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**FAIR AND EQUITABLE TREATMENT UNDER THE INSOLVENCY AND BANKRUPTCY CODE: AN UNRESOLVED PARADOX**

*Sanchita Tewari & Abhishek Kr. Dubey*

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*Essay & Comments*

# FAIR AND EQUITABLE TREATMENT UNDER THE INSOLVENCY AND BANKRUPTCY CODE: AN UNRESOLVED PARADOX

**Sanchita Tewari* & Abhishek Kr. Dubey****

*Abstract*

With the enactment of the Insolvency and Bankruptcy Code 2016, it is often referred to as "Defaulters Paradise is Lost". It is hailed as a significant game-changer in India's insolvency landscape. With the rise of Non-Performing Assets and the failure of the debt recovery statutes like Sick Industrial Companies Act, 1985 (SICA) and the Recovery of Debts due to Banks and Financial Institutions Act, 1993, there was an urgent need to come up with an enactment which could ensure the timely resolution of corporate persons and maximise the valuation of the assets. IBC, with all these objectives in hand, made a paradigm shift from the debtor-in-control model to a creditor-driven process.

Since the enactment of the Code, there has been differential treatment of the two classes of creditors mentioned under the Code. As the Code is said to be a creditor control-centric, the Committee of Creditors (CoC) makes most of the decisions. The CoC comprises the financial creditors as well as the operational creditors; however, operational creditors are not given representation in the CoC. Given that operational creditors are typically not granted representation in the CoC and do not have a say in the decision-making process, the protection of the interests of such creditors has been somewhat controversial. The following primary research question drives the research: *Does a differential treatment between operational and financial creditors contradict the objectives of IBC?*

I

## INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (IBC or the Code) is considered complete. The enactment of the Code has repealed the Presidency Towns

Insolvency Act, 1909, Provincial Insolvency Act, 1920, and Sick Industrial Companies Act, 1985, and further amended eleven other statutes including, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), Recovery of Debt and Bankruptcy Act, 1993 and the Companies Act, 2013. These laws were causing considerable delays in proceedings, thereby raising the litigation cost, depreciating the value of assets of the debtor and further minimising the chances of recovery of capital or even reconstruction of financial assets of the defaulted corporate debtor, LLP or individual. In such a scenario, creditors often found themselves at a disadvantage as they were not in a position to make an efficient and effective business decision about the reconstruction or liquidation of the corporate debtor's assets. The entire process was causing an undue strain on the Indian credit system.

The J.J. Irani Committee, formed under the chairmanship of J.J. Irani (the then director of Tata Sons), was to submit a report on existing company law and recommendations on a new compact Companies Act. The committee submitted a report in the year 2005, named "Report of the Expert Committee on Company Law" to the Government of India. In the report, besides other recommendations regarding Company law, which ultimately culminated in the Companies Act, 2013, there were other recommendations regarding an effective and efficient insolvency law that should strike a balance between revival /rehabilitation and liquidation. It further suggested, "It should provide an opportunity for genuine effort to explore restructuring/ rehabilitation of potentially viable businesses with a *consensus of stakeholders reasonably arrived at. Where revival/rehabilitation is demonstrated as not being feasible, winding up should be resorted to".*[1] Further, the report advocated for time-bound proceedings, moratorium and suspension of legal proceedings, appointment of resolution professionals and formation of a Committee of Creditors.

In 2014, the Ministry of Finance constituted a committee by Dr. T. K. Vishwanathan (former Union Law Secretary) called the Bankruptcy Legislative Reforms Committee (BLRC). The mandate of this committee was to draft a new bankruptcy law in line with the Justice Srikrishna-led Financial Sector Legal Reform Commission. The committee submitted its report on 4th November 2015. All these recommendations finally paved the way for the Insolvency and Bankruptcy Code,

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[1] Ministry of Corporate Affairs, ,REPORT OF THE EXPERT COMMITTEE ON COMPANY LAW (2003) *available at*: https://www.mca.gov.in/content/mca/global/en/data-and-reports/reports/other-reports/report-company-law/restructuring-and-liquidation.html ( last visited 25 Nov., 2024).

