
DEBT, DEFAULT AND DELAY: MAPPING THE CORRELATION BETWEEN DELAYS, VALUE EROSION AND REALISATIONS UNDER IBC

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ABSTRACT

The Insolvency & Bankruptcy Code, 2016 (IBC/Code) has undoubtedly been a watershed moment for the rescue regime of India bringing not only a significant shift in how the insolvency resolution process takes place from its earlier regime but has also gone a long way in addressing the perils that had plagued the previous legislations, particularly the long and cumbersome judicial process that was involved. While IBC has certainly addressed this major drawback, by bringing down the resolution timeline to around 300 days, it still is criticized for not being nimble enough, and for its abysmally low rates of realization and large haircuts to the creditors. While the realization rates under IBC are calculated as a percentage of admitted debt, it does not take into account the piling amount of interest on debt, and the value erosion of the assets of the distressed entity during the time gap from date of default to date of action to resolve stress i.e., date of admission of petition under IBC. This approach paints only a one-side image of the recoveries made under IBC and is bound to show haircuts at a staggering exaggerated percentage. This article makes an attempt to benchmark the realizations under the IBC after taking into account the value erosion of assets of the distressed entity so to realistically see the recovery rates of resolved companies.

INTRODUCTION

The enactment of IBC in May, 2016 was a watershed moment in India's resolution to embrace a pragmatic, business conducive environment aligned with the ever-increasing globalised economy.¹ The Code has brought not only a significant shift in how the insolvency resolution process takes place from its earlier regime² but has also gone a long way in addressing the perils that had plagued the previous legislations, particularly the long and cumbersome judicial process that was involved.³ In fact, the biggest criticism that was associated with the previous insolvency regimes such as the Sick Industrial Companies (Special Provision) Act, 1985 was that the companies that were being resolved under it often ended up being 'sicker' or worse off than how they were at the time of initiation of their resolution (emphasis supplied on 'initiation');⁴ owing solely to the tediously lengthy closure / resolution period that on an average took 5.8 years.⁵ While the IBC has certainly addressed this major drawback by bringing down the resolution timeline to around 300 days,⁶ it still is criticized for not being nimble enough, and for its abysmally low rates of realization; often being termed as 'an old dog with new tricks' instead of a completely revamped and revering corporate resolution process; and rightly so, after all the object and purpose of the Code is not just timely recovery procedure but maximization of value.

As recent as of September, 2022, the average haircuts in resolved companies under IBC is 69%⁷ essentially meaning that for every ₹100 in outstanding admitted debt, a soaring loss of ₹69 is sustained by the creditors as the outcome of corporate insolvency resolution process (CIRP).⁸ The foremost reason that is attributed to these plummeted recovery rates are the inordinate delays that are involved in the resolution process under IBC.

¹ Soumya Kanti Ghosh & Ashish Kumar, *IBC: The New Public Good*, IBC: Idea, Impressions and Implementation 73, 74 (2022).

² From the earlier model of 'Debtor-in-Possession' to 'Creditor-in-Control' approach.

³ Rajeswari Sengupta et al., *Evolution of the insolvency framework for non-financial firms in India Evolution of the insolvency framework for non-financial firms in India*, Indira Gandhi Institute of Development Research, W.P. No. 2016-018-2016 (2016).

⁴ S. Pardhasaradhi, *Corporate Sickness: Critical Analysis of SICA Vs IBC: A Study*, 10(2) IPE Journal of Management, 73 (2020).

⁵ *Id.*

⁶ Aashish Aryan et al., *IBC takes 300 days, BIFR took 5-8 yrs: IBBI chairman M S Sahoo*, Business Standard, Apr. 1, 2019.

⁷ BS Web Team, *Banks took a haircut of 69 per cent while resolving IBC cases: Report*, Business Standard, Aug. 25, 2022.

⁸ K.R. Srivats, *IBC cases: For every ₹100 of claims admitted, banks took haircut of ₹69*, The Hindu Business Line, Aug. 24, 2022.

Notionally, the haircuts and realized amount is often pegged only onto the duration of the recovery proceedings and the delays therein, this is evinced from the fact that all data pertaining to the realizations reckon only two data factors; *firstly*, the total admitted claims which often is the debt that was defaulted (with the mounting interest) and *secondly*, the total amount realized by the creditors. None of the datasets relating to haircuts take into consideration the period of delay i.e., the period between when the default first occurred and when the proceedings were actually initiated by the creditors. This approach towards calculating and arriving at the haircut percentage without taking into consideration the period of delay in initiating proceedings from when the default first took place has two glaring lacunas, first that it fails to ascertain the extent of value erosion of the corporate debtor's (CD's) assets from when the default had first occurred and when the CIRP was initiated, and secondly the cascading effect of the delay in initiating CIRP on the debt itself - in terms of the domino effect of defaults of the other creditors of the CD and the mounting interest that piles up. Leaving both the piling amount of interest, and the eroded value of the assets of CD out of the picture paints only a one-side image of the recoveries made under IBC and is bound to show haircuts at a staggering exaggerated percentage. Thus, it become imperative to benchmark the realizations under the Code after taking into account the value erosion of assets to realistically see the recovery rates of resolved companies.

OBJECTIVE AND RELEVANCE

Delays in filing application for initiating CIRP or 'pre-filing delays' can adversely impact the value of assets of the CD and lead to tumultuous value erosion of the CD. Value erosion owing to pre-filing delays may occur in the following manner: -

- a) The interval or period between when the default occurred and when the CIRP was admitted is likely to be exploited by devious suspended management who might use it to engage and execute preferential, undervalued, fraudulent and extortionate transactions through diversion of funds.

