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# THE NEXT PHASE OF THE IBC MUST FOCUS ON EFFICIENCY

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This report is the outcome of extensive secondary research, interviews with stakeholders (lenders, special situation and distressed asset investors, resolution professionals, lawyers and NCLT/NCLAT judges), and insights from A&M's global restructuring experience of more than 30 years. We have highlighted best practices from more efficient bankruptcy jurisdictions and suggested measures that are best suited in the Indian context.

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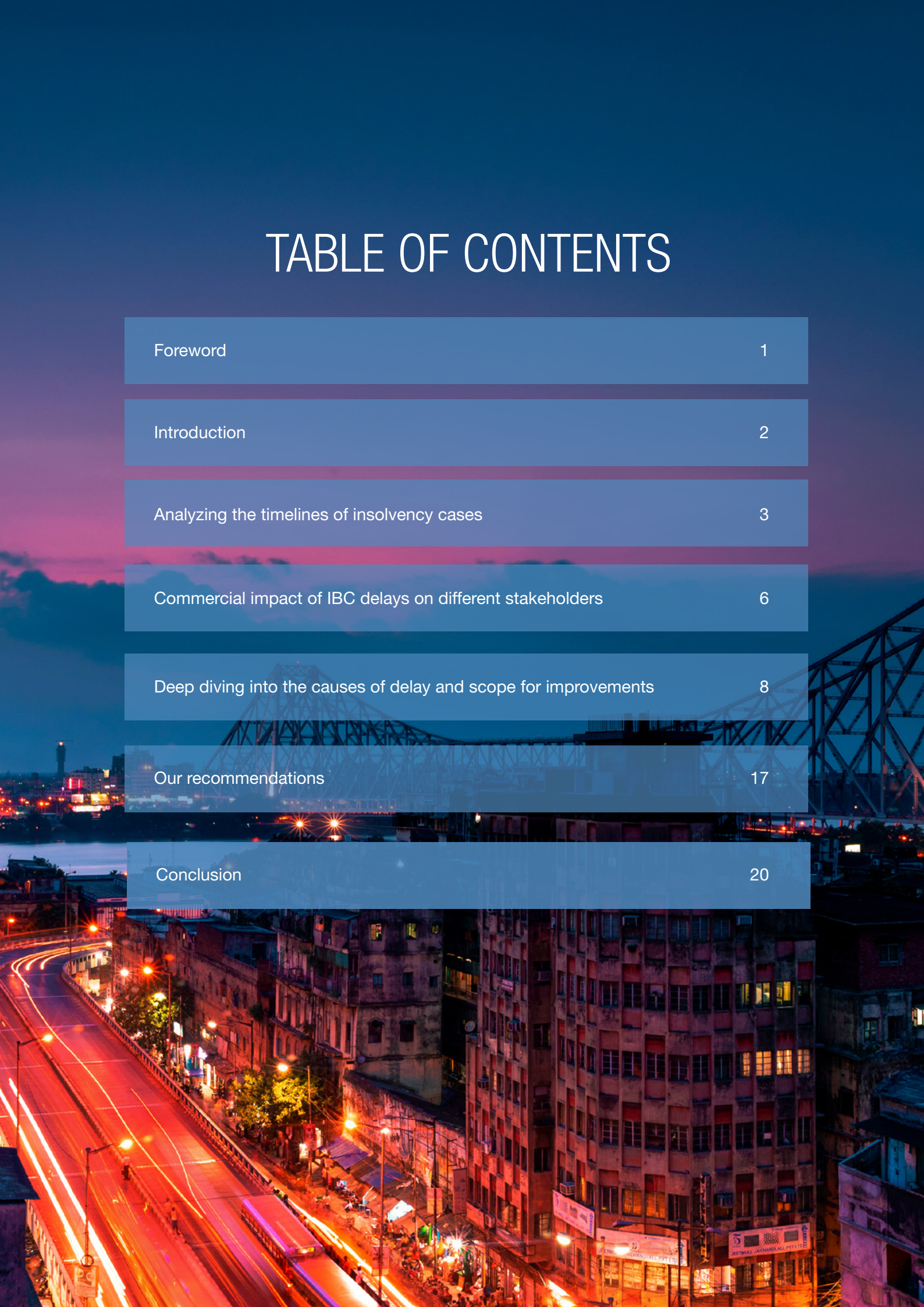


# FOREWORD

*India has a long chequered history of addressing stressed loans. From the days of the debtor-in-possession regime under the Sick Industrial Companies Act, 1985 ("SICA"), to a creditor-led recovery regime under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("RDDBFI"), to the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ("SARFAESI"), to the Reserve Bank of India ("RBI") guided Corporate Debt Restructuring ("CDR"), Sustainable Structuring of Stressed Assets ("S4A"), Strategic Debt Restructuring ("SDR"), and Flexible Structuring of Existing Long Term Project Loans from 2001 to 2015, to finally the Insolvency and Bankruptcy Code, 2016 ("IBC").*

*The IBC was formulated to consolidate and amend existing law into a comprehensive and modern framework for a creditor-in-control resolution process. After a decade of rapid economic growth financed by bank credit and resultant growth in stressed advances, it was an ideal time for a fresh approach with the IBC. The Indian Government acted with great alacrity to conceive and implement the IBC. Since then the regulators, judiciary, professionals, lenders and investors have played their part to build an ecosystem that supports successful corporate insolvency resolutions.*

*These efforts by all stakeholders over the last four years have resulted in the resolution of large cases (such as Essar Steel, Bhushan Steel, Binani Cement, Electrosteels Steel and Monnet Ispat, to name a few) and has also settled many contentious legal and commercial issues through jurisprudence. The IBC has been successful in a relatively short period in terms of recoveries for financial creditors, averaging 43–50 percent in FY2017–19 when compared with other recovery channels including SARFAESI, Debt Recovery Tribunal and Lok Adalats (14–32 percent in FY2017–19). However, the journey has led to a stretching of timelines beyond the envisaged period of 180 plus 90 days. The timelines and the outcome of litigation remain unpredictable, thereby keeping potential investors in abeyance. The current suspension of IBC due to the pandemic has provided stakeholders with a pause and the ability to reflect on the way forward.*

*Today, the IBC regime is at an inflection point. This paper highlights the perspectives of several stakeholders, analyzes the challenges that led to the delays in the resolution process and provides recommendations to improve the efficiency of the system. I must thank all the stakeholders who shared their valuable insights in a candid manner. We endeavor to address these critical issues to improve economic outcomes, timelines and India's global competitiveness for insolvency resolution on a global scale.*

