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## **Impact of Insolvency and Bankruptcy Code, 2016 on Mergers and Acquisitions in India: Pre-pandemic to Post-pandemic era**

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### **Abstract**

With the growing percentage of distressed assets in the economy, M&A deals targeted towards distressed assets, in order to revive them, have been increasing over the past two decades. Distressed assets act as attractive investment options as it gives entities a chance to buy assets which merely require changes in their management and financial maintenance, at reasonable prices. The introduction of Insolvency and Bankruptcy Code (IBC) in 2016 definitely was a positive move towards providing an effective and consolidated way for the resolution of distressed assets in a time-bound manner, as before that, the finalization of an M&A deal used to take a long time and sometimes even fail before it could be resolved. The success rate and the efficacy of the initial M&A deals done under the ambit of IBC, has attracted various domestic as well as international investors to invest in distressed Indian companies. With Covid 19 coming into the picture, there has been a substantial increase in distressed assets in the market which would have naturally led to more entities coming under the purview of IBC. The Government however, has temporarily suspended the functionality of Sections 7, 8 and 10 of IBC for 6 months leaving very few, less effective options for resolution of distressed assets. The researchers in the present paper would be analyzing the positive impact that the enactment of IBC has made on M&A deals in India elaborating on the process of M&A through the route of IBC, discussing the market trends and doing a case analysis of two M&A deals, the acquisition of Bhushan steel by Tata steel and the acquisition of Essar Steel by ArcelorMittal. The researchers would also be throwing light on the impact of suspension of specific sections of IBC due to Covid-19, on distressed M&A deals in India.

**Keywords- *Mergers, Acquisitions, Trends, Insolvency, Covid***

### **Introduction**

Mergers and Acquisitions (M&A) of distressed assets in India under the provisions of the Companies Act, 2013 are brought in effect to revive the potential of sick companies by merging them with other profit-making entities and consequently to either liquidate them or demerge a particular undertaking of the company in to the other company. Distressed asset M&A deals are different from general M&A deals as here the seller is forced to sell due to financial distress and

due to this reason, it requires focused time bound due diligence. Given the rapidly increasing number of distressed assets in India, the regulatory framework governing the same is very dynamic and has undergone a huge overhaul over the years. With the introduction of new rules and regulations, novel tools have been provided with the objective of constructing an inclusive approach for effective, efficient and timely resolution of distressed assets. The introduction of Insolvency and Bankruptcy Code (IBC) in 2016 has intensified movement in distressed mergers and acquisitions. IBC came into existence, amongst other things, with the aim to have a consolidated and amended law with respect to restructuring (which includes mergers, demergers, and acquisitions) and resolution of insolvency proceedings pertaining to corporate debtors, partnership firms and individuals in a timely manner with the objective of maximizing the value of the distressed assets of the entities and to balance the welfare of every stakeholder. While the ratio with respect to successful resolution in comparison to liquidation may not be encouraging, there has been an increase in activities in the distressed M&A sector with a lot of investors sensing an opportunity for acquisition of some good assets. Over the last four years, IBC has produced a formal market for distressed assets in India changing the mindset of people that investing in distressed assets is a tedious and time-consuming process through providing a better and effective process which overcame the problems which existed before. In the light of the Covid-19 pandemic though, and the fact that India is one of the worst affected countries, business and market in India have definitely been disrupted. With the Government temporarily suspending the functionality of Sections 7, 8 and 10 of IBC for 6 months, any entity in distress would not be able to access resolution through IBC which would leave both creditors and the impugned entity to resort to less effective routes. The researchers in the present research paper would be analyzing and focusing on the positive impact that the enactment of IBC has made on M&A deals in India elaborating on the process of implementation of mergers and acquisitions through the route of IBC and discussing the market trends with respect to the same finally doing case analysis of two M&A deals, the acquisition of Bhushan steel by Tata steel and the acquisition of Essar Steel by ArcelorMittal, which took the IBC route.

### **Materials and Methods**

The research methodology used is a combination of doctrinal and analytical methods. The researchers have collected information data from books, journals, websites, newspapers, reports, articles and / or other relevant sources of data. Specific case studies relevant to the topic have also been done by researchers to analyse the impact of IBC on M&A transactions

### **Data Analysis**

#### **Trends of Mergers and Acquisitions in India: Post IBC**

IBC came in the year 2016 and since then the distressed M&A deals have been increasing. The distressed M&A is defined as any transaction involving sale of a company directly in distress or

where the transaction was carried out where the parent group/company was in distress.<sup>1</sup> IBC helps the financially strong and healthy entities to have inorganic growth opportunities at very affordable prices; however the promoters acquiring such assets needs to ensure that the liabilities are bare minimum. IBC has resolved the problems both for the banks as well as the companies as the defaulting promoters are bringing in capital in order to avoid bankruptcy. The Reserve Bank of India also allows the distressed assets lenders to change the control to raise their money which is changing the psychology of the corporate sector to get out of the noncore assets to work with manageable debt.<sup>2</sup>

