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Haircut: Coup de grace the intentions of the Insolvency & Bankruptcy regime in India!

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Haircut: Coup de grace the intentions of the Insolvency & Bankruptcy regime in India!

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ABSTRACT

Insolvency and Bankruptcy Code, 2016 is one of the major economic reform in India. Discharging debt through bankruptcy is the bedrock principle of insolvency systems across the globe. The discharge of honest insolvent has come to be regarded as the all-important feature of bankruptcy statute. Methodical and probable Insolvency & Debt resolution mechanism leads to financial inclusion, credit availability, job upholding and new job opportunities in the market. This mechanism ensures the survival of the distressed companies.

According to the new record of Insolvency and Bankruptcy Board of India till date 987 resolution plans have been invited. Further, as per the Economic Times news NCLT has approved 180 resolution plans in the FY 2023 of total Rs. 51,424 crores. Though the resolution plans of various corporate debtor are approved by the NCLT, in many cases it is approved with the huge haircuts and the average haircut until now has been 65% under Corporate Insolvency Resolution Process.
This paper analyses the issue of 'haircut' under the IBC ecosystem. It also evaluates the Videocon Industries Ltd. case where NCLT had approved a resolution plan with 95% haircut.

Due to very large haircuts in the resolution process the banking companies are losing about four-fifths of the money lent to companies involved in the process of IBC. Due to this the depositors of banking companies are unable to retain faith in the banking system. Once bankruptcy proceedings have been filed, a creditor no longer bargains bilaterally with the bankrupt but the real contest is between the contracted counter party and bankers and other creditors. When the companies are in the midst of insolvency proceedings, the COC's decisions destroys the economic and social value of the companies, thereby making restructuring more complicated and inefficient. Further, the insolvency proceedings necessarily disrupt or alter the bargains struck by the affected parties and remove the autonomy to behave as they would under a contract.

In COC's decisions, the non-consenting creditors rights are altered without their consent and restructuring plans can be imposed upon an entire class of non-consenting creditors, provided certain conditions are met. The authors will employ the doctrinal and non-doctrinal research methodology to ascertain the findings and conclusion.

The authors propose to analyse the haircut issue in the IBC process. The study will evaluate if the haircuts lead to the deterioration of the objectives with which IBC was framed. Further, this paper evaluates the commercial wisdom of Committee of Creditors and judicial wisdom of NCLT as the NCLT has limited powers in the approval of resolution plan. The study will also examine the Sec.12A of the Insolvency and Bankruptcy Code, 2016 which authorizes the adjudicating authority to allow the withdrawal of application by 90% majority of the Committee of Creditors and the need to revisit to the Sec. 12A, the competence of resolution professionals in deciding the value of the assets of the corporate debtors and the residual powers of NCLT. Based on the finding of the research recommendations and suggestions will be made by the authors.

Keywords: Haircut, Residual powers, Commercial Wisdom, Non-consenting creditors rights, Economic and social value

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1. Introduction

Insolvency and Bankruptcy Code, 2016: The Trailblazing Reform in India

A dialogue between two characters in a novel goes like this: "How did you go bankrupt? "Bill asked. 'Two ways", Mike said "Gradually and then suddenly". 'Major bankruptcies take place that way'[1]. The reforms in India with regards to the insolvency took place in the same manner. On May 28, 2016 the insolvency reforms took shape by the execution of the Insolvency and Bankruptcy Code, 2016. Dr. M.S. Sahoo[2] said that, "in no time it became a reform by the stakeholders, of the stakeholders and for the stakeholders."

Before the enactment of Insolvency and Bankruptcy Code, 2016, India did not have an acquaintance of market based, dynamic, incentivise and time-bound insolvency statute. Many organisations, institutions needed the execution of highly developed insolvency law. However, it did not exist in India. The statute and major reforms are the outcome of the long journey from obscure to known insolvency regime[3]. As far as market economy is concerned, the insolvency realm is highly fructuous. It obtains maturity, depth and richness with every transaction. India is also not an exception to this Insolvency realm. The regulatory framework with regard to the corporate insolvency, including the resolution and liquidation, along with the ecosystem for the corporate insolvency were established in India at the end of 2016[4]. The provisions regarding the corporate insolvency process came into force on December 1, 2016 and provisions with regard to insolvency resolution and bankruptcy of personal guarantors to the corporate debtors, executed on 1st December, 2019. The Code was enacted and implemented in India without any obstructions; to make it robust, lot of legislative drilling was done and accordingly its objectives are in conformance with market needs. The purpose of codification of the statute is to provide clarity in law and to help various stakeholders, who are affected due to business collapse or incapable of paying their debts, to benefit by the application of consistent and clear provisions of law.

The statute is for the insolvency resolution and the basic objectives are as mentioned in the preamble of the Act[5].These objectives indicate India's advancement

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1 M. S. Sahoo, A Journey of Endless Hope, INSOLVENCY AND BANKRUPTCY CODE A MISCELLANY OF PERSPECTIVES, Insolvency and Bankruptcy Board of India, (2019)

2 Dr. M. S. Sahoo, an acclaimed thought leader in financial markets, served as the first Chairperson of the Insolvency and Bankruptcy Board of India (2016-2021)

3 Insolvency and Bankruptcy Board of India and International Finance Corporation, Understanding the IBC, Key Jurisprudence and Practical Considerations, A Handbook, https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf

4 ibid

5 Insolvency and Bankruptcy Code, 2016

towards a strong market economy. It caters to the need for an extensive law which would be operative for giving remedies to the insolvent debtors, maximization of value of assets which is available for creditors and facilitating the closure of unviable businesses seamlessly. One of the major objectives of the Code is to balance the interest of stakeholders. The Code has shifted the balance of power from the debtor to the creditor[6].

2. Review of Literature

IBC: Evolution and Implementation

The researcher has analysed various articles by Vinod Kothari[7], Nidhi Parmar[8], has explained that there have been ups and downs in IBC's voyage thus far, but as it develops over time, greater outcomes from this ambitious piece of economic legislation is anticipated in our nation. The article, however, failed to critically analyse the Corporate Insolvency Resolution Process, role of NCLT and other challenges in the IBC ecosystem. Further, the authors have explored the history of SICA repeal and offers background information on the IBC regime. In the article it is mentioned that the SICA is viewed as a failed attempt to address corporate disease. So, following the incident with IBC, SICA's demise was certain. Furthermore, the author has concluded that the highly anticipated SICA Repeal Act, 2003 provision was finally notified, bidding adieu to the SICA, 1985. Hopefully, the Code will be able to achieve the goal for which SICA was passed.

The article, however, failed to discuss the various issues, problems, concerns and challenges with regards to the Insolvency and Bankruptcy Code, 2016.

To understand the entire IBC ecosystem, the researchers have examined, A Handbook[9] by The IBBI[10] and IFC[11], in which the details of the four pillars of insolvency ecosystem is discussed along with the provisions of law, practices and case laws with regard to the Corporate Insolvency Resolution Process and Liquidation Process exhaustively.

The Handbook has considerably failed to consider the features, issues and challenges that exist after the passing of the Insolvency and Bankruptcy Code, 2016. The Handbook contains the laws and case laws of various countries but there is no attempt to compare and find the challenges faced by each country with the help of features and challenges of the other counties.

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6 Insolvency and Bankruptcy Board of India and International Finance Corporation, Understanding the IBC, Key Jurisprudence and Practical Considerations, A Handbook, https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf

7 Vinod Kothari & Company Practising Company Secretaries IBC: Ushering In A New Era, An anthology of articles on The Insolvency & Bankruptcy Code, 2016, (2019)

8 Nidhi Parmar, SICA BIDS ADIEU

9 Understanding the IBC, Key Jurisprudence and Practical Considerations, https://ibbi.gov.in/en, lastly accessed on 7/1/2024

10 Insolvency and Bankruptcy Board of India, https://ibbi.gov.in/en, lastly accessed on 7/1/2024

11 International Finance Corporation, a member of the World Bank Group, in 2019, which aims also the building capacity of insolvency professionals.

Corporate Insolvency and Resolution Process under Insolvency and Bankruptcy Code, 2016

To understand and analyse the IBC process, researchers have also studied the article[12] by R. K. Bansal. The author has discussed the CIRP stage and more particularly about the delay in admissions/adjudication of Section 7 of IBC applications in detail. The article elaborates liquidation proceeding, issues and problems with regards to it and also the status of fees to the liquidator in case Financial Creditor stand outside the liquidation process.

The article falls short on the other issues and challenges in legal theoretical framework and in working and implementation of the various legislations and mechanisms on insolvency and bankruptcy generally and protection to the non-consented creditors in the resolution plan during the Corporate Insolvency Resolution Process.

Furthermore, to understand the in-depth process of Corporate Insolvency Resolution Process and significance of moratorium under the CIRP process, the authors have studied the article by Vallari Dubey[13]'in which the author has discussed the provision with regard to the moratorium in detail and its importance in the process. The article also discusses the various rulings by the NCLAT with respect to the moratorium under the CIRP thoroughly. The article fails to cover the upcoming challenges in the CIRP process and lacks the exhaustive critical analysis of certain concerns related to the insolvency process.

In their article, Vinod Kothari & Sikha Bansal[14]discussed the significance of the role of insolvency professionals in corporate insolvency resolution process in depth. The authors have mentioned in the article that the committee of creditors oversees the RP's performance of certain tasks during corporate insolvency. Though the authors dwelled into the role of Insolvency Professionals in the CIRP process, they did not bother about the challenges faced by the Insolvency Professionals while dealing with the creditors: balancing the interests of debtors and creditors and in the execution of the insolvency resolution process.