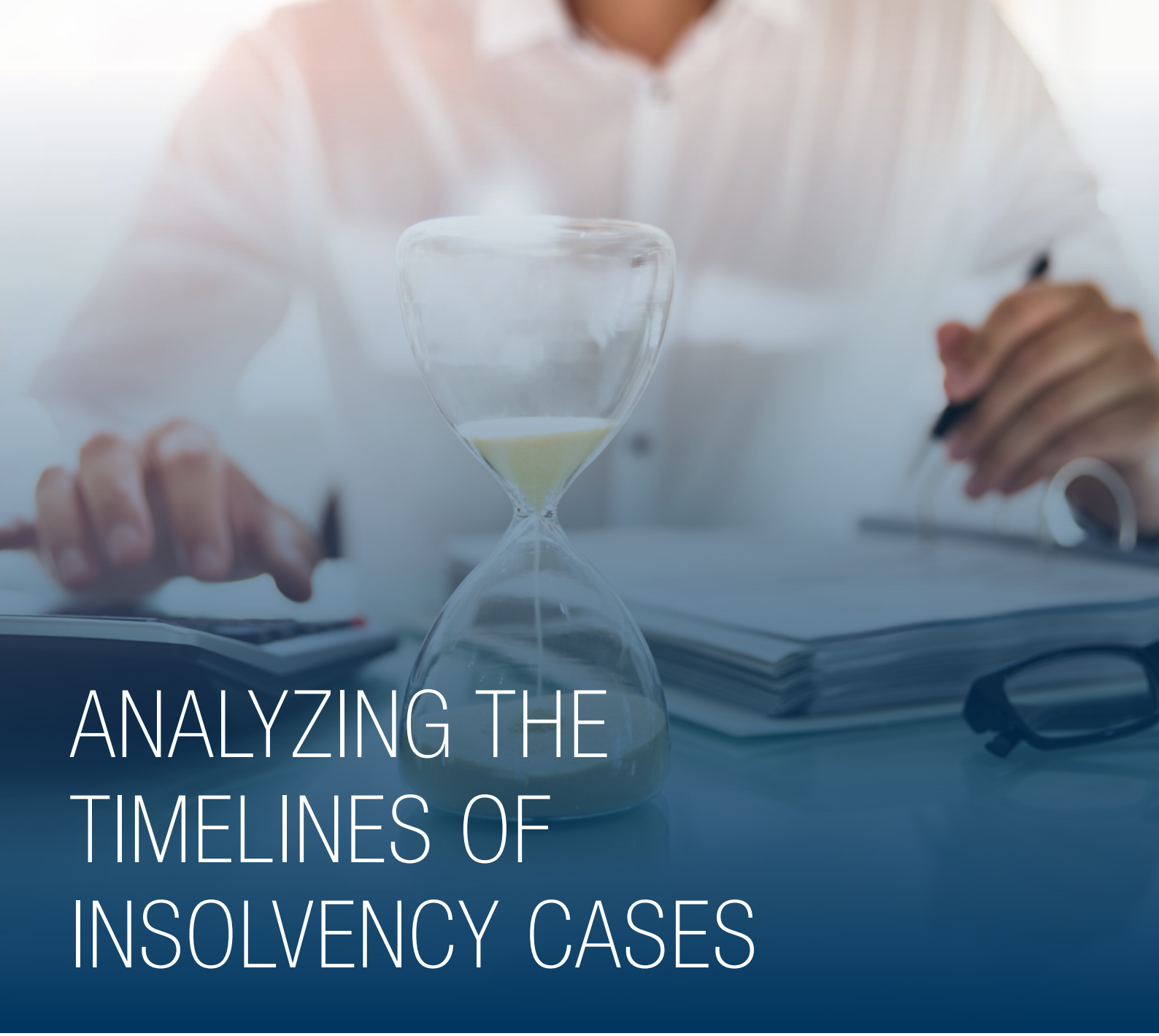
**-Nikhil Shah**

# INTRODUCTION

In December 2020, The Insolvency and Bankruptcy Code ("IBC" or the "Code") completed its four and half years of promulgation. It was introduced in 2016 with the aim to overhaul the existing framework and provide a comprehensive creditor-in-control framework for resolution of stressed assets in the wake of ballooning NPA of banks. Both the government and other stakeholders have been nimble footed in responding to the issues arising from the ongoing cases. In the last four years, the Code has been successful to stabilize on critical legislative matters. However, the promise of a time-bound resolution has still been a distant dream for stakeholders.

Of the 277 cases resolved in NCLT as of September 2020, the average time for resolution including litigation time has been 440 days. If one includes the time taken at the admission stage and post-approval of resolution plan, it takes close to 12–36 months to close the resolution process. This has strong implications on the recovery through Corporate Insolvency Resolution Process ("CIRP").

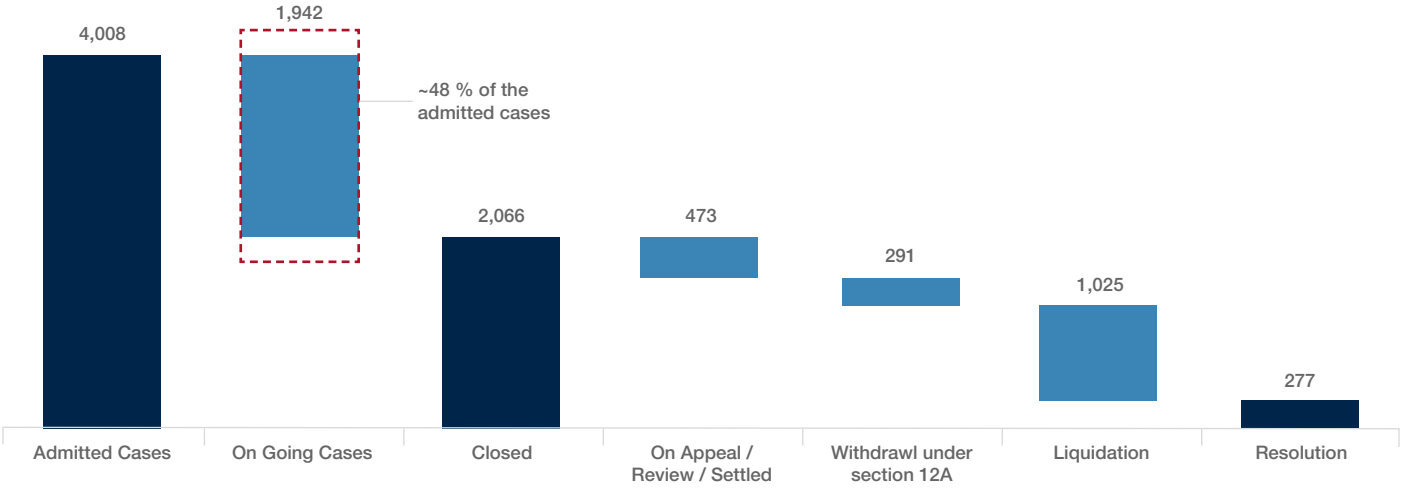
This paper attempts to understand the systemic delays in IBC, its impact on recovery value and potential solutions that must be addressed to revive investor and creditor confidence alike in IBC.



