

# RESCUE FINANCING IN LIGHT OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016: SUCCESS, CHALLENGES AND INSPIRATIONS

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*The Insolvency and Bankruptcy Code, 2016 aims at protecting the corporate debtors as going concerns as well as at maximizing the value of their assets. In pursuance of this objective, the Code has incorporated the provision of interim finance to facilitate the rescue of distressed debtors, and consequently, has stimulated the overall growth of the Indian economy. A healthy interim finance market lends a helping hand in promoting insolvency resolution while averting the possibilities of resorting to liquidation. However, the lack of a robust legal framework has resulted in the stunted growth of the rescue finance market in India. The recent introduction of the Pre-Packaged Insolvency Resolution mechanism for MSMEs is a commendable addition to rescue financing under the Code, but nonetheless, is susceptible to falling prey to the existing challenges suppressing the development of the market. These challenges majorly pose as conflict of interests among different stakeholders of the corporate debtors. The governmental restrictions on financial institutions for providing rescue funds have further suppressed the market. The present research aims at devising effective solutions to tackle these challenges. Part I of the research introduces rescue financing in the Indian scenario, Part II examines the challenges resulting from the inadequate governing legal framework in India, Part*

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*III analyses the success of rescue financing through practical instances, Part IV describes the inspirations that can be drawn from foreign legal frameworks on rescue financing and Part V extends suggestions to overcome the present challenges in light of the foregoing research.*

**Keywords:** Interim Finance, Going Concern, CIRP, Super-Priority Financing, Conflict of Interest

## I. INTRODUCTION

One of the cardinal objectives of the Insolvency and Bankruptcy Code, 2016 (IBC) is to protect and preserve the life of the corporate debtor “as a going concern” by yearning for the resolution of its insolvency through restructuring, keeping liquidation as last resort.<sup>1</sup> The concept of “rescue financing”, also known as “bridge financing” or “interim financing”, lends a helping hand in fulfilling the said objective of the Code.<sup>2</sup> It refers to the infusion of new funds by rescue financiers into the ailing corporate debtors so as to help them sail through the process of insolvency, safeguarding the value of their assets in the interim.<sup>3</sup> Given their role of giving new life to corporate debtors in return for lavish interest rates on the amount infused, rescue financiers have pocketed the epithet of “graveyard dancers”.<sup>4</sup>

Section 5(15) of IBC defines the term “interim finance” as “any financial debt raised by the resolution professional during the insolvency resolution process period or by the corporate debtor

<sup>1</sup> Archan Shah, Opinion, *Objective of Insolvency Law: Resolution Over Liquidation?*, BUS. TODAY (Dec. 19, 2017), <https://www.businesstoday.in/opinion/objective-of-insolvency-and-bankruptcy-law-ibc-resolution-liquidation/story/266337.html>.

<sup>2</sup> Avinash Kumar Khard, *Rescue Financing: Helping Hand for Entities in Distress*, INDIAN BUS. L. J. (Feb. 03, 2019), <https://law.asia/rescue-financing-helping-hand-entities-distress/> (hereinafter ‘Khard’).

<sup>3</sup> Shakti Patra, ARCs, *Nbfcs Eye Interim Finance Market as Bank Credit to Distressed Firms Dries Up*, MINT (Oct. 26, 2017), <https://www.livemint.com/Industry/fVH9148vveEGjy3p3IXoWK/ARCs-NBFCs-eye-interim-finance-market-as-bank-credit-to-dis.html>.

<sup>4</sup> *Id.*

during the pre-packaged insolvency resolution process period, as the case may be, and such other debt as may be notified”.<sup>5</sup> The definition envisages that the interim resolution professional under Section 20(2)(c) of the Code, the resolution professional under Section 25(2)(c), and the corporate debtor under Chapter III-A are empowered under IBC to take recourse to rescue financing for maintaining the corporate debtor as a going concern. The said power comes with the underlying caveat that the providers of such finance shall enjoy repayment rights of first instance as a part of resolution costs,<sup>6</sup> i.e. prior to all other debts of the corporate debtor.<sup>7</sup> Further, a security interest can be created by the resolution professional on the unencumbered property of the corporate debtor, and with the consent of creditors, on its already encumbered property as well.<sup>8</sup> The recourse of interim financing has been further strengthened by the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2018, which provide for interest payments to the interim financiers for the entire duration of the CIRP, thus supplying the necessary incentive for fund infusion in distressed entities.<sup>9</sup> Undoubtedly, rescue financing emerges out as a commendable measure for reviving the ailing companies, and hence, for safeguarding the Indian economy.