Critical Evaluation of Legislative Framework regarding Insolvency Process of India

Pooja Singla and Ritesh Kavdia[15], Neetu Potdar[16] enlightened the role of the Committee of Creditors and the Creditors rights in the insolvency process. The authors focused on a key component of the corporate insolvency resolution procedure (CIRP), which is the CoC. The composition of the CoC, which consists of each FC of the CD, is one

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12 R. K. Bansal, FINANCIAL CREDITORS AND THEIR STAKE IN THE IBC PROCESS, IBC Evolution, Learnings and Innovation, (2023), available athttps://www.iiipicai.in/wp-content/uploads/2023/10/IBC-Evolution-Learnings-and-Innovation.pdf, lastly accessed on 7/1/2024

13 Vallari Dubey CONSTITUTIONAL POWERS IMMUNE FROM MORATORIUM UNDER IBC

14 VINOD KOTHARI & SIKHA BANSAL[14]Role of insolvency professionals in corporate insolvency resolution process

15 Pooja Singla and Ritesh Kavdia, CREDITOR RIGHTS VS. COC DUTIES: UNTANGLING THE TWO, (2023)

16 Nitu Potdar, MEETINGS OF COMMITTEE OF CREDITORS UNDER INSOLVENCY CODE

significant factor. While analysing the role of the CoC, the authors have failed to consider the impact of powers of CoC on the non-consenting creditors and other stakeholders especially in the approval process of resolution plan. Further, the article failed to address the commercial wisdom of CoC under IBC and the judicial wisdom of NCLT with respect to the approval of resolution plan during the insolvency resolution process.

Nikhil Shah and Khushboo Vaish[17], analysed the timelines of insolvency cases, commercial impact of IBC delays on different stakeholders and depth critical analysis of the causes of delay in the insolvency resolution process and recommended the capacity building at the NCLT by increasing the number of benches majorly in the metropolitan cities and execution of separate benches for insolvency, specialized knowledge and skills. Yet, the article fails to elaborate on the other challenges, problems in the execution of insolvency resolution process apart from delays in the process.

Many authors, researchers, academicians, professionals and scholars have remarked on the meaning, need, scope, significance and implementation of the insolvency resolution process in India. Majorly, authors have also commented on the Corporate Insolvency Resolution Process, steps involved in the CIRP, and the historical background of the enactment of IBC 2016 in India. Some of them have analysed the various case laws such as the cases with regard to Essar Steel Co. Ltd, Videocon, Amrit India, and the Swiss ribbon case to resolve the various concerns raised in these case laws by the judicial interpretations. Authors have analysed the various problems, challenges and issues facing by the IBBI, IU and IPs in detail. Insolvency and Bankruptcy Code, 2016 is revolutionary till date in India. Some of the authors have covered the international status of the insolvency resolution process including European Union, Russia, United Kingdom and USA.

However, there is a negligible literature on certain issues, the challenges faced under the Corporate Insolvency Resolution Process and hence there is a need to a) Explore, analyse and deliberate on the issues posed by the researcher in the current research. b) There is a need to conduct an exhaustive research on which section or part of legislation, policy etc. poses the problem and whether the problems exist because of lack of legislation, policy, mechanism. c) There is a dire need to explore and analyse structure, working, powers and function of the mechanism to make it more robust and balance the stakeholders in real sense during insolvency resolution process. d) It is necessary to discuss each issue in great depth. It is necessary to explain which specific section, subsection, or policy is causing the issue as well as what precise section, subsection, or language is required to fix it and certain amendments are needed to be suggested. The researcher's concerns and challenges in the current research will be analysed, argued, and resolved using the literature on the numerous issues and obstacles posed by the researcher.

IBC Ecosystem: Soul for the survival of distressed companies

Businesses going bankrupt and closing their doors result in billions of dollars' worth of lost or marginalized capital, jobs, and company value annually. Investors and financial institutions experience increased costs of capital and risk perception as a result of inefficient debt collection and inadequate business exit procedures. For commercial

[17] The next phase of the ibc must focus on efficiency alvarez & marsal india

banks and firms to handle non-performing loans, ease business departure and restructuring, resolve commercial disputes, and recover debts, functional legal, regulatory, and institutional frameworks are essential[18].

An essential component of the bankruptcy environment is the overseeing body, the Insolvency and Bankruptcy Board of India (IBBI)[19]. The IBBI has made it its mission to guarantee that the service providers are technically sound, suitable individuals, and driven to maintain the highest levels of professionalism and ethics[20]. As part of this duty, the IBBI has been actively monitoring service providers' behavior and performance as well as implementing and advocating a range of initiatives to increase their capability[21]. Further, the IBBI became a part of the Cooperation Agreement with the International Finance Corporation (IFC)[22], IFC is the member of the World Bank Group with one of its aim being to build capacity of insolvency professionals[23]. IBBI has the unique distinction of being, both, the regulator of the process and the service provider too.

Further, Information Utility[24] is a significant forum created under the IBC for the storage of financial information and this financial information[25] is accessible to the registered users. The information available on the Information Utility has evidentiary value, though the Sec. 215 (3)[26] of the IBC states that the operational creditors "may" submit the financial information about the operational debt granted by them to the IU. Unfortunately, it is not a mandate to the operational creditors to provide the financial information to the IU and though for the Financial Creditors it is a mandate under section

[18] The World Bank, Insolvency and Debt Resolution, available at https://www.worldbank.org/en/topic/financialsector/brief/insolvency-and-debt-resolution#:~:text=The%20World%20Bank%20Principles%20for,Report%20on%20the%20Observance%20of, lastly accessed on 8/1/2024

[19] Under the Insolvency and Bankruptcy Code, 2016 (Code), the Insolvency and Bankruptcy Board of India was established on October 1st, 2016, available at https://ibbi.gov.in/en, lastly accessed on 8/1/2024

[20] Understanding the IBC, Key Jurisprudence and Practical Considerations, https://ibbi.gov.in/en, lastly accessed on 7/1/2024

[21] ibid

[22] International Finance Corporation available at https://www.ifc.org/en/about, lastly accessed on 8/1/2024

[23] The World Bank, Insolvency and Debt Resolution, available at https://www.worldbank.org/en/topic/financialsector/brief/insolvency-and-debt-resolution#:~:text=The%20World%20Bank%20Principles%20for,Report%20on%20the%20Observance%20of, lastly accessed on 8/1/2024

[24] National E-Governance Services Limited, NeSL is a fundamental component of India's bankruptcy and insolvency ecosystem. The other three components are the Insolvency and Bankruptcy Board of India (IBBI), Insolvency Professionals (IPs), and the Adjudicating Authority (National Company Law Tribunal and Debt Recovery Tribunal), available at https://nesl.co.in/what-is-an-information-utility/, lastly accessed at 8/1/2024

[25] The provisions of section 3(13) of the IBC define financial information as: • records of a person's debt (including an incorporated entity); • liabilities of the person, when the person is solvent; • records of the assets over which security has been created; • instances of default by the person against any debt; • balance sheet and cash-flow statements of the person; • any other information that may be specified.

[26] The Insolvency and Bankruptcy Code, 2016, BARE ACT, 2023, published by Professional Book Publishers

215(2)[27] of the IBC to provide the information to the IU, there is no penalty or punishment for not providing it to the IU under the Code.

Besides this, the AA under the IBC is the National Company Law Tribunal[28], which is established under section 408[29] of the Companies Act, 2013. It is the adjudicating authority for the resolution and liquidation of corporate persons; for the bankruptcy of individuals and partnership firms the DRT[30] is the adjudicating authority under IBC, which is not functional yet. The NCLT has the power to adjudicate the insolvency application filed by the Financial Creditors, Operational Creditors and Corporate Debtor itself. It also has the power to accept or reject the resolution plan for the Corporate Debtor; further if the resolution plan gets rejected, the NCLT will pass an order for the Liquidation. Though the Code mentions the wide powers of adjudicating authority but NCLT has limited powers while approving the resolution plan and it is widely discussed in the case law of Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta[31] and further it is discussed that although a minimum amount may be paid to various classes of operational and financial creditors, the Committee of Creditors will still need to consider the commercial wisdom of determining what amounts are to be paid to different classes. The Adjudicating Authority and Appellate Tribunal do not have residual equity jurisdiction to interfere in the merits of a business decision made by a necessary majority of the Committee of Creditors.

As per the Insolvency & Bankruptcy Code, 2016, the IP is the only one who can be appointed as an Interim Resolution Professional, Resolution Professional, Liquidator and bankruptcy trustee. IPAs are the primary regulators of the IPs. Under IBC, IPs have to comply with the major aspects of the Corporate Governance such as Code of Conduct, maintaining the confidentiality, integrity, independence and impartiality and compliance with the other laws too[32].

Thus, the IBC ecosystem provides relief to the major stakeholders; it is essential for the survival of the distressed companies; even for the banking companies and financial institutions, IBC is the better remedy to deal with the distressed assets in comparison with the SARFAESI and Recovery of Debts and Bankruptcy Act, 1993.

Corporate Insolvency Resolution Process: A key to the survival

Although there is a pressing need to address India's approximately 16 lakh crore stressed assets, very few deals have actually been completed up to this point. The goal of

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27 ibid

28 National Company Law Tribunal available at https://nclt.gov.in/national-company-law-tribunal, lastly accessed on 8/1/2024

29 Taxmann's Companies Act, 2013

30 Debt Recovery Tribunal available at https://drt.gov.in/#/aboutus, lastly accessed on 8/1/2024

31 [2019] 111 taxmann.com 234 (SC)[15-11-2019] available at https://www.taxmann.com/research/search?searchData=residual%20powers%20of%20NCLT%20under%20IBC, lastly accessed on 8/1/2024

32 Understanding the IBC, Key Jurisprudence and Practical Considerations, https://ibbi.gov.in/en, lastly accessed on 7/1/2024

the various regulations that the RBI[33] has periodically introduced, as well as the Insolvency and Bankruptcy Code (the Code or IBC), which is among the most successful and effective pieces of legislation, is the timely and collaborative resolution of business distress. Lenders, regulators, and the government must acknowledge that enterprises can fail, and that as long as there is a good cause for it[34].

The Corporate Insolvency Resolution Process is the core of the IBC regime in India. The timely resolution of the corporate debtor's insolvency and restructuring is the main goal of the IBC[35]. In the CIRP process, the key role is played by the Resolution Professionals, Committee of Creditors and the NCLT. Getting the creditors to the negotiating table and working together to draft and approve a workable resolution plan is one of the RP's main responsibilities.

The committee of creditors oversees the RP's performance of certain tasks during corporate insolvency. Even if multiple responsibilities are carried out by different specialized agencies, the RP serves as a stimulant for the entire negotiation process[36]. Even with extremely tight deadlines, the RP must complete the difficult task of balancing multiple objectives.