### **Process under IBC**

Under IBC, when a company defaults on a loan, financial creditors, operational creditors, as well as the company itself can file for initiation of insolvency proceedings to the National Company Law Tribunal (NCLT). The corporate insolvency resolution process (CIRP) commences from the date of application admitted by NCLT. This procedure is a time-bound procedure of 180 days and it may be extended only up to a period of further ninety days. After the 2019 Amendment, a total of 330 days are provided to finish the entire process.<sup>3</sup>

The Commencement of CIRP leads to passing of the moratorium till the completion of CIRP or till the resolution plan gets approved or till the liquidation order gets passed. The appointment of an interim resolution professional (IRP) is done by NCLT which sends out notice for the creditors to come and form the Committee of Creditors (COC). The COC encompasses financial creditors other than related parties. They appoint the Resolution Professional (RP) by a majority vote of not less than 66% of the voting of all the financial creditors at their first meeting. From the appointment date of the IRP, the functionality of board of directors is suspended and affairs of the corporate debtor are vested with the IRP. The IRP/RP needs to preserve and protect the worth of the assets and control the operations of the distressed company as a going concern. They basically step into the shoes of the corporate debtor. All their actions are approved by COC with 66% of voting shares approval. Then RP calls for the bids and any applicant (fulfilling the criteria laid down by the COC) can submit a resolution plan to purchase the distressed assets of the corporate debtor.<sup>4</sup> However if no plans are received then they need to go for liquidation.

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<sup>1</sup> Press Trust of India, 'More Distressed M&A Deals in Pipeline: Report' *Business Today* (New Delhi, 31 October 2018) <https://www.businesstoday.in/pti-feed/more-distressed-manda-deals-in-pipelinerreport/story/287247.html>.

<sup>2</sup> Abhineet Kumar, 'Bankruptcy will dictate M&A trend in 2018' *Business Standard* (Mumbai, 1 January 2018) [https://www.business-standard.com/article/companies/bankruptcy-will-dictate-m-a-trend-in-2018-118010100966\\_1.html](https://www.business-standard.com/article/companies/bankruptcy-will-dictate-m-a-trend-in-2018-118010100966_1.html).

<sup>3</sup> Lakshmikumar & Sridharan, 'Timelines for Corporate Insolvency Resolution Process – The 2019 Amendments & their Ambiguities' (*Lexology*, 19 August 2019) <https://www.lexology.com/library/detail.aspx?g=56506797-70d0-4669-8a8b-183980bab030>.

<sup>4</sup> Adity Chaudhry, 'Distressed M&A under IBC' (*Argus Partners*, 3 July 2018) <http://www.argus-p.com/papers-publications/thought-paper/distressed-ma-under-ibc/>.

Like, Lanco Infratech and ABG Shipyard has gone for liquidation which could have been deals worth \$ 10 billion.

The resolution applicant submits the plan after thorough Due Diligence (DD). A proper DD as it is done for a standard M&A needs to be undertaken to figure out whether the distressed company is worth acquiring or not. It helps to identify that whether the distressed asset has only business risk or has risk of fraud also. The acquirer should be fully aware of the real position of the company. This acquisition is similar to any other M&A transaction because the acquirer tries to maximize the value. Thus, the procedure used is IBC however the outcome is an M&A deal. As soon as the resolution plan gets the approval of the COC and the NCLT finally approves the deal, it comes into effect. The costs and debts have to be paid as per the plan approved.

### **Trends and Statistics**

IBC came in May 28, 2016 and since then till June 2019, admitted cases under IBC are around 2,162. Out of this 1292 cases are still outstanding. In the years 2018 and 2019 more than 12 cases have closed with an aggregate value exceeding 10 USD Billion.<sup>5</sup>

The major distressed M&A deals through IBC in the year 2017 and 2018 were Jaypee Cement acquisition by Ultratech Cements (Rs. 16000 crore worth deal) Reliance Communications acquisition by Reliance Jio (\$ 3.7 bn) Fortis Healthcares acquisition by IHH Healthcare (\$ 1.2 bn). In 2018, the 4 major deals were Bhushan Steels acquisition by Tata Steel (\$ 7.4 bn); Binani Cements acquisition by Ultra Tech (\$ 1.1 bn); Electrosteel Steels acquisition by Vedanta (\$ 0.8 bn); Monnet Ispat & Energys acquisition by JSW Steel and AION Capital Partners (\$ 0.4 bn). These deals were worth \$14.3 billion i.e., 12% of total number of deals between the years 2016-18 of which close to \$ 10 billion was closed in 2018 itself.

In 2019, the major deals were Bhushan Power Steel's acquisition by JSW (\$ 2.7 bn); Essar Steels acquisition by Arcelor Mittal (\$ 6.0 bn); Jyoti Structures acquisition by Group of HNIs headed by Sharad Singh (\$ 1 bn); Alok Industries acquisition by RIL and JM financial ARVC (\$ 4 bn).