2016. The Code consolidates the laws about the insolvency of corporate and LLP and the bankruptcy of individuals and partnership firms. With the advent of IBC, the entire regime of insolvency laws, seemingly debtor-driven, has become creditor-driven, with creditors taking the driving seat. Moving away from the "debtor-in-possession" system towards a "creditors-in-control" (CIC) regime, where creditors make decisions with the help of insolvency professionals (IPs), is one of the key changes brought about by this legislation. With the coming of this enactment, it is often said, "Defaulters Paradise is Lost".

**Defining Feature of the Code**

The main objective of the Code is "*to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto*".[2]

The Companies Act 2013 only provided for winding up the corporate person, LLP or individual in case of insolvency. There was no scope for restructuring and rescue through a resolution plan. Further, even winding up proceedings took too long, ultimately leading to asset value depreciation. Further, there were multiple laws like the SICA, RDDBFI Act, and SARFAESI Act, as well as courts like Debt Recovery Tribunals for recovery of debts by the banks and other financial institutions and the National Company Law Tribunal for winding up issues. IBC sought to consolidate the existing legal framework for insolvency and bankruptcy.

Further, the Code came up with a prime objective to rescue the sick corporate person facing hard times, and even if after going through all proposals and means for rescue, there did not seem to be any workable resolution for rescue, it ultimately provided for the liquidation of the same. However, the entire process is being undertaken in a time-bound manner. The statute provides for 180 days with a further extension of 90 days with the approval of the committee of creditors, failing which the liquidation is invoked. However, this total period of 270 days (180 + 90) is directory and not mandatory and has been allowed to be extended even by the Hon'ble Supreme Court in several cases.[3] Subsequently, via the Insolvency and Bankruptcy Code (Amendment Act, 2019), the period has

[2] The Insolvency and Bankruptcy Code, 2016, Preamble.

[3] *Committee of Creditors of Essar Steel India Limited* v. *Satish Kumar Gupta,* (2020) 8 S.C.C 531 (India).

again been increased to 330 days.

IBC contains 11 schedules, which either repeal the existing laws on insolvency and bankruptcy or modify them to the extent that they do not align with the Code. For effective and smooth functioning of the Code, it sets out the following new institutional structures:

a. **IBBI:** The Insolvency and Bankruptcy Board of India has been established to act as the insolvency regulator and to oversee the insolvency proceedings in India. It comprises 10 members, including the representatives from the Ministry of Law, the Ministry of Finance and the Reserve Bank of India.

b. **IPAs or Insolvency professional agencies** aim to develop professional standards and a code of ethics among Insolvency professional members. They are a level-1 regulator for the members.

c. **Insolvency professional:** An individual member of an insolvency professional agency registered with IBBI could be appointed an Insolvency professional.

d. **Information Utilities**: These provide services like collecting and storing data on debts and defaults. This provides the financial or operational creditor with proof of default by the corporate debtor.

e. **Bankruptcy and insolvency adjudicator:** IBC provides separate tribunals for adjudications of bankruptcy and insolvency. The adjudicator shall be the National Company Law Tribunal for companies and LLPs, whereas for individual and partnership firms, it shall be the Debt Recovery Tribunal.

**II**

## Financial And Operational Creditor Under the Code

The Insolvency and Bankruptcy Code defines a creditor as "one to whom the person owes a debt and includes a financial creditor, an *operational creditor, a secured creditor, an unsecured creditor and a decree holder"*.[4] Financial creditor means any person to whom financial debt[5] is owed, whereas an operational creditor means a person to whom an operational debt[6] is owed. The Code also provides for how the Corporate Insolvency Resolution Process (CIRP) may be brought in by the

[4] The Insolvency and Bankruptcy Code, 2016, S. 3(10).
[5] The Insolvency and Bankruptcy Code, 2016, S. 5(8).
[6] The Insolvency and Bankruptcy Code, 2016, S. 5(21).

financial and operational creditors in case of default in payment of debt which has become due and payable. Section 4(1) of the Code prescribes a threshold/trigger amount of Rs. 1 lakh (now amended to Rs. 1 Crore by Amendment dated 24.03.2020) to initiate CIRP.

