

Corporate Restructuring and Insolvency Resolution: Analysis of the Insolvency and Bankruptcy Code

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ABSTRACT

This research paper will probe into the complex field of Corporate Restructuring and Insolvency Resolution Processes along with the comprehensive analysis of the Insolvency and Bankruptcy Code (IBC), 2016. With the enactment and implementation of the Insolvency and Bankruptcy Code, 2016, the previous splintered provisions governing cases pertaining to insolvency, liquidation, restructuring and resolution processes got replaced with more intact regulations. Now, the code gives intact and comprehensive provisions for expeditious and efficacious resolution of the matters pertaining to insolvency disputes between entities and individuals, which eventually aids to the growth and development of the corporate sector. Moreover, prior to this legislation, businesses in the corporate sector which are getting liquidated due to heavy losses, were having slight possibility for reviving their business, and with the enactment of this code entities started assimilating whether a particular restructuring strategy will help the business to withstand during such crisis.

This study entails the broad and detailed analysis of the vital sections and regulations enacted by the code, in addition to its emphasis in the corporate sector with the help of some case studies and judicial precedents. Moreover, at the end of the reading, the reader will get an understanding of some of the strengths and weaknesses, challenges and opportunities and overall practical implication of the code on the corporate sector along with its impact. Thus our research area will be on exploring the operations of the Insolvency and Bankruptcy Code and what impact it carries out on the restructuring processes, along with knowing the factors which help in the success of the insolvency resolution.

KEY WORDS: Insolvency and Bankruptcy, Cross-Border Insolvency, IBC, SARFAESI, Corporate Restructuring, Insolvency Resolution, Committee of Creditors, Corporate debtor, NCLT, NCLAT.

I. INTRODUCTION

• OVERVIEW OF CORPORATE RESTRUCTURING AND INSOLVENCY RESOLUTION

Corporate restructuring is a part of strategic management which is often used, by the corporate entities in this era of dynamic market where there is frequent change in consumer tastes and preferences or demand and supply, as a tool to revive the sick companies by rearranging or changing the company's method of governance, structure or financial restructuring. While on the other hand, insolvency refers to the state of the company where it is not able to pay back its debts or liabilities as it becomes due. Generally as a layman, insolvency and bankruptcy are often used interchangeably but these are two different terms, insolvency refers to the state of any company when it is not able to pay off its financial obligations as soon

as it becomes due and on the other side bankruptcy is the legal status given to any company when became insolvent and there is no scope left of its revival after undergoing proper insolvency resolution process.¹ Moreover, corporate restructuring is used as a method by the companies who are undergoing insolvency resolution process under Insolvency and Bankruptcy Code, 2016 in order to revive their business if possible before opting for the last resort of winding off the company, as the procedure laid down under the law follows the going concern principle according to which the management or the adjudicating authority must first try to revive the sick company rather than putting the company under liquidation.

● **BACKGROUND AND EVOLUTION OF LAWS RELATED TO INSOLVENCY RESOLUTION AND CORPORATE RESTRUCTURING**

Prior to the Insolvency and Bankruptcy Code, 2016, India did not have such an intact and comprehensive law governing corporate insolvency and restructuring. However there were legislations like Security and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002² which has applicability on only banks and other financial institutions but not on individuals, or other corporate entities. This act helps the financial institutions in the recovery of bad debts and Non-Performing Assets (NPA) and protects and preserves the interests of the secured creditors by way of selling secured assets of the defaulting party, without any judicial intervention. Then we have Companies Act, 2013 which also provides a bunch of provisions dealing with restructuring and agreement between the corporate debtors and creditors but did not enumerates provisions pertaining to corporate insolvency resolution which stimulates the need for having a more intact and comprehensive legislation covering all the gaps and ensuring the interests of both the corporate debtor and creditor. Moreover, as there were no provision pertaining to corporate restructuring as a strategy to be used by the companies for resolving their financial distress or any other challenge caused by market dynamics, so Reserve Bank of India (RBI) has come up with a list of legal guidelines in the year 1970 enumerating instructions to the companies to undergo corporate restructuring, if 75% of the creditors are in favor of this proposal of rearrangement of the company's governance or capital structure in order to revive the company. RBI has also laid down certain eligibility criteria for the companies to undergo corporate restructuring.³

Thus, a draft of Insolvency and Bankruptcy Code was presented by the Ministry of Corporate Affairs in both the Houses of Parliament in the year 2015, which was then passed and came into force in December, 2016.