Further, during the resolution process, the business may be considered to be in the hands of the creditors, as the IP assumes control and supervision of the company while the RP is an appointee of the Committee of Creditors. It is also important to note that though the Insolvency Professionals are executing the insolvency resolution process, it is subject to the approval of the Committee of Creditors. Section 28[37] of the IBC lays out specific actions that must be conducted with the prior consent of CoC, so restricting the jurisdiction of the interim resolution professional/resolution professional.

Apart from the CoC and IPs, the adjudicating authority also plays the crucial role in the CIRP process. The adjudicating authority under IBC is the National Company Law Tribunal and as the legal foundation for resolving corporate insolvency challenges in India, the NCLT is essential to preserving the fairness and efficiency of the insolvency resolution procedure described in the IBC. The NCLT has the power with regard to the acceptance/rejection of the insolvency resolution application filed by the creditors or the corporate debtor.

Following is the table which talks about the no. of cases filed, no. of cases admitted, no. of cases pending, and no. of cases disposed which are filed under the Sec. 7, 9 and 10 of the Insolvency & Bankruptcy Code, 2016, with the NCLT from the year of 2017 to 2022.

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[33] Reserve Bank of India available at https://www.rbi.org.in/, lastly accessed on 9/1/2024

[34] Evolving landscape of corporate stress resolution December 2019 Abizer Diwanji Partner and National Leader – Financial Services, EY India available at https://www.ey.com/en_in/people/abizer-diwanji lastly accessed on 9/1/2024

[35] Binani Industries Ltd. v/s Bank of Baroda & Another [CA (AT) (Ins) 82/2018 & Others

[36] Vinod kothari & sikha bansal, role of insolvency professionals in corporate insolvency resolution process, ibc: Ushering in a New Era

[37] Section 28: Approval of Committee of Creditors for certain actions.

[Table 1]

As per table 1, no. of cases pending after admission is less in comparison with the pre-admission. Further, the no. of cases disposed is also noticeable; 85.84% is the average percentage of the adjudication of the cases under the IBC in India. It shows that CIRP under IBC is working successfully in India since its inception.

[Figure 1]

The figure 1 indicates that since the Insolvency and Bankruptcy Code's introduction in 2016, the number of cases admitted for Corporate Insolvency Resolution Processes (CIRPs) has climbed every quarter, indicating the growing recognition of IBC as a successful debt settlement tool. After declining in the previous three quarters of FY21 and FY22, the number of cases accepted to the insolvency process climbed year over year by almost 24% in Q2FY23. Nevertheless, the number of cases admitted to the bankruptcy process remains lower than it was in prior quarters of FY19/20.

Hence, it is important to note that the CIRP process is effectively initiated by the financial creditors, operational creditors or the corporate debtor itself despite certain challenges in the execution of the process faced by the stakeholders in India. Apart from the delays in the CIRP process, conflict with the management by the IRPs/RPs, lack of finance to execute the CIRP, the huge haircut granted under the resolution plan in the CIRP is also one of the major challenges in the today's IBC era and the researchers have focused on the key concern i.e. Haircut granted in the CIRP in this research paper.

Haircut under Corporate Insolvency Resolution Process: Complication or Compulsion?

The IBC furnishes the revival of the distressed companies by averting a value-minimisation of the assets of the company. Via a market procedure, it seeks to either close down the company if its business is not viable or save it if it is. The business is reconstructed as a going concern in the event of a rescue. Creditors' claims are reorganized and may be settled with them right away or gradually. In the event of a company closure, its assets are sold, and the revenues are promptly divided among creditors in accordance with the priority rule. Financial creditors are tasked with reorganization by the IBC because they are able and willing to reorganize their claims. They are likely to save a business that has a going concern surplus, which puts the interests of creditors and the business in balance and makes the situation a win-win situation. In the event that the company lacks sufficient assets, financial creditors may not receive as much money as they are owed through a rescue. In ordinary terminology, this kind of shortage is called a haircut[38]. The term 'Haircut' is not defined in the IBC. Within the banking industry, a haircut is the sum of money that lenders must give up throughout the loan resolution process.

Though IBC is a new Code, it is at its budding stage. The fact that the law is still constrained by its flaws, however, cannot be disregarded. Further, it is important to note

[38] M S Sahoo, A Shorter haircut Timely use of IBC can help minimize and even avoid losses for creditors, available at https://ibbi.gov.in/uploads/resources/c638d6161ba469aad13dde2a0af116b0.pdf, lastly accessed on 9/1/2024

that the creditors' confidence in the established mechanism has undoubtedly been damaged by these misconceptions, which include the difficult and drawn-out revival procedure as well as the average duration of 459 days for any resolution plan to end as opposed to the 330 days specified by the statute.

The researchers have further studied the data of the status of the CIRP cases admitted, pending, withdrawn and closed for good understanding and analysis.

[Figure 2]

When compared to the prior time frame, the cases' status has mostly not changed. By September 2022, 5,889 cases had been admitted to CIRP overall. Just 9% of resolution plans have been approved, and as of the end of March 2022, 33% of cases were still in the resolution process, down from 35%. It is needed to be mentioned that a total of 1,807 cases (31% of the admitted cases) have resulted in liquidation. In the meantime, 76% of these cases were either defunct or BIFR cases. 11% of the 846 CIRPs have been withdrawn under Section 12A of the IBC, and about 14% have been closed on appeal, reviewed, or resolved. The majority of cases that were dropped (around 54%) had a value of less than Rs. 1 crore, and the main causes of withdrawal were either previous settlements with creditors (24%) or the applicant's complete settlement (40.6%).

[Table 2]

Table 2 illustrates how the overall recovery rate in India up to Q4FY22 was 32.9%, indicating a downward trend, following the implementation of the IBC. In Q2FY22, the recovery rate was 49.2%; in Q2FY23, it rose to 30.2%, and by the end of Q2FY23, the total recovery had reached 30.8%. As such, the creditors have taken a roughly 70% haircut on accepted claims in the instances that have been settled.

Accordingly, it is understood to the researchers that though the no. of CIRP processes are increasing, in many cases the creditors have granted the average haircut more than 65% in the resolution plan to settle the matter. To comprehend more about the haircut and its impact, the researchers have further analysed the Videocon Case where the learning has been that the creditors are protected absolutely by granting 95.85% haircut in it, though later NCLT stayed the matter after examining the resolution plan prudently.

A Videocon Case: Learning cannot be disregarded

A haircut is the phrase used in finance to describe a decrease in the value of an asset. When there is little chance of recovery and the loan might be written off in exchange for a one-time payment, a haircut is frequently considered as a last recourse.

Videocon Industries[39] and its 12 group entities have admitted claims totalling Rs. 64,8383.63 crores. Twin Star Technologies' resolution proposal of Rs. 2,962.02 crores for

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[39] A. State Bank Of India Applicant in MA 1306/2018 & B. Mr. Venugopal Dhoot Applicant in MA 1416/2018

V/S

1. Videocon Industries Limited 2. Videocon Telecommunications Limited 3. KAIL Ltd. 4. Evans Fraser & Co. (India) Ltd. 5. Millennium Appliances (India) Ltd. 6. Applicomp India Ltd.7. Electroworld Digital

indebted Videocon Industries was accepted by the NCLT. Additionally, it was noted that the operational creditors received 99.28% of the resolution plan. Claims admitted totalled Rs. 64,838.63 crores, out of the total claims made for Rs. 71,433.75 crores. Only Rs. 2,962.02 crores, or 4.15 percent of the total amount of outstanding claims, remain from the aforementioned claims; the total hair cut was determined to be 95.85%. Concerned about the same, the NCLT asked that the CoC be founded in order to boost the compensation. It was observed that the share of the allowed claim that went to operational creditors was only 0.72%. The NCLT noted in its June 8, 2021, judgment that a large number of the operating creditors in this case were MSMEs, and if their current situation persists, these creditors may soon be subject to insolvency proceedings. According to the resolution plan authorized by the CoC, dissenting secured financial creditors would receive 4.56% and secured financial creditors would receive just 4.89%. Notably, dissenting unsecured creditors received nothing, while assenting unsecured creditors received a pitiful 0.62%. According to the resolution plan, which is detailed in the decision, Twin Star Technologies will provide funding in the form of equity, convertible securities, or convertible loans in order to meet its payment obligations fully and on time. Additionally, it has demanded that the group's 11 enterprises consolidate[40].

It's undeniable that haircuts have given creditors new cause for concern. Liquidation cases are increasing, and it appears that IBC is not meeting its actual goals. In the case of Monnet Ispat[41], the haircut was 75%, and in the case of Alok Infrastructure Ltd[42]., which Reliance acquired, the haircut was 83%. In the Siva Industries case[43], bankers authorized the settlement but took a haircut of up to 93.5%. This number typically represents 30–40% of cases worldwide. This is a serious blow to the Indian banking industry, particularly because Indian banks are still the ones suffering from rising non-performing assets. The IBC has repeatedly failed, despite expectations that it would offer banks some relief. The primary cause of huge haircuts may be that, once CIRP gets underway, it might become clear that companies have no assets, making it impossible for creditors to bid for them. Consequently, in the case of Amrit India too, there was just one financial creditor in the instance of Amrit India[44]. When Amrit India's relationship with the financial creditor deteriorated and the financial creditor refused to extend credit, Amrit India declared bankruptcy. The company was established in 1981 and had closed its doors in 2019. It further asserted that COVID-19 had a negative impact on it. As a

Solutions Ltd.8. Techno Kart India Ltd. 9. Trend Electronics Ltd. 10. Century appliances Ltd. 11.Techno Electronics Ltd.12.Value Industries Ltd.13.PE Electronics Ltd. 14.CE India Ltd 15. Sky Appliances Ltd., MA 1306/2018 in CP No. 02/2018, CP No.