# ANALYZING THE TIMELINES OF INSOLVENCY CASES

The number of cases filed since inception has outpaced the capacity of the existing NCLT infrastructure, which has eventually resulted in a clogging of the insolvency cases even at the admission stage. As of July 31, 2020, a total of 19,844 cases were pending before NCLT including 12,438 cases under IBC. In FY2020, approximately 480 cases were admitted every quarter which, if continuing at the existing pace, may take six years to complete the backlog. Admission of cases in NCLT have been one of the biggest bottlenecks in current insolvency proceedings, since it takes several months to admit an application in most of the cases, despite 14 days envisaged in the Code. The closure of a CIRP process has been equally time consuming, most running over more than a year. Until September 2020, 4,008 cases have admitted for CIRP in NCLT, of which only about 52 percent have been closed.

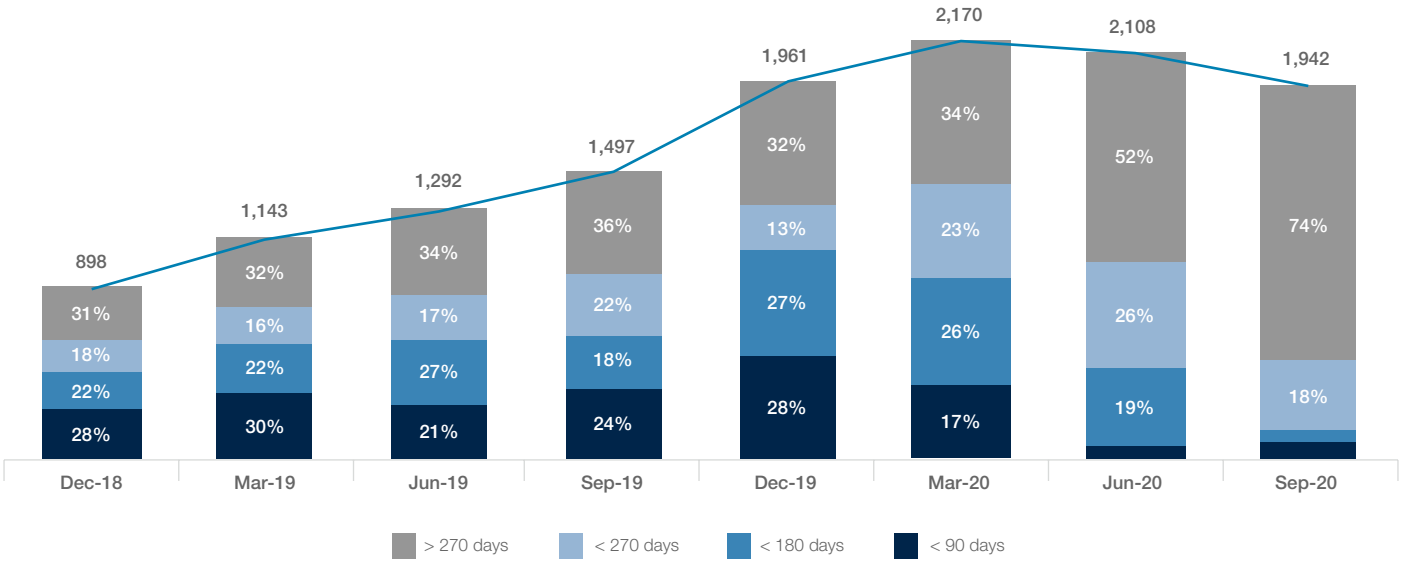
**FIGURE 1:** BREAKDOWN OF ADMITTED CASES IN NCLT AS OF SEPTEMBER 2020.




*Source: IBBI newsletter.*

Multiple litigations initiated by stakeholders during the CIRP process, administrative delays at NCLT and inconsistencies in judgments across benches have been some of the key driving forces for the slower resolution process. The rate of filing of new cases has far exceeded the rate of closure of ongoing cases, resulting in nearly 75 percent of the 1,942 ongoing cases having aged more than 270 days. Further, systemic issues and inherent problems associated with certain sectors have also delayed the resolution process.