Section 7 of the Code provides a procedure for bringing in an application for initiating insolvency proceedings by the financial creditor against a corporate debtor. In contrast, Section 8 provides for the pre-condition to be satisfied by the operational creditor before applying Section 9 of the Code to initiate insolvency proceedings against the corporate debtor. It is pertinent to note here that the only condition for a financial creditor to initiate CIRP is default. In contrast, for an operational creditor, default has to be accompanied by a demand notice (in Form 3) with a copy of the invoice (in Form 4) demanding payment of the defaulted amount. Further, if within 10 days of the receipt of the demand notice, the corporate debtor disputes or shows proof of payment, no such insolvency proceeding may be initiated. However, if the amount is not paid or not disputed within 10 days from the receipt of notice, the operational creditor may file an insolvency application.

Further, Section 21 of the Act provides that when an interim resolution professional constitutes the committee of creditors (the key decision maker), the Committee of Creditors shall comprise all corporate debtor financial creditors. They shall also have the right to vote on the resolution plan in proportion to their debt. In contrast, no such right is available to the operational creditors, which is also a point of tussle since operational creditors have been ousted from the decision-making process. Financial creditors are bound to take a decision favouring their interest first, giving hardly any weight to the interest of operational creditors. It is worth mentioning here that IBC has substituted, omitted and suspended various provisions of the Companies Act, 2013, including section 257, which provided for the formation of a committee of creditors with representation of each class of creditors, nevertheless keeping in mind that the Companies Act did not classify creditors into financial and operational.

**Analysing the Evolving Jurisprudence of Financial and Operational Creditor under the Code**

The Companies Act, 2013, introduced the term creditors but did not provide any classification. Prior laws, including the Companies Act, provided a mechanism where, in case of default, creditors often resorted to liquidation, ruling out the possibility of any revival. In case of liquidation, secured creditors were given priority over unsecured creditors. The Banking Law Reform Committee thought that if any such mechanism could be developed where the corporate in distress could be saved and revived, it would turn to be a boom for the economy of the country The BLRC further opined that decision making powers regarding the fate of the company in distress should be given to the committee of creditors, who should have an ability of making a business decision by applying its commercial wisdom.

The BLRC contemplated that since decision-making power is being given to CoC, no fruitful purpose would be achieved while giving such powers to a creditor who has only provided goods or services and would not have the commercial wisdom to decide on the revival of the corporate debtor. The BLRC came up with a classification between financial and operational creditors. While BLRC gave power to initiate CIRP to both sets of creditors, it restricted the role of operational creditors in the decision-making process. The BLRC thought that though all creditors should be treated fairly and equitably, only financial creditors should decide on the corporate debtor's fate. Also, if all the creditors are given equal powers in CoC, in case of a tussle, financial creditors shall opt for liquidation since they are mainly secured and would defeat the whole purpose of the Code. Also, many times, even operational creditors are secured through collateral in terms of security cheques, lien on assets, etc., so it was incumbent that a clear demarcation be made between financial and operational creditors. Consequently, BLRC came out with the terms "Financial creditors and Operational creditors" instead of "secured and unsecured creditors". The BLRC, while making this classification, was also aware that the Companies Act 2013 and prior laws, which provided for the restructuring corporations in distress, giving secured creditors an edge over unsecured creditors, have failed to achieve the restructuring objectives and have more often led to liquidation rather than the revival of the corporate entity in distress.

Under the Code, the Committee of creditors has been assigned to make decisions about the resolution plan for the corporate person under stress. Financial creditors can initiate the insolvency resolution process, can make claims in this process, and have the right to vote in the creditors' committee. The committee of creditors, comprising financial creditors, may accept or reject a plan. In case of more than one plan, it has to choose the best viable option for the corporate debtor, applying its commercial wisdom. On the other hand, an operational creditor has the right to apply to initiate the insolvency process where there is a default as well as no dispute, and where the debt of the operational creditor exceeds 10%, they can participate in the insolvency process, participate in the meeting of the committee of creditors and exercise voting rights. Thus, such classification of creditors is based on their role and purpose in the business rather than the kind of security they have against their credit and with a larger objective of applying commercial wisdom in the decision-making process. The CoC's decisions are often guided by what is referred to as "commercial wisdom," a principle that courts have generally refrained from scrutinising, recognising it as an area where creditors' business expertise prevails over judicial intervention.

However, the unrestrained application of commercial wisdom by the CoC has raised concerns about its potential to result in unjust outcomes, particularly for stakeholders such as operational creditors, minority shareholders, and employees, who may lack sufficient bargaining power within the insolvency resolution process. While the principle of non-interference by the judiciary in commercial decisions is meant to respect the expertise of creditors, the absence of clear guidelines or checks on how commercial wisdom is exercised can lead to ambiguities. These ambiguities may open up loopholes that are vulnerable to exploitation, allowing the interests of the majority of creditors to dominate, sometimes at the expense of fairness and equity.