01/2018, CP No. 543/2018, CP No. 507/2018, CP No. 509/2018, CP No. 511/2018, CP No. 508/2018, CP No. 512/2018, CP No. 510/2018, CP No. 528/2018, CP No. 563/2018, CP No. 560/2018, CP No. 562/2018, CP No. 559/2018, CP No. 564/2018

40 *Recovery From IBC Keeps Falling; Bankers Take 60% Hair Cut In 348 Resolved Cases So Far,* NEW INDIAN EXPRESS (1st July, 2021, 6:00 P.M), https://www.newindianexpress.com/business/2021/may/29/recovery-from-ibc-keeps-falling-bankers-take60-hair-cut-in-348-resolved-cases-so-far-2309311.html

41 State Bank of India v/s Monnet Ispat & Energy Limited, MA 346/2018 in CP (IB) 1139 MB/2017

42 Axis Bank Ltd v/s Alok Infrastructure Ltd., CP (IB)-2047/MB/2018

43 In the matter of M/S Siva Industries and Holding Limited, IA/837/IB/2020 IN IBA/453/2019

44 IA No.1599 (PB)/2023 IN CP (IBPP) No.03(PB)/2022

result, Amrit India launched PPIRP[45] and put out a basic resolution proposal that would completely damage the interests of contingent creditors and give the FC a 90% haircut. Major haircuts observed in cases of Deccan Chronicle (95%), Lanco Infra (88%), Ushdev International (94%), Zion Steel (99%).

By studying the Videocon case and other cases too, it is further realised by the researchers that haircut is forcefully imposed on the non-consenting secured creditors. Hence, it can be said that though it is woeful, the concerns have undoubtedly been raised by the haircut trend in the Indian banking industry. It is undeniable that this can have a significant effect on the economy in turn. It drives MSMEs into insolvency, doubles non-performing assets, and annoys creditors. We must no longer use the standard "developing" legislation justification when defending the IBC. Six years later, shortcomings have been adequately brought to light too.

Uncovering mystery of Haircut under IBC

Even while the IBC aspires to accomplish its goals through swift, effective, and unbiased restructuring or settlement, there is a big difference between the goals and what is happening right now, mostly because of the rise in haircuts[46]. Certain causes for the rise in haircuts are discussed further by the researchers and they are as follows:

Section 12-A of the IBC: Turn tail the revival

Under Section 12-A of the Insolvency and Bankruptcy Code, 2016, the adjudicating authority can grant the withdrawal of the admitted application by the Financial Creditors, Operational Creditors or Corporate Debtor itself, if it is represented by the 90% voting share of committee of creditors for the one-time settlement. Even after the CoC's have approved the resolution plan, they frequently take advantage of this clause to negotiate for OTS at a steep discount in order to obtain earnest money. Without taking the company's goal of resuscitation into account, the CoC's frequently vote in favour of withdrawal requests for earnest money. Furthermore, a liquidation of the CD following the withdrawal is not well equipped by law. Furthermore, this kind of behavior is unreasonable because it takes a long time to resolve a case when creditors agree to take over debt at a significant discount under Section 12A.

Commercial wisdom of CoC: Lamently indispensable than the judicial wisdom of the Adjudicating Authority

Additionally, if creditors holding 90% of the debt consent, section 12A gives the adjudicating authority ("AA") permission to grant withdrawal requests. Generally speaking, the AA has placed a high value on the CoCs approval. On the other hand, the Siva Industries case has demonstrated the contrary about the National Company Law Tribunal's ("NCLT") outlook. In order to further the overarching goal of IBC, the NCLT in this instance terminated the autonomy of CoC. Additionally, the bench made it clear that

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[45] Section 54A Pre-Package Insolvency Resolution Process, 2021 Chapter III-A, The Insolvency and Bankruptcy Code, 2016

[46] Rising Haircuts: A Death Knell for the IBC?

https://indiacorplaw.in/2022/03/rising-haircuts-a-death-knell-for-the-ibc.html lastly accessed on 9th Dec 2023 at 5:17pm in the event that the terms of the CoC's settlement are unclear, a withdrawal application under section 12A cannot be filed. This, therefore, suggests that it would be necessary to assess the CoC's decision-making and the AA's accountability for it[47].

As under section 31 (1)[48] of the Insolvency and Bankruptcy Code, 2016, it is noticeably mentioned that the if the resolution plan is approved by the CoC by meeting the requirements u/s 30 (2)[49], then, in that case, the adjudicating authority shall approve the resolution plan by passing an order and it will be mandatory to the corporate debtor and its employees, members, creditors, Central Government, any State Government and all other stakeholders too. By interpreting this provision, it came to the knowledge of the researcher that in the provision the term "shall" is used to mean that if the resolution plan is approved by the CoC, the NCLT has to approve the resolution plan without the examination of the merit of it in detail. Furthermore, as per Section 30 (2) the requirements are ensured by the Resolution Professional and after the compliance with it, the RP submit the resolution plan to the CoC for their approval. Thereafter, once it is approved by the CoC with not less than 66% voting share, the RP has to submit it to the adjudicating authority for its approval. Thus, after analysing the entire process of the approval of resolution plan, the IBC has given the priority to the CoC. The adjudicating authority does not have the power to look into the merits of the resolution plan. Unfortunately, the major powers are given to the CoC under the insolvency resolution process. Additionally, courts have granted the creditors' business acumen complete autonomy. Other goals, such as asset value maximization and time-bound resolution processes, have been negatively impacted by this in an "overwhelming way." The current situation has demonstrated the decreased likelihood of the pressured company's resuscitation.

It is crucial to keep in mind how important the CoCs' function is to the overall insolvency process. The creditors have stopped being reasonable in how they have been addressing their obligations lately. Hence, it is important to say that in many cases, the commercial wisdom of the CoC prevailed in comparison with the judicial wisdom of the adjudicating authority.

Legislative framework of insolvency resolution process in India: A pragmatic analysis

In order to validate the findings, issues/problems regarding haircut under IBC, the researchers have applied the triangulation method. With the help of literature, the researchers have explored the problems with regard to haircut; these problems are further analysed and explored by the researchers on a logical paradigm. After analysing these problems with the help of literature and logic, it was further validated by taking the views of the legal fraternity, Chartered Accountant, Registered Valuers, Creditors, Cost Accounts, Insolvency Professionals and stakeholders.

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[47] Ms. Kaushiki Ranjan legal researcher at Mirza & Associates, Advocates & Attorneys Haircut" under Insolvency Laws https://www.mirzaandassociates.com/haircut-under-insolvency-laws/lastly accessed on 9th Dec 2023 5:19pm

[48] Section 31: Approval of resolution plan.

[49] Section 30: Submission of resolution plan.

There were 10 main questions in the questionnaire answered by the legal fraternity, Chartered Accountant, Registered Valuers, Creditors, Cost Accounts, Insolvency Professionals and stakeholders. The researchers have provided the question-wise, category-wise, and cumulative analysis in detail. Analysis of the data on each question is as follows:

[Pie Chart 1]

To the very first important question, majority of the 75% stakeholders agree that the insolvency proceedings under the Insolvency and Bankruptcy Code, 2016, are a better remedy than liquidation for the revival of the distressed companies. To that extent, 18% are strongly in favour of the same. However, very few stakeholders do not want the insolvency proceedings and went along with the liquidation process of the old version of the Companies Act. **It is noticed that almost all stakeholders (93%) are of opinion that they are in favour of contemporary resolution process which is one of the successes of the Act in terms of pragmatic implementation on the root**. This validates the need of IBC Code, 2016 too.

[Pie Chart 2]

Post validation of the utility of the Act, most of the stakeholders agree that the Act on root of fulfilling the preamble. This question stands very important as most of the legislations do not match with the preambles, the needs of the industry and the legislative intent. In addition, around 14% stakeholders are strongly agreed and 62% stakeholders are agreed that the Insolvency and Bankruptcy Code, 2016 fulfils the objectives which are mentioned in the preamble of the Code. **It has been critically important to observe the dissent where around 14% disagree with the same and with few lesser percentages i.e.10% neutral. The views, experiences and expectations of this decent is critically important and their observations may have been considered as a legal gap to the research if found suitable.**

[Pie Chart 3]

According to the Pie Chart no. 3 it shows that 66% stakeholders are concurred that the Insolvency & Bankruptcy Code, 2016 balances the interest of stakeholders but 31% stakeholders are disagreed on the same. 0% stakeholders have chosen the option "Don't know". Interest of the stakeholders is of supreme importance through its civil or commercial laws. In view of extreme majority, the Act balances the interest of stakeholders. The success of the Act is termed in this question as the legislation proof to be an effective piece to serve the industry and economy. It's important to observe that around half of the percentage of the majority firmly disagree and do not find the balance of interest. It's critically important to analyse this result as the percentage is substantially high.

Any Act passes the test of inclusivity when dissent is not substantially high. The survey was conducted amongst industry persons where awareness and legal maturity is at an expected standard. **31 % of dissent is extremely important to see the gap in law and industry expectations and also to analyse the rationality of the Act and suggestions thereof.** Further, the data analysis also indicates the gap of 35% between the stakeholders who agree and who are disagree.

[Pie Chart 4]

Pie Chart 4 is related to the question, "Do you think that in major resolution plans under the Corporate Insolvency Resolution Process average haircut is more than 65% granted in India which nullifies the core objectives of the Insolvency and Bankruptcy Code, 2016?", the data analysis of Pie Chart no. 4 indicates that 17% stakeholders are strongly agreed that under the Corporate Insolvency Resolution Process average haircut is more than 65% granted in India which nullifies the core objectives of the Insolvency and Bankruptcy Code, 2016, whereas 42% stakeholders agreed on the same. Few stakeholders i.e. 17% stakeholders disagree to that under the Corporate Insolvency Resolution Process average haircut is more than 65% granted in India which nullifies the core objectives of the Insolvency and Bankruptcy Code, 2016 and 24% stakeholders neither agreed nor disagreed on the same.