The Resolution process is being undertaken for Jaypee Infratech, Era Infra Engineering, Amtek Auto, however acquirers are yet to be finalised for these distressed companies, the process is ongoing and these deals are worth \$ 4 billion.<sup>6</sup> Thus, between 2016 and April 2019, there have been 7 large scaled stressed acquisitions totalling \$23 billion.<sup>7</sup>

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<sup>5</sup> CII, 'India's M&A and Distressed Opportunity Landscape' (*Corporate Finance and Restructuring*, September 2019) [https://www.alvarezandmarsal.com/sites/default/files/am\\_cii\\_report\\_2019.pdf](https://www.alvarezandmarsal.com/sites/default/files/am_cii_report_2019.pdf).

<sup>6</sup> Sanjeev Krishnan & Sue Ellen Pereira, 'Deals in India: Annual Review and Outlook for 2020' (*PWC*, December 2019) <https://www.pwc.in/assets/pdfs/services/deals/deals-in-india-annual-review-and-outlook-for-2020.pdf>.

<sup>7</sup> Ridhima Saxena, 'Distressed asset acquisitions, consolidation behind large M&A transactions' *Live Mint* (Mumbai, 26 September 2019)

<https://www.livemint.com/companies/news/distressed-deals-consolidation-driving-large-m-a-deals-in-india-bain-co->

However, the distressed M&A deals have been only 3% i.e. twenty-one out of a totality of six hundred and twenty-three deals completed, since 2017. These are subject to increase, with the increase in cases for resolution under IBC. So, this shows a direct proportion. The number of cases being referred for IBC increases; it will in turn lead to increase in distressed M & A deals.

Till 2017, out of the total investors in the distressed deals, 90% of stressed transaction value and 81% of deal volume were Indian investors. A major chunk of these investments came from steel sector because there is lot of uncertainty in completion timeline of these projects, so domestic acquirers showed strong interest.<sup>8</sup> The largest one of these deals has been of Bhushan steel, worth \$ 7.8 billion in assets. It accounts for half of the distressed asset values and 14% of distressed asset volumes.<sup>9</sup> The other two were acquisition of Electrosteel Steels by Vedanta, worth \$ 274 million and Jindal Stainless worth \$132 million.<sup>10</sup> Arcelor Mittal acquiring the debt-laden Essar Steel is a landmark M&A deal through distress sale not only in the steel sector but in the entire M&A sector. These deals have helped the lenders to recover their dues and at the same time helped the shareholders to create value for their shares by increasing the market capital. The Fortis Healthcare deal, which is a Malaysian based IHH Healthcare's acquisition of Fortis, has also been a notable foreign investor transaction. After the steel sector, pharmaceutical, real estate and cement sectors can witness many distress M&A transactions in the future.

The Bain & Company published M&A Report 2019 in collaboration with Confederation of Indian Industry (CII) where they stated that in the year 2018 the M&A activities have grown by 70% due to distressed deals through CIRP.<sup>11</sup>

These deals show that IBC has positively impacted the M & A in India as it has given a way out for distressed assets investment which earlier was considered as time consuming by the investors. There have been two-thirds of direct distress M&A deals i.e. where the asset itself is distressed; only one-third were indirect transactions (selling of the asset because its parent organisation is distressed).<sup>12</sup> This is because IBC has governments and judicial support to make it efficient and effective.

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1569482593936.html.

<sup>8</sup> Swaraj Singh Dhanjal, 'IBC Impact: M&A deal worth \$14.3 billion signed in 2 years' *Live Mint* (Mumbai, 29 October 2018) <https://www.livemint.com/Companies/c17rNOIV4h5i1zTnlUfEVN/IBC-impact-MA-deals-worth-143-billion-signed-in-2-years.html>.

<sup>9</sup> M&A Critique, 'IBC Triggers M&A deals for distressed assets' (*M & A Critique*, December 2018) <https://mnacritique.mergersindia.com/insolvency-bankruptcy-code-drives-mergers-acquisitions/>.

<sup>10</sup> *ibid.*

<sup>11</sup> Dinkar Ayilavarapu & Vikram Chandrashekhar, 'India M&A Report 2019' (*Bain & Company*, September 2019) [https://www.bain.com/globalassets/noindex/2019/bain\\_report\\_india\\_m\\_a\\_report\\_2019.pdf](https://www.bain.com/globalassets/noindex/2019/bain_report_india_m_a_report_2019.pdf).

