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## COMPARATIVE FOOTING OF STAKEHOLDERS UNDER THE IBC 2016: SUMMARY PRÉCIS

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Ajay Pal Singh, Rahil Setia & Nishant Sharma, Army Institute of Law, Mohali, Punjab, India

“Fiat Justitia Ruat Caelum”<sup>1</sup>

- Lord Mansfield<sup>2</sup>

### ABSTRACT

The Insolvency and Bankruptcy Code, 2016 (IBC) provides a uniform and comprehensive insolvency framework which involves several stakeholders such as the Corporate Debtors, Financial and Operation Creditors, Resolution Professionals, Committee of Creditors and the Adjudicating Authority etc. taking part in the Corporate Insolvency Resolution Process. In fact, although the IBC envisages a creditor-driven process, yet the aforesaid stakeholders have their own distinct position/role and enjoy an array of rights and remedies. However, some of these differ from the relatively distinct position of the stakeholders in the recently introduced Pre-Packaged insolvency resolution process. Further, the law on the position of foreign stakeholders under the IBC hasn't fully crystalised either. Consequently, this article makes an attempt to provide a descriptive analysis of the rights, roles and responsibilities of the various stakeholders in the Corporate Insolvency Resolution Process under IBC in India, with a special emphasis on recent judicial trends. Further issues pertaining to Pre-Packaged insolvency resolution process, Cross Border insolvency, place of main proceedings and enforcement of foreign judgments, have been touched upon in order to summarise the challenges faced by foreign stakeholders under the current IBC regime.

**Keywords:** IBC, Corporate Debtor, Financial Creditor, Operation Creditor, Resolution Professional, Committee of Creditors, Adjudicating Authority.

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<sup>1</sup> Latin for "Let justice be done though the heavens fall".

<sup>2</sup> Oxford Reference, '*Fiat justitia ruat caelum*', OXFORD REFERENCE (Dec. 12, 2021, 10:04 AM), <https://www.oxfordreference.com/view/10.1093/acref/9780190304737.001.0001/acref-9780190304737-e-1570>.

## INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as IBC) has consolidated the existing framework for insolvency laws in India by creating a single unified legislation for insolvency and bankruptcy.<sup>3</sup> The IBC offers a uniform, comprehensive insolvency legislation encompassing all companies, partnerships and individuals (other than financial firms). It creates a new institutional framework, consisting of a regulator i.e., the Insolvency and Bankruptcy Board of India (hereinafter referred to as IBBI), Insolvency Professionals, information utilities and adjudicatory mechanisms, which seek to facilitate a formal and time bound insolvency resolution process and liquidation.<sup>4</sup> There are various stakeholders and entities in the entire insolvency resolution process namely the Corporate Debtors, Financial and Operation Creditors, Resolution Professionals (hereinafter referred to as RP), Committee of Creditors hereinafter referred to as CoC) and the Adjudicating Authority (hereinafter referred to as AA).<sup>5</sup> All these stakeholders have their distinct rights and responsibilities in the standard insolvency resolution proceedings under the IBC. Further, with the advent of Pre-Packaged Insolvency, a new framework is being formulated, where the aforementioned rights and responsibilities are relatively different. Moreover, Cross Border insolvency adds an additional layer of complexity to the process, with the entry of several foreign stakeholders (primarily foreign creditors) in the IBC regime.<sup>6</sup> It is within this milieu, that the present article, seeks to provide a descriptive analysis of the rights and legal position (and the limitations upon them) of the various stakeholders in the Corporate Insolvency Resolution Process (hereinafter referred to as CIRP) in India, with a reference to recent judicial trends. Further, an attempt has been made to explain the broad position of the aforementioned stakeholders in the Pre-Packaged Insolvency Process. Finally, issues such as the determination of jurisdiction and enforcement/recognition of foreign judgments, so as to provide an analysis of the position of foreign stakeholders in the Cross Border insolvency proceedings have been discussed.

## RIGHTS OF CORPORATE DEBTOR UNDER THE IBC 2016

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<sup>3</sup> Trilegal, '*IBC 2016 Key Highlights*', MONDAQ, (Dec. 12, 2021, 9:21 AM), <https://www.mondaq.com/india/insolvencybankruptcy/492318/the-insolvency-and-bankruptcy-code-2016--key-highlights>.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Vyapak Desai, Arjun Gupta and Bhavana Sunder, '*Introduction to Cross Border Insolvency*', NISHITH DESAI ASSOCIATES, (Dec. 14, 2021, 12:53 PM), [https://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research\\_Papers/Introduction-to-Cross-Border-Insolvency.pdf](https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Introduction-to-Cross-Border-Insolvency.pdf).

A 'Corporate Debtor' under the IBC is a corporate person who owes a debt to any person.<sup>7</sup> The term 'Corporate Person' has been defined under Section 3(7) of IBC, and it includes a Company as defined under Companies Act, Limited Liability Partnership as defined under Limited Liability Partnership Act 2008 or any other person incorporated with limited liability, but doesn't include financial service providers such as Banks or Non-Banking Financial Companies.<sup>8</sup> The Corporate Debtors have been vested with a catena of rights under the IBC. Since, the promoters of a Company may be inevitably the Corporate Debtors as well, these rights encompass promoters as well. Thus, some of the specific rights of the Corporate Debtor envisaged under the IBC 2016 include:

### **1. Right to voluntarily initiate Corporate Insolvency Resolution Process**

Under Section 10 (1) of the IBC, a Corporate Debtor may file a petition for initiation of insolvency resolution process before the relevant adjudication authority, if the corporate debtor has defaulted in payment of the debt. Thus, the Corporate Debtors have a right to voluntarily initiate insolvency proceeding and soon as default in payment occurs, they may file an application to the AA i.e., National Company Law Tribunal (hereinafter referred to as NCLT) for initiating the CIRP.<sup>9</sup> Part III of the IBC provides for insolvency proceedings of individuals and thus the parties can file an application under Section 94 of the IBC for initiation of insolvency resolution process for themselves.<sup>10</sup> However, this right is not an absolute right and is subject to limitations. For instance, when CIRP proceedings are already ongoing, then the claim by a corporate debtor is barred by the IBC. Section 94 (4)(c) of the IBC clearly states that a debtor cannot be entitled to make an application under Section 94(1) if the company is already undergoing an insolvency resolution process, therefore an application moved by Debtor under Section 94 before the AA is not maintainable and is liable to be dismissed. Thus, only if the Corporate Debtors do not fall under any of the said category as envisaged by Section 94(4) that their application for initiation of insolvency, proceedings should be admitted by the AA i.e., NCLT. In *Renish Petrochem FZE v. Ardor Global Private Ltd.*<sup>11</sup> the issue for

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<sup>7</sup> CA Rajput Jain & Associates, '*Corporate Debtor under IBC*', RAJPUT JAIN AND ASSOCIATES, (Dec. 14, 2021, 1:32 PM), <https://carajput.com/services/corporate-debtor-under-ibc.php>.