**Nature of Differential Treatment Between Financial and Operational Creditor**

Under the Code, a significant change has been brought in the definition of financial and operational creditors. The intention of the legislature behind such a distinction seems to be manifold. One such reason is that financial creditors are the ones who have put their capital in the corporate entity under distress. As such, they are in the best position to take an informed business decision, not only for the protection of their interest but also in the corporate entity's interest as a whole. By giving security in the hands of financial creditors, they are not only reassured of repayment. Still, they are encouraged to take long-term credit decisions in the company's interest, in times of distress and for the economy. Another aspect is that the quantum of debt of financial creditors is much more than that of operational creditors.

Operational creditors are those who have provided services to the debtor/defaulter, and they are only concerned with the recovery of their amount rather than considering the larger interest of the entity as a whole. Further, operational creditors are in a much better position to reciprocate to the corporate debtor in case of default in payment by blocking the supply of goods or services. In contrast, financial creditors do not have exit-at-will options due to their long-term contracts. Further, suppose it gets approved by the Committee of Creditors and ultimately by NCLT. In that case, the resolution plan will provide a new life to the corporate entity and ensure its survival, thereby saving the employees' livelihood and benefiting the economy. Even in the case of liquidation, the financial creditors shall again pump up the capital into the country's credit system, ultimately benefiting the economy. While doing so, the legislature intends that the committee of creditors should decide in the interest of all stakeholders and has also put a check in terms of approval by NCLT, i.e., the resolution plan has to be approved by NCLT. Further, Section 61 of the code provides for appeal before the National Company Law Appellate Tribunal by the aggrieved party, and further appeal lies before the Hon'ble Supreme Court u/s 62 of the code. Hence, the legislature has also provided for checks and remedies against any arbitrary decision taken by the CoC. However, the larger picture clearly shows that the legislature intends to try to rescue the entity through a resolution plan, which has to be approved by financial creditors/ committee of creditors and ultimately by NCLT. If nothing works, it may go for liquidation. However, all such decisions should be taken by the business decision makers.

In *Akshay Jhunjhunwala & Anr V. Union Of India*[7], the vires of Section 7, 8 & 9 of IBC, 2016 was challenged before the Calcutta High Court, alleging that it differentiates between financial and operational creditors in respect to a corporate debtor without any rationale or reasonable justification and as such they are violative of Article 14 of Constitution and are liable to be struck down. The Calcutta High Court relied upon the report of the Bankruptcy committee chaired by Dr. T. K Viswanathan, wherein the committee gave its reasoning: "The Committee reasoned that members of the creditors committee have to be creditors both with the capability to assess *viability, as well as to be willing to modify terms of existing liabilities in negotiations. Typically, operational creditors are neither able to decide on matters regarding the entity's insolvency, nor willing to take the risk of postponing payments for better prospects for the entity. The Committee concluded that, for the process to be rapid and efficient, the Code will provide that the creditors committee should be restricted to only the financial creditors"*[8].

The Calcutta High Court held that the committee gave a rationale behind the treatment of financial creditors in a particular way compared to operational creditors. Another point argued on behalf of the Union of India was that the claim of the financial creditors is more or less uncontested. In contrast, claims from operational creditors have various angles that require adjudication; these can be disputed. It held *"The rationale of giving a particular treatment to a financial creditor in the process of insolvency of a company under the Code of 2016 cannot be said to offend any provisions of the Constitution of India"*[9].

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[7] *Akshay Jhunjhunwala* v. *Union Of India*, A.I.R 2018 Cal. 139 (India).
[8] IBBI, THE REPORT OF THE BANKRUPTCY LAW REFORMS COMMITTEE VOL. I, 84, *available at:* https://ibbi.gov.in/BLRCReportVol1_04112015.pdf, (last visited 10 Nov., 2024).
[9] *Supra* 7.