In fact, investors and lenders have started to inject rescue funds into some entities even before they hit the stage of insolvency, in the apprehension of distress. This involves the lenders and borrowers shaking hands on “*pre-bankruptcy settlements*”, thereby avoiding the long and tiresome corporate insolvency resolution process (CIRP) under IBC.<sup>10</sup> Considering the prevalence of such insolvency-

<sup>5</sup> Arvind Mangla, *Interim Finance during CIRP*, LINKEDIN (June 11, 2020), <https://www.linkedin.com/pulse/interim-finance-during-cirp-arvind-mangla/?articleId=6676711519981568000>.

<sup>6</sup> Insolvency and Bankruptcy Code (Amendment) Act, 2021, § 3, No. 26, Acts of Parliament, 2021 (India).

<sup>7</sup> Ashwin Bishnoi, *The Indian Insolvency & Bankruptcy Code 2016: No More a “Wait and Watch” Space for Private Equity*, 22 EMPEA LEGAL & REG. BULL. 7 (2017).

<sup>8</sup> Shishir Mehta et al., *Restructuring and Insolvency in India: Overview*, UK PRAC. L. (Oct. 01, 2017), <https://uk.practicallaw.thomsonreuters.com/6-506-0854>.

<sup>9</sup> Megha Mittal, *Interim Financing Becomes Effective and Attractive*, in IBC: USHERING IN A NEW ERA 150 (Megha Mittal ed., 2019).

<sup>10</sup> Don Weinland, *Global Investors Sidestep Indian Bankruptcy with Rescue Finance*, FIN. TIMES (Jan. 02, 2019), <https://www.ft.com/content/6059445a-0d82-11e9-acdc-4d9976f1533b>.

preventive measures in addition to the current urgency of uplifting the Indian economy, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 has formally introduced the “*Pre-Packaged Insolvency Resolution*” mechanism for Micro, Small & Medium Enterprises (MSMEs). The newly introduced preventive-mechanism furnishes a chance to the corporate debtors to retain their management rights while their creditors strike settlements with investors and formulate effective resolution plans.<sup>11</sup> As evident from the amendment proposed by the Ordinance to Section 5(15) of the Code, the finances raised for the purpose of such beforehand insolvency resolution are also covered under the ambit of interim finance.<sup>12</sup>

Furthermore, going beyond the scope of the Code, rescue financing also includes injecting funds through subscriptions to contingent convertible securities or acquisition deal sex tended by private equity firms.<sup>13</sup> Notably, the aforesaid recourses of pre-packaged deals and fund-raising through private equity firms are beneficial for managements that are unwilling to give up their control over the corporate debtor.<sup>14</sup> Lately, the rescue finance market in India has been marked with a surge in private equity firms willing to extend funds on a super-priority basis, with Bain Capital, KKR & Co., Blackstone, Eight Capital, Lone Star and some other firms coming on board.<sup>15</sup> Clearly, the varied measures of rescue financing for preserving insolvent firms as going concerns are rapidly gaining traction in India. However, the legal framework is yet to fully evolve to address the plethora of challenges that surround the idea of such financing.

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<sup>11</sup> Dinesh Unnikrishnan, *Explained: Why Pre-Packaged Insolvency Resolution is Great for MSME Borrowers*, MONEY CONTROL (Apr. 05, 2021), <https://www.moneycontrol.com/news/business/explained-why-pre-packaged-insolvency-resolution-is-great-for-msme-borrowers-6729901.html>.

<sup>12</sup> Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021, § 3 (Apr. 4, 2021).

<sup>13</sup> Reshmi Khurana, *Global Investors Sidestep Indian Bankruptcy with Rescue Finance*, KROLL (Jan. 02, 2019), <https://www.kroll.com/en/about-us/news/global-investors-sidestep-indian-bankruptcy> (hereinafter ‘Khurana’).

<sup>14</sup> Karunjit Singh, *Pre-pack: Insolvency Resolution Option for MSMEs*, THE INDIAN EXPRESS (Apr. 07, 2021), <https://indianexpress.com/article/explained/explained-how-does-the-pre-pack-under-insolvency-and-bankruptcy-code-work-7260652/> (hereinafter ‘Singh’).

<sup>15</sup> KHURANA, *supra* note 13.

## II. EXAMINING THE CHALLENGES

Rescue financing can be required at any level of CIRP for covering multiple operational payments ranging from employee remuneration, lease payments, machinery repairs expenses, to dues for procurement of raw materials.<sup>16</sup> The determination of the requisite amounts of rescue funds as well as the payments to which they should be allocated lies in the discretion of the resolution professional,<sup>17</sup> who mandatorily needs to take consent of the CoC in this regard.