Lord Coke while cautioning about the adverse impact of delay in bankruptcy proceedings had this to say: -

"Three businessmen go for dinner, where each tries to prove his financial worth by

*offering to pay the bill. One of them says that he should pay as his company had a great financial quarter. Another one says that he has recently got a huge amount as inheritance from a rich aunt that he never knew he had, therefore, being cash rich, he should pay. And the last one, who also happens to be a promoter of a company, replies, tongue-in-cheek, **that he should pay since his company is going under insolvency next week!**” ~ Lord William Cooke⁹*

The above rhetorical has never been truer; with the forthcoming of the Code; the promoters of CD have become more brazen in attempting to mull-over and delay the initiation of CIRP in order to ‘buy time’ for diverting valuable assets of the CD into their pockets. It also does not help much, when the look-back period or twilight period prescribed under the Code is only two years, meaning thereby that any delay of more than two years would simply leave out the preferential transactions out of the Code’s purview.

- b) The delay in filing for initiation of CIRP logically means a delay in admission of CIRP itself which resultantly means a delay in imposing moratorium which again would enable not just the suspended management but also the individual creditors to part away with the valuable assets and records of the CD, thereby reducing the chances of a successful resolution.

Afterall moratorium is like a ‘closed-door’ that avoids multiplicity and piecemeal recoveries in favor of a single concerted resolution and recovery *in rem* without which it would be next to impossible to keep the assets of the CD together and intact.

- c) Pre-filing delays also negatively impacts the going concern status of the CD and thereby reduces the expectation of creditors for good realization. Default once occurred has a domino effect; it leads to apprehension amongst other creditors of the CD thereby leading to a lot of friction in ensuring that the operations of the CD don’t come to a halt.

The behavioral impact of a default is very detrimental for the continued operations of the CD, as due to default, the creditors become reluctant in providing further financial

⁹ WILLIAM COOKE, A COMPENDIUM SYSTEM OF BANKRUPT LAWS, Gale Research Inc. (1778).

reliefs to the CD, this reluctance coupled with the apprehension that the CD would further default, in turn raises the cost of working capital and ultimately leads to a situation where the CD finds it difficult to keep itself afloat as a going concern. This difficulty often culminates into either the CD becoming defunct or it making hasty decisions such as creating more charges on its assets and or taking high interest rate short loans and interim finance, both of which ultimately detracts and erodes the value of the CD and its assets either way. Thus, a vicious cycle is created; where greater the value erosion, the minimal the chances of obtaining interim finance.

Most of the provisions of IBC are aimed at avoiding the precarity of the above situations; provisions such as imposition of moratorium, wresting the control from the promoters or be it avoidance of transactions are all aimed at preventing hasty decisions and piecemeal and fragmented recovery that ultimately leads to a slow demise of the CD's value. However, due to the delays at the very filing stage; all these provisions of IBC that act as 'brakes' remain yet to kick-in.

From above, it is trite to say that, conceptually the failure of taking into account the ambit of value erosion due to pre-filing delays in calculating realizations has much force, however the same appears to not just be a futile conceptual notion but a real and worrying obstacle. In the 2021 Financial Stability Report of the Reserve Bank of India (RBI); an analysis was done of the resolutions of a small-sample of companies which showed that the delayed identification and inaction towards non-performing assets (NPAs) has pronounced effects on the ultimate recovery, with a sharp drop in the recovery rate by 40% for meagre delay of three years and the longer the bad loans remain unacted, the slimmer the recovery gets. This in addition to the report of the NeSL that showed the average delays in terms of initiation of CIRP under the IBC was upwards of two to three years as of February, 2020 possibly foreshadows a significant degree of value erosion and a dwindling likeliness of meaningful recovery. This delay on part of banks and financial institutions of almost two years is partly owed to the mandate of the RBI Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances; which requires all lenders to explore and implement a resolution plan for stressed assets, if feasible, within a period of 180 days from the end of review period which is generally 30 days from the date of default. This itself creates a lag of 210 days in filing the application under the Code, which may give the errant promoters/ management, one more opportunity to

divert the valuable reserves of the CD before it goes in the hands of an independent Insolvency Professional (IP) under the Code.

On a first blush of both the reports i.e., of the RBI as-well as the NeSL, it shows that the staggeringly low haircuts and realisations under the Code is a result of the delays that are induced in the filing of the applications for initiating CIRP. In view of the same, the present article would attempt to showcase the extent of delay that occurs in the filing of application for initiating CIRP and highlight if there is a correlation between the pre-filing delays and the value erosion of the CD.

RESEARCH METHODOLOGY AND ANALYSIS

The research methodology has been designed keeping in view the main objective of the present research study i.e., to ascertain the delays in resolving stress in corporates and the occurrence of value erosion due to such delays. To begin with, data of companies that have been successfully resolved under the Code as of June, 2022 was sourced from the IBBI website. Since, the financial data of listed companies is easily accessible in public domain, this study is limited to 91 listed companies which have been successfully resolved under the Code.