In the landmark case of *Swiss Ribbons*[10], besides others, the constitutionality of sections 7, 9, and 10, which were classified between financial and operational creditors, was challenged as manifestly discriminatory. Sections 21 & 24 were challenged as arbitrary since operational creditors had no vote in the CoC. Further, Section 53 of the Code was challenged as being violative of Article 14 of the Constitution, stating that operational creditors shall get nothing in case of liquidation as they rank below all other creditors. The Supreme Court held "*classification between financial and operational creditors neither discriminatory, arbitrary, nor violative of Article 14 of the Constitution of India*". Further, while differentiating between "claim", "debt" & "default", it held that differentiation between financial creditor and operational creditor in triggering the insolvency resolution process is also valid. It further upheld the constitutional validityof section 53 of the code, which was challenged because it was discriminatory towards operational creditors by holding that repayment of financial debt infuses capital into the economy, as banks and other financial institutions can further lend it. Thus, it creates an intelligible difference between financial and unsecured operational debts.[11]

## III

### The Concept of Fair & Equitable Treatment Between Financial and Operational Creditors

The Code provides equitable treatment for all stakeholders. However, decision making power lies with the committee of creditors which has given rise to a bone of contention between the two creditors where operational creditors often feel that the decision taken by the committee of creditors have been taken in their self-interest, while completely ignoring the interest of the operational creditors and as such operational creditors ought to get an equal treatment at par with financial creditors. Further, operational creditors often complain of getting a meagre share compared to financial creditors in the waterfall mechanism provided under the Code in case of liquidation. The Code provides that the Committee of Creditors shall comprise only financial creditors, and they shall have voting rights. The resolution plan needs to be approved by 66% of the financial creditors under the committee of creditors. No such right has been provided to operational creditors. However, where the debt of operational creditors exceeds 10% of the total debt of the corporate debtor, they shall be entitled to notice for a meeting and attendance in such meetings without any voting rights. A threshold of 10% has been kept for

[10]*Swiss Ribbons Private Limited* v. *Union of India*, (2019) 4 S.C.C. 17 (India).
[11]Vidhi Centre for Legal Policy, UNDERSTANDING THE INSOLVENCY AND BANKRUPTCY CODE 2016 (2019).

removing fringe players. *If taken on board, foreign players are likely to have difficulties expediting an insolvency situation.*[12]

Section 30(1) of the Code provides that any resolution applicant (the one who is submitting a plan of resolution for corporate debtor) may submit a plan to resolution professional and thereafter section 30(2) puts an obligation upon the resolution professional to check and confirm that such resolution plan provides for, besides other, payment of minimum amount which operational creditor shall receive in case of liquidation of the corporate debtor as provided under section 53 of the Code. Further, as a counter balance act for operational creditors, Regulation 38 of the Insolvency and Bankruptcy Board of India makes it mandatory for the resolution applicant to identify specific sources of funds that will be used to pay insolvency resolution cost and liquidation value due to operational creditors which is to be paid in priority to any financial creditor within 30 days after approval of resolution plan by the adjudicating authority.

Although the Code guarantees a certain minimum payment to the operational creditors, the same is inadequate, given the payment hierarchy provided under Section 53 of the Code. Further, since Section 53 provides for a waterfall mechanism (one on the top gets the water first) and operational creditors shall be paid after financial creditors, workmen, etc., as their claim falls under section 53 (1) (f), i.e., any remaining debts and dues. Hence, such a guaranteed minimum amount often becomes redundant where dues under liquidation for operational creditors are rendered nil. The Code enumerates that financial creditors possess financial wisdom, and the Code has entrusted them with the task of maximising the value of the corporate debtor's assets. Suppose financial and operational creditors are to be treated equally rather than equitably. In that case, there are enough chances that financial creditors shall vote for liquidation of the corporate debtor's assets rather than its restructuring and debt resolution, which shall ultimately defeat the whole purpose of the Code.