The challenge manifest here concerns the scope of discretion available to the resolution professionals, for there exists a vacuum of guidance regarding the substantive meaning of interim finance. The ramifications of such a vacuum include the non-judicious raising of interim finances and the unnecessary litigations by creditors claiming the funds lent by them to be interim finances so as to secure super-priority status on these funds. Such ramifications hamper the premier objective of asset value maximization of the corporate debtors, as envisaged by the Preamble of the Code.<sup>18</sup> The same is evident from the recent order in the matter of Tuf Metallurgical (P) Ltd. v. Impex Metal & Ferro Alloys Ltd., wherein the National Company Law Appellate Tribunal (NCLAT), disregarding the claims of the Appellant, stated that the advance money received by the corporate debtor against the promise of supplying goods to the creditor does not constitute interim finance under Section 5(15) of the Code, and that the Appellant is merely an “*unsecured financial creditor*” having no super-priority right over other creditors.<sup>19</sup> Therefore, in the absence of effective guidelines as to the ambit of interim finance under the Code, the provision is prone to fall prey to widespread misuse and exploitation.

Further, even though ‘third-party rescue financing’ is extremely beneficial for the corporate debtor as well as the overall economy, it is

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<sup>16</sup> Tuf Metallurgical (P) Ltd. v. Impex Metal & Ferro Alloys Ltd., 2021 SCC OnLine NCLAT 43.

<sup>17</sup> DEP'T FOR PROMOTION INDUSTRY & INTERNAL TRADE, RESOLVING INSOLVENCY (2017).

<sup>18</sup> Manaswita Nakwaal, *Maximisation of Value of Assets under the Insolvency & Bankruptcy Code, 2016*, INDIAN REV. ADVANCE LEGAL RES. (Oct. 01, 2020), <https://www.iralr.in/post/maximisation-of-value-of-assets-under-the-insolvency-bankruptcy-code-2016>.

<sup>19</sup> Tuf Metallurgical (P) Ltd., 2021 SCC OnLine NCLAT 43.

thoroughly disliked by the existing creditors of the corporate debtor. This is because they are reluctant to allow the status of “super-priority” to rescue financiers which will push them down the waterfall under the Code.<sup>20</sup> Notably, the proposal for interim financing requires the consent of 75% majority of the voting members of CoC (Committee of Creditors).<sup>21</sup> Given the fact that the survival, restructuring and revival of the corporate debtor necessarily require financial resources, the existing creditors being adamantly against third-party rescue proposals for the aforesaid reason are left with little or no alternatives but to liquidate the corporate debtor. The same is evident from the fact that in a bulk of insolvency matters, resolutions plans are not even formulated or filed before the National Company Law Tribunal (NCLT).<sup>22</sup> Also, the fear that the corporate debtor might not survive even after the infusion of super-priority rescue funds, which, in turn, will result in further reduction of the realisable repayments for the existing creditors, drives them to vote against super-priority financing.<sup>23</sup> Clearly, there exists a conflict of interest between the existing lenders and the rescue financiers, resulting in unnecessary liquidation of corporate debtors in sheer violation of the objective of the Code.

Another challenge impeding the fulfilment of the objectives of the Code is the remarkably low number of financial institutions desiring to pursue the endeavour of interim financing.<sup>24</sup> Luring new or existing creditors to finance the companies that have failed to repay their debts, and hence have landed up in insolvency, is an exceedingly challenging

<sup>20</sup> Dinkar Venkatsubramanian, *IBC: Fighting a Lone Battle: Approaching Asset Resolution with a Multi-Pronged Strategy*, ERNST & YOUNG (Dec. 2019), [https://assets.ey.com/content/dam/ey-sites/ey-com/en\\_in/topics/transaction-advisory-services/pdfs/evolving-landscape-of-corporate-stress-resolution.pdf](https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/topics/transaction-advisory-services/pdfs/evolving-landscape-of-corporate-stress-resolution.pdf).

<sup>21</sup> *The IBC and Interim Finance: Potential Developments Based on DIP Lending Experience*, MAGZTER (Dec. 2017), <https://www.magzter.com/stories/Business/Legal-Era/The-IBC-And-Interim-Finance-Potential-Developments-Based-On-DIP-Lending-Experience>.

<sup>22</sup> Khard, *supra* note 2.

<sup>23</sup> *Rescue of Business in Insolvency Law*, EUR. L. INST., (July, 2017), [https://europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/Instrument\\_INSOLVENCY.pdf](https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Instrument_INSOLVENCY.pdf) (hereinafter ‘Rescue’).

<sup>24</sup> Vishwanath Nair, *As Banks Deny Working Capital to Insolvency Cases, Resolution Professionals Turn to Funds*, BLOOMBERG QUINT (Aug. 28, 2017), <https://www.bloombergquint.com/business/2017/08/28/as-banks-deny-working-capital-to-insolvency-cases-resolution-professionals-turn-to-funds>.

task for resolution professionals.<sup>25</sup> Also, considering the risk exposure of financial service providers (FSPs) and their rising non-performing assets (NPAs), the Reserve Bank of India (RBI) has long been unwilling to permit them to rescue ailing corporate debtors.<sup>26</sup> The same is aggravated by the instant condition of the Indian economy marked with a shortage of cash flows, which further deters these providers and other rescue financiers from supplying funds to the corporate debtors.<sup>27</sup>

Moreover, rescuing through pre-packaged settlement deals brings forth a peculiar bone of contention between the corporate debtors and certain categories of creditors. Notably, pre-packaged settlements are eminently opposed by the unsecured and operational lenders of the corporate debtors,<sup>28</sup> for such deals tend to serve the purposes of, and to secure debt-repayments for, big financial creditors. However, such settlements prove to be the financial lifelines for the corporate debtors who wish to retain the control and management rights with themselves.<sup>29</sup> Hence, the inconsistent interests of unsecured lenders and corporate debtors come face-to-face, hindering the procurement of pre-packaged resolution deals, and hence, of the requisite rescue funds to protect the latter as going concerns.