To examine the delays at pre-CIRP filing and post-CIRP filing stage, three important data points are considered:

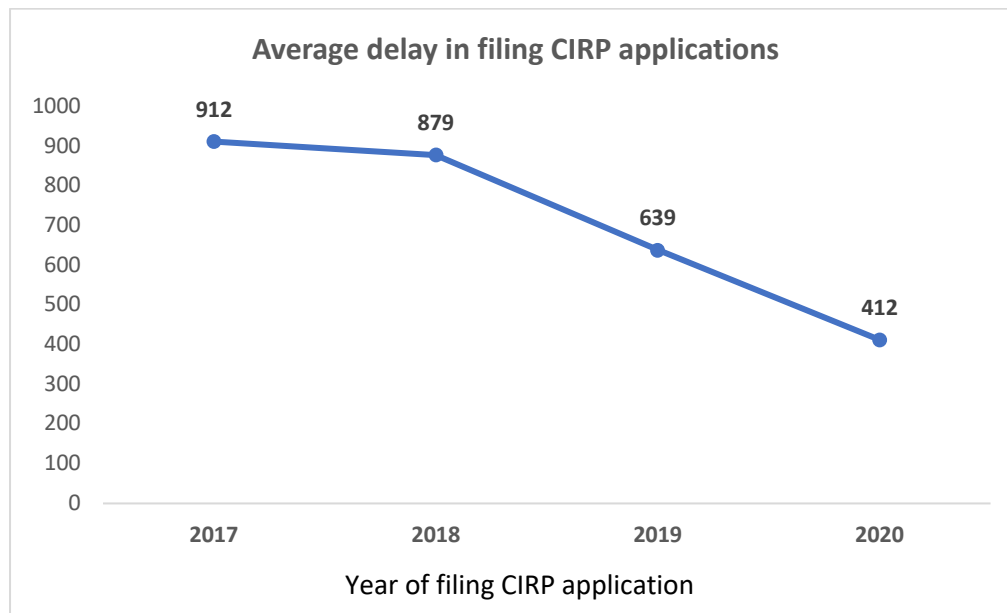
- a) **Date of default:** The date of default is majorly extracted from the CIRP forms (process related forms) filed by the IPs with the IBBI for the respective case. In cases, where this data could not be gathered from the CIRP forms, the admission orders passed by the Adjudicating Authority (AA) i.e., NCLT, are referred to, for ascertaining the date of default. Out of 91 cases under consideration, date of default is not available in respect of five cases. Hence, those five cases have been excluded.
- b) **Date of filing CIRP application:** This data is sourced from IBBI. In limited cases, where the date of filing was not available in the IBBI dataset, the orders of the AA are referred to. Out of 91 cases, date of filing of CIRP application is not available in respect of one case, hence, excluded.
- c) **Date of admission of CIRP application:** This data is sourced from the IBBI and is available in respect of all 91 cases.

On comparison of date of default with date of filing CIRP application in 85 cases, it has been found that there is a gap of 824 days on an average which means the CIRP application has been filed with a delay of more than two years from the date of default. However, this also includes the cases where the default has occurred prior to IBC coming into force. A summary of findings is presented in the table below:

Table: Average delay in filing CIRP applications

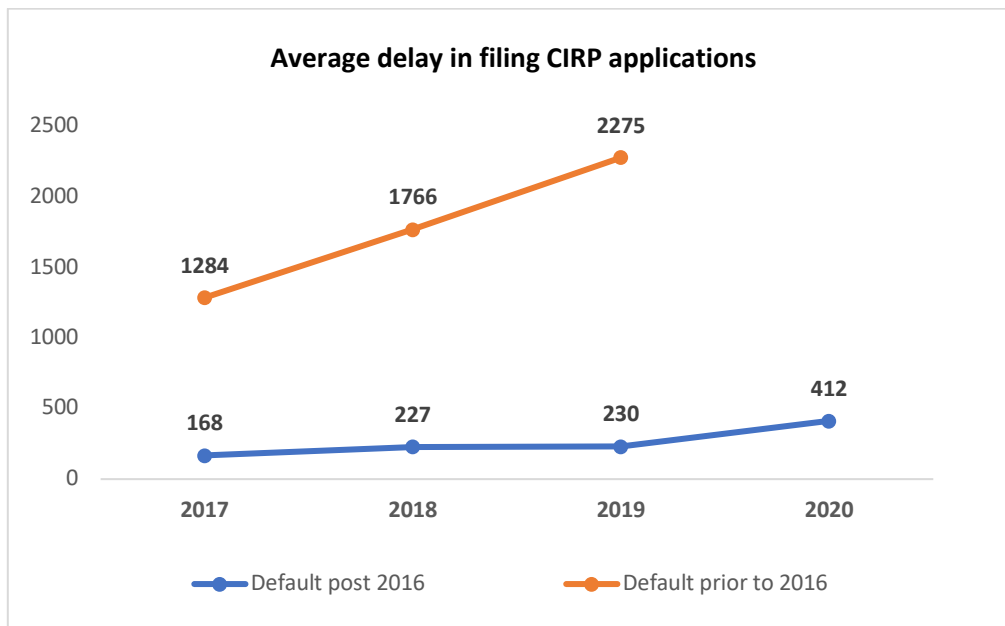
<i>Date of default</i>	<i>No. of cases</i>	<i>Average Delay (In days)</i>	<i>Median Delay (In Days)</i>
<i>Prior to IBC coming into force</i>	40	1491	1326
<i>Post-IBC era</i>	45	232	141
<i>Total</i>	85	824	551

The year-wise data (Fig.1) shows that there is a downward trend in terms of no. of days by which the CIRP filing is delayed. This implies that there is an increased awareness among the stakeholders for timely use of resolution mechanisms under the Code.