<sup>8</sup> IBC Laws, '*Section 3 IBC Definitions*', IBC LAWS, (Dec. 12, 2021, 9:23 AM), <https://ibclaw.in/section-3-definitions-under-insolvency-and-bankruptcy-code-2016-ibc-2016-part-i-preliminary/>.

<sup>9</sup> Trilegal, *supra* note 6.

<sup>10</sup> Vipul Kumar, '*Individual Insolvency under Part 3 of IBC, 2016*', SCC ONLINE, (Dec. 14, 2021, 1:32 PM), <https://www.sconline.com/blog/post/2021/01/06/individual-insolvency-under-part-3-of-ibc-2016-why-the-provisions-ought-to-be-reviewed/>.

<sup>11</sup> *Renish Petrochem FZE v. Ardor Global Private Ltd.*, [2017] S.C.C. OnLine NCLT 7683.

determination was whether a guarantor can be considered as Corporate Debtor in case of claim by an Operational Creditor. The NCLT, held that the amount due from the buyer of the goods and which is due to the seller of the goods and is guaranteed by the guarantee agreement, is an Operational Debt. Further, in *Alpha & Omega Diagnostics (India) Ltd. v. Asset Reconstruction Company of India*<sup>12</sup>, the National Company Law Appellate Tribunal (hereinafter referred to as NCLAT) has opined that in so far as guarantor is concerned, they fall within the meaning of Corporate Debtor individually, as distinct from principal debtor who has taken a loan. In *Ferro Alloys Corporation v. Rural Electrification Ltd*<sup>13</sup>, the NCLAT observed that since a guarantor is included within the definition of ‘Corporate Debtor’ as provided under Section 3(8) of the Code, “a guarantee becomes a debt or as soon as the guarantee is invoked against it wherein after a guarantor (‘corporate guarantor’) becomes a ‘corporate debtor’ in terms of the IBC”. Thus, a Corporate Debtor undergoing CIRP; or having completed CIRP twelve months preceding the date of making application; or Corporate Debtor or Financial Creditor who has violated any of the terms of plan which was approved twelve months before; or the Corporate Debtor in respect of whom a liquidation order has been made, cannot file an application for CIRP.

## 2. Right to defense against insolvency application and fraudulent claims

Under the IBC every creditor, financial or operational, has to follow a certain procedure to establish their claim and initiate the CIRP. If the said procedure is not duly followed then the Corporate Debtor has a very good defense to get the petition disposed of.<sup>14</sup> The Hon’ble Supreme court in its decision in *B.K. Educational Services Private Limited v. Parag Gupta*<sup>15</sup> has upheld the applicability of Limitation Act, 1963 to the IBC, and therefore requirements laid down by it must be met in IBC proceedings. A Corporate Debtor can defend the insolvency application against them if the claim raised by the creditor is not genuine or have been raised to harass the corporate debtor. When an application is filed against the Corporate Debtor, the Corporate Debtor should verify the accounts and identify whether the claim raised is genuine

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<sup>12</sup> *Alpha & Omega Diagnostics (India) Ltd. v. Asset Reconstruction Company of India*, [2017] S.C.C. OnLine 12611.

<sup>13</sup> *Ferro Alloys Corporation v. Rural Electrification Ltd*, [2017] S.C.C. OnLine 13674.

<sup>14</sup> Query Legal, ‘IBC for Corporate Debtor’, QUERY LEGAL, (Dec. 14, 2021, 1:54 PM), <https://www.querylegal.com/ibc-for-corporate-debtor/>.

<sup>15</sup> *B.K. Educational Services Private Limited v. Parag Gupta*, [2019] 11 S.C.C. 633.

or not.<sup>16</sup> Finally, the fact that there is a provision for resolving the disputes through arbitration in the agreement, does not bar initiation of the CIRP process by the Corporate Debtor.<sup>17</sup>

### 3. Right to file application against Resolution Plan

According to Section 5 (26) of the IBC, “Resolution Plan” means a plan proposed by Resolution applicant for insolvency resolution of the Corporate Debtor as a going concern in accordance with Part II. While the IBC envisages a Creditor-Driven Process<sup>18</sup>, yet it doesn’t allow a complete trampling of the rights of Corporate Debtors. This is obvious in the context of Resolution Plan. Thus, when there is a Resolution Plan in contravention to the IBC or the Corporate Debtors feel wronged by the terms of the Resolution Plan, they have a right to file application against the same.<sup>19</sup> Therefore, the IBC does provide remedies to Corporate Debtors by allowing them to file an application to the AA if the terms provided in the Resolution Plan are in contravention to the applicable provisions of law, or if the applicant has arbitrarily reduced or written off substantial liabilities of promoters/guarantors without any legal basis. Similarly, if the lenders have not been treated similarly and restructuring for its entire claims of the Corporate Debtor is against the provisions of IBC, then the application is allowed as well. Further, the IBC specifically provides for indemnifying the guarantors by the Corporate Debtor. Therefore, any clause of the Resolution Plan which *prima facie*<sup>20</sup> discriminates the promoters/guarantors in a manner that they are not considered equal to other creditors of the Corporate Debtor, or are discriminated by not given the rights of subrogation and are burdened with extra liability and even after successful Resolution Plan they are being left on the mercy of creditors who can invoke guarantee against them anytime, then in all such aforementioned circumstances, the Resolution Plan can be rejected by the AA. However, the IBC prohibits the promoters from benefiting from the CIRP or its outcome.<sup>21</sup> Admittedly, the shareholders and promoters are not the creditors and thereby the Resolution Plan cannot balance the maximization of the value of the assets of the Corporate Debtor at par with the ‘Financial Creditors’ or ‘Operational Creditors’ or ‘Secured Creditors’ or ‘Unsecured Creditors’.

