GNLU CENTRE FOR LAW & ECONOMICS

Policy Recommendations

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Comments to the Ministry of Corporate Affairs and the Insolvency and Bankruptcy Board of India on changes being considered to the Insolvency and Bankruptcy Code, 2016.

Comments on behalf of the Research Group on IBC, GNLU Centre for Law & Economics

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I. Introduction

The Insolvency and Bankruptcy Code, 2016 ("IBC") was enacted to provide a streamlined law that enabled efficient and effective insolvency resolution and reorganization. The objective of the law is to enhance the availability of credit and balance the interests of all the stakeholders to promote value maximisation of assets and entrepreneurship. The functioning of this law finds its base squarely in the field of Law and Economics.

The provisions of the Code have been regularly amended to ensure a robust insolvency resolution framework. The Ministry of Corporate Affairs is further considering changes to the IBC to strengthen the functioning of the Code.

Therefore, the Centre for Law and Economics constituted a Research Group to study the Paper and research on the proposals to suggest comments which would further guide the policy draft for efficient regulations in India.

II. Clause-wise comments

Sr. No.	Extract from the Discussion Paper	Comments
4.1.	Under section 10 of the Code, a CD is empowered to apply to initiate the CIRP voluntarily on occurrence of a default. Along with the application for initiating CIRP, the CD can propose an insolvency professional ("IP") to be appointed as an interim resolution professional ("IRP"). As per section 16 (2), the proposed IP is appointed as an IRP after admission of the case. It is felt that since the IRP is required to hold the trust and confidence of the Committee of	Issue: This amendment proposes to take away the right of a Corporate Debtor to propose an interim resolution professional which is given under section 10 of the IBC. It must be noted that the IRP proposed by the CD has the tenure of maximum 30 days. Ultimately, the resolution professional is going to be appointed by the Committee of Creditors as per Section 22 of the IBC. Taking away the right of the promoters to propose IRP will take away all the rights from the CD. Suggestion: In case of voluntary liquidation of a company, the creditors of the company can appoint the liquidators in the same way

	Creditors ("CoC") upon commencement of the CIRP, it often becomes incongruous for a person being considered by the CD to be appointed as an IRP. She is responsible for accumulating relevant information from the CD and scrutinising its affairs to trace avoidable transactions or transactions amounting to wrongful or fraudulent trading. Thus, it may be appropriate to appoint an independent person as the IRP to prevent misuse of this provision. **It is being considered that section 10 may be amended to delete the right of the CD to propose an IRP. In such instances, the IRP should be appointed by the AA on the recommendation of the IBBI.**	Corporate Debtors should also be allowed to appoint IRP as it does not necessarily mean that the independence will be sacrificed. If CD himself appoints the IRP, he be able to interact with the IRP in a better manner and it will result in an efficient insolvency process. Apart from this, the appointment of IRP is only for maximum 30 days and hence it will have no impact because ultimately COC will appoint the RP who will be undertaking all the major responsibilities. Hence, it is not advisable to take away the right of the CD to appoint IRP under section 10 of the Code.
5.1	**Therefore, it is being considered that section 235A may be amended to empower the AA to impose penalties where any person fails to comply with the provisions of the Code or any rules or regulations made thereunder, where such compliance was required. The proceedings in relation to this may be initiated**	Issue: While the step is in the right direction, the issue still remains with the common tactics of Corporate Debtor to cause delay in insolvency proceedings. Suggestions 1. The proposed amendment to the IBC, will certainly expedite the resolution process and shall keep busybodies at bay. But to make sure, it does not encourage Corporate Debtor to cause a delay in proceedings, the civil

	on an application made by the IBBI or any other person authorised by it in this regard.	penalty should also be raised to achieve required deterrence. If the cost is not enough, the parties may see it as a cost of doing business and keep violating the provisions. (**Maneka Doshi, *Decriminalisation of Company Law and other U-Turns,* BLOOMBERG (Dec.7, 2019, 10:47 A.M.) https://www.bqprime.com/law-and-policy/decriminalisation-of-company-law-and-other-u-turns-2)** Issue: Under Criminal prosecution, the threshold is to prove beyond reasonable doubt while in civil proceedings it shall depend on preponderance of probability. Therefore, lowering the threshold may lead to a significant increase in the application under S235A, leading to further delay. Suggestions: The penalty should be imposed sparingly on Corporate Debtor only in case of clear and flagrant violation of the IBC. Further habitual or periodic offenders should be dealt with differently and sternly.
5.2	**Hence, it is being considered that the AA should also be empowered to impose a penalty where it believes that such a person has filed frivolous or**	Issue: The S. 65 of IBC lists malicious intent as an element to prove fraudulent initiation of proceedings. Intent is therefore difficult to prove considering myriad factors. Suggestion: The requirement of intent should