<sup>12</sup> FE Online, 'IBC Boost: How India's distressed merger and acquisition market gained from bankruptcy law' *Financial Express Online* (01 November 2018)

There are advantages and disadvantages of acquiring these assets through IBC. The biggest challenge that arises in the due diligence of the stressed assets is getting all the information but it is sometimes even more difficult to get the whole access as the RP is himself struggling to manage the business. This is because the promoters of these distressed companies are generally removed by the time resolution process starts and they no longer stay co-operative. So, this lack of information may lead to overestimation of the ability of the asset and in turn over payment. Then the other issue that arises is of the lack of consensus among different classes of creditors, due to which it takes a lot of time to get the resolution plan approved.<sup>13</sup>

In case of acquisitions through IBC, these investors don't have to face the litigations arising from the past liabilities of the debt laden companies. It is important to provide the investor the company with a clean state and an assumption of the mindset of a non-hostile M&A process cannot be made.<sup>14</sup> In the case of JSW Steel Ltd. acquiring Bhushan Power & Steel Ltd. in a \$2.7 billion, Bhushan power was struggling with accounting frauds still NCLT while approving the resolution plan of JSW Steel declined to provide immunity to new structure of Bhushan Power formed after insolvency, from the on-going criminal proceedings. However, the case should be that from the date the resolution plan gets approved, the previous liabilities no longer play any role.<sup>15</sup>

Thus, we can conclude that as stressed assets are increasing in multiple sectors, they will have to come for time-bound resolution or liquidation under IBC. This will help the banks and the other financial creditors against the loan defaulting companies and debtors as the corporate assets of these defaulters will be available for acquisition. Acquisition will help to save the company and keep it a going concern; this in turn will have a good impact on the Indian Economy. Thus, more and more M&A deals will take place as the resolution process under IBC increases. The law makers are trying to make the process more effective and efficient so that the restructuring can take place with ease.

## **Case Studies**

### **Acquisition of Bhushan Steel by Tata Steel**

Tata Steel acquired 72.65% controlling stake in Bhushan Steel (BSL). It acquired BSL indirectly through its wholly owned subsidiary Bannipal Steel Ltd (BNPL) and renamed it Tata Steel

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<https://www.financialexpress.com/industry/ibc-boost-how-indias-distressed-merger-and-acquisition-market-received-gained-from-bankruptcy-law/1368756/>.

<sup>13</sup> Roundtable- Mergers & Acquisitions, 'Distressed M&A' (*Financier World Wide Magazine*, December 2019) <https://www.financierworldwide.com/roundtable-distressed-ma-nov19#.XnultogzbIV>.

<sup>14</sup> Ankur Singhania, 'Mergers and Acquisitions Trend in 2019 and Outlook for 2020' (*Inc 42*, 01 January 2020) <https://inc42.com/resources/an-overview-of-mergers-and-acquisitions-in-india/>.

<sup>15</sup> Ridhima Saxena, 'Buyer under IBC should get clean asset as due diligence tough: Tata Steel CFO' *Live Mint* (Mumbai, 26 September 2019) <https://www.livemint.com/companies/news/buyer-under-ibc-should-get-clean-asset-as-due-diligence-tough-tata-steel-cfo-1569491435362.html>.

BMSL Ltd.<sup>16</sup> This was one of the 12 distressed assets that RBI had referred to the NCLT and TATA Steel being the highest and sole resolution applicant led to it becoming the first landmark deal of distressed M&A through IBC. Tata Steel acquired BSL after paying the dues of Rs. 35,200 crores to the financial creditors of BSL, Rs. 1200 crore to the operational creditor. It also paid the corporate insolvency costs and the employee dues as per IBC's waterfall mechanism.<sup>17</sup>

The investment in BSL was done through Rs. 158.89 crore equity and inter-corporate loan of Rs. 34,973.69 crore. The acquisition was financed through a loan of Rs. 16,500 crores availed by BNPL and equity infusion of Rs. 18,700 crores from Tata Steel in BNPL. The nominees of BNPL were appointed on the board of BSL and earlier directors of BSL resigned from the board according to the resolution plan. As per the NCLT's resolution approval plan the BNPL shall be classified as the "promoter" of BSL and the existing promoter group re-classified as public shareholders of BSL.<sup>18</sup>

Prior to acquisition, the Vice-Chairman and Managing Director of BSL had gone to NCLAT to seek a stay on the takeover by Tata Steel as he wanted to avert his equity from being transferred. The old promoter group which included the Managing director owned 43.9% of the equity in publicly-listed BSL. Thus, he had a high stake in the company. There were more litigations from L & T (BSL's operational creditor) and BSL's employees against Tata Steel. There was another claim by the Department of Forest and Environment, Government of Jharkhand against Tata Steel that a part of the land mentioned in the resolution plan did not belong to Bhushan steel.<sup>19</sup> Due to all this, Tata Steel had to file a caveat and ask the court to not pass an order without hearing the company. However, ultimately NCLT had dismissed all the cases and approved the takeover of BSL.

However, Department of Forest and Environment went in appeal to the NCLAT. So in case of acquisition the NCLAT stated that, "if the title of land is defective, it cannot be cured upon taking over the assets of the Corporate Debtor by the Resolution Applicants".<sup>20</sup> Thus, it was held that the remedy to the Government to take their land back does not depend upon the approval of the resolution plan.