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<sup>16</sup> Argus Partners & Solicitors, ‘Corporate Restructuring & Insolvency, Disputes’, ARGUS PARTNERS & SOLICITORS, (Dec. 14, 2021, 1:54 PM), <https://www.argus-p.com/updates/updates/bk-educational-services-private-limited-v-parag-gupta-and-associates/>.

<sup>17</sup> Alcon Laboratories v. Vasan Health Care, [2017] S.C.C. OnLine NCLT 547.

<sup>18</sup> Nidhi Parmar, ‘Difference between Operational and Financial Creditors’, VINOD KOTHARI CONSULTANTS, (Dec. 17, 2021, 11:09 AM), <http://vinodkothari.com/wp-content/uploads/2019/06/Difference-between-OC-FC.pdf>.

<sup>19</sup> Trilegal, *supra* note 6.

<sup>20</sup> Latin for "at first appearance".

<sup>21</sup> Trilegal, *supra* note 6.

#### 4. Right to protection from judicial proceedings during the moratorium

Once moratorium period under the IBC starts there is total prohibition on institution of all other kinds of suits. Thus, the Corporate Debtor is protected against judicial proceedings for recovery, enforcement of security, interest, sale or transfer by moratorium under the IBC starts which starts from the insolvency commencement date and is in force till the CIRP period.<sup>22</sup> However, in *Nitin Hasmukhlal Parikh v. Madhya Gujarat Vij Company Ltd.*<sup>23</sup> it was held that a performance guarantee given by Corporate Debtor to its customers on purchase of goods and services supplied by it can be encashed during moratorium period.

#### RIGHTS OF FINANCIAL CREDITORS AND OPERATIONAL CREDITORS UNDER THE IBC 2016

The IBC envisages two broad categories of debt and creditors namely Financial Debt/Operational Debt and Financial Creditors/Operational Creditors.<sup>24</sup> According to Section 5(8) of the IBC 'Financial Debt' means a debt along with interest, if any, which is disbursed against the consideration for time value of money and includes items referred to in sub-clauses (a) to (i). Whereas according to Section 5 (21) of the IBC 'Operational Debt' means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time. Further, according to Section 5 (7) 'Financial Creditor' means any person to whom a Financial Debt is owed and includes a person to whom such debt has been legally assigned or transferred to and under Section 5 (20) 'Operational Creditor' means a person to whom an Operational Debt is owed and includes any person to whom such debt has been legally assigned or transferred.<sup>25</sup> Financial Creditors are different from Operational Creditors and therefore, there is obviously an 'intelligible differentia' between the two which has a direct relation to the objects sought to be achieved by the IBC and the manner of satisfaction of claims as stated in the Resolution Plan so far as it pertains to Financial Creditors. Thus, while both Financial Creditor (for a defaulted Financial Debt) or an Operational Creditor (for an unpaid Operational Debt) can initiate an CIRP against a Corporate Debtor at the NCLT, yet the classification of the creditor into Financial Creditors

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<sup>22</sup> IBC Laws, 'All about Moratorium under Section 14 of the IBC 2016', IBC LAWS, (Dec. 21, 2021, 1:54 PM), <https://ibclaw.in/all-about-the-moratorium-under-ibc-including-judicial-proenouncements/>.

<sup>23</sup> *Nitin Hasmukhlal Parikh v. Madhya Gujarat Vij Company Ltd.*, [2018] TaxPub (CL) 0233 (NCLT-Ahd).

<sup>24</sup> Aarohee Gursale and Sana Khan, 'Financial Creditor And Operational Creditor under the IBC 2016', MONDAQ, (Dec. 21, 2021, 1:54 PM), <https://www.mondaq.com/india/insolvencybankruptcy/607738/financial-creditor-and-operational-creditor-under-the-insolvency-and-bankruptcy-code-2016>.

<sup>25</sup> *Ibid.*

or Operational Creditors is of vital significance and is paramount to the CIRP itself.<sup>26</sup>

### 1. Rights of Financial Creditor

Financial Creditors are those whose relationship with the entity is a pure financial contract, such as that of a loan or a debt security. The Financial Creditor occupies an exalted position in the scheme of things.<sup>27</sup> Only Financial Creditors are entitled to be members of the CoC and will have the right to vote in the proceedings of CoC including approving the Resolution Applicant / Resolution Plan and such other related matters. According to Section 7 of the IBC, a particular Financial Creditor can file an application before the NCLT on a sole basis or along with others. Such an application can be filed before the NCLT when a default has happened. In respect of Financial Creditor, the application for initiating Resolution Process can be made straight away without waiting for raising a claim for the money and without proving that no dispute exists for the payment under consideration.<sup>28</sup> In fact in *Swiss Ribbons (P) Ltd. v. Union of India*<sup>29</sup> it was held that Financial Creditors can, and therefore do, engage in restructuring of the loan as well as reorganization of the corporate debtor's business when there is financial stress.

### 2. Rights of Operational Creditor

The method of initiating the CIRP proceedings that is to be followed is different for Operational Creditor vis-à-vis<sup>30</sup> Financial Creditor. Section 8 of the IBC deals with the petition filed by the Operational Creditor. Under the IBC, Operational Creditors are not allowed representation on the CoC and are accordingly unable to vote on any decision regarding the CIRP. This includes the approval of a Resolution Plan, which may alter the terms of their debt or extinguish it without any repayment.<sup>31</sup>

### 3. Right to file application against Resolution Plan

The IBC aims at promoting availability of credit which is provided by both Financial as well

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<sup>26</sup> Ibid.

<sup>27</sup> K.S.N. Murthy, 'Financial Creditors under IBC', TAX GURU, (Dec. 21, 2021, 6:32 PM), <https://taxguru.in/corporate-law/financial-creditors-ibc.html>.