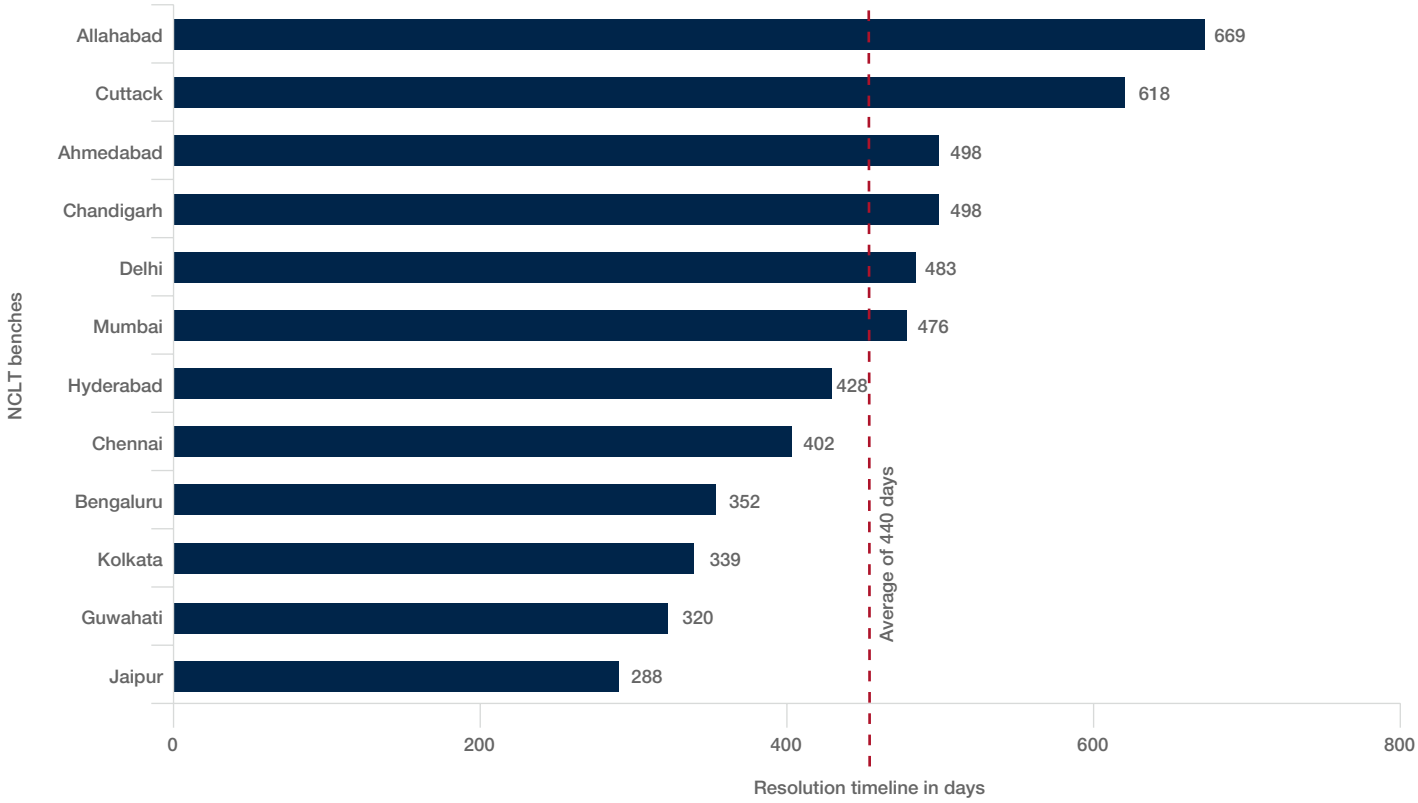
**FIGURE 2:** STATUS OF ONGOING CIRP CASES.




*Source: IBBI newsletter.*

The performance of NCLT has also differed from bench to bench in terms of average time for resolution. NCLT benches of Delhi and Mumbai, having the highest number of insolvency cases, have resolution time of more than 475 days, which is above national average of 440 days. NCLT benches at Kolkata and Bengaluru have better metrics than their peers with average resolution at 339 and 352 days, respectively.

**FIGURE 3:** AVERAGE RESOLUTION TIME (IN DAYS) (INCLUDING EXCLUDED TIME) ACROSS NCLT BENCHES AS OF SEPTEMBER 2020.



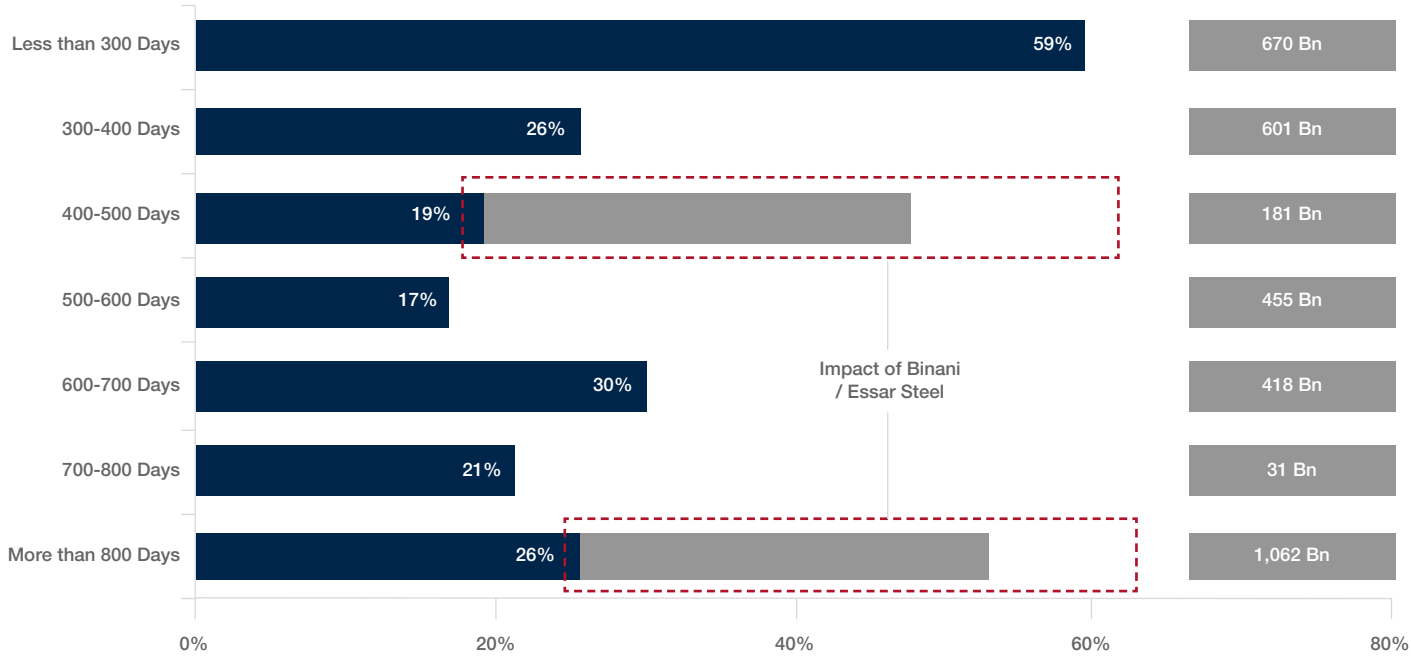

*Source: IBBI newsletter.*

If we include the time for appeals beyond the NCLT (to NCLAT and Supreme Court) and subsequent litigation, the true time for the resolution increases sharply. The average time of resolution for the sample 23 cases, aggregating financial creditors' ("FC") claim of INR 1.02 lac crore which escalated beyond the NCLT, increased from 445 days to 751 days. Prolonged delay in resolution, lengthy court battles and uncertainty of time-bound recovery post-approval of resolution plan have deterred many potential investors to participate through IBC process.