All these challenges in the form of conflict of interests have somewhat clutched the development of rescue financing in India. Nevertheless, the fact that rescue financing plays a pivotal role in preserving the corporate debtors as going concerns, and hence, constitutes the need of the day, is rather undeniable. The said proposition can be further supported by relevant cases of rescue financing that have successfully revived the corporate debtors in their respective scenarios.

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<sup>25</sup> Maksym Iavorskyi et al., *Resolving Insolvency - New Funding and Business Survival*, DOING BUS. (2016), <https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB16-Chapters/DB16-CS-RI.pdf> (hereinafter 'Iavorskyi et al.').

<sup>26</sup> Sui-Jim Ho & Surya Kiran Banerjee, *Indian Bankruptcy Code—How Does it Compare?*, 8 EMERGING MARKETS RESTRUCTURING J. 51, (2018) (hereinafter 'Banerjee').

<sup>27</sup> Mithun Dasgupta, *It'll be Difficult to Disburse Interim Funds to IBC Firms: CS Setty, Managing Director, State Bank of India*, FIN. EXPRESS (Apr. 29, 2020), <https://www.financialexpress.com/industry/itll-be-difficult-to-disburse-interim-funds-to-ibc-firms-cs-setty-managing-director-state-bank-of-india/1942509/>.

<sup>28</sup> BANERJEE, *supra* note 26.

<sup>29</sup> SINGH, *supra* note 14.

### III. PRESERVATION AS GOING CONCERNS: ANALYSING THE SUCCESS

The issue of interim financing was pronounced upon by the NCLAT for the very first time in the matter of *Edelweiss Asset Reconstruction Co. Ltd. v. Sai Regency Power Corpn. (P) Ltd.*<sup>30</sup> Stating that the collective decision of the CoC prevails over the commercial wisdom of an individual Financial Creditor, the NCLAT held that non-provision of expeditious interim finance will impede the goal of maximization of the asset value of the corporate debtor, and will bring it to a “*grinding halt*”.<sup>31</sup> Therefore, the order highlighted the significance of interim finance during the continuance of CIRP and the negative implications that ensue from the denial of such finance to corporate debtors.

Revival of a hugely distressed corporate debtor through rescue funds amidst regulatory challenges can be efficiently examined from the insolvency matter of *Benani Cement Limited*. The matter arose as a result of the denial of banks to finance the working capital requirements of Benani Cement Limited. Here, pursuant to thorough deliberations, rescue funds amounting to Rs.100 crores were raised from a member of the CoC to ensure the continued operation of the corporate debtor. Notably, the amount could not be raised from public sector banks due to numerous restrictions imposed by RBI. This matter depicts the persistent reluctance of regulators to allow financial institutions to rescue distressed entities. However, the matter also evinces that even the existing creditors can be persuaded, through thorough discussions and robust proposals, to infuse rescue funds for preserving such entities. Another noteworthy aspect of the present matter is the immediate partial repayment of the rescue funds out of the initial returns from the continued business operations of the corporate debtor. Such timely repayment of rescue funds fosters the feelings of trust and confidence in lenders, resulting in the overall development of the rescue finance market.<sup>32</sup>

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<sup>30</sup> *Edelweiss Asset Reconstruction Co. Ltd. v. Sai Regency Power Corpn. (P) Ltd.*, 2019 SCC OnLine NCLAT 921.

<sup>31</sup> *Id.*

<sup>32</sup> Vijaykumar V. Iyer et al., *Performance Analysis of M/s Binani Cement Limited*, INDIAN INST. OF INSOLVENCY & PROF. OF ICAI (Jan. 2020), <https://www.iiipicai.in/images/PDF/CASE-STUDY-BINANI-CEMENT.pdf>.



Similar is the insolvency matter of *Alok Industries*, wherein the company was provided CoC-approved 'super-priority interim funding' amounting to Rs. 150 crores by Edelweiss.<sup>33</sup> While the funds ensured the survival of the company during the insolvency phase, the resolution plans and the subsequent acquisition by Reliance Industries Limited and JM Financial Asset Reconstruction Company led to the revival of the company.<sup>34</sup> Henceforth, the infusion of rescue funds in Benani Cement and Alok Industries proved to be an instrumental step in ensuring the survival of the companies during as well as subsequent to their insolvency phase.