<sup>28</sup> Ibid.

<sup>29</sup> *Swiss Ribbons (P) Ltd. v. Union of India*, [2019] S.C.C. OnLine SC 73.

<sup>30</sup> French for "in relation to".

<sup>31</sup> Nihit Nagpal and Anuj Jhavar, 'Initiation of CIRP by Operational Creditor', MONDAQ, (Dec. 21, 2021, 6:34 PM), <https://www.mondaq.com/india/insolvencybankruptcy/1046556/initiation-of-cirp-by-operational-creditor>.

as Operational Creditors and as such both are to be treated without any discrimination as either creditor is not enough for running the business.<sup>32</sup> If a Resolution Plan is discriminatory against any Financial or Operational Creditor, such plan can be held to be against the provisions of the IBC.<sup>33</sup> This is extremely vital, as for instance if Operational Creditors are ignored and provided liquidation value then in such case creditors will not supply goods or render services on credit to any Corporate Debtor in the future,<sup>34</sup> especially as liquidation value is usually low since it tends to go down with time as many assets suffer from a high economic rate of depreciation, and recovering claims at liquidation value is not in the best interests of Operational Creditors.<sup>35</sup> Thus, if the CIRP plan is discriminatory or perverse the creditors can apply to the adjudicating authority, which has the power to modify it. This has been reiterated recently in the *Darshak Enterprises Pvt. Ltd. v. Chhaparia Industries Pvt. Ltd.*<sup>36</sup> judgment.

## ROLE OF THE RESOLUTION PROFESSIONALS

An RP is a licensed professional who has qualified the Limited Insolvency Examination, is enrolled with the Insolvency Resolution Agency, and is registered with the IBBI. These professionals are authorised to act on behalf of insolvent individual and companies etc. According to the IBC, “Resolution Professional” means an Insolvency Professional who conducts the insolvency resolution process and includes an interim resolution professional and takes necessary steps to revive the company.<sup>37</sup> Under the IBC, NCLT shall accept an insolvency application when a claim is certain and only then does it appoint a RP, an Interim Resolution Professional (hereinafter referred to as IRP) is appointed until the constitution of the CoC and appointment of an RP.<sup>38</sup> The RP’s primary function is to take over the management of the corporate borrower and operate its business as a going concern under the broad directions of a CoC. Therefore, the thrust of the IBC is to allow a shift of control from the defaulting debtor's management to its creditors, where the creditors drive the business of the debtor with the RP acting as their agent. The RP, thus plays a vital role in the Insolvency and Bankruptcy process. The Bankruptcy Law Reforms Committee (BLRC) in its final report also emphasized on the role of an RP which stated that “Insolvency professionals

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<sup>32</sup> Rajputana Properties Pvt. Ltd. v. UltraTech Cement Ltd, [2018] S.C.C. OnLine SC 906.

<sup>33</sup> Binani Industries Limited v. Bank of Baroda, [2018] S.C.C. OnLine NCLAT 112.

<sup>34</sup> Ibid.

<sup>35</sup> M/s. Innoventive Industries Ltd.v. ICICI Bank, [2017] S.C.C. OnLine SC 1025.

<sup>36</sup> Darshak Enterprises Pvt. Ltd. v. Chhaparia Industries Pvt. Ltd, [2018] S.C.C. OnLine NCLAT 224.

<sup>37</sup> IBBI, ‘IP FAQ’, IBBI, (Dec. 21, 2021, 8:23 PM), [https://ibbi.gov.in/uploads/register/FAQ\\_IPs.pdf](https://ibbi.gov.in/uploads/register/FAQ_IPs.pdf).

<sup>38</sup> Vinod Kothari and Sikha Bansal, ‘Role of IP in CIRP’, VINOD KOTHARI CONSULTANTS, (Dec. 21, 2021, 9:56 PM), <http://vinodkothari.com/wp-content/uploads/2019/06/Role-of-IP-in-CIRP.pdf>.



form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process.”<sup>39</sup> The RP performs a broad range of functions such as conducting the CIRP proceedings, managing the affairs of the Corporate Debtor, taking over control of the assets of the Corporate Debtor, constituting the CoC, managing the operations of the Corporate Debtor as a going concern, preparing the information memorandum and examining the Resolution Plan.<sup>40</sup> Further, the RP can collate the claim & may accept in full or part of the claim but, it has no power to determine the claim or reject it. Thus, the RP has to vet and verify the claims made and ultimately determine the amount of each claim.<sup>41</sup>

## **ROLE OF THE COMMITTEE OF CREDITORS**

The CoC is the supreme decision-making body in the CIRP proceedings under IBC and therefore plays a vital role in the IBC regime.<sup>42</sup> The important decisions which will affect the resolution of the insolvency of the Corporate Debtor are taken by the Meeting of CoC. Generally, as per IBC, the CoC consists of the Financial Creditors only.<sup>43</sup> Thus, all the Creditors who have financed the Corporate Debtor against the consideration of time, value of money are included in the CoC. CoC is empowered to exercise its commercial wisdom whilst taking any decision for the corporate debtor/company. This is so because it is construed that the CoC has the highest stake in the company, has better knowledge and can better adjudge the grim situation of the company under distress. Therefore, as a general principle the decision of CoC owing to its commercial wisdom is of paramount importance and is given primacy and as such is free from any intervention.<sup>44</sup> The AA and/or the NCLAT cannot sit in appeal over the decision of the CoC.<sup>45</sup> Thus, the legislature and the courts must only control the process of resolution, but not be burdened to make business decisions. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it and the Financial

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<sup>39</sup> IBBI, *The Report of the Bankruptcy Law Reforms Committee*, IBBI, (Dec. 21, 2021, 9:56 PM), [https://ibbi.gov.in/BLRCReportVol1\\_04112015.pdf](https://ibbi.gov.in/BLRCReportVol1_04112015.pdf).

<sup>40</sup> Legal Services India, *Role Duties and Rights of a RP*, LEGAL SERVICES INDIA, (Dec. 21, 2021, 9:56 PM), <http://www.legalservicesindia.com/law/article/1875/3/Role-Duties-and-Rights-of-a-Resolution-Professional-in-Insolvency-Proceedings>.