	vexatious applications	be done away with and the Adjudicatory Authority must be prima facie satisfied keeping in consideration the preponderance of probability. The threshold should be lowered but the penalty should be awarded considerately.
6.1 (d)	To protect and preserve the assets of the CD during the pendency of this process and to avoid any recovery actions or syphoning off of assets, **the applicant shall have the option to approach the AA to seek a moratorium (with the approval of a requisite majority of unrelated FCs).** The scope of the moratorium shall be similar to the one provided during the CIRP under section 14 (1).	Issue: The purpose of the proposal is to streamline the insolvency process by removing adjudicative interference. Allowing the matter to go for Moratorium will defeat this purpose of FTRP as it will delay the process significantly. Suggestion: Moratorium is the most crucial part of the insolvency process. If the moratorium is not ordered and the creditors continue to bother the corporate debtor then the whole purpose of the CIRP is lost and because of which the requirement of statutory order cannot be compromised with. However, the insolvency process can be fast tracked if the process of granting the moratorium order can be automated. If the financial creditors are anyway asking for a moratorium order, then the NCLT should be willing to grant the same without further investigation or questioning, only then the CIRP can fast tracked as envisaged.
7.1	**Accordingly, it is being considered that section 54A be amended to provide that the framework shall apply to**	The PPIRP mechanism was introduced to provide MSME owners with a method of resolution where the company remains with them. It was to act as a quick, cost-effective

	prescribed categories of CDs in addition to the MSMEs	and value maximising method of resolution which was least disruptive to the company business. The UK insolvency law after the 2014 Graham Report, the Pre-Pack Regulations were brought into force, however, there is no restriction on which CDs can avail a pre-pack administration scheme. Further, the Sahoo Committee report stated that there is no reason to deny pre-pack to anyone as it provides an alternative option for resolution of stress. **(Ministry of Corporate Affairs, Report of the Sub-Committee of the Insolvency Law Committee on Pre-packaged Insolvency Resolution Process, October 2020)** Thus, it is suggested that Section 54A should be applied to additional categories of CDs. This will reduce transaction costs and enable efficient resolution.
7.2 (a)	The PPIRP framework may involve a diverse range of FCs who will be required to approve its initiation at the pre-commencement stage by confirming the proposed RP under section 54A (2) (e). Thus**, to facilitate quicker and more efficient decision-making at this stage, the sixty-six per cent threshold for unrelated FCs may be lowered to fifty-one per**	As a comparison, The Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021 brought in the UK requires creditors approval, in a general sense, at 50%. At this stage, 51% should suffice. However, a strict evaluation of the initiation application by the Adjudicating Authority should be mandated to combat frivolous applications as commencement of PPIRP entails a moratorium under Section 14 of IBC by way of Section 54E of the IBC.

	cent. Similarly, under section 54A (3), the sixty-six per cent threshold for unrelated FCs may be replaced **by an enabling provision for the IBBI to specify the appropriate threshold, not being less than fifty-one per cent of the unrelated FCs, for approving the filing of an application.**	
7.2 (c)	Further, *bona fide* CDs attempting to resolve insolvency through this process should not be concerned about the possibility of a change of management pursuant to section 54J or conversion to CIRP or liquidation under sections 54O or 54N (4). Stakeholders' feedback also highlights similar concerns. **Hence, it is being considered that these provisions may be omitted.**	Section 54J provides that the CoC can vest the management of the CD with the Resolution Professional at any time. Though, the threshold set is quite high with required approval from 66% voting share and AA accepting the resolution only on the ground of fraud or gross mismanagement of affairs, an underlying benefit of the PPIRP process is that the management of the CD does not change, this provision naturally dilutes the basis of PPIRP. The provision causes unnecessary stress to the management as the CoC already has mitigating powers. This creates inefficiency in the law. Thus, this provision should be omitted. Section 54O allows the CoC to initiate CIRP at any time after PPIRP has commenced but before the resolution plan has been approved. Section 54O does not require any reason nor does it list out any criteria for initiation of CIRP in place of PPIRP. It provides an arbitrary power to the CoC that would hamper