In the international context, the insolvency matter of *Marvel Group* is rather inspirational. Faced with a severe financial crunch, the company required urgent monetary infusion for operational payments to give effect to the proposed reorganization plan. The rescue funding amounting to \$100 million, sanctioned by the Court and supplied by Chase Manhattan Group, maintained the company as a going concern over the negotiation phase, eventually yielding a world-famous entertainment giant bearing its present-day worth in billions of dollars.<sup>35</sup> Similarly, the insolvency matter of *Eastman Kodak* was resolved by raising \$950 million of rescue funds during the execution period of the strategic reorganization plans of the company.<sup>36</sup> The infused rescue funds facilitated the retention of efficient and talented personnel in these companies, allowing them to grow and emerge as successful international giants.

#### IV. DRAWING INSPIRATIONS FROM FOREIGN LEGAL FRAMEWORKS

In light of the above, looking at the importance of rescue financing and the inadequacy of the present Indian legal framework to address

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<sup>33</sup> *Bankruptcy Case: Alok Ind Likely to Get Interim Finance from Edelweiss*, Say Sources, MONEY CONTROL (Sept. 29, 2017), <https://www.moneycontrol.com/news/business/cnbc-tv18-comments/bankruptcy-case-alok-ind-likely-to-get-interim-finance-from-edelweiss-say-sources-2401195.html>.

<sup>34</sup> Varishika Dinesh, *Alok Industries and the Story of its Revival*, FINOLOGY (Oct. 19, 2020), <https://blog.finology.in/success-stories/alok-industries-and-its-revival-story>.

<sup>35</sup> IAVORSKY ET AL., *supra* note 25.

<sup>36</sup> *Eastman Kodak Seeking Rescue Financing*, REUTERS, <https://www.reuters.com/article/instant-article/idUSN1E79K1DV2011021>.

the ensuing challenges, it is pertinent to examine and draw inspirations from the legal frameworks concerning the same prevalent in the American, European and Asian jurisdictions.

United States - The provision for rescue financing finds its mention under Chapter 11 of the United States Bankruptcy Code, which lays down funding alternatives for insolvent entities based on the “*debtor-in-possession (DIP)*” insolvency model.<sup>37</sup> These alternatives facilitate raising funds not only to meet the basic working capital requirements for the mere survival of insolvent entities but also to meet the restructuring expenses for a full-fledged revival of these entities.<sup>38</sup> Lending funds under the DIP-Financing model fetches attractive rates of interest for the creditors, thus supplying them the vital incentive for undertaking rescue financing.<sup>39</sup>

One of the strategies under the DIP Model, namely the “*Roll-Up Strategy*”, involves the infusion of super-priority funds by the creditors of insolvent entities, which are to be used for there-payment of their already existing debts to these creditors.<sup>40</sup> Another DIP-Financing strategy prevalent in the US is the “*Cross-Collateralization Strategy*”. Under this strategy, rescue funds are supplied by the existing creditors against a security interest which is created on the assets purchased by the debtor after invoking Chapter 11 of the US Bankruptcy Code, with the rider that such security interest is simultaneously created for their pre-existing debts too.<sup>41</sup> This essentially results in securing even the prior debts extended by these existing creditors while securing their newly supplied rescue funds. Although the aforesaid two strategies conveniently secure the repayment of the pre-existing debts of these

<sup>37</sup> Sachin Gupta, *India: The Journey of Insolvency & Bankruptcy Code*, MONDAQ, [https://www.mondaq.com/advicecentre/content/3750/The-Journey-of-Insolvency-Bankruptcy-Code-\(hereinafter-Gupta\)](https://www.mondaq.com/advicecentre/content/3750/The-Journey-of-Insolvency-Bankruptcy-Code-(hereinafter-Gupta)).

<sup>38</sup> Kiran Kumar, *Can Debtor-in-Possession (Dip) Financing Work in India?*, INT’L SCH. MGMT. EXCELLENCE, <https://www.isme.in/can-debtor-in-possession-dip-financing-work-in-india/>.

<sup>39</sup> Julian Chung & Gary Kaplan, *An Overview of Debtor in Possession Financing*, in LENDING & SECURED FINANCE LAWS AND REGULATIONS 2021 120 (Thomas Mellor ed., 2021).

<sup>40</sup> James H.M. Sprayregen & Tarun Warriar, *The IBC and Interim Finance: Potential Developments Based on DIP Lending Experience*, LEGAL ERA (Dec. 12, 2017), <https://www.legaleraonline.com/articles/the-ibc-and-interim-finance-potential-developments-based-on-dip-lending-experience>.