<sup>41</sup> PTC India Financial Services Ltd. v. Mr. Venkateswarlu Kari, [2019] S.C.C. OnLine NCLAT 299.

<sup>42</sup> L. Srinivas, *Meeting of Committee of Creditors under IBC*, TAX GURU, (Dec. 21, 2021, 8:02 PM), <https://taxguru.in/corporate-law/meeting-committee-creditors-ibc.html>.

<sup>43</sup> Ibid.

<sup>44</sup> K Sashidhar v. Indian Overseas Bank, [2019] S.C.C. OnLine SC 257.

<sup>45</sup> Amir Ali Bavani, *CoC are the decision makers-Court Perspective*, MONDAQ, (Dec. 12, 2021, 12:37 PM), <https://www.mondaq.com/india/insolvencybankruptcy/783964/committee-of-creditors-are-the-decision-makers-court-perspective>.

Creditors are best equipped to assess viability and feasibility of the business of the Corporate Debtor. Moreover, the IBC (Amendment) Act, 2019 now equates distribution of amounts under a Resolution Plan with the manner as allowed in case of liquidation, maintaining the same hierarchy of lenders. The amendment has been enforced retrospectively.<sup>46</sup>

## **RIGHT OF THE COMMITTEE OF CREDITORS TO FORMULATE A RESOLUTION PLAN**

CoC has a right to formulate and frame Resolution Plans during the CIRP. Further, the Resolution Plans which fulfil the conditions are passed on to the CoC, which may approve a plan with 66% majority. The plan approved by CoC is submitted to the AA for its sanction.<sup>47</sup> The CoC has a right to add upon the request of its members, any specific clause in the resolution, as long as it is valid under the IBC. For example, a clause can stipulate that the Resolution Plan does not extinguish the rights of lender to invoke any guarantees executed to secure the debts of corporate debtor and that the rights of the guarantors of Corporate Debtor to claim subrogation shall be extinguished upon approval of Resolution Plan is valid under the IBC. However, the pros and cons of the Resolution Plan must be studied and if the AA approves the plan, it should record in writing its satisfaction, in the judgement approving the Resolution Plan. The Resolution Plan shall balance the interests of all the stakeholders i.e., the dues of Operational Creditors must get at least similar treatment as compared to the due of Financial Creditors, and therefore any Resolution Plan if shown to be discriminatory against one or other Financial Creditor or the Operational Creditor, can be held be against the provisions of IBC and hence not binding on the AA.<sup>48</sup> In *Lalit Mishra v. Sharon Bio Medicine Ltd*<sup>49</sup>, the NCLAT has held that a personal guarantor's right to subrogation against a Corporate Debtor can be taken away in a Resolution Plan under the IBC. In the instant case, the appellants, the promoters of Sharon Bio Medicine Limited ("Corporate Debtor") had challenged the approval of a Resolution Plan. It was observed that resolution under the IBC is not a recovery suit. It is aimed at maximization of the value of the assets of the Corporate Debtor and then to balance all the

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<sup>46</sup> Trilegal, '*IBC Amendment Act 2019 Key Changes*', MONDAQ, (Dec. 14, 2021, 12:43 PM), <https://www.mondaq.com/india/insolvencybankruptcy/837398/insolvency-and-bankruptcy-code-amendment-act-2019--key-changes>.

<sup>47</sup> Adv. Asmita Chaudhary Nagpal, '*Committee of Creditors under IBC*', CENTRIK, (Dec. 14, 2021, 7:53 AM), <https://www.centrik.in/blogs/committee-of-creditors-coc-under-ibc/>.

<sup>48</sup> Raj Dev Singh and Deepika Kumari, '*Resolution Plan not to discriminate*', MONDAQ, (Dec. 14, 2021, 7:43 AM), <https://www.mondaq.com/india/insolvencybankruptcy/771476/resolution-plan-not-to-discriminate-against-one-or-other-financial-creditor39-or-operational-creditor39-rules-nclat/>.

<sup>49</sup> *Lalit Mishra v. Sharon Bio Medicine Ltd*, [2018] S.C.C. OnLine NCLAT 669.

creditors.

## POWERS OF THE ADJUDICATING AUTHORITY

The IBC recognises the NCLT as constituted under Section 408 of the Companies Act 2013 to be the AA for the purpose of insolvency and liquidation of corporate persons. NCLT is a quasi-judicial body set up to resolve disputes arising between civil corporations. Whereas, National Company Appellate Tribunal (NCLAT) is a higher tribunal where appeals can be lodged in case the parties are not satisfied with the decision of NCLT.<sup>50</sup> The AA has wide powers under the IBC. Some of these powers include:

### 1. Power to admit Insolvency Resolution Application and scrutinize debt

Under the IBC the initiation of an Insolvency Resolution Application takes place before AA i.e., NCLT by the Financial Creditor, or Operational Creditor or Corporate Debtor itself. Section 7(4) of the IBC states that within the time period of 14 days from the receipt of the application by the creditor, AA has to ascertain as to whether there is an existence of default. If the AA is satisfied that there is a default and application is rightfully made and there are no disciplinary proceedings pending before the proposed IRP, then it will accept the application.<sup>51</sup> In fact the AA has been empowered under the IBC to deal with cases of fraudulent and malicious initiation of proceedings, which ensures proceedings are brought only for the purpose of resolution of insolvency, or liquidation, as the case may be and not for a malicious or fraudulent purpose.<sup>52</sup> Where any person initiates fraudulent or malicious liquidation proceeding or insolvency resolution process then, the AA may impose upon such person specified penalties in such a situation.

### 2. Power to declare moratorium

Under Section 13 of the IBC the AA is bound to declare a moratorium in accordance with the terms mentioned under Section 14 of the IBC.<sup>53</sup>

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<sup>50</sup> Pradeep K. Mittal, 'Role of NCLT', INSTITUTE OF COMPANY SECRETARIES OF INDIA, (Dec. 22, 2021, 8:36 PM), <https://www.icsi.edu/media/portals/72/year%202017/presentation/Role%20of%20NCLT%20-%20PK%20Mittal.pdf>.