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<sup>16</sup> Pritam Sangwan, 'Tata Steel acquires Bhushan through IBC Route' (*M & A Critique*, June 2019) <https://mnacritique.mergersindia.com/tata-steel-acquires-bhushan-through-ibc-route/>.

<sup>17</sup> Nishith Desai Associates, 'Analysing 2018 through the lens of the Insolvency Code' (*Mondaq*, 12 February 2019) <https://www.mondaq.com/india/insolvencybankruptcy/779908/analysing-2018-through-the-lens-of-the-insolvency-code>.

<sup>18</sup> Tanya Thomas, 'Tata Steel buys Bhushan Steel, to settle dues of Rs.35,200 crore' *Live Mint (Mumbai)*, 18 May 2018) <https://www.livemint.com/Companies/zQJ1nAQuZndCvPo0baMCeO/Tata-Steel-unit-completes-acquisition-of-Bhushan-Steel.html>.

<sup>19</sup> *ibid.*

<sup>20</sup> Press Trust of India, 'NCLAT upholds Bhushan Steel sale to Tata Steel, rejects issues over its ineligibility' *Economic Times* (10 August 2018) <https://economictimes.indiatimes.com/industry/indl-goods/svs/steel/nclat-upholds-bhushan-steel-sale-to-tata-steel-rejects-issues-over-its-ineligibility/articleshow/65356129.cms?from=mdr>.

The positive impact of sale of distress asset through IBC under this M&A deal was that due to CIRP, the material and industrious assets of Bhushan Steel were protected and every stakeholder counting the employees too, kept perks of being fully employed. Its merger with Tata Steel gave a huge opportunity to the shareholders and other interested parties to come under the preview of the largest steel manufacturer and to obtain their returns. Most importantly, the merger bought a ray of optimism to the banking sector who was drowning in NPAs, regarding the very real possibility of recovery of money via the IBC route. This was critical for the sector that was sitting on gross bad loans worth Rs. 9 lakh crore and a good chunk of wilful defaults. Also, there was profitable utilisation of assets of Bhushan Steel.<sup>21</sup>

Thus, the distressed M&A deal between Tata Steel and Bhushan Steel accelerated the operational synergies, reduced the regulatory burden and simplified the group structure. The procedure under IBC ensures that the risk which is being undertaken by the acquirer is less and no defective titles or risks of the target company are being acquired by the acquirer. In this case, the outcome was satisfactory and achievable for all the stakeholders.

#### **Acquisition of Essar Steel by Arcelormittal**

Essar Steel was included amongst the 1st list of the biggest twelve distressed accounts that the Reserve Bank of India had published in June 2017 asking the banks to submit it to the National Company Law Tribunal and thus consequently the company was officially referred to NCLT on June 27, 2017.<sup>22</sup> Essar Steel owed Rs 54,547 crores to its financial creditors and operational creditors. It was submitted under IBC to recuperate the unpaid dues.<sup>23</sup>

Thereby NCLT confirmed the appointment of a Resolution Professional who consequently invited resolution plans for rehabilitation of the corporate debtor in October 2017. After submission and rejections due to ineligibility under specific sections of IBC, of numerous applications by mainly ArcelorMittal, Vedanta and Numetal, ArcelorMittal was finally declared as the highest evaluated resolution applicant after it paid off its NPAs and its resolution plan got the approval of the CoC and consequently by NCLT in March, 2019 where it ordered the CoC to treat both the operational and financial creditors in a somewhat similar manner. This decision was upheld and elaborated upon by NCLAT in an appeal filed by the creditors before it stating,

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<sup>21</sup> *ibid* (n 16).

<sup>22</sup> ET Online, 'RBI Sent List Of 12 Stressed Account To Bankers; These Stocks Tanked Up To 20%' *Economic Times* (New Delhi, 18 June 2017) <https://economictimes.indiatimes.com/markets/stocks/news/rbi-sent-list-of-12-stressed-account-to-bankers-these-stocks-tanked-up-to-20/articleshow/59179378.cms?from=mdr>.

<sup>23</sup> ET Online, 'ET Explains: All About Essar Steel Case And The Latest Twist In The Tale' *Economic Times* (23 July 2019) <https://economictimes.indiatimes.com/news/et-explains/et-explains-all-about-essar-steel-case-and-the-latest-twist-in-the-tale/articleshow/70344568.cms?from=mdr>.

inter alia, that equitable treatment principle should be followed whether creditors are secured or unsecured, financial or operational.<sup>24</sup>

These judgments led to a short period of waiting time for ArcelorMittal to take control of Essar Steel. However, this decision was again appealed before the Supreme Court by the CoC which decided the Essar Steel Insolvency matter in favor of the CoC of Essar Steel. The Court, inter alia, stated that the adjudicating authority has, “limited judicial review and can in no circumstance trespass upon a business decision of the majority of the Committee of Creditors”. The Court also disagreed with the application of the equitable treatment principle for all creditors as was given by NCLAT. The Bench after referring to UNCITRAL Legislative Guide stated that “equitable treatment” is done only of “similarly situated creditors”.<sup>25</sup>