The core of this research was to start with this question where it has been noticed that **(59%) majority of the stakeholders agree that major resolution plans under the Corporate Insolvency Resolution Process average haircut is more than 65% granted in India.** This nullifies the core objectives of the Insolvency and Bankruptcy Code, 2016 where as 17% disagree with this. So, has been very evident that the core of the research about applicability of the haircut is questionable in application. **The stakeholders are strongly of the opinion that some amendments are the need of the hour to keep alive the preamble and spirit of the Act.**

[Pie Chart 5]

The Pie Chart 5 deals with the question, "Do you agree that the heavy haircut granted in the resolution plans such as Videocon case, Amrit India is ultimately loss to the depositors in the banking system?", the data analysis of Pie Chart no. 5 displays that 28% stakeholders are strongly agreed that the heavy haircut granted in the resolution plans such as Videocon case, Amrit India is ultimately loss to the depositors in the banking system and 45% stakeholders are agreed to the same. However, very few stakeholders i.e. 3% disagreed that the heavy haircut granted in the resolution plans such as Videocon case, Amrit India is ultimately loss to the depositors in the banking system and 10% stakeholders are disagreed to the same. Furthermore, 14% stakeholders are neither agree nor disagree that the heavy haircut granted in the resolution plans such as Videocon case, Amrit India is ultimately loss to the depositors in the banking system. **The majority (73%) stakeholders agree that the heavy haircut granted in the resolution plans such as Videocon case, Amrit India is ultimately loss to the depositors in the banking system.**

This question validates the need of amendment as the actual factual matrix of the recent case studies shown that the haircut process is not in line with the interest of the stakeholders. Very few stakeholders are in favour of the process. This question plays an extremely critical role as is evident in the process of haircut in the industry. It makes it imperative to analyse the issue of the Hair cut process not being in favour of the industry. It is important to reconsider such practice which has, neither legislative intent, nor balances the interest of the stakeholders. Utility to society of any practice or norm is crucially important. It validates the process though it is not codified. The haircut process failed with regard to this aspect, post observation and analysis of this data.

[Pie Chart 6]

The Pie Chart 6 is related to the question, "Do you think that 'Haircut' granted in the resolution plan is forcefully imposed on non-consenting secured creditors under the insolvency proceedings?", the data analysis of Pie Chart 6 shows that 24% stakeholders are strongly agreed that 'Haircut' granted in the resolution plan is forcefully imposed on non-consenting secured creditors under the insolvency proceedings and 45% stakeholders agreed on the same, nonetheless, 14% stakeholders are not concurred that 'Haircut' granted in the resolution plan is forcefully imposed on non-consenting secured creditors under the insolvency proceedings. Moreover, 17% stakeholder are neither agreed nor disagreed on the same.

The question brings into consideration a very important point of inclusivity or protection of the interest of the stakeholders. **Majority (69%) of the stakeholders, including almost half strongly agree with the imposition of the process on non-consenting secured creditors**. Here, dissent is very less. The majority view of stakeholders validates the unfair application of Haircut. It is even proven from the huge percentage. So, such non-codified and non-institutionalised practices are found not to protect the interest of non-consenting secured creditors, who are an important vertical for any organisation to retain their financial stability in the market.

[Pie Chart 7]

The Pie Chart 7 deals with the question, "Should the powers of NCLT under section 31(1) of the Insolvency and Bankruptcy Code, 2016, with respect to the approval to the resolution plans also extend to look into the merits of the resolution plan during the insolvency proceedings?", the data analysis of Pie Chart 7 indicates that 14% stakeholders are strongly agreed that powers of NCLT under section 31(1) of the Insolvency and Bankruptcy Code, 2016, with respect to the approval to the resolution plants should also extend to look into the merits of the resolution plan during the insolvency proceedings and 62% stakeholders are agreed to the same. Besides, 10% stakeholders are disagreed that powers of NCLT under section 31(1) of the Insolvency and Bankruptcy Code, 2016, with respect to the approval to the resolution plants should also extend to look into the merits of the resolution plan during the insolvency proceedings and 14% stakeholders are neither agreed nor disagreed on the same.

The majority (76%) of the stakeholders are in favour of established institution to be extended with the power. So, the NCLT under section 31(1) of the Insolvency and Bankruptcy Code, 2016, with respect to the approval to the resolution plans also extended to look into the merits of the resolution plan during the insolvency proceedings is clearly seen to be an objective of the stakeholders here. Dissent seems to be very less here. **Considering the composition, administration and application, NCLT seems to be a trusted adjudicatory intuition in this new age law.**

[Pie Chart 8]

The Pie Chart 8 is related to the question, "Do you agree that the commercial wisdom of the Committee of Creditors (CoC) during the insolvency proceeding destroys the economic and social value of the companies by considering only the recovery than the revival of the distressed company?", the data analysis of Pie Chart 8 exemplifies that 21%

stakeholders are strongly agreed that the commercial wisdom of the Committee of Creditors (CoC) during the insolvency proceeding destroys the economic and social value of the companies by considering only the recovery than the revival of the distressed company and 41% stakeholders are agreed on the same. However, 14% stakeholders are disagreed that the commercial wisdom of the Committee of Creditors (CoC) during the insolvency proceeding destroys the economic and social value of the companies by considering only the recovery than the revival of the distressed company and 24% stakeholders are neither agreed nor disagreed on the same.

To this extremely important question, the credibility of Committee of Creditors is at stake as maximum (62%) stakeholders strongly agree to the question with reference to the CoC. Further, **the data analysis shows the gap of 48% between the stakeholders who are agreed and who are disagreed.** A very small percentage is in favour of the CoC. When a majority of issues are driven by the Committee of Creditors, it is important to mention the shockingly low level of confidence of the stakeholders on the institution. These views are critically significant as the astute and aware stakeholders are in distress with regard to the functioning of the committee. It is proven that the committee is nothing but an eclipse in protecting the rights of the industry.

[Pie Chart 9]

The Pie Chart 9 deals with the question, "Do you think that the powers of the National Company Law Tribunal (NCLT) are deficient in the "approval of resolution plan" during the insolvency proceedings?", the data analysis of Pie Chart 9 shows that 7% stakeholders are strongly agreed that the powers of the National Company Law Tribunal (NCLT) are deficient in the "approval of resolution plan" during the insolvency proceedings and 58% stakeholders are agreed on the same. However, 14% stakeholders are disagreed that the powers of the National Company Law Tribunal (NCLT) are deficient in the "approval of resolution plan" during the insolvency proceedings and 21% stakeholders are neither agreed nor disagreed on the same.

With regard to the credibility of the established intuition NCLT, a majority (65%) are of the view that the powers of the National Company Law Tribunal (NCLT) are insufficient in the "approval of resolution plan" during the insolvency proceedings. Moreover, the data analysis indicates that there is a gap of 51% between the stakeholders who are agreed and who are not agreed. It is important that exhaustive powers be given to NCLT in protecting the interest. It is clearly evident that the credibility of NCLT is far superior to the Committee of Creditors. Considering the application of law and administration at the NCLT, the extended powers accorded to the NCLT during the resolution process is well taken move by the stakeholders.

[Pie Chart 10]

The Pie Chart 10 deals with the question, "Do you think that in India there is a need of amendment in certain provisions of existing legislation to reduce the haircut in the resolution plan in the insolvency proceedings?", the data analysis indicates that 24% stakeholders are strongly agreed that in India there is a need of amendment in certain provisions of existing legislation to reduce the haircut in the resolution plan in the insolvency proceedings and 55% stakeholders are agreed on the same. However, 10%

stakeholders are disagreed that in India there is a need of amendment in certain provisions of existing legislation to reduce the haircut in the resolution plan in the insolvency proceedings and 11% stakeholders are neither agreed nor disagreed on the same. **The maximum (79%) stakeholders are in favour of the amendment in certain provisions of existing legislation to reduce the haircut in the resolution plan in the insolvency proceedings.**

The last question raises the need for protection of stakeholders, democracy in the process and enhancement of corporate governance. When a company is in distress, revival and not dissolution is the best remedy. It is natural for everyone to want to survive. In the case of the corporate, when mass stakeholders are relying on the growth of the company, and when national economy progresses with the same aim, revival proves to be a cure to the stakeholders and indemnify preamble of the Act.

The concept of corporate governance based on the principle of corporate democracy. In the existing framework, the corporate democracy is not exposed to protect interest of the stakeholders.

Also, the existing practice of haircut with the self-relied institution may not serve the purpose of the Act. It's clearly defeating preamble of the Act and seems to be a unilateral way of adjudication without protecting the interest of all stakeholders. Ultimately, it is against the established principle of Democratic Socialism which is at core of the Indian Constitution.

3. Findings & Conclusion

1. As per the qualitative research it is noticed that maximum (93%) stakeholders are of opinion that they are in favour of contemporary resolution process which is one of the successes of the Insolvency and Bankruptcy Code, 2016 in terms of pragmatic implementation on the root.

2. It has been critically important to observe the dissent where around 14% disagree with that the Insolvency and Bankruptcy Code, 2016, on root of fulfilling the preamble of it and with few lesser percentages i.e.10% neutral. The views, experiences and expectations of this decent is critically important and their observations may have been considered as a legal gap to the research if found suitable.

3. 31% stakeholders dissented that the Insolvency & Bankruptcy Code, 2016 balances the interest of stakeholders and 31 % of dissent is extremely important to see the gap in law and industry expectations and also to analyse the rationality of the Act and suggestions thereof.

4. 59% majority of the stakeholders agree that major resolution plans under the Corporate Insolvency Resolution Process average haircut is more than 65% granted in India. The stakeholders are strongly of the opinion that some amendments are the need of the hour to keep alive the preamble and spirit of the Act.

5. The majority (73%) stakeholders agree that the heavy haircut granted in the resolution plans such as Videocon case, Amrit India is ultimately loss to the depositors in the banking system.

6. Majority (69%) of the stakeholders, including almost half strongly agree with the imposition of the process on non-consenting secured creditors.

7. The majority (76%) of the stakeholders are in favour of established institution to be extended with the power.

8. The credibility of Committee of Creditors is at stake as maximum (62%) stakeholders strongly agree that the commercial wisdom of the Committee of Creditors (CoC) during the insolvency proceeding destroys the economic and social value of the companies by considering only the recovery than the revival of the distressed company.

9. With regard to the credibility of the established intuition NCLT, a majority (65%) are of the view that the powers of the National Company Law Tribunal (NCLT) are insufficient in the "approval of resolution plan" during the insolvency proceedings.

10. The maximum (79%) stakeholders are in favour of the amendment in certain provisions of existing legislation to reduce the haircut in the resolution plan in the insolvency proceedings.