<sup>51</sup> IBC Laws, 'Section 7 of IBC: Initiation of CIRP process', IBC LAWS, (Dec. 23, 2021, 1:42 PM), <https://ibclaw.in/section-7-initiation-of-corporate-insolvency-resolution-process-by-financial-creditor-chapter-ii-corporate-insolvency-resolution-process-cirp-part-ii-insolvency-resolution-and-liquidation-for-corpor/>.

<sup>52</sup> IBC Laws, 'Section 65 of IBC', IBC LAWS, (Dec. 23, 2021, 1:39 AM), <https://ibclaw.in/section-65-fraudulent-or-malicious-intiation-of-proceedings/>.

<sup>53</sup> IBC Laws, *supra* note 22.

### 3. Powers to extend time limit

The AA on being satisfied that the subject matter of the case is such that it cannot be completed within default maximum time, may, by order, grant a one-time extension beyond the prescribed default maximum time. However, one time extension in case of normal process cannot exceed 90 days and in case of the fast-tracked process cannot exceed 45 days. Section 12 of the IBC has set default maximum time of 180 days for completing the insolvency resolution process in normal case and 90 days in fast tracked insolvency resolution process under Section 56.<sup>54</sup>

### 4. Power to approve the Resolution Plan

The AA approves the Resolution Plan under Section 31 of the IBC.<sup>55</sup> This ensures that the plan isn't in any way violative of IBC or isn't discriminatory or prejudicial to the interest of any Financial or Operational Creditor. Thus, it is only when the AA is satisfied with the plan, that it becomes binding upon various Stakeholders in the CIRP. Further the AA can determine whether the Resolution Plan violates the provision of any law, after hearing arguments from resolution applicant and CoC.<sup>56</sup>

### 5. Power to order Liquidation Process and Dissolution Order

The AA has the power to order liquidation in specified cases, and when the business operations of the corporate person have been completely wound up and its assets have been completely liquidated, it has the power to order dissolution of the said corporate person.<sup>57</sup>

### 6. Power to prevent certain transactions

The AA has the power to pass orders to prevent practices such as Preferential Transactions, Undervalued Transactions, Extortionate Credit Transactions, and Fraudulent or Wrongful Trading.<sup>58</sup>

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<sup>54</sup> IBC Laws, '*Analysis of time limit under Section 12 of IBC*', IBC LAWS, (Dec. 23, 2021, 1:32 PM), <https://ibclaw.in/analysis-on-time-limit-under-section-12-of-the-code-for-completion-of-cirp/>.

<sup>55</sup> Amir Ali Bavani and Rishika Kumar, '*Approval or Rejection of Resolution Plan*', MONDAQ, (Dec. 22, 2021, 6:59 PM), <https://www.mondaq.com/india/insolvencybankruptcy/1083596/approval-or-rejection-of-resolution-plan-by-nclt--no-longer-merely-a-rubber-stamp-authority>.

<sup>56</sup> Standard Chartered Bank v. Satish Kumar Gupta, [2019] S.C.C. OnLine NCLAT 388.

<sup>57</sup> Dhiren S Shah, '*Liquidation Under IBC*', WESTERN INDIA REGIONAL COUNCIL OF THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA, (Dec. 23, 2021, 2:05 PM), <https://www.wirc-icai.org/images/material/Insolvency-Bankruptcy-Code-II-Liquidation.pdf>.

<sup>58</sup> Ashish Aggarwal and Ramya Aggarwal, '*Preferential Transactions under the IBC 2016*', IBC LAWS, (Dec. 22, 2021, 3:09 PM), <https://ibclaw.in/preferential-transactions-under-the-insolvency-and-bankruptcy-code-2016-by-adv-ashish-aggarwal-adv-ramya-aggarwal/>.

## PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS AND STAKEHOLDER'S RIGHTS

Pre-Packaged Insolvency Resolution Process, or 'Pre-Packs' are hybrid mechanisms allowing out-of-court resolutions to be recognised under insolvency law with appropriate safeguards for all stakeholders.<sup>59</sup> In April, 2021, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021, was promulgated to introduce a Pre-Packaged Insolvency Resolution Process under the IBC. The aim of the Pre-Package Process is to provide an "efficient alternative insolvency resolution process" for Micro, Small and Medium Enterprises ("MSMEs"). Thus, it aims to provide a cost-effective, swift and value-maximising mechanism for resolving insolvency with minimum disruption to business operations (during the process).<sup>60</sup> The instant article is primarily focused on the rights of various stakeholders during the standard CIRP proceedings under the IBC, and not with Pre-Packs *per se*. However, as a logical and necessary consequence Pre-Packs impose some limitations upon its participants. For instance, the Corporate Debtor should satisfy that it is eligible to initiate a Pre-Pack process i.e., it is an MSME that defaulted on its loans (the minimum amount of default being Rs. 10 lakh). Further, the Pre-Package process involves a Pre-Filing Stage, where both the Corporate Debtor and the Financial Creditors are required to complete certain requirements before formally initiating the process.<sup>61</sup> Moreover, the 2021 Ordinance, prescribes the procedure to be followed regarding the initiation and conduct of Pre-Packaged insolvency process, which must be complied with. Thus, the key stakeholders in the process- the Corporate Debtor, RP and Creditors, perform different functions. The Corporate Debtor retains the responsibility of managing the business, the RP is responsible for conducting the process (along with facilitating decision-making by the CoC). The CoC meanwhile oversees the functioning of the Corporate Debtor as well as the RP.<sup>62</sup> In conclusion, even though the Pre-Pack process is still in a nascent stage in India, it would not be incorrect to say that the rights and responsibilities of stakeholders in the Pre-Pack Process are slightly different from the standard CIRP under the IBC, owing to its relatively restrictive statutory requirements/the eligibility criteria to avail and implement this process.<sup>63</sup>

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<sup>59</sup> Debanshu Mukherjee et al, '*Pre-Packaged Insolvency Resolution*', VIDHI CENTRE FOR LEGAL POLICY, (Dec. 22, 2021, 9:53 AM), <https://vidhilegalpolicy.in/blog/pre-packaged-insolvency-resolution-under-the-insolvency-and-bankruptcy-code-ibc-an-overview/>.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Varsha Banerjee and Mukund Rawat, '*Pre-Pack Insolvency Resolution Process for the MSMEs*' MONDAQ, (Dec. 20, 2021, 7:26 PM), <https://www.mondaq.com/india/insolvencybankruptcy/1058402/pre-pack-insolvency-resolution-process-for-the-msmes>.