# COMMERCIAL IMPACT OF IBC DELAYS ON DIFFERENT STAKEHOLDERS

To understand the impact of delays on recoveries for financial creditors, we analyzed recovery patterns for 246 cases (out of 277 resolution cases, excluding litigation cases and cases with nil FC value) where the resolution plan was approved by the adjudicating authority as of September 2020. If we exclude two cases with highest recovery by value, Essar Steel and Binani Cements, the highest recovery is seen in the resolution cases that have been closed within 300 days. As the resolution time increases, recovery percentages fall sharply to 15–25 percent. The average recovery observed for the resolved cases for financial creditors ("FC") has been 41 percent as of September 2020.

**FIGURE 4:** RECOVERY PERCENTAGES FOR FINANCIAL CREDITORS BY TIME TAKEN FOR RESOLUTION.




*Source: IBBI newsletter.*

We compared the financial performance of 10 resolved cases (cases with FC admitted claims of more than 2,000 crore that took more than 270 days for the resolution, subject to availability of data) during the quarters when CIRP was ongoing. We compared average revenue over four trailing quarters before the start of the CIRP to average revenue of all quarters during which the company was in CIRP, and most companies saw revenue decline—Alok Industries (64 percent ), Orchid Pharma (16 percent ), Ruchi Soya (17 percent ), Uttam Value Steel (23 percent ), etc. Only three companies showed revenue increases, namely, Bhushan Steel (22 percent), Electrosteels Steel (55 percent ) and Monnet Ispat (35 percent ), largely driven by an increase in steel prices.

There are several controllable and noncontrollable factors that affect the performance of the business during the CIRP period, such as the fundamentals of the business, quality of management, support from vendors and customers, quality of RP and RP's team, sectoral policies, macroeconomic factors, etc. Also, the absence of interim funding support by the lenders has left many of the companies without adequate liquidity and working capital. In the above-mentioned examples, the companies that clocked higher revenue also benefitted from the cyclical surge in the steel sector both in terms of volume and prices during the period. Some cases with proactive and supportive lenders and an equally efficient RP and team have shown much better results than their peers and have created value for the investors.
However this cannot be a basis to justify a long CIRP period, as the value of the business can be optimized when the corporate debtor is operating outside of the restrictions imposed through an insolvency law. This can be achieved only when the insolvency is resolved, and the corporate debtor is handed over to the successful resolution applicant.

**Elongation of CIRP period also tends to reduce recovery to the creditors on an NPV basis which could be further accentuated by a deterioration in the value of the assets. For an investor, the range of outcome of litigation in commercial matters has been large and unpredictable. Also, systemic delays have exposed the investors to risks of exchange fluctuation, inflation, deterioration of cash flow, etc. Uncertainty and suboptimal value preservation due to the above factors make it difficult for investors to underwrite these investment cases. These have also led to a loss of momentum and reduction of investors' interest in distressed assets available through a CIRP.**

# DEEP DIVING INTO THE CAUSES OF DELAY AND SCOPE FOR IMPROVEMENTS

The statistics presented in the earlier section provide a glimpse of the length of the resolution process compared to the timelines envisaged in the Code. This report attempts to analyze the major causes of the delay, which differ from case to case, the constant changes in the IBC law and regulations, the issues that remain unresolved and the way forward.

In order to delve deeper into the causes of delay, we interacted with some of the active market participants such as RP, lenders, investors, asset reconstruction companies ("ARCs"), judges, policy advisors, lawyers and bankers to identify the major causes of delay.

# VIEW FROM THE GROUND: WHAT HAVE STAKEHOLDERS EXPERIENCED?

It is pertinent to evaluate factors that may cause delays at various stages of an insolvency resolution process. Some of these causes can be attributed to one or more of the stakeholders, inherent legacy issues of the system, lack of legislative clarity and the inefficiency of the market participants.

## 1. PRIOR TO THE ADMISSION OF THE CASE

**Litigation at admission stage** – IBC requires the Adjudicating Authority ("AA") to ascertain the admission of an insolvency application within 14 days of receipt. However, in most of the cases, the insolvency application has been litigated heavily by the corporate debtor on several grounds, such as existence of disputes or technical faults in the applications or jurisdiction of AA, etc.

*"Considering that there is sufficient documentary evidence of default and acknowledgement of default by the corporate debtors, 14-day time for admission of case under Section 7 (filed by FCs) should be strictly adhered to. CIRP needs to be commenced immediately to transfer control to Committee of Creditors ("CoC") and to avoid asset stripping/siphoning.*

**– Rajeev Sinha, Chief General Manager, IDBI Bank**

Such disputes undergo prolonged litigation and, in some cases, have taken more than two years.

On average it takes around six to twelve months for a case to be admitted, despite the observation by the Supreme Court in the case of *Innoventive Industries Ltd.* that the moment the AA is satisfied that a default has occurred the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within seven days. An example of a long delay in admission is the insolvency petition for Reliance Naval & Engineering Ltd. ("RNEL") which was admitted in January 2020 after 16 months, during which: the Supreme Court quashed RBI's February 12, 2018, revised resolution framework even though the original insolvency application was made independent of the RBI circular. Similarly, in case of Reliance Communications Ltd, an appeal from the corporate debtor stayed the admission for more than a year before it was finally admitted in April 2019.

**Multiple applications –** At times, multiple creditors tend to file insolvency petitions for their respective defaults with their own respective Interim Resolution Professionals ("IRPs"), which leads to disputes between creditors. AA would need to hear all petitions before individual or in conjoint hearings before passing the order. In the case of Essar Steel India Ltd., two separate applications by Standard Chartered Bank and State Bank of India (on behalf of the lenders' consortium) created another reason for a delay in admitting the insolvency application.

**Reserving of orders –** NCLT takes time in releasing the order from the date of pronouncement of the order. In some cases, the orders of insolvency admission have been reserved for months. In case of *Era Infra Engineering Ltd. ("EIEL")*, the NCLT reserved its admission order for months because parallel winding up petitions were already filed at the Delhi High Court. As a further setback to the timeline, as of August 2020 the CIRP of EIEL has been put on hold by the Supreme Court in a civil suit filed by an operational creditor after more than two years since the insolvency commencement date.