II. ANALYSIS OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

With the enactment and enforcement of the Insolvency and Bankruptcy Code, 2016 in India, all the splintered provisions pertaining to insolvency resolution, corporate restructuring and liquidation are consolidated into this more intact and comprehensive code. The code laid down special provision related to initiation of Corporate Insolvency Resolution Process (CIRP) efficaciously and in a time-bound manner, formation of Insolvency and Bankruptcy Board of India (IBBI) which helps in the regulation and enforcement of the code and additionally laying down several guidelines pertaining to the roles and responsibilities of the Resolution Professional along with maintaining register for the registration of

¹ Ms. Himanshi Sanjaykumar Sharma, Corporate restructuring under IBC, IBC LAWS (Mar. 20, 2024, 10:35 PM), IBC Laws - Corporate restructuring under IBC - By Ms. Himanshi Sanjaykumar Sharma.

² Security and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, No. 45, Acts of Parliament, 2002 (India).

³ LEXOLOGY, Spotlight: recent restructuring and insolvency developments in India - Lexology, (last visited Mar. 23, 2024).

insolvency resolution professionals, and making the National Company Law Tribunal and National Company Law Appellate Tribunal adjudicating authority for handling disputes pertaining to insolvency under this code, conducting liquidation process in case of failure to have a successful resolution process that is where the COC has not selected any of the proposed resolution plan. The present code has excluded from the ambit of its applicability all the banking or financial institutions, as they are governed by the SARFAESI Act, 2002.

The fundamental provisions of the IBC, 2016 can be better analyzed under the following heads being called as pillars of the IBC:-

- **Corporate Insolvency Resolution Process**

The CIRP can be initiated by a financial creditor (under section 7 of the IBC),⁴ or operational creditor (under section 9 of the IBC)⁵, or corporate debtor's applicant (under section 10 of the IBC)⁶, by filing applications under the prevalent sections before the adjudicating authority. This process can be initiated once any of the concerned applicants found that default has been committed by the corporate debtor, i.e. non-payment of the amount of money once it becomes due for payable.⁷ This is a procedure laid down in the IBC which can either result in the revival of the business or liquidate the company.

- **Resolution Professional**

The Resolution Professionals are the independent and qualified bodies established under the code which are authorized by the adjudicating authority to take in hand the daily managing affairs of the company, initiate and execute the resolution process and also aid in communication between the corporate debtors and creditors. The code obligates the RP to carry out the business operations of the corporate debtor as a going concern, avoid any contracts or agreements if not in favor of the corporate debtor, and publish notification about the undergoing CIRP or bankruptcy proceedings in the newspaper and on the company's portal if any.⁸

- **Adverse effects of IBC on Corporate Restructuring**

The IBC has also resulted in several difficulties during implementation in practical situations for company restructuring. One of such issues is a dearth of experienced professionals in the domain of bankruptcy with the correct abilities and dynamic knowledge needed to tackle situation of difficult restructuring. The speedy reformation process could not be achieved with a scarcity of trained personnel.

The potency of corporate restructuring under IBC highly depends on the cooperation between the stakeholders and management of the company. In order to reach an agreement on the restructuring plan the interest of all the parties must be aligned and dealt with accordingly. All these intricacies and complexity needed for restructuring has resulted in reducing the effect of IBC, thus enhancing the probability of the bankrupt enterprise being resurrected.

⁴ The Insolvency and Bankruptcy Code, 2016, § 7, No. 31, Act of Parliament, 2016 (India).

⁵ The Insolvency and Bankruptcy Code, 2016, § 9, No. 31, Act of Parliament, 2016 (India).

⁶ The Insolvency and Bankruptcy Code, 2016, § 10, No. 31, Act of Parliament, 2016 (India).

⁷ The Insolvency and Bankruptcy Code, 2016, § 3(12), No. 31, Act of Parliament, 2016 (India).

⁸ Chelcie Agrawal, Corporate Restructuring And Insolvency Resolution: Analysis Of The Insolvency And Bankruptcy Code (Ibc) In India, LEGAL VIDHIYA (Mar. 22, 2024, 22:20), CORPORATE RESTRUCTURING AND INSOLVENCY RESOLUTION: ANALYSIS OF THE INSOLVENCY AND BANKRUPTCY CODE (IBC) IN INDIA - Legal Vidhiya.

- **CASE LAWS ON INSOLVENCY RESOLUTION AND CORPORATE RESTRUCTURING**
- **Bhushan Power and Steel Limited Case (NPA Crisis)⁹**

Bhushan Steel Ltd., is a leading steel manufacturer in India. The company had fallen under the debt trap as had been indebted heavily during the said period and was facing dire financial downfall owing to various factors, some of which were mismanagement in the governance of the company, market dynamics and economic downturn.