## RIGHTS OF FOREIGN STAKEHOLDERS IN CROSS BORDER INSOLVENCY

The term Cross-border insolvency denotes a situation where the insolvent debtor has assets in more than one jurisdiction or where some of the creditors of the debtor are not from the jurisdiction where the insolvency proceedings have been filed.<sup>64</sup> While the IBC provides for a robust set of rights and liabilities for various stakeholders in Insolvency Resolution process in India, the law is obscure on the question of rights of foreign stakeholders in matters of Cross-border insolvency. At the moment, the only provisions dealing with the Cross Border Insolvency are Sections 234 and 235 of the IBC.<sup>65</sup> Section 234 of the IBC states that the Central Government can enter into any agreement with a foreign country to start with the insolvency proceedings.<sup>66</sup> Meanwhile, Section 235<sup>67</sup> of the IBC states that the letter of request can be made to the authority of foreign nation with which such reciprocal arrangements have been made under Section 234. However, the scheme of entering into separate bilateral agreements or issuance of letters of request is not very efficacious, and therefore, a proper mechanism of cooperation and coordination between local courts and insolvency representatives on one hand, and foreign courts and foreign representatives on the other hand is required<sup>68</sup> and the ambiguity regarding jurisdiction and enforcement/recognition of judgments must be cleared soon, in order to protect the rights and interests of foreign stakeholders under the IBC.<sup>69</sup> Thus, there are two vital issues regarding Cross Border Insolvency, that require elucidation, namely:

### 1. Determination of Jurisdiction: Place of Main proceedings

India has adopted the United Nations Commission on International Trade Law (hereinafter referred to as UNCITRAL) on Cross-Border Insolvency with Guide to Enactment and Interpretation 1997 (hereinafter referred to as Model Law) *mutatis mutandis*<sup>70</sup>, except Article

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<sup>64</sup> Desai, Gupta and Sunder, *supra* note 9.

<sup>65</sup> Umakanth Varotil, 'Filling in the Gaps in the IBC: Cross Border Insolvency' INDIA CORP LAW, (Dec. 20, 2021, 7:26 PM), <https://indiacorplaw.in/2016/05/filling-in-gaps-in-insolvency-and.html>.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> Ishita Das, 'The Need for Implementing a Cross-Border Insolvency Regime within the IBC 2016', SAGE JOURNAL, (Dec. 23, 2021, 12:53 PM), <https://journals.sagepub.com/doi/full/10.1177/0256090920946519>.

<sup>69</sup> *Ibid.*

<sup>70</sup> Latin for "with the necessary changes having been made".

14.<sup>71</sup> Thus, a vital issue in cross border insolvency proceedings is the determination of place of main proceedings. The UNCITRAL Model Law sets out the principle of “Centre of Main Interests” (hereinafter referred to as COMI) to decide the jurisdiction where main proceedings should be commenced. Thus, under the COMI principle, the foreign proceedings take place in the State where the debtor has the centre of its main interests. COMI is determined by factors which are both objective and ascertainable by third parties, especially existing creditors and potential creditors.<sup>72</sup> Thus, in order to determine COMI the location where the central administration of debtor takes place, is as the principal factor. This has been incorporated in the ‘nerve centre’ test where the key determinants are concerned with the ‘actual centre of direction, control and coordination’.<sup>73</sup> Other additional factors that might be considered for determining COMI include the location of the majority of the debtor’s creditors and the location of the centralized management of supply, human resources, accounting and IT functions.<sup>74</sup> Deciding on the issue of COMI, one must also consider that the objectives of the Model Law are *inter alia*<sup>75</sup> to protect and maximize of the value of the debtor’s assets, facilitating the rescuing of financially troubled businesses and thereby protecting investment and preserving employment and to provide for fair and efficient administration of cross-border insolvencies which protects the interests of all creditors and other interested persons, including the debtor. Thus, where the foreign state has not signed the model law, the COMI must lie in India as in such case, a foreign state which has not signed the model law is not obliged to cooperate with and assist India in case of cross border insolvency, especially in absence of a reciprocal agreement between India and such foreign state.<sup>76</sup> Thus under the present system, India has not included any kind of reciprocity agreements while adopting the Model Law and is only bound to recognize the foreign proceedings in a state which fulfils all the conditions of

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<sup>71</sup> Sarthak Jain and Anushka Sheth, ‘Cross Border Insolvency: Why India should adopt the UNCITRAL Model Law’, INDIA LAW JOURNAL, (Dec. 23, 2021, 8:53 AM), <https://www.indialawjournal.org/cross-border-insolvency.php>.

<sup>72</sup> UNCITRAL, ‘Working Group V Insolvency Laws Forty-Third Session: Interpretation and Application of Selected Concepts of the Model Law’, UNITED NATIONS DOCUMENTS, (Dec. 23, 2021, 9:21 AM), <https://undocs.org/en/A/CN.9/766>.

<sup>73</sup> Hertz Corp. v. Friend, [2010] 559 U.S. 77.

<sup>74</sup> DLA Piper’s Global Restructuring Group, ‘Practical Problems in the Cross-Border Insolvency’, INSOL INTERNATIONAL, (Dec. 23, 2021, 9:25 AM), [https://www.insol.org/emailer/May\\_2015\\_downloads/Document%2015.pdf](https://www.insol.org/emailer/May_2015_downloads/Document%2015.pdf).

<sup>75</sup> Latin for “among other things”.

<sup>76</sup> Ran Chakrabarti, ‘India’s Proposed Cross Border Insolvency Regime’, MONDAQ, (Dec. 12, 2021, 3:21 PM), <https://www.mondaq.com/india/insolvencybankruptcy/721994/india39s-proposed-cross-border-insolvency-regime-will-it-trump-the-gibbs-rule>.