*Building judicial infrastructure will be crucial to minimizing procedural delays and reducing admission time in IBC.*

**– Mayuri Gupta, Executive Director, SSG Advisors LLP**

## 2. DURING THE CIRP STAGE

**Lack of consensus within CoC** – Creditors at times have been unable to resolve their disputes and work for a collective resolution. Some creditors act in a manner to maximize individual recovery at the cost of collective maximization, thus creating opposing forces where important decisions either get delayed or compromised. Disputes range from issues of the distribution framework, security rights, past pending issues of consortium meetings, claim values calculation, composition and voting share in the CoC, share of proceeds due to balance sheet and working capital changes during CIRP, information asymmetry between groups or classes of creditors, etc.

» Treatment of different classes of lenders – As the IBC does not distinguish different security rights for the purpose of the CoC, unsecured creditors or creditors that have subservient charge tend to challenge the claim and distribution under resolution plan at each stage, to the dismay of superior charge holders.

» Similarly placed financial creditors tend to take different positions on similar issues in different CIRP cases. For example, CoC members of Reliance Infratel Ltd. ("RITL") have included their claims based on invocation of corporate guarantee given on behalf of Reliance Communications Ltd. in the voting share, despite objection from other lenders of RITL like Doha Bank. The logic is not consistently applied in other cases in absence of settled position of law.

» Behavior of home buyers is starkly different than that of conventional financial creditors and may take a sub-optimal economic decision. Absenteeism, activism and individual voting preferences of home buyers tend to delay key decision making or alter the decision by present and voting creditors. For example, in case of Jaypee Infratech Ltd., 41.15 percent of home buyers abstained from voting on the matter of replacement of the interim resolution professional, and only 15.53 percent of home buyers voted in favor of it, along with all the banks. In order to avoid holdout by creditor classes like home buyers, Section 25A(3A) was inserted through an amendment dated August 16, 2019, to provide that in all cases (except for withdrawal under Section 12A), the authorized representative "*shall cast his vote on behalf of all the financial creditors he represents in accordance with the decision taken by a vote of more than fifty per cent of the voting share of the financial creditors he represents, who have cast their vote*."

**Investor interest –** Despite the promise of being a transparent and time-bound mechanism, most CIRP cases have evinced interest from a small number of investors. The RP, CoC endeavors to invite multiple interested parties to submit an expression of interest ("EOI") and engage with them for a prolonged period to maximize the number and quality of bidders. For instance, in case of *Jet Airways (India) Ltd*., EOI has been invited in four different rounds over a period of 10 months due to backtracking of interested parties. Similarly, in the case of *Bharati Defence and Infrastructure Limited,* several investors submitted an EOI but did not submit a resolution plan or even basic KYC documents of the applicants.

The lack of bids may be attributable to various causes such as the nascency of the law with a lack of clarity over several legislative matters, ineligibility under Section 29A, information asymmetry, inadequate time for diligence, deterioration in the quality of assets as most of cases had been non performing for 3 to5 years prior to the insolvency.

*Speedy resolution was a crucial element envisioned by the IBC law. Unless the resolution time is reduced, investors will not be interested in bidding in NCLT but instead will prefer to use out-of-court restructuring.*

**– Ravi Chachra, Executive Chairman, Eight Capital Management**

*Pre-pack has become the prime ask by investors because it is essentially an OTS with a whitewash on liabilities provided by NCLT.*

**– Indranil Ghosh, MD, and India Head, Cerberus Capital Management**

**Competency of RP and RP's team** – The RP carries out a wide range of duties under the CIRP and executes all the decisions along with the CoC; as a result the competency of RP and the team significantly affects the pace and outcome of the process. RPs play an instrumental role in driving consensus, but many inexperienced RPs have been less successful in consensus building which has led to delays in the process and accordingly lower recoveries. Several considerations that affect the appointment of an RP befitting the case requirements and the speed at which the RP runs the process are:

- Relevant CIRP, restructuring and turnaround experience, subject knowledge and sector expertise of the team
- Competitive fee structure commensurate with the value that the RP can deliver in terms of recovery (vs. lowest fee)
- Incentive for RP to facilitate faster resolution by providing a fee linked to recovery outcome
- Steps to be taken by the team for value addition and preservation of the corporate debtor
- The Day 1 readiness of RP and team to take control of the business. Many new RPs tend to spend initial critical few months in understanding the business before being able to make major operational decisions and thus have no option but to seek an additional 90 days from AA.
- If IRP is not appointed by financial creditors, the CoC tends to replace the IRP which delays the process, as the new RP shall start afresh, setting up the suboptimal management of corporate insolvency resolution process (CIRP) until the new RP takes office.

*RP can play an important role in educating and guiding the CoC members on the negative impact of delays due to inter-financial creditor disputes on ultimate collective resolution. RP as an insolvency expert along with legal team to ensure earlier contentious matters resolved through extensive jurisprudence developed is disseminated to reduce litigation to reduce overall time period of resolution and legal cost.*

**– Satish Kumar Gupta, Insolvency Professional and Stressed Asset Consultant**

*The process needs to adopt concepts like "vendor diligence" and "sector experts along with RPs" to enhance the quality of information that is passed on to the investors considering the limited time available under CIRP.*

**– Dinkar Venkatasubramanian, Head – Restructuring & Turnaround, EY India**

## 3. APPROVAL OF RESOLUTION PLAN STAGE

**Long delays in adjudication of cases by AA** – There is no prescribed timeline in the Code for the approval of a resolution plan by the AA. It has been observed in most cases that post the submission of the resolution plan all the clauses are reviewed by the AA instead of addressing only challenged clauses. The AA tends to go beyond the requirement of Section 31 and evaluate all economic and procedural aspects of the plan and the CIRP. Besides liberally entertaining several litigations, AA also tends to take *suo-moto* cognizance on commercial aspects of the plan.

This, however, has been put to rest after Supreme Court's judgement in the case of Essar Steel Ltd. where it upheld the primacy of the commercial wisdom of the COC in 'all aspects of the Plan, including the manner of distribution of funds among the various classes of creditors'. In addition to this, AA tends to be slow about the approval process, and delays the release of order. For example, AA took around five months to release the actual order after the final hearing in case of Bhushan Power & Steel Ltd. Yet, in another case of Educomp Solutions Ltd, AA did not pass the judgment and the resolution applicant finally withdrew the plan.