<sup>41</sup> *Cross-Collateralization*, THOMSON REUTERS PRAC. L., <https://content.next.westlaw.com/5-500-6513>.

creditors, they do not aim at giving a new life to the insolvent entities. Further, they render asymmetrical benefits to these few DIP-Financing creditors, to the detriment of other creditors as well as of the insolvent entities.<sup>42</sup>

Notably, the Code marks a shift in the Indian legal framework from the DIP model to the “*creditor-in-possession*” insolvency model.<sup>43</sup> Consequently, the power to make decisions concerning the corporate debtors under insolvency rests in the hands of their creditors, rendering their erstwhile management devoid of any voting rights.<sup>44</sup> The formal introduction of pre-packaged insolvency resolution for MSMEs implies the re-incorporation of some aspects of the DIP-Financing model in the Indian insolvency law. This has further opened the doors for the adoption of other beneficial DIP measures to supplement the existing insolvency resolution mechanism under the Code. Although the aforesaid two DIP-Financing strategies have various underlying shortcomings, they can be adopted in the Code over time with necessary caveats so as to align them with the goal of reviving the insolvent entities.

Europe - Interestingly, in many European jurisdictions, the approval of Courts and insolvency practitioners are given cardinal importance for raising rescue finances.<sup>45</sup> The same is evident from the practice prevalent in Sweden wherein the super-priority status is rendered only to those additional finances which are raised during the reorganization process with the assent of the Court-appointed “*reconstructor*”.<sup>46</sup> Similarly, in Italy, the sanction of the Court is a must to supply super-priority status to the rescue funds raised from creditors and shareholders.<sup>47</sup>

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<sup>42</sup> Seung Hee Cho, *Roll-Up & Cross-Collateralization in DIP (Debtor-in-Possession) Financing as Measures of Creditor Control*, U. OF PENNSYLVANIA SCHOLARLYCOMMONS (2018).

<sup>43</sup> Sachin Gupta & Varsha Banerjee, *India: Restructuring & Insolvency Laws & Regulations*, INT’L COMP. LEGAL GUIDES (May 05, 2020), <https://iclg.com/practice-areas/restructuring-and-insolvency-laws-and-regulations/india>.

<sup>44</sup> GUPTA, *supra* note 37.

<sup>45</sup> RESCUE, *supra* note 23.

<sup>46</sup> Carl Brodén & Elin Lindberg, *Restructuring and Insolvency in Sweden: Overview*, THOMSON REUTERS PRAC. L. (Jan. 01, 2018), <https://uk.practicallaw.thomsonreuters.com/3-501-9187>.

<sup>47</sup> *Restructuring Across Borders Italy: Corporate Restructuring and Insolvency Procedures*, ALLEN & OVERY (Dec. 2017), <https://www.aohub.com/aohub/publications/>

Singapore - According to the Singapore High Court's judgment in the matter of *Re Attilan Group Ltd.*,<sup>48</sup> there is a strict mandate to conclusively establish an unavoidable need for rescue funds for the survival of the debtor company. In other words, super-priority funding during insolvency of a corporate debtor will be allowed only after adequate efforts made for raising additional funds on a normal or non-priority basis have failed.<sup>49</sup> Further, the status of super-priority cannot be claimed for the new funds that the existing creditors are obliged to extend to the debtor.<sup>50</sup> Additionally, such funding should be in the best interests of, and not be detrimental to, the existing creditors.<sup>51</sup> Therefore, the judgment evinces that the recourse of rescue financing can be adopted only in case of inescapable need when other alternatives for infusing funds fail to provide the requisite relief. Given the adherence to all the aforesaid caveats, the Singapore Court readily sanctioned the requests for rescue finance in the matters of *Re: Asiatravel.com Holdings Limited*,<sup>52</sup> and *Re: Swee Hong Limited*.<sup>53</sup>

A careful adoption of the Court approval system of Italy along with the aforesaid principles envisaged under the Singapore legal system can devise a noteworthy fund-raising mechanism to strengthen the Indian Insolvency Law. On elaboration, the said proposition signifies that the Italian Model should be incorporated in the Indian law for the matters wherein rescue funds are raised not merely to facilitate the insolvency proceedings but to actually revive the corporate debtors. Further, when the applicants seek approvals for rescue financing in pursuance of such matters, the Court should duly observe the aforesaid principles laid

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<sup>48</sup> *Attilan Group Ltd.*, In re, 2017 SGHC 283.

<sup>49</sup> *Super-Priority for Rescue Financing: Show Attempts to Get Financing without Super-Priority First*, ALLEN & OVERY (Nov. 30, 2017), <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/super-priority-for-rescue-financing---show-attempts-to-get-financing-without-super-priority-first>.

<sup>50</sup> *Id.*

<sup>51</sup> *Guide to Super Priority Rescue Financing in Singapore*, DHC CAPITAL (Mar. 2020), <https://www.dhccapital.com/media-page/2020/3/11/insights-guide-to-super-priority-rescue-financing-in-singapore>.