Haircut in banking terms refers to the amount of money lenders need to sacrifice as a part of CIRP. Objective of IBC is to provide a time bound and effective process for insolvency and bankruptcy in a transparent manner. It is a process for resolution of the stressed assets and maximizing the value and not recovery of the money.

For the last four years, banks have taken an average haircut of about 80%. It can be attributed partly to:

1. Resolution Professional's eligibility, experience and competence in cross checking the assets valued by the CoC,

2. Sanctity of the commercial wisdom of CoC in valuation of assets,

3. Non-empowerment of the NCLT to exercise judicial wisdom as against commercial wisdom in cases where One Time Settlement is opted. It can be also attributed partly to what stage of stress the company enters the CIRP, the period for which the company has been sick, the significant depletion of the value of the assets.

Meanwhile the courts have repeatedly ruled that the commercial wisdom of CoC will prevail, NCLT has no choice to exercise its judicial wisdom. But the ruling in Siva Industries and Holdings Ltd. may trigger some changes in law. The commercial wisdom of CoC cannot be questioned, which raises a question whether CoC is competent enough to understand the nitty gritty of the resolution process and whether the revival of the stressed company has taken place, which is the object of the IBC. The banks have taken an average haircut of 80% since 2017. In April 2023, IDBI Bank lenders, who made up the CoC, discussed and approved a proposal of Siva Industries and Holdings Ltd. where creditors agreed to take a 93.25% haircut to settle dues of Rs. 4863.87 Crs. This meant that banks would have recovered only Rs. 328.21 Cr. But NCLT Chennai interrupted autonomy of CoC stating that S.12A withdrawal cannot be made if terms of the settlement are ambiguous on the part of the CoC.

Therefore, it can be safely said that the commercial wisdom of the CoC which is detrimental to the survival of the distressed company should be subject to the judicial wisdom of the NCLT.

Since there are many factors which contribute to the CIRP, where sacrifices are required to be made by the banks in varying percentages, it cannot be said that the objective of IBC is defeated but there is an urgent need to take corrective measures.

4. Suggestions and Recommendations:

1. Necessity to balance the commercial wisdom of CoC and the judicial wisdom of adjudicating authority under IBC by amending Section 12-A of the IBC; it states the withdrawal of an admitted application by the CoC subject to 90% representation of the CoC can be allowed by the adjudicating authority. Hence, certain conditions need to be put for the withdrawal of an admitted application in the Code to ensure the revival of the company than the own interest of the CoC. Accordingly, NCLT should be given the power to oversee the compliance to the conditions for the withdrawal of application by the CoC.

2. Necessary to extend the powers of NCLT in the approval process of resolution plan by making amendments to the Section 31 (1) and 30 (2) of the Insolvency and Bankruptcy Code, 2016, in both these provisions the priority is given to the CoC in the approval of the resolution plan. The absolute powers are given to the CoC under IBC to execute the insolvency resolution process. Before approving the resolution plan the NCLT should be empowered to examine the merits of the resolution plan in depth. The CoC may have its own interest in the process but the judiciary is completely unbiased and hence the NCLT can ensure the survival of the company, accordingly, the NCLT can develop the expertise towards it by setting up the NCLT insolvency resolution professional's team to assist the NCLT in the verification of the merits of the resolution plan.

3. With the help of AI, the CIRP process can to be completed within a time-period because the delay in the completion of the process leads to the depletion of the value of the assets of the company and further, it ends with the large haircuts in the insolvency resolution process. AI can give the pre-NPA warnings to the creditors and the regulatory authorities.

4. The Asset Reconstruction Companies can also be part of the resolution applicant as the ARCs have the experience, skills and knowledge to deal with the stressed assets and consequently, these institutions can help in the reduction of haircut in the insolvency resolution process.

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Table 1
List of cases filed under the IBC with the National Company Law Tribunal[50]

CASES FILED, PENDING AND DISPOSED UNDER SECTION 7, 9 AND 10 OF IBC FROM 01.11.2017 TO 31.08.2022

SECTION OF IBC, 2016	NO. OF CASES NUMBERED	NO. OF CASES PENDING (PRE ADMISSION)	NO. OF CASES PENDING (AFTER ADMISSION)	NO. OF CASES DISPOSED OF	NO. OF CASES ADJUDICATED [(4) + (5)]	% OF ADJUDICATION [(6) ÷ (2) × 100]
(1)	(2)	(3)	(4)	(5)	(6)	(7)
SEC 7	9,429	2,304	1,540	5,990	7,530	79.86%
SEC 9	21,262	4,703	1,639	16,162	17,801	83.72%
SEC 10	512	168	190	291	481	93.94%
TOTAL	31,203	7,175	3,369	22,443	25,812	85.84%

Table 2
Summary of CIRPs Yielding Resolution[51]

	Amt/%		
Particulars	Up to Mar. 2022	For Q2FY23	Up to Sep. 2022
Total admitted claims of Financial Creditors (Rs cr)	684,901.3	10,121.5	790,626.2
Liquidation value (Rs cr)	131,447.9	2,793.2	137,118.8
Realisable by FCs (Rs cr)	225,293.8	3,054.4	243,452.5
Realizable by FCs as a % of their claims admitted	32.9	30.18	30.8
Realisable by FCs as a % of their liquidation value	171.4	109.4	177.6

Source: IBBI

50 National Company Law Tribunal available at https://nclt.gov.in/section-7-9-and-10, lastly accessed on 9/1/2024

51 ibid

Figure 1
Number of CIRP cases with the NCLT[52]

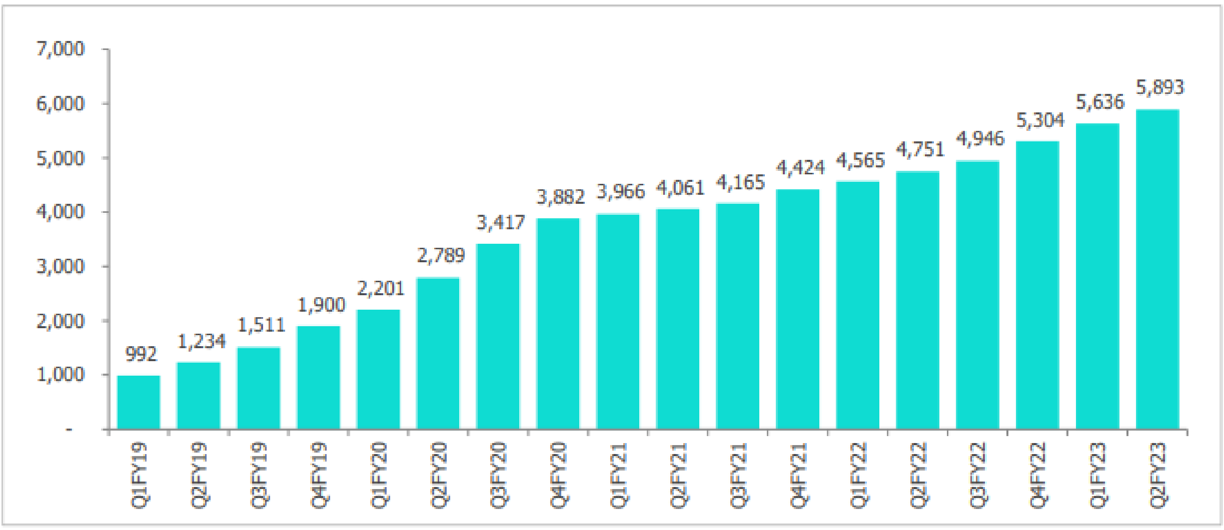
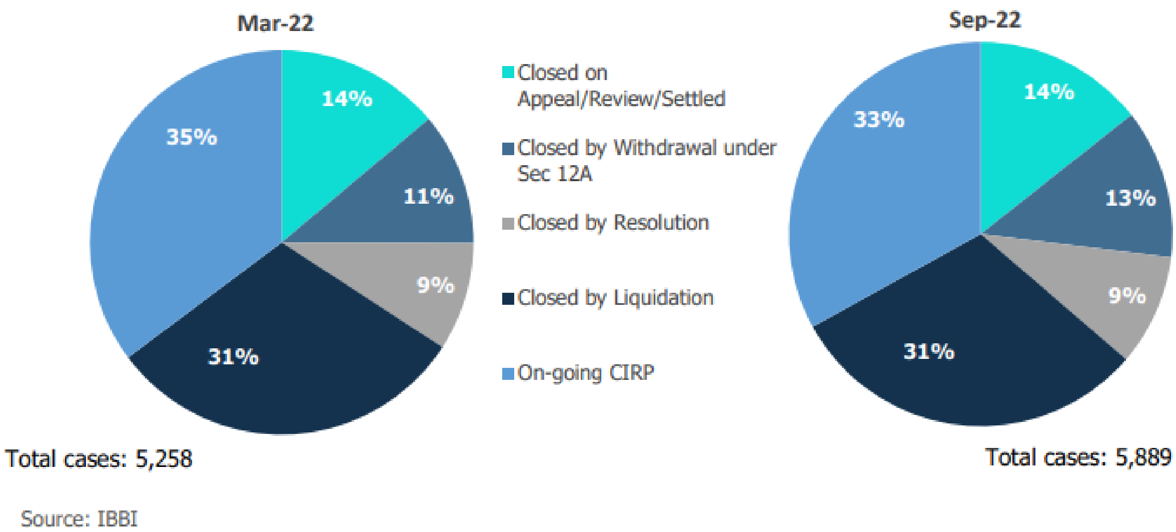


Figure 2
Status of CIRP cases[53]