*There is significant loss of value due to delay in admission of the case as also during the periods from CoC approval to NCLT approval and from NCLT approval to the plan implementation. After approval of plan by NCLT, delay in plan implementation due to litigation erodes the value as the Monitoring Committee might not always be skilled to manage the asset.*

**– Rajeev Sinha, Chief General Manager, IDBI Bank**

**Litigation by dissenting creditors** –

The assenting creditors tend to approve the terms of the resolution plan, which may be less favorable to the dissenting creditors. While the CIRP regulation did require the resolution plan to provide for the dissenting financial creditors at least the notional liquidation value, this was done away with an amendment dated October 5, 2018, after NCLAT's ruling in the case of Sirpur Paper Mills Ltd. It was later reintroduced under Section 30(2)(b) and CIRP Regulation 38(1)(b) through an amendment dated August 16, 2019, and November 27, 2019, respectively. Either way, dissenting creditors, especially the unsecured creditors who may receive a small recovery from the plan, or the secured creditors who may receive a lower recovery than their realizable security value, tend to litigate the plan. Cases such as Essar Steel Ltd. and Jyoti Structure Ltd. witnessed more than two years of litigation from the date of submission of the resolution plan to AA on a similar matter.

*Delay in completion of CIRP period results in increase in CIRP costs for companies that have no or low operations, which ultimately have to be borne by the creditors in terms of lower recovery.*

**– Pooja Mahajan, Managing Partner, Chandhiok & Mahajan**

**Litigation by Operational Creditors ("OCs")** –
As OCs have no voting power in the CoC, they tend to receive low and disparate recoveries on a case-by-case basis. Some section of OCs and statutory authorities have litigated in most of the cases for reconsideration of the plan, although the legal position on rights of operational creditors is largely settled.

## 4. IMPLEMENTATION OF RESOLUTION PLAN STAGE

**Delay in Infusion of Funds by Investors** –
In many cases, the successful resolution applicant ("SRA") has delayed the infusion of the funds either for business purpose or for upfront payment to creditors as envisaged in the plan, either due to ongoing litigation or disputes emerging during the implementation stage. This causes unnecessary damage to the business and may negatively influence the outcome of the plan. For example, Liberty House and Deccan Value Investors filed for withdrawing the plan for *Amtek Auto Ltd.*; Liberty House also backed out of *ABG Shipyard Ltd.* and *Adhunik Metaliks Ltd.*; and JSW Steel delayed infusion of funds as it appealed against attachment of properties *Bhushan Power & Steel Ltd*. by Enforcement Directorate.

# OTHER COMMON ISSUES

## 5. JUDICIAL ISSUES

**Inconsistency of judgments –** Several NCLT benches have taken different positions on same issues and at times the same NCLT takes a different position on same issues but in different cases, much of which is eventually litigated to be settled by higher courts. In some cases, NCLTs have also not followed precedents set by higher courts and tend to hear the complete merits of the case again before concluding despite an established precedent.

*Litigations against resolution plan due to unfair treatment of operational creditors, statutory dues, dissenting FCs, etc., have increased, leading to further delays in closure of insolvency process. As the Code evolves it must provide a consistent understanding to all the stakeholders on the concept of commercial wisdom of CoC.*

**– Mayuri Gupta, Executive Director, SSG Advisors LLP**

It is felt that AA has not moved in pace with other stakeholders of IBC, and it remains a key bottleneck to achieve time-bound resolution framework. It cannot be denied that AA has stood the test of judicial scrutiny and played an active role in settling several complex issues under the new regime; there remains a lot of improvement from an outside-in perspective. While there has been gradual increase in benches from 11 benches in 2016 (16 judicial and 9 technical members) to 16 benches in 2020 (22 judicial and 25 technical members), it has been done reactively instead of proactively, despite the disproportionate increase in the case load. As of September 2020 only 2,066 cases have been disposed of (including resolution, liquidation and withdrawal).

Some of the key issues emerging are:

**Inadequate judicial strength –** Given the deluge of IBC cases in addition to corporate law matters, the low number of judicial and technical members is impacting both the admission and resolution process. Also, the optimal mix of technical and judicial members who can address all type of cases in all benches is missing, leading to disproportionate load on few benches.

*It is imperative to appoint more judges to NCLTs to cope with rising case laws. More importantly, judges with commercial background with adequate training are required. Lastly, physical infrastructure and administrated support at NCLTs need to be bolstered.*

**– Suharsh Sinha, Partner, AZB & Partners**

**Weak infrastructure** – Weak infrastructure – The AA lacks modern physical/technology infrastructure and has low digital adoption resulting in manual intervention and slower execution.

*Online courts are an equally efficient alternative to physical hearings, and courts must consider allowing the same even after the COVID pandemic is over.*

**– Amit Agarwal, Senior Executive Vice President, Edelweiss Alternative Asset Advisors Ltd**

*NCLT should have improved infrastructure like High Courts including their own IT and electronic infrastructure, their own cadre of staff and court officers, etc.*

**– Pooja Mahajan, Managing Partner, Chandhiok & Mahajan**

**Inadequate support staff and administration issues** – Judges in mature insolvency regimes devote their time to core judicial function only, whereas the non-judicial and administrative functions are delegated to professional management or outsourced to external agencies that are professionally managed. In India, the NCLT staff are mostly drawn on a deputized basis from nonjudicial government departments and may not be as efficient as full-time judicial employees of regular courts.

**Procedural issues** – There are also several issues with the way the tribunal functions and litigations are managed, leading to slower disposal of cases.

*Judges in common law countries such as the UK, U.S.A., Canada and Australia (Victoria) can devote more time to the core judicial function since the nonjudicial and administrative functions are delegated to separate administrative support services that are professionally managed.*

**– Pratik Datta, Senior Research Fellow, SAM & Co**

For example:

- Number of notices/affidavits are issued at different stages/forums for the same case, especially in fresh filings.
- NCLT has started a common practice of issuing notices/summons through registry. This has increased the timeline for fresh filings, as most of the time is spent in following up with the registrar on procedures and subsequent follow up on issuing summons.
- There is a lack of transparency at the registry level in terms of sequential listing of petitions which at times requires multiple follow ups. This is primarily due to a lack of any digital mode. Multiple follow ups are required by the petitioner's advocate to know the status.
- Many interim applications are filed during the CIRP which has relevance at various phases of the resolution. Currently, there is no specific order in which the applications can be taken and decided, whether it should be taken before the resolution plan is introduced, post the plan or along with it.