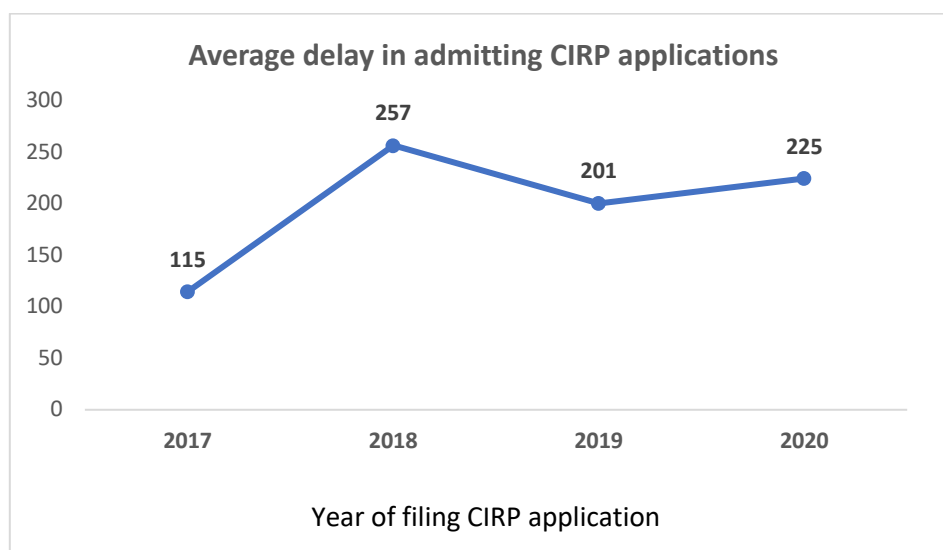
Fig 1: Year-wise delay in filing CIRP application (from date of default)

As discussed above, since the data includes the cases where default has occurred prior to IBC coming into force, Fig.2 shows the trend of delay in filing CIRP applications in two different scenarios:

- a) Default prior to 2016: Though the figure shows an upward trend in terms of delay in filing, the no. of such cases gradually declined and seems to have been acted upon completely till 2019. No such cases were reported in the year 2020.
- b) Default post 2016: The figure shows a slightly upward trend in terms of delay in filing. Since the data pertains to the cases where default has occurred post-IBC, the upward trend implies that the creditors probably have used other resolution mechanisms and thus have opted for IBC at a much later stage or as a last resort.

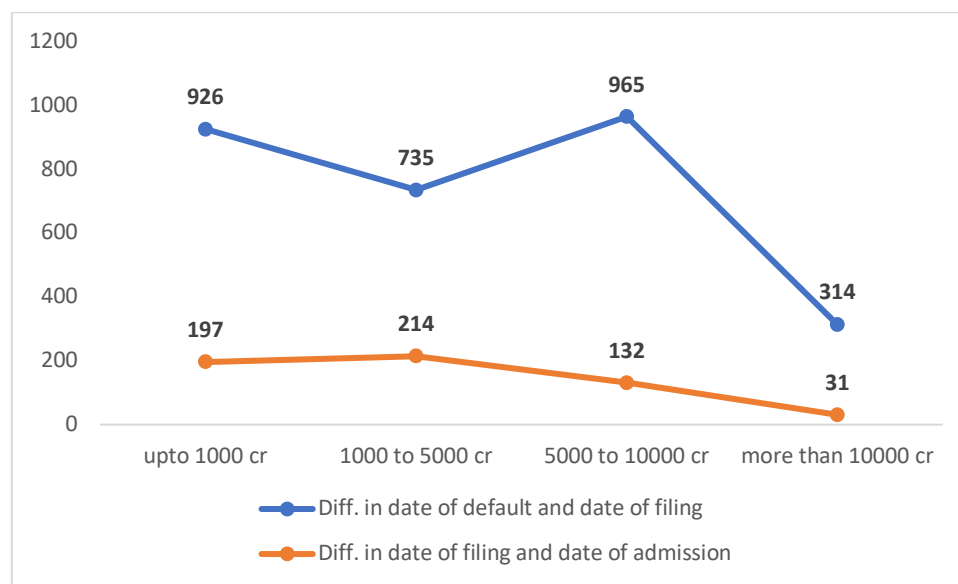
Fig 2: Delay in filing CIRP application (from date of default)

On comparison of date of filing with date of admission of CIRP application by the AA, it is found that there is an average delay of 180 days in admitting an application in contrast to the mandate of 14 days provided under the Code (Fig.3).

Fig 3: Delay in admission of CIRP application (from date of filing)

To further categorise the delays, the dataset has been bifurcated into slabs as per admitted claims of the distressed CDs and thereafter the delays in filing and admission of CIRP applications have been ascertained. Fig.4 shows that there is significant difference between the filing and admission delays of companies having admitted claims of upto Rs.1000 crore and companies having admitted claims of more than Rs.10000 crore. This implies that the creditors are more driven to resolve the large ticket cases as quickly as possible.

Fig 4: Delay in filing and admission of CIRP application (as per admitted claims)



The next step is to calculate the value erosion which the distressed corporate has undergone during the period from the date of default till date of admission. To determine the value erosion, the financial data of the resolved entities such as total income from operations, total expenses and net worth is fetched from the analysis and screening tools available in public domain. Majorly two websites are considered for this purpose i.e., Money control and Stock screener.

The financial data at three points in time is considered – a) at the time of default, b) at the time of filing CIRP application, and c) at the time of CIRP admission. Since the listed entities are mandatorily required to submit the financials on quarterly basis to the stock exchange, the financial data at three points in time, as mentioned above, is taken for the closest quarter. However, for ascertaining the net worth of the company, the data of closest year end is considered.