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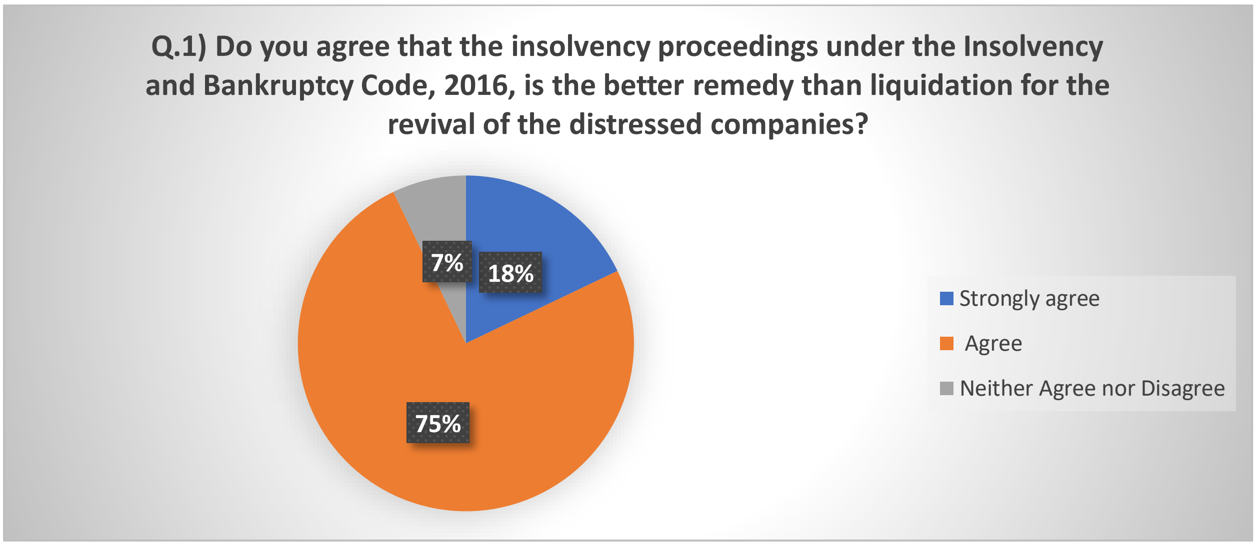
Pia Chart 1



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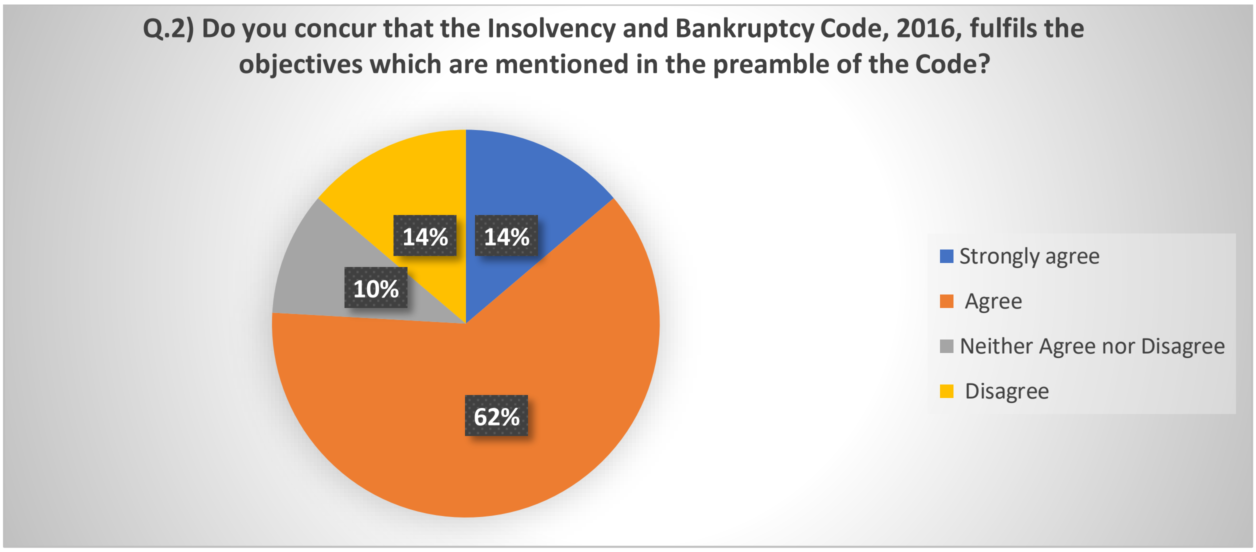
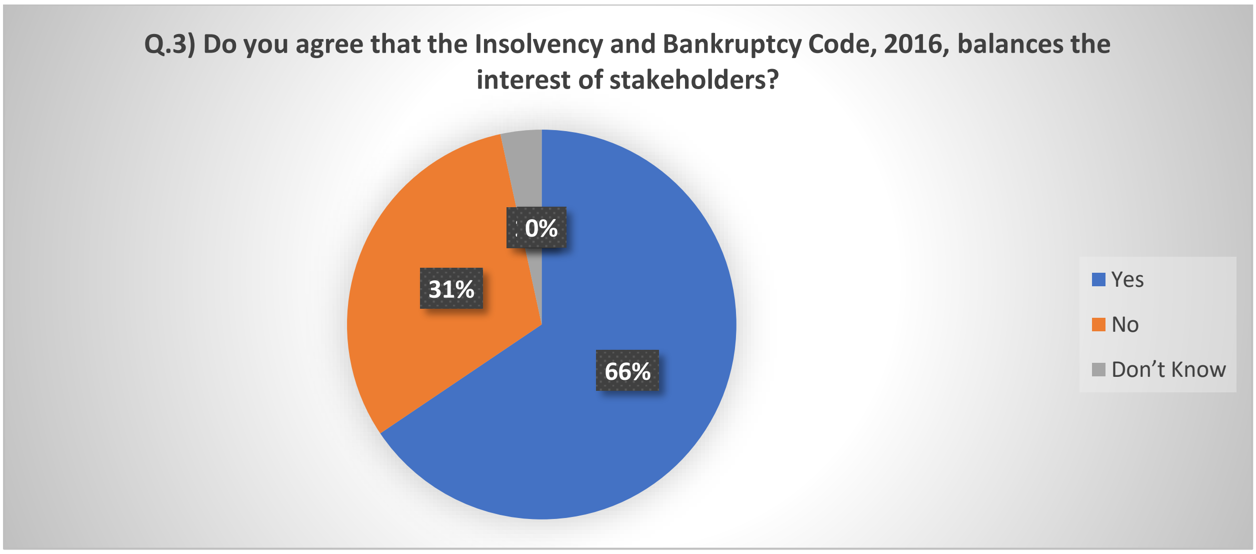


Pia Chart 3



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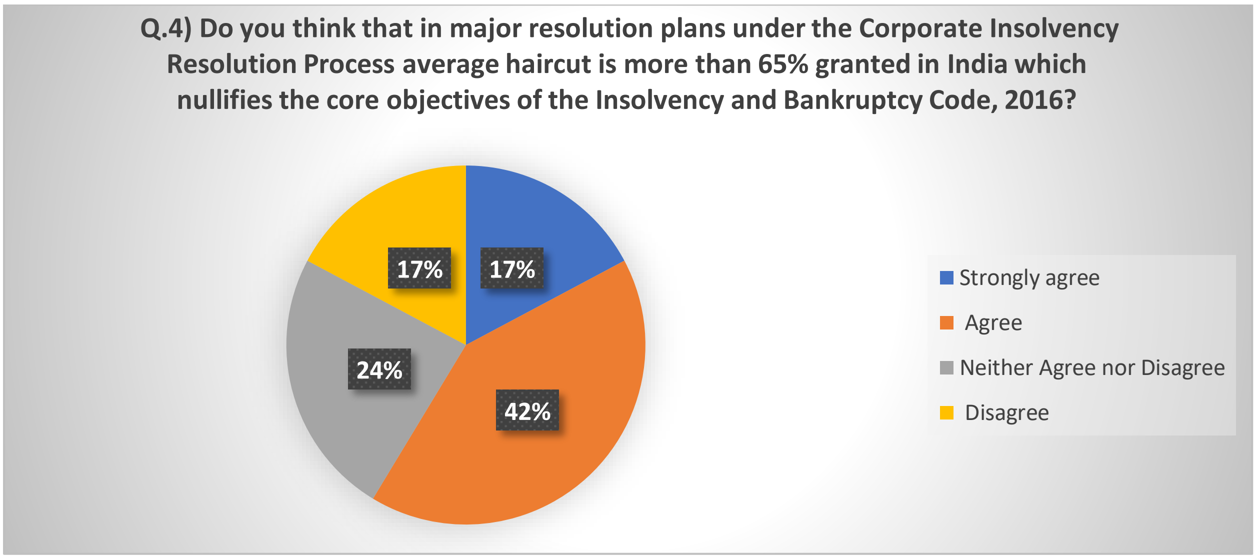
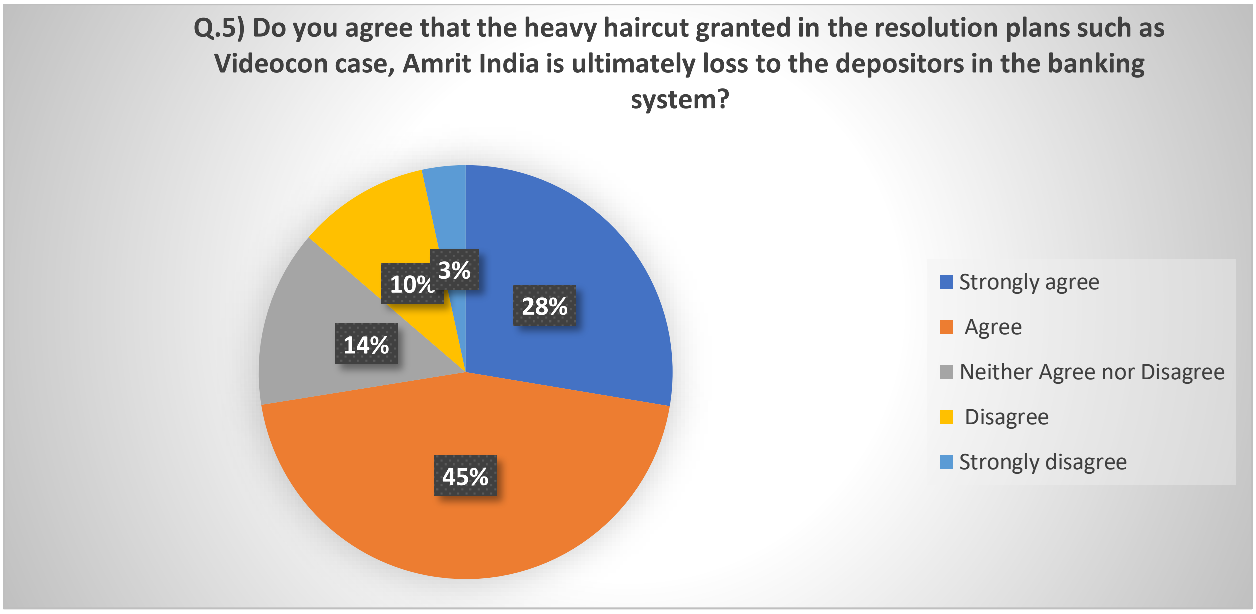