*The overburden of excessive documentation and procedures have clogged the movement of cases in NCLT. Streamlining of procedures across NCLT with respect to fillings, elimination of unwanted administrative steps, and shifting the process to e-mode or digital as adopted during COVID would help in decongesting case workload.*

**– Abhilash Lal, Insolvency Professional**

**Case prioritization** – It has been observed that the high-profile cases consume significant court time and are prioritized over hearings of small and medium sized cases. Hearings of smaller cases keep shifting, and many of the orders are reserved or passed late, adding to the delay.

# OUR RECOMMENDATIONS

The focus of the government, regulators and stakeholders should be to hasten the admission and resolution process and increase the predictability and reliability of the timelines. While the measures discussed below are linked at specific stages of the process, many of these measures would help improve the insolvency resolution process at all stages.

## 1. BEFORE THE ADMISSION OF THE CASE

**Strengthening pre-IBC preparedness** – Currently, corporate debtors are pushed to CIRP without much preparedness, and once the CIRP begins, multiple activities are required to be carried out in a crunched timeline. When lenders plan to take a company under IBC, efforts should be made to appoint the concerned IRP to carry out basic preparatory work, vetted by RP in pre-IBC scenario, for example, perform due diligence, financials and asset monitoring, etc., so that a lot of time can be saved during the CIRP period and so that bid invitation and resolution can be fast tracked.

**Capacity building at NCLT**

- Increase the number of benches at least in major cities and establish separate benches for insolvency with specialized talent pool.
- Develop specialized capabilities with a pool of sector experts as nonjudicial resources so that NCLT judges need not delve deeply in sector-specific matters.
- Appointment of judges with commercial exposure.
- A dedicated training calendar should be established with expert interaction from India and abroad that should include exchange of knowledge important precedents.
- NCLT has reconstituted all its benches to hold regular hearings via video conference from December 1, 2020. The reconstituted benches will hear matters falling under their respective jurisdiction as they were hearing them before March 23, 2020. This move is appreciated, and several cases' basis criteria can be completely taken via video conferencing to expedite the hearings and obviate delays due to absenteeism.

**Administration and infrastructure**

- Outsourcing of administration function to a specialized agency is critical, in order to allow the judges to focus on the core judicial function only. For example, UK's 'Her Majesty's Courts and Tribunal Services' or U.S.A.'s 'Administrative Office of U.S. Courts' are specialized entities focusing entirely on court administrative matters. Such agencies may be supervised by the representatives from judges and/or central government. It might enter into service-level agreement with the courts or tribunal to charge appropriate fee for its services.
- Build its own cadre of NCLT staff to improve consistency and quality, instead of staffing government employees on a deputized basis.
- Invest in digital infrastructure.

**Conduct of judicial function** – It is essential to unclog the NLCT benches by stopping frivolous litigation and instituting stricter adherence to timelines of the Code in various aspects of the process.

- Mechanism to levy penalties and costs on claims/appeals that turn out to be frivolous.
- Limit the extension of hearings to, say, a maximum of three.
- Online filing and hearings to be promoted, which shall result in fewer adjournments and more disposal of cases.

**Faster admission** – Admission process can be simplified for cases involving commercial banks, for instance, automatic admission if referred by scheduled commercial banks or an ARC if accompanied by the records of Information Utility ("IU").

**Implementation of Information Utility** –The implementation of IU has so far been less effective as compared to other pillars of IBC in terms of maturity of the process. The IBC ecosystem must make use of IU as a one-stop repository for all debt/claim/dispute-related matters and for documentation to help in reconciliation, adjudication and communications issues. The NCLT vide its order dated May 12, 2020, has already directed that any new insolvency petitions filed under Section 7 must be accompanied by a default record from an Information Utility failing which no petitions will be entertained. The NCLT's order has however been struck down by Kolkata High Court, thereby indicating that a legislative intervention may be needed to strengthen reliance on IU.

## 2. DURING THE CIRP STAGE

**Legal clarification/amendments required**

The law has come a long way through a fast-maturing process of high value insolvencies, multiple litigations, amendments, resolutions and liquidations, and has seemed to have settled most of the critical legislative matters. However, legislative clarity on a critical issue explained below should be brought about at the earliest possible time.

» Treatment of differential charge holders under resolution plan and liquidation scenario. It should be clearly legislated whether differential charge is recognized in IBC like it is recognized under common law.

## 3. APPROVAL OF RESOLUTION PLAN STAGE

**Legal clarification/amendments required on:**

» Regulation or amendment is required directing the government authorities to adhere to specific timelines for providing their view on a resolution plan, and after which no other dispute should be entertained.

» Timeline for submission of objections on resolution plan should be limited through legislation, allowing discretionary powers to court in rare situations.

## 4. IMPLEMENTATION OF RESOLUTION PLAN STAGE

**Penalty on resolution applicant in case of delay** – Withdrawal of plan by the resolution applicant or delayed implementation of plan frustrates the entire CIRP process. While the RP and the CoC may have a performance guarantee in place, which does act as a deterrent, but usually is a small percentage of the overall recovery for creditors. The RP and CoC may consider having a higher performance guarantee from resolution plan applicants.

## OTHER COMMON ISSUES

**Additional fund allocation to NCLT** – Government may consider allocating more funds to the NCLTs for development of its infrastructure and capacity.

**Better data management framework** – Currently, credible data is not available about the stages of ongoing cases or pending admission cases. The IBBI/NCLT portal should be able to provide bench-wise, creditor-wise or issue-wise details of delays, so that delays can be reliably analyzed and rectified. Also, sector level classification of any data will help in analyzing differential impact of IBC on various sectors for better policy making direction as well as provide a single repository for prospective bidders

# CONCLUSION

*IBC is a four-year-old law that has by and large been successful. It has improved financial behavior of debtors and creditors, strengthened creditors' rights, improved recoveries by a magnitude of two to three times, shortened resolution timeframes significantly (vs. prior resolution frameworks), allowed for the reallocation of capital and resources, and helped create a secondary market for stressed assets. IBC will have to undergo its natural time horizon to settle like any other major law, which is gradually happening through landmark judgments and quick amendments mentioned above. With the slowdown induced by COVID-19, it is apt to introspect our experiences and evaluate major causes of delay in resolution processes. It is evident that delays cannot be attributed to one pillar alone. All the stakeholders involved need to focus on addressing the delays and improving timelines, which is currently the most important issue threatening the success of the IBC as an effective resolution framework.*

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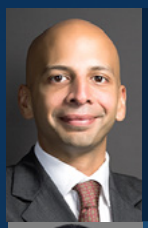

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