		the purpose of introducing PPIRP mechanism. Thus, Section 54O may be omitted.
8.5	Further, it is observed that allottees may, during a CIRP or a project specific resolution process as being considered herein, request ownership and possession of a completed unit of the real estate project, which cannot be permitted during the moratorium under the Code. To benefit such allottees, **it is being considered that section 28 of the Code may be amended to enable the RP to transfer the ownership and possession of a plot, apartment or building to the allottees with the consent of the CoC.**	The National Company Law Appellate Tribunal through a landmark judgement in **Flat Buyers Association Winter Hills – 77, Gurgaon Vs Umang Realtech Pvt. Ltd through IRP & Ors.** provided that when CIRP is initiated against a real estate company, it will have to be limited to the concerned project only and will not affect other projects. Amending the provision of the IBC will give statutory effect to the judicial decision. It is, however, suggested that instead of amending Section 28 of the Code, an additional Section should be added to provide a clear provision that lays down the procedural and substantial aspects of the same to prevent any future confusion. While Section 28 of IBC may be amended to enable RP to transfer ownership, Section 28 is a negative provision where the RP "shall not take any of the following actions without the prior approval of the committee of creditors." It would be unnecessary to amend Section 28 since approval of CoC is to be a requirement. Thus, it is suggested that an additional section may be added to the Insolvency and Bankruptcy Code that clearly states that in cases of CIRP related to real estate wherein specific real estate projects are affected, with approval of the CoC, RP may transfer ownership and possession to the allottees.

9.2	**Therefore, it is being considered that the Code may be amended to enable that the CoC may approve that individual or collective assets of the CD may be resolved in one or more resolution plans.** However, it may be clarified that **at least one of the plans ought to provide for insolvency resolution of the CD as a going concern, which may include provisions for its corporate restructuring and other mandatory requirements such as management of affairs of the CD after approval by the AA**.	The objective of the IBC is to provide a time-bound and transparent process for the resolution of insolvency and bankruptcy cases in India. Allowing for multiple resolution plans provides greater flexibility and options for the creditors, and can increase the chances of finding a solution that is acceptable to the majority of creditors and leads to a successful resolution, but this comes with caveat as the implementations might find a lot of roadblocks as different resolution plans would require to follow different compliances and different procedures and methods would be applied hence increasing the possibility of bottlenecks. In such a scenario the entire purpose of such a plan would be defeated which is to ensure that the process is time bound in nature
13.1	There have been several judicial opinions in favour of granting equitable distribution to OCs under the processes of the Code. The recoveries made by OCs under liquidation are seemingly inadequate, even compared to unsecured FCs. Thus, to improve their position in the priorities for distribution under a plan or in liquidation, **it is being considered that all unsecured creditors (FCs, OCs and any government or authority) other**	Issue: The Lack of representation of Operational Creditors under Committee of Creditors under S.21(2) of IBC. Suggestion: While the step is commendable, and with equal designation of operational creditors and (unsecured) financial creditors under s.53, IBC, it is suggested that the operational creditors should also be allowed representation under the Committee of Creditors for a more democratic resolution. One of the reason that the Operational Creditors get more inequitable distribution of assets is also due to the lack of representation