The complete financial data with respect to income from operations and expenses was available

only in respect of 71 entities out of total 91 cases under consideration which shows that around 22% of the financially stressed entities are non-compliant in terms of filing of financial results. Out of 71 cases, the total income from operations has increased in 15 cases during the period from date of default till date of filing CIRP application. Such cases hereafter shall be referred to as 'performing entities', and others shall be referred to as 'non-performing entities' (where total income from operations has decreased during the same period).

Fig.5 presents the change in financial position of performing entities from the date of default till date of filing CIRP application. On an average, the total income from operations has increased by 240%, total expenses have increased by 393% whereas the net worth has reduced by 128%. Increase in expenses at a pace greater than the pace of increase in income may possibly indicate the avoidance transactions (diversion of funds) on the part of promoters/suspended management of the CDs.

Fig 5: Change in financial position of performing entities
(from date of default till date of filing CIRP application)

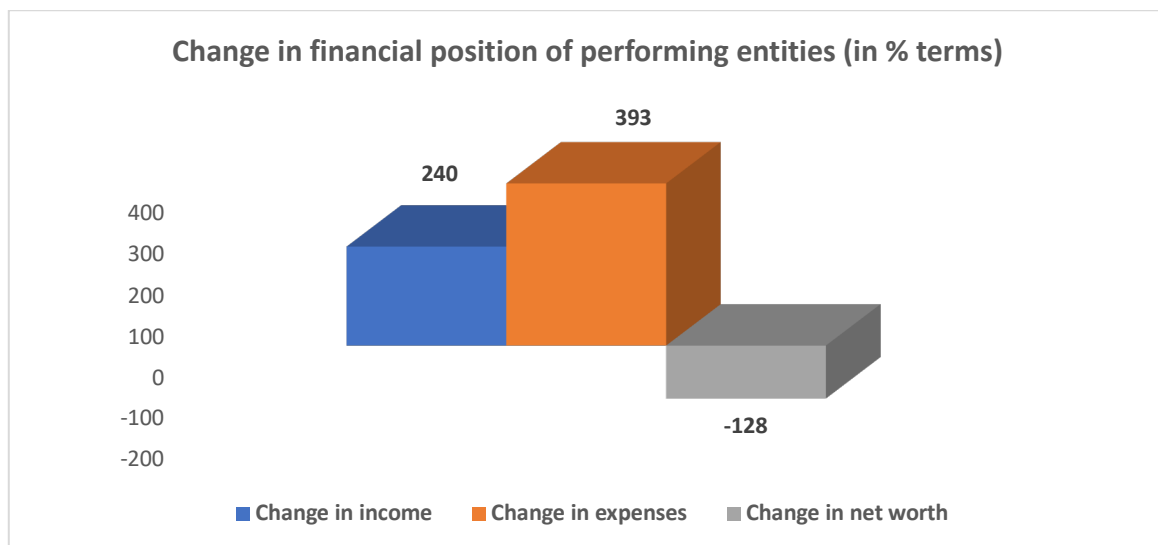


Fig.6 presents the change in financial position of performing entities from the date of filing CIRP application till date of admission. On an average, the total income from operations has reduced by 33%, total expenses have reduced by 24% whereas the net worth has reduced by 26%.

Fig 6: Change in financial position of performing entities
(from date of filing CIRP application till date of admission)

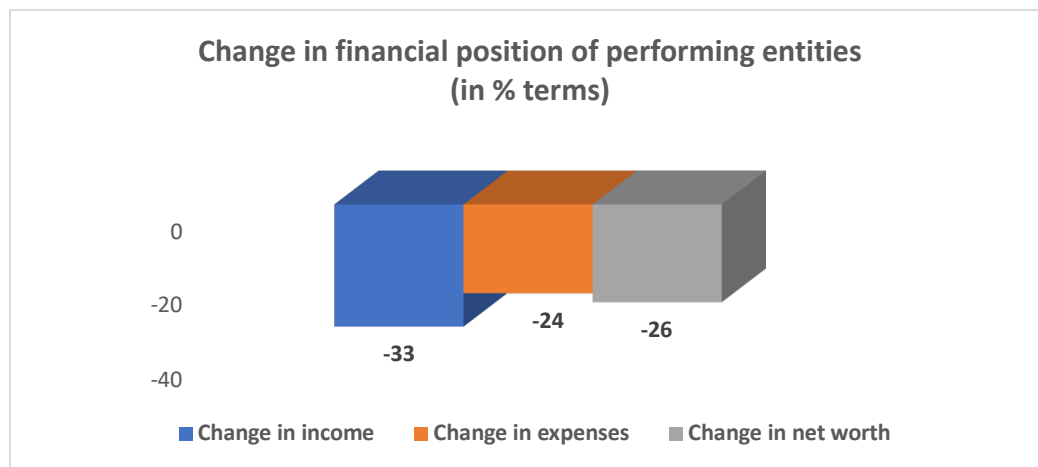
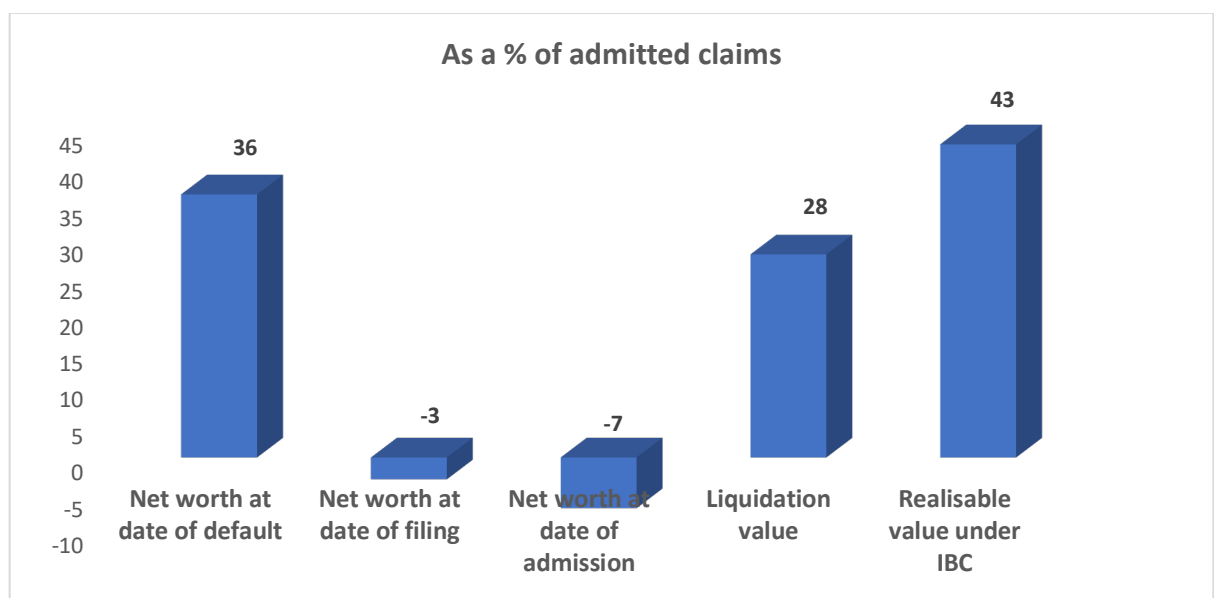


