insolvency ('Model Law' or 'MLCBI') with certain modifications to suit the domestic requirements by way of insertion of a separate Part (Draft Part Z) in the Code to deal with cross border insolvency.

8.21 In continuation of the above, the Cross Border Insolvency Rules/ Regulations Committee (CBIRC), constituted by the MCA vide order dated January 23, 2020, submitted its report on the rules and regulatory framework required for smooth implementation of proposed cross border insolvency provisions in the Code based on the report of the ILC.

8.22 Furthermore, Union Budget 2021-22, mentioned that necessary amendments in the Code will be carried out to facilitate cross border insolvency resolution.

8.23 The designated Colloquium Group examined the reports of ILC and CBIRC. In addition to this, the Colloquium Group analysed cross-border frameworks of 53 jurisdictions to understand the treatment of Indian insolvency proceedings, creditor and debtor interests, IPs and courts in such jurisdictions. The Group further examined case studies of following CDs, that involved specific cross-border elements, to assess the need for cross border framework in the Indian insolvency context:

i. Jet Airways (India) Limited
ii. SEL Manufacturing Limited
iii. ABG Shipyard Limited
iv. Punj Lloyd Limited

8.24 The Group discussed in detail the issues pertaining to Model Law on Cross Border Insolvency and experiences of other jurisdictions. The linkages between cross border insolvency framework and group insolvency framework were discussed in detail.

8.25 **Recommendation 3:** *There was consensus on the need to adopt a cross border insolvency framework on an urgent basis and that the Model Law could be adopted with suitable India specific checks and balances.*

8.26 *The Group was of the view that benefits under cross border regime will fully fructify if group insolvency is also included in the proposal.*

8.27 *Further the Group noted that at present group insolvency as a concept has not been included in the Code for domestic entities. The Group recommended that without deferring the implementation of cross border, timing of integrating group insolvency within the Code's mandate can be appropriately decided by the Government. It was recommended that a line entry in the Code for treatment of group insolvency may be provided with enabling requirements being vested with the Board to specify the details for domestic entities. Further, after reviewing its functioning, it can be considered for appropriate integration with cross border insolvency framework at a later stage.*

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LIST OF ABBREVIATIONS

AA	Adjudicating Authority
AFA	Authorisation for Assignment
AI	Artificial Intelligence
API	Application Programming Interface
AR	Authorised Representative
BLRC	Bankruptcy Law Reforms Committee
Board/IBBI	Insolvency and Bankruptcy Board of India
BT	Bankruptcy Trustee
CA	Corporate Applicant
CARO	Company Auditor's Report Order
CBDT	Central Board of Direct Taxes
CBIC	Central Board of Indirect Taxes & Customs
CBIRC	Cross Border Insolvency Rules/Regulations Committee
CD	Corporate Debtor
CEO	Chief Executive Officer
CIRP(s)	Corporate Insolvency Resolution Process(s)
CIRP Regulations	IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
CLRA	Creditor-led Resolution Approach
CoC	Committee of Creditors
Code/ IBC	Insolvency and Bankruptcy Code, 2016
COMI	Centre of Main Interest
DC	Disciplinary Committee
DRT	Debt Recovery Tribunal
EPFO	Employees' Provident Fund Organisation
ESIC	Employees' State Insurance Corporation
FC(s)	Financial Creditor(s)
FTP	Fast Track Process
HC	High Court
IA	Interlocutory Application
IBA	Indian Banks' Association
IIRP	Individual Insolvency Resolution Process
ILC	Insolvency Law Committee
IP(s)	Insolvency Professional(s)
IPA(s)	Insolvency Professional Agency / Agencies
IPE(s)	Insolvency Professional Entity/Entities
IRP	Interim Resolution Professional
IRPC	Insolvency Resolution Process Cost
ITES	Information Technology Enabled Services
IM	Information Memorandum
IU	Information Utility
KYC	Know-Your-Customer
Liquidation Regulations	IBBI (Liquidation Process) Regulations, 2016
MCA	Ministry of Corporate Affairs

MLCBI / Model Law	UNCITRAL Model Law on Cross-border Insolvency
MSME	Micro, Small and Medium Enterprises
NeSL	National E-Governance Services Limited
NCLAT	National Company Law Appellate Tribunal
NCLT	National Company Law Tribunal
NOC	No Objection Certificate
OC(s)	Operational Creditor(s)
PDA	Platform for Distressed Assets
PG(s)	Personal Guarantor(s)
PRA	Prospective Resolution Applicant
PSB(s)	Public Sector Bank(s)
PUFE	Preferential, Undervalued, Fraudulent and Extortionate
PPIRP	Pre-packaged Insolvency Resolution Process
RBI	Reserve Bank of India
RDB Act	Recovery of Debts and Bankruptcy Act, 1993
RFRP	Request for Resolution Plan
RoD	Record of Default
RP	Resolution Professional
RV(s)	Registered Valuer(s)
RVE	Registered Valuer Entity
RVO(s)	Registered Valuer Organisation(s)
SARFAESI	The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
SC	Supreme Court of India
SCBs	Scheduled Commercial Banks
SCC	Stakeholders' Consultation Committee
SCN	Show Cause Notice
SRA	Successful Resolution Applicant
TAR	Technology Aided Review
UNCITRAL	United Nations Commission on International Trade Law
WTM	Whole Time Member

ANNEXURE 1

Table: Requirement of additional courts in NCLT					
Sl. No.	**Place of NCLT**	**No. of Courts functioning**	**No. of Courts sanctioned**	**Total no. ofcases pending**	**No. of additional courts required**
1	Principal Bench, New Delhi	1	1	2296	7
2	New Delhi	5	1	4985	
3	Ahmedabad	2	6	1945	2
4	Allahabad	1	2	939	1
5	Amravati	1	1	335	0
6	Bengaluru	1	1	902	1
7	Chandigarh	1	1	2656	4
8	Chennai	2	3	3774	4
9	Cuttack	1	1	384	0
10	Guwahati	1	1	110	0
11	Hyderabad	2	2	2055	2
12	Indore	1	1	609	0
13	Jaipur	1	1	1139	1
14	Kochi	1	1	331	0
15	Kolkata	2	2	3207	4
16	Mumbai	5	6	15219	24
	Total	**28**	**31**	**40886**	**50**

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भारतीय दिवाला और शोधन अक्षमता बोर्ड

Insolvency and Bankruptcy Board of India