	than the workmen and employees shall be treated equally for distribution under section 53. The order of priority for the secured creditors, workmen and employees shall be retained as stipulated under section 53.	in the final decision making body. (**Suhas Sakhamuri, *Equitability of Operational Creditors Under The IBC; An Unjust Code,* MANUPATRA (Dec. 31, 2021) https://articles.manupatra.com/article-details/Equitability-of-Operational-Creditors-Under-The-IBC-An-Unjust-Code)**
15.1	Presently, the information memorandum shared with the resolution applicants for preparing the resolution plan does not contain a valuation estimate of the assets. It is observed that providing such an estimate to all the resolution applicants will make the procedure more transparent and may help in obtaining better resolution plans from the market. Thus, **it is being considered to amend section 29 to provide that the information memorandum shall contain an estimation of the valuation of the corporate debtor's assets**.	Issues: The maximum litigation arises from section 29 of the IBC hence relooking it becomes imperative in nature. Hence there are ways in which this can be handled- allowing the corporate debtor to provide an estimation of the valuation can also lead to conflict of Interest and The corporate debt or may not be impartial in its estimation, leading to an inaccurate valuation of the assets, which can negatively impact the insolvency resolution process. Ultimately, the decision on whether to allow the corporate debtor to estimate its assets should balance the need for speed and accuracy in the insolvency resolution process with the need for impartiality and fairness in the valuation of assets.
20	**Appointment of Administrator by the Central Government** 20.1. Section 241 (2) of the Companies Act, 2013 empowers	Issues: 1. Increased interference by the Central Government. 2. Interests of the Creditors may be

	the Central Government to apply to the NCLT for appropriate relief against 'oppression and mismanagement' if it believes that the affairs of the company are being conducted in a manner prejudicial to the public interest. In practice, it is observed that such a mechanism might be well-suited for certain CDs requiring a quick and guided resolution under the Code. Accordingly**, it is being considered to insert an enabling provision in the Code for the Central Government or any other authority as may be prescribed or authorised in this behalf, to propose the appointment of an 'Administrator' in specific CIRP cases involving public interest for performing all the duties of an IP, IRP, RP, or liquidator, as the case may be. Under this proposal, the processes will be conducted as per the Code's provisions for regular cases, except that the CoC will not have the power to remove or replace such an Administrator (and such power shall only vest with the Central Government or any**	ignored. The provision section 241(2) of the Companies Act 2013. Is intended to empower the central government to ensure that the company does not carry on its activities in a manner prejudicial to public interest. It empowers the central government to make an application to the tribunal but the final power rests with the tribunal to decide on the merits of the case. Even the powers of the tribunal as specified in Section 242, although are not exhaustive, but under 242(2)(h) of the Companies Act 2013 (Companies Act, 2013, § 242(2)(h), No. 18, Acts of Parliament, 2013 (India), the power extends to the removal of MD, Manager or Director of the company but not the appointment of a new MD or Director, the authority to take that decision rests with the Shareholders itself. Therefore, it is suggested that, on the lines of the Companies Act, the IBC should also have provision to check the functioning is not prejudicial to the public interest. Therefore, instead of appointing the Administrator, it should be provided for with the power to remove the RP or IRP or liquidator or IP in cases where the central government feels that the CIRP is not catering to the public interest. Moreover, the final decision making power, as provided for in Companies Act 2013 should rest with an independent body and not the Central Government itself. Because it may

	other authority as may be prescribed or authorised in this behalf).	lead to greater intervention by the government in the liquidation or resolution process which may not be in the best interest of creditors. Therefore, it is advised the CoC should have a reasonable say in the appointment of the 'Administrator' to ensure that the their interests are not compromised and at the same time, a balanced power should rest with the central government to account for the public interest in the resolution plan. It may be considered that the administrator to be appointed by a committee having representation both from the Central Government as well as the Committee of Creditors to ensure that the resolution plan thus prepared strikes an equilibrium between public interest as well as the interest of the creditors.
25.1	The liquidation process' swiftness and efficiency depends on the liquidator. The Code does not envisage any supervisory role of creditors during the liquidation process. It only recognises a limited requirement to conduct a non-binding consultation with the stakeholders, and that too only at the discretion of the liquidator. However, like CIRP, the liquidation process requires commercial judgement regarding several aspects. To ensure that such aspects of commercial	Issues: The voting power in the Committee of Creditors rests only with the Financial Creditors and not the operational creditors, therefore, if the decision making power of the liquidator, is made subject to CoC, or if CoC is entitled to take commercial decisions, **INTEREST OF OPERATIONAL CREDITOR MAY BE IGNORED.** When it the issue is discussed in the Supreme Court of India, it was observed that the exclusion of operational creditors was justified in the way that financial creditors have been assessing the viability of the debtor from the very beginning and therefore, can