Relying on UNCITRAL Legislative Guide and BLRC 2015 Report, the Bench stated that if an “equality for all” method identifying the rights of all types of creditors who are involved in an insolvency resolution procedure is used, secured financial creditors would, a lot of times, treat that as an incentive to go for liquidation rather than resolution, since if the corporate debtor goes into liquidation rather than go through the resolution process, they might just have improved rights. Thus, the whole point of the commencement of IBC, i.e., to guarantee that resolution of stressed assets is done and an entity be liquidated only if that isn't possible, would be defeated<sup>26</sup>

ArcelorMittal in consequence of this decision, initiated payment to the creditors in December 2019. This will be the biggest recovery through the IBC route which at Rs 42,000 crore is the largest distressed-asset transaction to be done in the country. ArcelorMittal thus possesses sixty percent equity shareholding of AM/NS India, with Nippon Steel, its Japanese partner, holding the rest. Lakshmi Mittal, the CEO and Chairman of ArcelorMittal said while discussing the how strategically important this acquisition was for them that, “The transaction also demonstrates how India benefits from the Insolvency and Bankruptcy Code, a genuinely progressive reform whose positive impact will be felt widely across the Indian economy”.<sup>27</sup>

ArcelorMittal did not immediately pay off the lenders and kept the amount reserved in an Escrow Account because it had wanted protection for Essar Steel assets from any pending cases of their promoters, the Ruias, and because they did not want to end up in the situation Jindals were in after the Bhushan Power takeover.<sup>28</sup> However, a recent amendment to IBC provided

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<sup>24</sup> *Committee Of Creditors Of Essar Steel India Ltd. Through Authorized Signatory v. Satish Kumar Gupta And Ors.* 2019 SCC OnLine SC 1478.

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*

<sup>27</sup> M&A Critique, 'Arcelormittal, Nippon Steel Complete Acquisition Of Essar Steel' (*M&A Critique*, December 2019) <https://mnacritique.mergersindia.com/news/arcelormittal-nippon-steel-complete-acquisition-of-essar-steel/>.

<sup>28</sup> CBNC TV 18, 'Arcelormittal Repays Essar Steel Lenders, Rs 40,000 Crore Transferred To SBI' *CNBC TV 18* (18 December 2019)

<https://www.cnbc18.com/business/arcelormittal-repays-essar-steel-lenders-rs-40000-crore-transferred-to-sbi->

fencing to the entities whose bid was selected, from any criminal cases against offences committed by the previous management/promoters which thereby gave ArcelorMittal the path to move ahead with the payment process.<sup>29</sup> The whole of existing issued, subscribed and paid-up share capital (both equity and preference) of Essar stood cancelled and deleted with effect from December 16, 2019 giving the shattered investors of Essar Steel a fair settlement.<sup>30</sup>

While this case took well over 850 days for its culmination considering the somewhat wrong interpretations of sections of IBC given by NCLT and NCLAT, it paved the way for much more timely resolutions of such acquisitions as the Supreme Court laid down clear and precise interpretations of the sections. Essar Steel's financial creditors got a great deal at one of the biggest recovery rates in M&A deals in India through the process, as the bid value represents 85% of the Rupees 49,395 crore of their claims.<sup>31</sup> After the judgment by Supreme Court, M&A deals through IBC will take much less time. If the CoC is in favour of the resolution plan the adjudicating authority cannot trespass upon its decision. This clears out the road for easier implementation of M&A deals across the country. Further by stating that secured financial creditors will be given preference in payment of debts, the Court also made sure that none of them are motivated to vote against the resolution plan considering they would get the same, if not better, rights in case of liquidation of the company too. This move will definitely help companies to think about ways of restructuring and rehabilitation of companies through mergers and acquisitions rather than winding up or liquidating the company. The judgment given on this case leaves less room for delays and will shorten the timeline for future cases.

### **Impact of suspension of IBC on distressed M&A**

Due to the Covid-19 pandemic, businesses all over the world are struggling to keep their balance sheets afloat. There has been a substantial increase in the distressed assets due to cash crunch and lack of liquidity in the market. The numbers of defaults are already increasing at an alarming rate and will continue to do so in the foreseeable future. Ironically, keeping in mind the situation the Government of India on June 05, 2020, by issuing an ordinance has temporarily suspended Sections 7, 8 and 10 of the IBC for a period of 6 months, subject to an extension of another 6 months.<sup>32</sup> These provisions provide for initiation of CIRP by financial creditors, operational creditors and the corporate debtor, respectively. The 6-month period is effective from March 25,

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4872901.htm.