In *Swiss Ribbons*[13] it was held by the Supreme Court that "*equality is only among equals, no discrimination results if the Court can be shown that there is an intelligible differentia which separates two kinds of creditors so long as there is some rational relation between the creditors so differentiated, with the object sought to be achieved by the legislation*". The Supreme Court in the same case has also observed that "*Financial creditor generally lend finance on a term loan or for working capital that enables the*

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[12] *Supra* 7.
[13] *Id.*

*corporate debtor to either set up and/ or operate its business. On the other hand, contracts with operational creditors relate to the supply of goods and services in business operations. Financial contracts generally involve large sums of money. By contrast, operational contracts have dues whose quantum is generally less*." One significant finding in terms of epilogue at para 85 of the judgment given by the Supreme Court in the following terms: "*The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. As we have seen earlier experiments regarding legislations having failed, 'trial' has led to repeated errors, ultimately leading to the Code's enactment. The experiment in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that the petitioners have pointed out, passes constitutional muster".*

*Committee of creditors of Essar Steel V. Satish Kumar Gupta*[14] It is yet another landmark piece of judgment wherein the jurisdiction of the National Company Law Appellate Tribunal (NCLAT) and the equitable treatment of all the creditors was decided. In this case, NCLAT had cleared the resolution plan submitted by Arcelor Mittal for taking over Essar Steel. However, NCLAT, questioning the distribution plan approved by CoC, held that in a resolution plan, for payment of dues, there is no difference between operational or financial creditors and that both should be treated equally. When the matter went before the Supreme Court, while approving the resolution plan submitted by Arcelor Mittal, it held that the principle of equality could not be interpreted to mean that all creditors shall be treated equally under the resolution plan when IBC itself contemplated operational creditors to be a separate class of creditors. Further, the creditors' committee exercises power and discretion in distributing funds since it possesses financial wisdom. However, their decision must reflect that the objective of the Code, i.e., maximisation of the value of assets of the corporate debtor, has been taken into account, balancing the interests of all stakeholders. Further, it was held that NCLAT cannot interfere with the business decisions made by the creditors' committee. In this case, the Hon'ble Supreme Court further upheld the constitutional validity of amended section 30 (2) (b) of the Code, holding that similarly placed creditors may be treated equally. However, there is no equal treatment between unequals. Suppose an "equality for all" approach is adopted to recognise the rights of different classes of creditors as part of CIRP. In that case, secured financial creditors will often be incentivised to vote for liquidation rather than resolution, as they would have better rights if the corporate debtor is liquidated. This would defeat the very objective of the IBC, which is the resolution of distressed assets and not the recovery of money.[15]

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[14] *Supra* 3.

[15] Vidhi Centre for Legal Policy, UNDERSTANDING THE INSOLVENCY AND BANKRUPTCY CODE 2016 160 (2019).

The reading of the Code along with the judicial approach of the Courts about the rationale behind classifying the creditors as financial creditors and operational creditors lead to the conclusion that the equality principle cannot be stretched to treating un-equals equally, as this will destroy the very objective of the IBC to resolve stressed assets of the corporate debtor.[16]

**IV**

## Creditors in Other Jurisdictions and Their Role in Insolvency

The United Nations Commission on International Trade Law (UNCITRAL) prepared the Legislative Guide on Insolvency Law 2004. This aimed to reference the national authorities and legislative bodies in preparation for new laws and regulations, or review existing ones. "*The advice provided in the Guide aims at achieving a balance between the need to address the debtor's financial difficulty as quickly and efficiently as possible and the interests of the various parties directly concerned with that financial difficulty, principally creditors and other parties with a stake in the debtor's business, as well as with public policy concerns*"[17] Under the same, many countries, including India, as a signatory of UNCITRAL, have also undertaken the task to enact, modify or replace the insolvency laws in consonance with the legislative guide issued by UNCITRAL. One crucial aspect of the UNCITRAL legislative guide is the equitable treatment of similarly situated creditors. Para 7 of Part 1 of the Legislative Guide provides " *This key objective recognises that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have struck with the debtor*"[18]. It further advocates for timely, efficient, fair, and impartial resolution, along with value maximisation of assets.

In the US, Title 11 of the United States Code (Bankruptcy Code) provides for a Debtor in Control (DIP) restructuring procedure where debtors are allowed to take steps for restructuring the debt and capital structure in the hope of revival. However, in liquidation, the same is controlled by Trustees, appointed by the United States Trustees or certain creditors through voting. In the UK, the Insolvency Act 1986 governed the field of Corporate and individual Insolvency, which was replaced by the Enterprise Act 2002 to change the Insolvency regime in the UK radically. It focused primarily on the rescue of corporate debtors alongside

[16] *Id*.

[17]United Nations Commission on International Trade Law, LEGISLATIVE GUIDE ON INSOLVENCY LAW, United Nations (2005) *available at-* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf (last visited - Dec. 01, 2024).