	nature benefit from the commercial wisdom of the creditors of the CD and to ensure that the liquidator's activities are monitored more effectively, it is being considered that **the CoC should supervise and support the liquidator's functioning. It will take commercial decisions and oversee the conduct of the process**. Further, the liquidation process involves the rights of all creditors to receive a share in accordance with section 53. Thus, the composition of the CoC for the liquidation process should be modified to include a more broad-based representation of creditors in the manner specified by the IBBI. Further, **it is also being considered that the CoC in liquidation may take all decisions by a simple majority of fifty-one per cent or more of the voting share**	play an important role in restructuring of the company and it's liabilities. ***(Swiss Ribbons v. Union of India, Writ Petition (Civil) No. 99 of 2018. Decided on 25.01.2019).*** Considering that this need does not arise at the time of liquidation of the company, it is felt that the exclusion of operational creditors from the decision making process can have serious repercussions for the interest of the operational creditors. Hence, it is suggested that this proposal should only be considered if the decision making power is being shared with the operational creditors. Although it has been highlighted in the clause itself, but a concrete amendment is necessitated. 1. The interference by the CoC, in the matters of liquidator can also lead to stretching of the time frame for completing the liquidation procedure. 2. Effectively this change will reduce the role of liquidator to managing the day-to-day affairs of the company, as all the final important decision making powers regarding the liquidation of the company shall now vest with CoC. Considering the above two issues it is recommended that the power granted under section 35 of IBC Act to consul the stake holders, should be made compulsory in the manner that it must be necessitated to consult the stakeholders including members of CoC, and then the suggestions as received from

		them should be recorded in writing and made available to all the stakeholders. Reasons for not accepting the suggestions if any should also be mandatorily be recorded in writing and be accessible to all stakeholders. But the ultimate decision-making power should rest with the Liquidator only. This will not compromise the independence of the liquidator while also ensure that the commercial wisdom of CoC and other stakeholders is used while arriving at decision while liquidating the company.
27.1	Section 33 (5) of the Code bars the institution of suits or legal proceedings by or against the CD without the leave of the AA during the liquidation process. However, it does not bar the continuation of any pending suit or legal proceeding once the moratorium imposed during the CIRP is terminated. After that, these proceedings are resumed on commencement of the liquidation process and hinder the liquidator's ability to conduct the liquidation process. **It is being considered that section 33 (5) be amended to prohibit the continuation of the suit or other legal proceedings during the liquidation process, apart**	Issue: Internationally most countries including UK, and USA, allow for ongoing legal proceedings to continue during liquidation, as it is seen as a way to resolve outstanding debts and obligations efficiently. A bar on the continuation of legal proceedings during liquidation harms the creditors' interest, restricts the chance of fair and just distribution of assets, and hinders the efficient recovery of creditor's investments. And the inefficient resolution of the CD's dues toward its creditors leads to distrust amongst investors. **(Insolvency Act, 1986, No. 45, Acts of Parliament, 1986, (UK)).** Suggestion: It is suggested that instead of the creditor, the CD must seek leave of the AA to prohibit continuation of suits that are pending from before the liquidation if the CD can prove lack of merit, malice, or by giving

	from proceedings under section 52. The leave of the AA should also be required for continuing any suit or other legal proceeding by or against a CD undergoing liquidation.	assurance that the creditor will be adequately compensated through the liquidation proceeds and no separate proceeding is required. Here, the interest of investors will be protected and the CD (or liquidator) will have an opportunity as well to prove their case before the AA to prohibit proceedings that may cause any undue delay. In ***Monnet Ispat and Energy Ltd. vs. ICICI Bank Ltd.,*** NCLAT clearly explained how liquidation under IBC is intended to preserve and maximise the value of the CD's assets for the benefit of the creditors. Thus, prohibiting the continuation of legal proceedings of creditors would be counter intuitive and this cannot be the intent of the legislators who have carefully drafted this Code and S. 33(5). **(*Monnet Ispat and Energy Ltd. vs. ICICI Bank Ltd.,* National Company Law Appellate Tribunal (NCLAT), New Delhi in Company Appeal (AT) (Insolvency) No. 547 of 2019)**