Fig 7 shows a comparison of average net worth of the performing entities at different points in time with the liquidation value determined during the CIRP period and realisable value approved under the Code. While the net worth of the performing entities has completely eroded, when measured as a % of admitted claims, as on date of admission, the Code has successfully resolved the said entities with an average realisable value of 43%.

Fig 7: Comparison of value of performing entities at different stages



Out of 71 cases, the non-performing entities are 56. Fig.8 presents the change in financial position of non-performing entities from the date of default till date of filing CIRP application.

On an average, the total income from operations has reduced by 45%, total expenses have reduced by 34% whereas the net worth has reduced by 116%.

Fig 8: Change in financial position of non-performing entities
(from date of default till date of filing CIRP application)

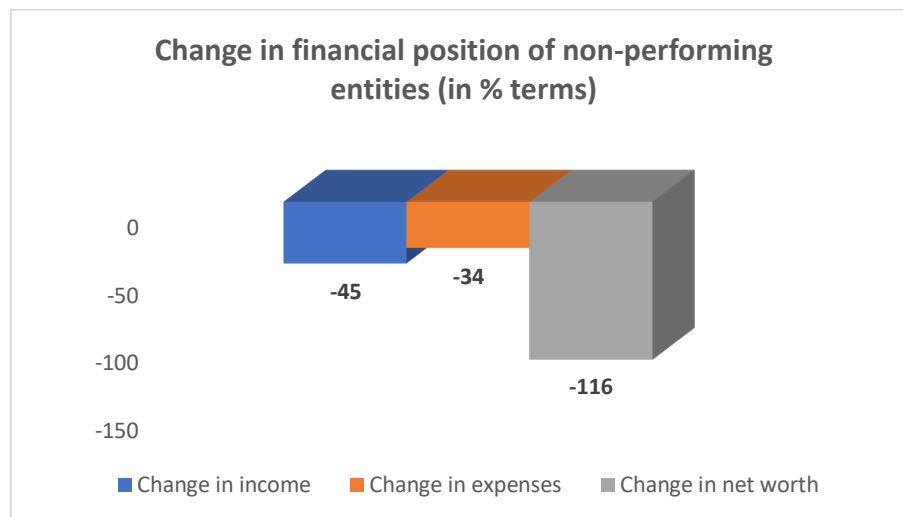


Fig.9 presents the change in financial position of non-performing entities from the date of filing CIRP application till date of admission. On an average, the total income from operations has increased by 1%, total expenses have increased by 62% whereas the net worth has increased by 161%.

Fig 9: Change in financial position of non-performing entities
(from date of filing CIRP application till date of admission)