Article 17 of the Model law but not otherwise.<sup>77</sup>

## 2. Recognition of Judgment of a Foreign Court.

As a general rule, a Foreign Judgment rendered by a Court of Law of another jurisdiction, even if verified and found to be true, in absence of non-compliance with Sections 234 and 235 of the IBC, cannot be recognized by the AA under the IBC in India. Further, India is not a signatory of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971.<sup>78</sup> However, India follows the basic and customary principles of international law for entering into international treaties, including the principles of comity and *res judicata*<sup>79,80</sup> Further, the country is party to bilateral treaties with the reciprocating countries being notified under the Code of Civil Procedure, 1908 (hereinafter referred to as CPC) for the purpose of recognition and enforcement of foreign judgments. Thus, the CPC lays down the procedure for recognition/enforcement of foreign judgments and decrees in India. Section 13 of the CPC embodies the principle of *res judicata*<sup>81</sup> regarding foreign judgments and allows a judgment delivered by a foreign court of competent jurisdiction to be executed and enforced in India. Meanwhile, Section 44A of the CPC provides for the execution of decrees passed by Courts in a reciprocating territory.<sup>82</sup> Moreover, in the old English judgment of *Goddard v. Gray*<sup>83</sup>, it has been held that under Common Law the reciprocity provision of an Act does not supplant the inherent power of a Court to recognize and enforce foreign judgments under Common Law principles. Under Common Law in the absence of express rules or procedure, foreign judgments can be enforced if a competent jurisdiction had adjudicated a certain sum to be due from another person and a legal obligation arises to pay that sum. Further, following the principle of comity of courts, a State may give effect within its territory to the legislative, executive or judicial acts of another State, having due regard both to international duty and convenience, and to the rights of its own citizens, or

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<sup>77</sup> Soham Chakraborty, 'Reciprocity Requirements in India's Adoption of the Model Law', INDIA CORP LAW, (Dec. 15, 2021, 8:53 AM), <https://indiacorplaw.in/2020/02/reciprocity-requirements-in-indias-adoption-of-the-uncitral-model-law-on-cross-border-insolvency.html>.

<sup>78</sup> Chadha & Co, 'Enforcement of Foreign Judgments in India', LEXOLOGY, (Dec. 13, 2021, 7:40 AM), <https://www.lexology.com/library/detail.aspx?g=36daf3c7-cd94-4cb0-8ba8-3702391e24ca>.

<sup>79</sup> Latin for "a matter judged".

<sup>80</sup> Chadha & Co, *supra* note 81.

<sup>81</sup> *Res Judicata*, *supra* note 82.

<sup>82</sup> Jonathan Jose and Shruti Maniar, 'Enforcement of Foreign Judgments and Decrees in India', MONDAQ, (Dec. 13, 2021, 12:43 PM), <https://www.mondaq.com/india/trials-appeals-compensation/434962/enforcement-of-foreign-judgments-and-decrees-in-india>.

<sup>83</sup> *Goddard v. Gray*, [1870] LR 6 QB 139.



of other persons who are under the protection of its laws.<sup>84</sup> Thus, while the current regime for recognition and enforcement of foreign judgments pertaining to IBC (mainly based upon statutory, common law and judicial principles is nebulous in nature), but still, it allows for some protection of the rights of foreign stakeholders (for instance Section 21 of the IBC contains enabling provisions for collective representation of foreign creditors).<sup>85</sup> Nonetheless, proper statutory reforms/amendments in the IBC itself will go a long way to specify their (foreign stakeholders) rights, responsibilities and position in a better manner.<sup>86</sup>

## CONCLUSION

The IBC has brought about a ground-breaking transformation in the existing insolvency and bankruptcy framework. The standard CIRP process involves the participation of several stakeholders and entities such as the Corporate Debtors, Financial and Operational Creditors, RP, CoC and the AA/NCLT etc. All these stakeholders have their distinct rights and position under IBC. For instance, the Corporate Debtor has the Right to voluntarily initiate insolvency resolution process, and can file a claim against an unjust Resolution Plan. Moreover, the IBC has introduced a distinction between Financial Creditors and Operational Creditors, with greater rights available in the manner of satisfaction of claims as stated in the Resolution Plan so far as it pertains to the former category (Financial Creditors). Meanwhile the RP's form a crucial pillar upon the effective functioning and credibility of the CIRP process rests. The RP constitutes the CoC which is the supreme decision-making body in so far as it takes major decisions such as the formulation of a Resolution Plan which will affect the resolution of the insolvency of the Corporate Debtor. Finally, the NCLT as the AA exercises wide powers for the purpose of insolvency and liquidation of corporate persons, as it not only admits insolvency resolution application but also approves the Resolution Plan. Additionally, it orders the liquidation process and passes the dissolution order in specified cases. However, the rights of stakeholders under the CIRP process differ slightly from those under the new Pre-Packaged Insolvency Resolution Process. Finally, while the IBC does provide for a simple and efficient platform for various Indian stakeholders in the CIRP proceedings, the law on the question of rights and position of foreign stakeholders in the matters of Cross-border insolvency and the

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<sup>84</sup> Sikha Bansal, 'Cross Border Insolvency', VINOD KOTHARI CONSULTANTS, (Dec. 23, 2021, 8:53 AM), [http://vinodkothari.com/wp-content/uploads/2018/07/Cross-Border-Insolvency\\_Draft.pdf](http://vinodkothari.com/wp-content/uploads/2018/07/Cross-Border-Insolvency_Draft.pdf).

<sup>85</sup> Ibid.

<sup>86</sup> Ministry of Corporate Affairs, 'Cross Border Insolvency Report October 2018', MINISTRY OF CORPORATE AFFAIRS, (Dec. 23, 2021, 8:43 PM), [https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport\\_22102018.pdf](https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf).

existing provisions and mechanism concerning the issue, need a major overhaul and reform. Nonetheless, the new regime established by IBC has brought about a revolutionary shift in the area of insolvency and bankruptcy jurisprudence in India, bringing the country at par with appurtenant structures in leading economies across the globe.