<sup>52</sup> Meiyen Tan, *Developments in the Law of Super Priority for Rescue Financing in Singapore*, 17 INT'L CORP. RESCUE 12, (2020).

<sup>53</sup> Kenneth Lim & Wong Pei Ting, *Singapore*, in *THE RESTRUCTURING REVIEW*, (Peter K. Newman ed., 14th ed., 2020).

down by the High Courts of Singapore before granting its approval for the same. In this manner, the objections of the existing creditors against rescue financing to the effect that it hampers their repayment interests by attaching super-priority status to the rescue financiers can be placated to a great extent.

The inspirations from foreign jurisdictions can play a decisive role in reforming the 'Indian legal framework'. However, the same need to be supplemented by numerous other measures and riders for evoking a more robust framework for governing the matters of rescue financing.

## V. SUGGESTIONS

In addition to taking inspiration from foreign jurisdictions in the manner highlighted in the foregoing section, there arises a need to expeditiously address the aforementioned challenges encasing rescue financing in India. It is pertinent to note that the mere on-paper existence of the law on rescue financing is not enough to bring it into effect. Studies have shown that even after having clear provisions governing rescue financing, a remarkably low number of insolvent entities actually invoke these provisions.<sup>54</sup> Therefore, incentive building, both for corporate debtors as well as their creditors, is a pre-requisite for the successful development of the rescue finance market in India.

The mere accordance of super-priority status is not an adequate incentive in itself. There is a need to incorporate a legal provision in the Code guaranteeing a minimum return even in the case of declaration of liquidation of the corporate debtor so as to provide better security of repayment to the rescue financiers,<sup>55</sup> irrespective of whether they are existing creditors or third-party funders.

For promoting third-party rescue financing in India, the legislature as well as the Insolvency and Bankruptcy Board of India (IBBI) should endeavour to balance the interests of the third-party financiers and

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<sup>54</sup> IAVORSKYI ET AL., *supra* note 25.

<sup>55</sup> Rohit Prasad & Yogesh Mathur, Opinion, *Can the Insolvency Code Handle the Aftermath of the Corona Crisis?*, MINT (Apr. 15, 2020), <https://www.livemint.com/opinion/online-views/can-the-insolvency-code-handle-the-aftermath-of-the-corona-crisis-11586970967188.html>.

the existing creditors of the corporate debtors so as to incentivize the former to extend rescue funds and the latter to vote in favour of raising such funds. Similarly, in the matters of rescue financing by existing creditors, the legislature and the IBBI should endeavour to balance the interests of these creditors and the other stakeholders of the corporate debtors. As a matter of fact, no straight-jacket legal provision can be laid down for stimulating all the matters of rescue financing, for furthering the interests of multiple stakeholders of the corporate debtors highly depends upon the distinct and peculiar circumstances of each of these matters. Henceforth, the Italian Model of judicial approval, wherein the Court plays the role of balancing the interests of the stakeholders of distressed entities, is a must to successfully integrate the culture of rescue financing in India.

Further, there is a need to provide immediate guidance to the substantive meaning of interim finance under the Code, the viable sources of raising such finance, and the corresponding minimum and maximum interest rates payable by the corporate debtors to the providers of such finance. Guiding legal provisions on these aspects will confine rescue financing as a viable option only for genuine and feasible matters while preventing unnecessary litigations similar to the recent *Tuf Metallurgical*<sup>56</sup> case. Also, the Rules supplementing the said substantive provisions should unequivocally lay down the grounds on which Courts will entertain and allow the applications for raising rescue finance. These grounds should be on the same lines as the criteria laid down in *Attilan Group Ltd. case*<sup>57</sup> to the effect that the applicants should be required to sufficiently establish the genuine need of funds and the scope of the revival of the corporate debtor before the Court. Such an austere legal framework governing the matters of rescue financing, in turn, bears the potential of encouraging RBI to ease the funding restrictions it imposes on FSPs (Financial Service Providers) that largely hinder the growth of the rescue financing market in India.

Furthermore, the newly introduced pre-packaged insolvency resolution for the MSME sector, an aspect of the DIP-Financing

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<sup>56</sup> *Tuf Metallurgical (P) Ltd. v. Impex Metal & Ferro Alloys Ltd.*, 2021 SCC OnLine NCLAT 43.

<sup>57</sup> *Attilan Group Ltd.*, In re, 2017 SGHC 283.

insolvency model, should gradually be widened to cover all the corporate persons under the Code. Additionally, in order to protect the interests of the unsecured creditors who tend to oppose pre-packaged resolutions, the proposers of such resolution should be mandatorily required to establish that the resolution will not be detrimental to the interests of any other stakeholder of the corporate debtor. After all, the Code marks the shift of the Indian legal framework to the creditor-in-possession model, thus prioritizing the interests of the creditors, and any re-inclination towards the DIP model should first secure the repayments of the debts for these creditors. However, the Court proceedings involved in establishing the aforesaid should be brief and on a fast-track basis to avoid undue delays in arriving at viable resolution plans for distressed entities.