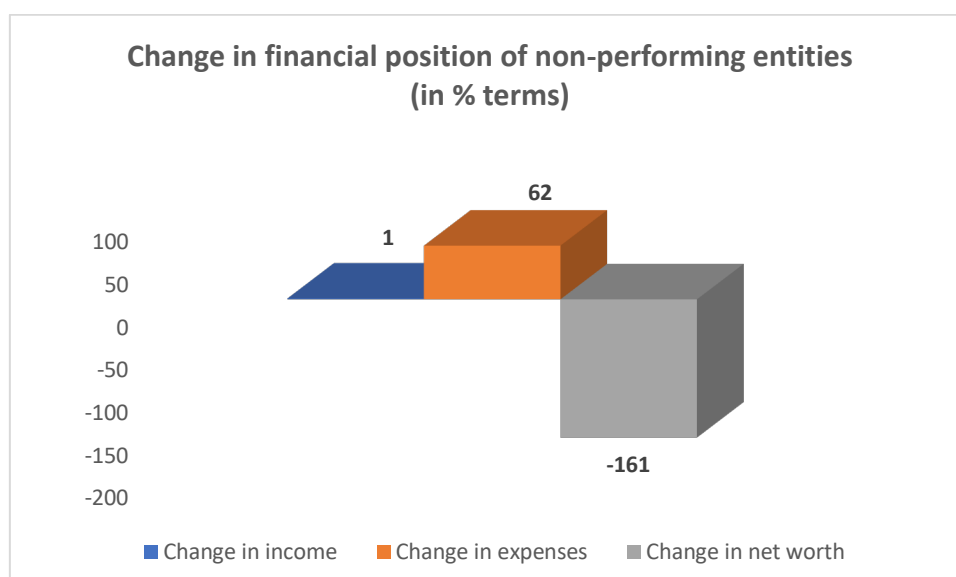
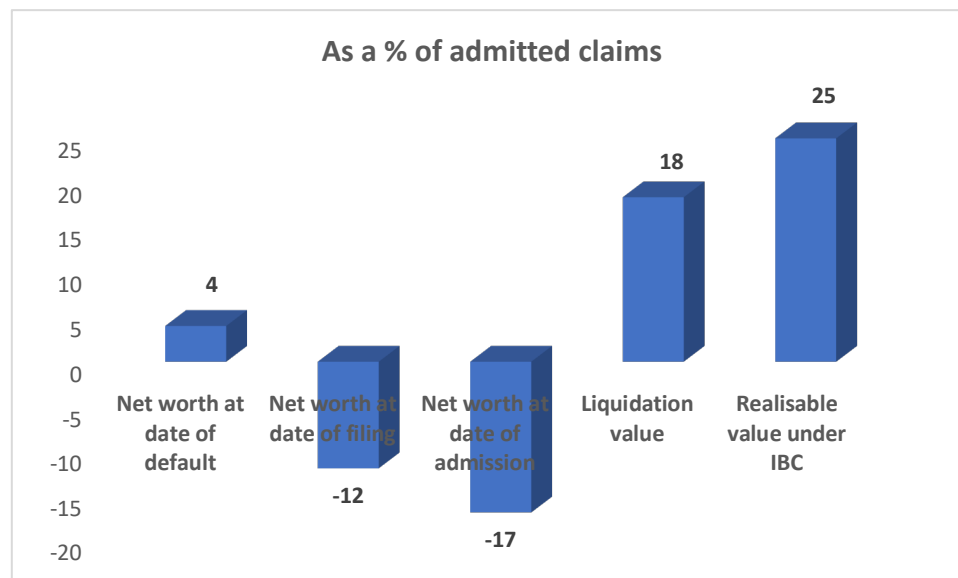


Fig. 10 shows a comparison of average net worth of the non-performing entities at different points in time with the liquidation value determined during the CIRP period and realisable value approved under the Code. While the net worth of the non-performing entities has completely eroded, when measured as a % of admitted claims, as on date of admission, the Code has successfully resolved the said entities with an average realisable value of 25%.

Fig 10: Comparison of value of non-performing entities at different stages



KEY OBSERVATIONS AND RECOMMENDATIONS

The Hon'ble Supreme Court in the matter of *Innoventive Industries Ltd. v. ICICI Bank*¹⁰ referred to the Report of the Bankruptcy Law Reforms Committee (November, 2015) and observed:

16. At this stage, it is important to set out the important paragraphs contained in the Report of the Bankruptcy Law Reforms Committee of November 2015, as these excerpts give us a good insight into why the Code was enacted and the purpose for which it was enacted:

“...India is one of the youngest republics in the world, with a high concentration of the most dynamic entrepreneurs. Yet these game changers and growth drivers are crippled

¹⁰ Civil Appeal Nos.8337-8338 of 2017.

by an environment that takes some of the longest times and highest costs by world standards to resolve any problems that arise while repaying dues on debt.

.the recovery rates obtained in India are among the lowest in the world. When default takes place, broadly speaking, lenders seem to recover 20% of the value of debt, on an NPV basis. When creditors know that they have weak rights resulting in a low recovery rate, they are averse to lend....

The recently enacted IBC was designed, *inter alia*, to facilitate the assessment of viability of an enterprise at a very early stage, and to ensure a time bound insolvency resolution process to preserve the economic value of the distressed enterprise.

The Code provides a timeline of 14 days for admission or rejection of an application for initiating insolvency proceedings. On the contrary, the data as of September, 2022 shows that 12918 applications for initiation of CIRP are pending for disposal at the level of AA. Out of this, 6202 cases are pending for more than 180 days. The Standing Committee on Finance in its 32nd Report on 'Implementation of Insolvency and Bankruptcy Code – Pitfalls and Solutions' noted that one of the main reasons for delay in the insolvency resolution process is delay in admission of cases in NCLT. It further noted that resolution period delays result in rapid value erosion, thereby reducing the realisation value.

However, apart from the delays at admission stage, one also needs to look at the delays that happen at pre-CIRP stage i.e., delay in filing the application. The data analysis in this article shows that there is a significant time gap between the date, an account becomes non-performing in the books of banks/financial institutions and the date when an application for initiating the CIRP is filed by the creditor. A creditor generally tries every possible formal and informal means to recover the dues before initiating the CIRP and a valuable time is lost in this exercise.

In view of the aforesaid analysis, the following are some of the suggestions for preventing delays in resolving distressed entities under IBC:

The Shift from 'Repeated Recovery' to Rescue-Resolution Model

One of the foremost ways in which delay induced value erosion can be minimized is by minimizing the delays itself. Whenever there is a default, the first instinct or protocol should

obviously be towards negotiating and restructuring the debt in default,¹¹ since initiation of insolvency is a drastic step that affects not just the promoters who are shoehorned out of the company but its creditors as-well who are embroiled in the protracted litigation and resolution process.