Pia Chart 5



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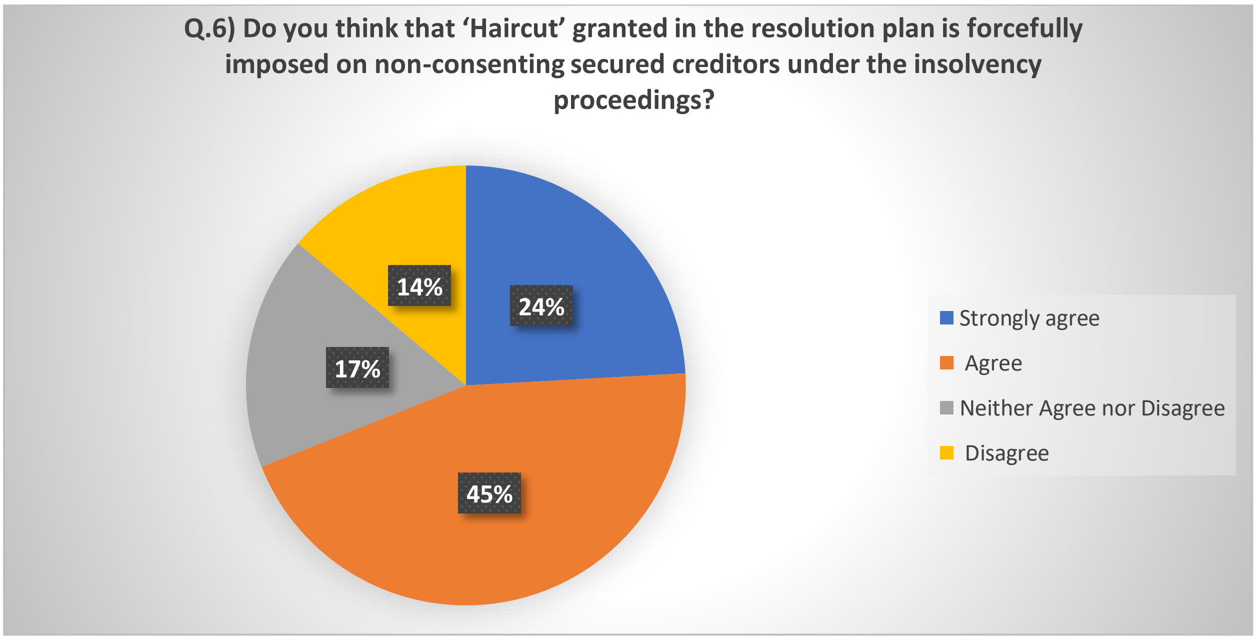
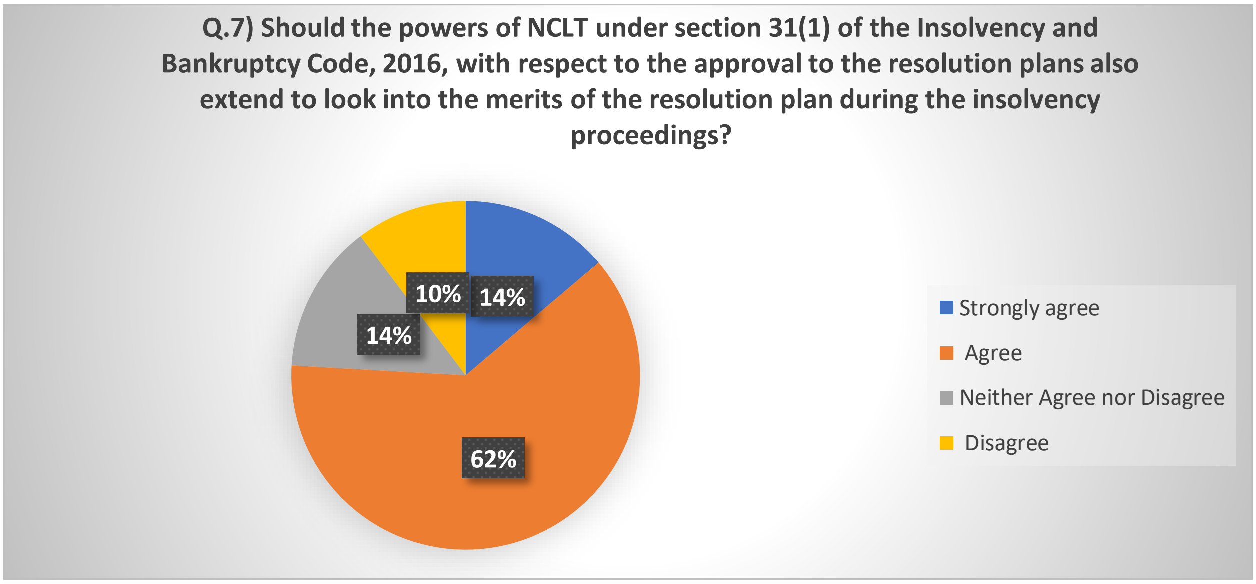


Pia Chart 7



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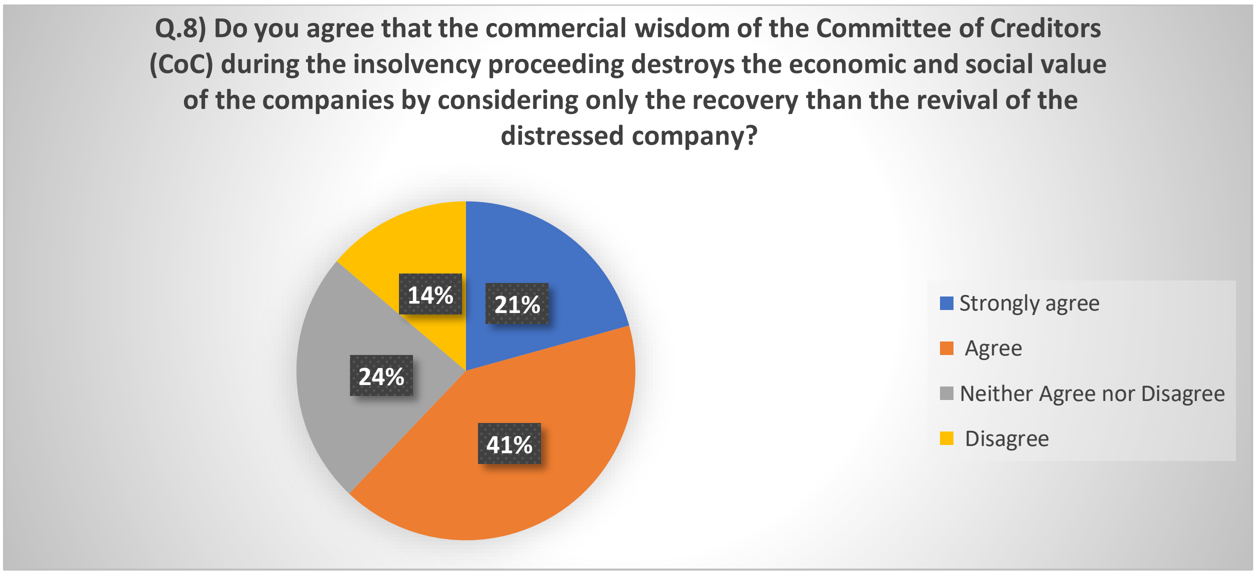
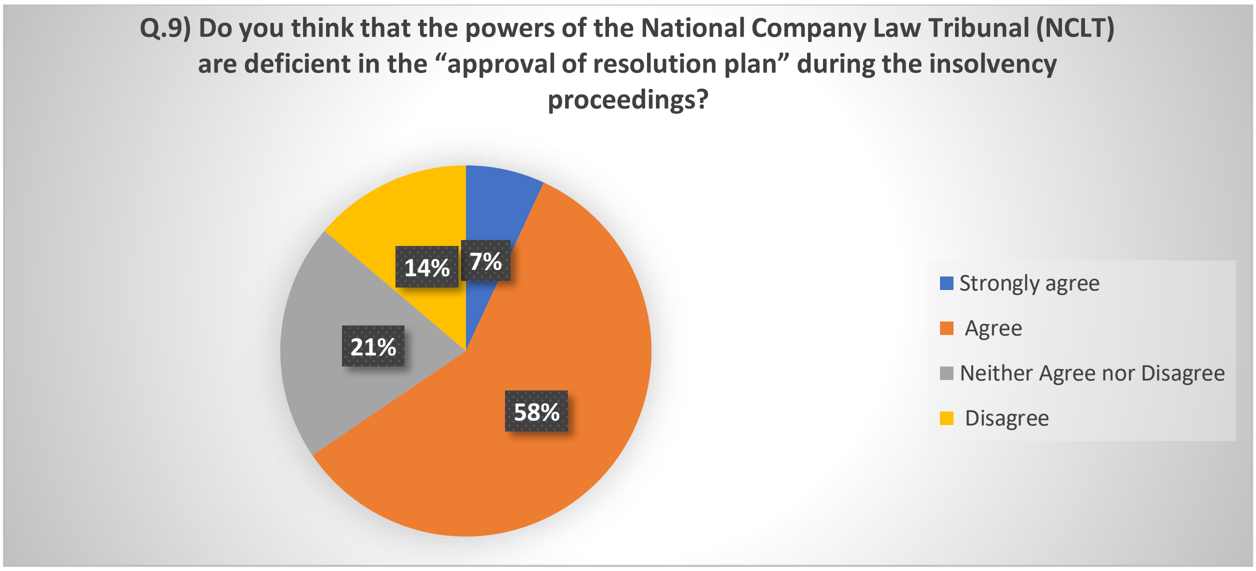


Pia Chart 9



Pia Chart 10