Recently, a strategy adopted by the administrators of *NMC Health*, to the effect that the existing claims of the lenders who infuse additional funds will be elevated to a higher level on the waterfall, evoked active participation of the company's lenders in rescue financing.<sup>58</sup> Although such a strategy will allow the prominent and financially sound creditors of distressed entities to secure their own debts merely by infusing some amount of rescue finance, they can be highly feasible, given the simultaneous incorporation of some robust caveats against its potential misuses.<sup>59</sup> One of the effective caveats can be the thorough yet expeditious judicial scrutiny of rescue financing strategies.<sup>60</sup> However, the task of the first instance is to check the legality of such strategies in light of the provisions of the Code. Failure to establish their legality should evoke necessary amendments to the Code for broadening the scope of rescue financing in India. Careful implementation of these measures will conveniently address the twin problems of incentive-inadequacy for infusing rescue funds and creditor-reluctance for the super-priority status of such funds.

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<sup>58</sup> Davide Barbuscia, *NMC Health \$275 Mln Rescue Financing Faces Creditor Opposition – Sources*, NASDAQ (Aug. 12, 2020), <https://www.nasdaq.com/articles/nmc-health-%24275-mln-rescue-financing-faces-creditor-opposition-sources-2020-08-12-0>.

<sup>59</sup> BANERJEE, *supra* note 26.

<sup>60</sup> BANERJEE, *supra* note 26.

Moreover, the non-availability of information concerning private equity firms and other rescue financiers, and their terms of financing also poses difficulties for the rescue financing market. To overcome this hindrance, the National E-Governance Services Ltd. (NeSL), an IBBI-registered Information Utility, has proposed an innovative technological mechanism namely “*Marketplace for Interim Finance*” that provides for an easy computer-based repository for facilitating the provision of interim finance.<sup>61</sup> Continuous efforts should be made for updating the scope of information disseminated through the platform to keep pace with the ever-growing demands and ever-changing needs. Easy availability of information reduces the search costs for insolvent entities and builds confidence amongst the stakeholders who support rescue financing for reviving these entities.

Overall, a balance needs to be stricken between the rights and interests of the third-party rescue financiers, the corporate debtors, the existing creditors, and the other stakeholders so as to uphold the objective of the Code in its true sense. Undoubtedly, the interests of one cannot be promoted at the cost of the others.

## VI. CONCLUSION

Rescue financing is the key to effective insolvency resolution. When pursued under a comprehensive legal framework, it results in a win-win situation for all the stakeholders of corporate debtors. Notably, the rescue finance market in India is in the nascent stage, awaiting its systematic expansion and development. The Indian legislature bears the power of moulding the Code to facilitate the achievement of not only the objective of value preservation of corporate debtors as going concerns but also that of employment generation, talent retention, choice availability for consumers, adequate market competition and stakeholder protection. The creditors too need to play their part in the achievement of these objectives by aiming beyond the mere fulfilment of their individual interests, without giving in to the highlighted conflicts of interests. They need to pay heed to the fact that absent the provision

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<sup>61</sup> NATIONAL E-GOVERNANCE SERV. LIMITED, *Insolvency Case Management Made Easier* (Oct. 20, 2020).



of rescue funds to the corporate debtor, the value of the repayments they are to receive will tumble to a great extent.

The constantly rising non-performing assets (“NPAs”) of financial institutions render it extremely hard for corporate debtors to raise adequate rescue funds. The problem is further aggravated by the RBI restrictions imposed on these institutions to control their risk exposure, for they constitute “*too big to fail*” economic pillars of the country. Therefore, any steps taken for resolving the problem of NPAs indirectly contribute towards the promotion of the rescue finance market in India. Further, a well-functioning rescue finance market has the potential of lowering the burden on the government to bail-out these institutions from their state of insolvency.

Clearly, a collaborative approach of all the financial sector regulators towards a solution is the need of the day. The Insolvency and Bankruptcy Board of India has assured to take effective measures and to provide a conducive environment for promoting the scarcely tapped bridge financing market in India.<sup>62</sup> Other financial regulators should also endeavour to facilitate the same. After all, the success of rescue financing is directly linked with the success of the overall economy of India, and hence, the development of the rescue finance market cannot be given a backseat by the government.

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<sup>62</sup> *Interview with the Expert Dr. MS Sahoo*, THE MGMT. ACCT. (Oct. 2017), [https://ibbi.gov.in/uploads/resources/IBBI%20Chairperson%20Interview%20Managment%20Accountant%20Oct\\_2017.pdf](https://ibbi.gov.in/uploads/resources/IBBI%20Chairperson%20Interview%20Managment%20Accountant%20Oct_2017.pdf).