<sup>29</sup> *ibid.*

<sup>30</sup> Suresh P Iyengar, 'Arcelormittal Informs Essar Steel Investors About Cancellation Of Their Holding In Company' *The Hindu Business Line (Mumbai, 02 June 2020)* <https://www.thehindubusinessline.com/markets/stock-markets/arcelormittal-informs-essar-steel-investors-about-cancellation-of-their-holding-in-the-company/article30457302.ece>.

<sup>31</sup> Ravi Ananthanarayanan, 'Arcelormittal's Essar Steel Acquisition: Who Wins, Who Loses' *Live Mint (Mumbai, October 2019)* <https://www.livemint.com/Money/ct77MgGs4txemkuMYyfHdJ/ArcelorMittals-Essar-Steel-acquisition-Who-wins-who-loses.html>.

<sup>32</sup> Insolvency and Bankruptcy Code (Amendment) Ordinance 2020, s 10A.

2020. The ordinance has gone further in prohibiting initiation of CIRP against any 'default' that has occurred during these six months as a result of Covid-19 pandemic. One of the reasons for the suspension given by the government is that it will be difficult to find the desired resolution applicants for the distressed assets during this period.<sup>33</sup>

However, the government has failed to realise the objective of IBC. The preamble of IBC itself states that it is - *"An Act 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 maximisation of value of the 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."*<sup>34</sup>

Thus, IBC provides for the most viable and time-bound option for debt restructuring and distressed deals as it maximises the value of the assets. The companies are run as a going concern throughout the resolution process and even in cases of liquidation. As per ICRA till March 2020, financial creditors had realized 45% of their claim through distressed M&A deals under IBC. The assistant vice president of Sankha Banerjee stated that this recovery was due to resolution of 8 companies out of the Reserve Bank of India's 12 largest defaulters.<sup>35</sup> The ICRA report went on to add that the financial creditors can realize about Rs 60,000-70,000 crore in the current fiscal year through successful resolution plans under the IBC compared with almost Rs 100,000 crore last year.<sup>36</sup>

As discussed in the previous chapters that after the commencement of IBC, the distressed M&A deals have substantially increased and going back to the pre-IBC era in the pandemic world is nothing but self-destructive. This will negatively impact the creditors who have no other recourse but IBC. It covers all kinds of stakeholders of the corporate debtor and provides them with an opportunity to recover the maximum amount of debt. Unlike, the RBI circular on Prudential Framework for Stressed Assets (the June 07 circular) which covers only RBI regulated creditors i.e., banks and NBFCs. Also, unlike the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (The SARFAESI Act) which covers only secured creditors holding a mortgage over the immovable assets of the debtor. Few creditors may get some relief under other statutory debt recovery provisions but for most of the creditors, the only recourse is to file a civil suit after the suspension of IBC.

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<sup>33</sup> Rohit Jain, 'IBC: Ordinance Issued to Suspend Insolvency and Bankruptcy Code for Six Months' *Bloomberg Quint* (05 June 2020) <https://www.bloombergquint.com/law-and-policy/ibc-ordinance-issued-to-suspend-insolvency-and-bankruptcy-code-for-six-months>.

<sup>34</sup> Insolvency and Bankruptcy Code 2016, preamble.

<sup>35</sup> Beena Parmar, 'IBC Suspension to Drag Down Realisations for Creditors: ICRA' *VCCircle* (03 June 2020) <https://www.vccircle.com/coronavirus-ibc-suspension-to-drag-down-realizations-for-creditors-icra>.

<sup>36</sup> *ibid.*

Thus, the suspension of IBC is against the main objective of the code as well as the purpose of suspension will be defeated as there are other half effective remedies which the creditors will be forced to resort to in these unprecedented times. This will also lead to a reduction in numbers and values of distressed M&A deals. However, once the suspension is lifted, there will be a sudden surge in the IBC cases because there is no other mechanism as effective as IBC to restructure debts. But this won't be effective for valuation of distressed M&A deals because if the firms will stay distressed for a longer period of time due to suspension, then their value will decrease and they might even be pushed into liquidation.<sup>37</sup>

Also, before issuing the ordinance, the government by notification under section 4 of the Act had increased the minimum threshold of the default from one lakh to one crore rupees. Under the notification, the government has failed to specify the time period for which it will be in effect and no further clarification has been issued. The intent of the government was to protect the micro, small and medium enterprises, however, it will act as a hindrance for the financial and the operational creditors as even after the suspension is lifted, such notification might continue to exist and leave them without any remedy under IBC as the threshold is too high. This will force the creditors to resort to other remedies as mentioned above and in turn will decrease the value of the assets and push them to the path of liquidation.<sup>38</sup>

So, the only alternative remedy in these times we have is to resort to pre-package insolvency.<sup>39</sup> Pre-Package insolvency is a process in which the financially distressed company along with its creditors reach an agreement with the buyer for the sale of the distressed assets before initiating the insolvency process.<sup>40</sup> Pre-package insolvency will help us in value preservation and also the faster restructuring of the distressed assets. It should be introduced under the code as it will help us achieve the desired objective of preventing the liquidation of the distressed companies and also help us restructure distressed deals with the sanction of the NCLT.<sup>41</sup> Also, suspension of Section 29A can also help us achieve the objective of suspension as that way the promoters and management themselves can restructure their companies if they are headed towards bankruptcy.<sup>42</sup>

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<sup>37</sup> Mukesh Butani, 'IBC Suspension: Reforms that can fill the Gap' *Bloomberg Quint* (26 May 2020) <https://www.bloombergquint.com/opinion/ibc-suspension-filling-the-gap>.