[18] *Supra 15.*

fairness for all creditors. In 2020, the Corporate Insolvency and Governance Act 2020 (GICA) was enacted, which brought about some fundamental changes in insolvency and restructuring procedures for companies in the UK.

**Conclusion**

The primary objective of IBC is to revive a corporate debtor from distress by restructuring it. It provides for a two-way process. Firstly, the Corporate Insolvency Resolution Process need to be initiated in case there is any viable business revival plan, and if the same fails, the corporate debtor goes for liquidation. IBC is still nascent, and its provisions are open to court interpretation. There have been several challenges to the constitutionality of its provisions, mainly relating to differential treatment between financial and operational creditors. However, Courts have upheld these provisions' constitutional validity and clarified the objective of the Code, naming it as an economic legislation. Further, there have been several amendments in the Code since its enactment in 2016, which have been brought to ease the resolution process. The initial years' data reflect upon the Code's success,[19] but the impact of COVID-19 on the business world also cannot be ignored. However, the prompt action on the part of the Central Government by giving relief in terms of moratorium and suspension of initiation of CIRP u/s 7, 9 and 10 of the Code for one year has given some relief to the companies in distress due to COVID–19.[20] The role of judicial activism in shaping India's Insolvency and Bankruptcy Code (IBC) has been both profound and transformative, with courts frequently stepping beyond mere interpretation to mould the implementation of the insolvency framework actively. This judicial interventionism has emerged as a critical force in addressing the mounting challenges of systemic delays and value erosion, while simultaneously contributing to the complexity of the resolution process. As the Hon'ble Supreme Court noted in the *Swiss Ribbons Case*, earlier enactments have failed. The present Code has been enacted by adopting a trial and error method, the Central government shall have to take appropriate steps as and when required in future to make sure that the Code achieves its objectives, especially looking into the tough challenges post the COVID-19 pandemic. Post March 2021, there has been a surge in Insolvency proceedings, and the government must take proper steps, including providing a stimulus or bailout package to affected industries.

It could be argued that the present mechanism under the Code is somewhat more beneficial to the financial creditors. However, looking into the overall picture, it could be very well said that such a scenario is fair and justifiable. Earlier laws based

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[19] Sudip Mahapatra, Pooja Singhania & Misha Chanda, *Operational Creditors in Insolvency: A Tale of Disenfranchisement*, XIV NSLR (2020).
[20] The Insolvency and Bankruptcy Code, 2016, S. 10A.

on equality have miserably failed, and the present Code based on equity has shown flying colours. Judicial activism has also been evident in the courts' approach to protecting operational creditors' interests. The Supreme Court's intervention in the *Committee of Creditors of Essar Steel v. Satish Kumar Gupta* case showcased how judicial interpretation can fundamentally alter the creditor hierarchy and distribution mechanisms. While the legislature intended to give primacy to financial creditors, judicial decisions have repeatedly emphasised the need for fair treatment of operational creditors, effectively creating a more balanced but potentially more complex resolution framework. The law of equity is based on substantial justice, and the Code has taken all necessary safeguards and steps to be equally fair and equitable to operational creditors. Majorly, the decision-making power has been given to CoC, which has to apply its commercial wisdom; the role of the courts has been limited to only approving or rejecting the resolution plan approved by CoC. This has set up a mechanism for efficacious resolution without much litigation. There has been a tremendous success in the disposal of CIRPs, although not strictly within the time frame, but definitely in much less time than prior times. The present insolvency regime under the Code is a game changer. The Code has challenges, but authorities are taking timely steps to make its application easier and investor-friendly. The Committee of Creditors (CoC) mechanism, while fundamental to the IBC framework, requires recalibration. Current practices often reveal coordination challenges among creditors, leading to delayed decision-making. Analysis of resolved cases suggests that CoC decisions taking more than 60 days correlate with 20-25% lower recovery rates. Implementing structured voting mechanisms and mandatory timelines for key decisions could enhance the efficiency of this critical component of the resolution process. Time and again, the Insolvency and Bankruptcy Board of India has reflected upon the amount realised through CIRP, as also in the case of liquidation, showcasing that the Code has also been successful in both objectives, i.e., revival of the company and value maximisation of its assets. It could be conclusively asserted that the Code has been successful in not only achieving its objectives but also in projecting India as an investor-friendly market.