Due to the judicial delays involved, lenders in India find it more viable to opt-for recovery and repayment plans through OTS proposal etc., than to go through a resolution procedure. It is undeniable that repeated recovery deals often leave the lenders with poor haircuts. While the Code has enabled the trigger of insolvency against a company merely on default test (of prescribed threshold) and not necessarily when the company is balance sheet insolvent, still a change in mindset also needs to be brought about whereby lenders feel not just comfortable but also confident about going with a formal insolvency resolution process. A stronger backing by the insolvency regime not only means that lenders would be willing to prefer resolution but it also entails better out of court recovery and restructuring deals, as debtors would be more desirous to honor them for fear of them losing out their company to the insolvency process. Creditors need to shed away their urge to repeatedly revise recovery arrangements with debtors, and rather should instead immediately move towards initiating CIRP as soon as their initial restructuring arrangement either fails or where they are unlikely to even pan-out.

Assessment of Viability and Information Symmetry

Another aspect that is worthwhile to explore for reducing delays is by harnessing and expanding the usage of Information Utilities (IUs). IUs essentially are electronic databases that store the financial information of a debtor, information relating to debt availed, default occurred etc. At present the IUs only play a key-role during the stage of admission of an application / petition for initiating CIRP.¹² The role of IUs can also potentially be expanded towards enabling a better assessment of the viability of the CDs.

As soon as a certain threshold of default is recorded in the IU (be it admitted or disputed default), the IUs should periodically provide key financial information of the CD to the creditors so that they can continually and constantly keep assessing the viability of the company. This would provide the creditors with a better picture about the company while

¹¹ Ajay Shah, *Need restructuring, not bankruptcy*, Business Standard, Oct. 4, 2020.

¹² Veena Sivarmakrishna, *Insolvency: What is important about 'information utilities'*, The Hindu Business Line, Sept. 25, 2022.

taking decisions as regards whether it is feasible to defer CIRP and revise repayment plans with the debtor, or to pursue insolvency resolution process.

Applicability of a single resolution framework and alternative recourses to be time bound

As mentioned earlier, the RBI prudential norms mandate the lenders to explore and implement a resolution plan for stressed assets, if feasible, within a period of 180 days from the end of review period which is generally 30 days from the date of default. This itself creates a lag of 210 days in filing the application under the Code, which further give the errant promoters/management, one more opportunity to divert the valuable reserves of the CD.

It has been often said that a comprehensive law like the IBC should be often viewed as a last resort by the lenders – an avenue that needs to be explored after exhausting all alternatives. However, without participation of all stakeholders, any effort towards resolution is likely to be incomplete and would be a mere postponement of the inevitable liquidation. In the present scenario, IBC is the only law that balance the interest of all the stakeholders. Therefore, any framework, other than IBC, adopted by the financial institution after default should be strictly time-bound as the time lost in pursuing such incomplete resolutions is likely to result in asset erosion that may compound the eventual losses to the creditors and costs to the financial system. The merger of resolution framework specified by the RBI and that given under IBC is worth exploring. Further, a maximum time-limit (to be counted from date of default) may be provided for banks and financial institutions to file CIRP application under IBC.

Provision for Mediation and Pre-Packaged Insolvency Resolution

At present, there is no streamlined process for how settlement of defaults take place, how repayment plans are drawn and who all would partake in it. Whenever a default occurs it is the prerogative of the lender and the borrower to consider entering negotiations; and as aforementioned, in India lenders are more willing to negotiate rather than insolvency resolution. Due to absence of any proper procedure, negotiations and restructuring arrangements turn into a law-less frontier where debtors resort to legal stratagem to frustrate the negotiations and force lenders to settle with huge write-offs.¹³ If a formal mediation process

¹³ Manojit Sinha, *Banks have written off double the amount recovered in last 5 yrs: RBI data*, Business Standard, Jan. 7, 2022.

is formulated under the Code that would be party oriented as-well as confidential, then much of the frustration could be avoided.¹⁴

Another way for improving settlements is through increasing use of pre-packaged insolvency resolution process (PPIRP). Under PPIRP, the promoters of the CD are not thrown out, rather they continue in the CD and occupy a key-integral role in drawing out a resolution plan.¹⁵ As the process does not involve the promoters losing control of their business, they are much more palpable and cooperative in trying to resolve the default and that too at a faster pace.

CONCLUSION

The present study while noting a gap of 824 days on an average between the date of default and date of filing CIRP application (though significantly reduced for defaults occurring post IBC-era), also observed that the net worth of the distressed CDs had completely eroded as on date of admission of the case under IBC. On comparing the net worth of the listed distressed CDs (resolved under IBC) with the realisations under the Code, it has been found that IBC has achieved a commendable recovery of claims (43% for the performing entities and 25% for the non-performing entities), even when there were negligible assets on ground.

Hence, the present study supplements the finding of the RBI that the longer bad loans remain on banks' balance sheets, the lower is the amount banks succeed in recovering which implies that reduction in the gap between NPA identification and CIRP commencement may have a pronounced effect on ultimate recovery.

¹⁴ Ashok Haldia, *Let's promote mediation as a way to resolve IBC delays*, Live Mint, June 24, 2022.

¹⁵ Karunjit Singh, *Explained: How resolution 'pre-packs' for MSMEs can speed up insolvency cases*, The Indian Express, July 29, 2021.