<sup>38</sup> Ministry of Corporate Affairs, (2020) S.O. 1205 (E) Gazette of India <<https://ibbi.gov.in/uploads/legalframework/48bf32150f5d6b30477b74f652964edc.pdf>> accessed 1 July 2020.

<sup>39</sup> Hemant Kothari, 'Suspension of IBC: It's a half baked solution to ease financial stress' *Money Control* (19 May 2020) <https://www.moneycontrol.com/news/economy/policy/suspension-of-ibc-its-a-half-baked-solution-to-ease-financial-stress-5285481.html>.

<sup>40</sup> Dheeraj Nair and Anjali Anchayil, 'Getting a move on: is it time for pre-packaged insolvency in India' *Economic Times* (16 May 2020) <https://economictimes.indiatimes.com/small-biz/legal/getting-a-move-on-is-it-time-for-pre-packaged-insolvency-in-india/articleshow/75771588.cms>.

<sup>41</sup> Meenal Garg, 'Introducing Pre-Pack Insolvency Amidst a Covid Struck IBC' (*Juris Omnibus*, June 2020) <https://jurisomnibus.wordpress.com/2020/06/19/introducing-pre-pack-insolvency-amidst-a-covid-struck-ibc/>.

<sup>42</sup> Krishnava Dutt, 'Is IBC Suspension Antithetical To Pandemic Protection?' (*Mondaq*, June 2020)

### **Conclusion and Recommendations**

Mergers and Acquisitions in the country as discussed by the researchers in the project through market trends and statistics have definitely increased due to the rising cases of filings under IBC. The introduction of IBC has provided investors who were previously cautious to invest in distressed assets with a streamlined legal framework. It has also been seen from the market trends that while previously most of the investors in distressed assets were domestic investors who had a strategic holding over the market, post the introduction of IBC, a lot of foreign investors as well as private equity firms have started taking interest in investing in distressed assets. IBC is a process with a defining feature of timely resolution of cases, 180 days which can be extended to another 90 days (after the 2019 Amendment, a total of 330 days are provided to finish the entire process), the code helped to step up the mergers and acquisition activities in India. It also helped India increase its performance to achieve a way better assessment in the Ease of Doing Business rankings for the year 2019. IBC has proved to be a safe platform to clean the industry of sick companies with improper management leading to stagnancy in their growth by providing an advantageous and comfortable environment for the companies to seek new management and progress prospects. Further, as seen from the case studies of acquisition of Essar Steel by ArcelorMittal and the acquisition of Bhushan steel by Tata steel, IBC forces the entities involved to have time bound due diligence and since the contents of the resolution plans are backed by judicial approval it provides an added safety mechanism to the investors. Further, as the Essar case clarified, even though there is a requirement of judicial approval, the adjudicating authority cannot go over the verdict of the CoC, which definitely removed the obstacle of unnecessary delays in the process of merger/acquisition and leads to better and effective implementation.

However, even though IBC has provided a very effective platform for distressed M&A deals, proper due diligence and effective strategies are key steps in order to ensure a smooth implementation and successful completion of a deal. The reasons and causes for an asset turning into a distressed asset should be properly analyzed to ensure that whether through the planned strategy it would be possible to turn the asset operational or not. Further, even while drafting a resolution plan, potential risks and liabilities definitely must be kept in mind. We can definitely see that the introduction of IBC has made a huge positive impact on the M&A market in India and with the recent amendments and clarifications given by the Apex Court, with proper, well devised strategies and resolution plans and because of the growing number of distressed assets in a number of major sectors in India, such number of M&A deals through the route of IBC are only going to increase ultimately leading not only to the personal growth of companies but also economic growth of the economy as whole.

Further, with the recent changes in IBC brought by the Government which we have discussed in the preceding chapter, the most effective steps by the government would have been to amend and modify the provisions of IBC in such a manner that it fulfils its objective of restructuring and maximization of the value of distressed assets even in these unprecedented times instead of suspending it. Since the time IBC came in 2016, there has been a substantive increase in the number of resolutions achieved through distressed M&A deals and has helped the creditors recover the maximum amount of debt. In the post pandemic world, the government will have to thrive to keep the companies from going into liquidation as it has taken away the most effective tool of restructuring through distressed M&A deals from the hands of not only the creditors but also the corporate debtor itself.

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