So under the IBC, 2016, a resolution plan was submitted by the Tata Steel which was subsequently approved by the COC as well as the adjudicating authority, and thus involved acquiring a majority stake in Bhushan Steel by paying back a portion of their debt and infusing capital to revive its operations and getting back the situation to the square one. The efficacious resolution process of Bhushan Steel under the IBC facilitated in preserving jobs, protecting and preserving the interests of the creditors, and retaliating the principle of going concern thus reviving the company. The Supreme Court of India in this case has focused on the accountability and responsibility of the Resolution Professional in managing the matters of the corporate debtor after the initiation of CIRP along with scheduling meetings of the COC so as to reach on a mutually benefitting conclusion.

- **Essar Steel India Limited vs. Satish Kumar Gupta Case¹⁰**

Essar Steel Ltd. is a renowned steel producer company being operated in India, has started facing some dire sort of financial distress in conducting its operations because of its heavy indebtedness and other problems pertaining to mismanagement or market dynamics. The company has then instituted insolvency resolution proceedings under the code.

Then after having prolonged and contentious legal proceedings along with then amended proposal of resolution plans in the COC meetings, the COC finally approved a resolution plan duly submitted by Arcelor Mittal. The resolution plan enumerated that there should be acquisition of Essar Steel and a significant capital of ₹8,000 crore has to be infused for reviving the business. The gist of the Essar Steel's insolvency landmark case under the IBC came out as a remarkable debt resolution process in the Indian Corporate history and additionally highlights the effectiveness and efficacy of the IBC framework in resolving such a complex insolvency situation and helping it to revive its operations by way of corporate restructuring.

- **AMTEK Auto Limited Case¹¹**

Amtek Auto Ltd. is a renowned automotive parts producer and supplier in India, which then started facing financial burden because of diverse factors such as liquidity crisis, high indebtedness, and severe corporate governance issues. The company's insolvency proceedings put forth various challenges in respect of operational turnaround and recovery of debt by creditors.

After several failed endeavors to ensure a resolution plan be put in place, the company ultimately went into liquidation according to the provisions of IBC. The liquidation procedure required the sale of assets possessed by Amtek Auto's in order to repay creditors, even if it has to be sold at considerably discounted rates. The present case of Amtek Auto emphasized the need for early detection and resolution of financial difficulties, along with the need for efficient restructuring strategies for prevention of liquidation and maximization of creditor recovery. All the above mentioned case studies provide in depth insight into the

⁹ Bhushan Power & Steel Ltd. vs SEBI (2023).

¹⁰ Essar Steel India Limited vs. Satish Kumar Gupta (2019).

¹¹ Committee of Creditors of AMTEK Auto Limited Through Corporation Bank vs. Dinkar T Venkatasubramanian & Ors. (2020).

practical application of IBC framework and its ramification on corporate insolvency resolution procedure in India. They perfectly showcase the dynamic outcomes of insolvency proceedings under the IBC, starting from successful restructuring and revival to liquidation and sale of assets. Furthermore, it focuses on the challenges and complexities embedded in amicably solving corporate insolvency disputes and the part of stakeholders i.e. creditors, resolution professionals, and judicial authorities, in the entire resolution process.

III. IMPACT OF IBC ON CORPORATE BEHAVIOR, ECONOMY, CORPORATE GOVERNANCE, AND RESTRUCTURING

- **Impact of IBC on Corporate Behavior:**

Insolvency & Bankruptcy Code enacted in the year 2016 has proved to be a landmark legislation. The primary rationale behind the code was to consolidate and amend laws for reorganization and insolvency resolution of corporate persons as well as entities, to promote business undertaking, availability of credit and cater to the interests of all the stakeholders collectively. It introduced a comprehensive framework for resolution of distressed companies and saving them from getting totally wound up eventually.

- **Impact of IBC on Corporate Governance:**

Stronger footing to Creditors: IBC provides a wide range of protection to all stakeholders this evident from the fact that the Resolution Professional cannot be made without the approval of the Committee of Creditors. The basic responsibility of the COC is to give approval to the most workable resolution plan among those submitted for the corporate debtor. This involves choosing the plan that can maximize the value of the corporate debtor's assets, and ensure adequate payment to all creditors.

Promoting Transparency: The Insolvency and Bankruptcy Code enables for a clear resolution process for the corporate debtors. The resolution professional must thoroughly examine the transactions of the corporate debtor to determine what would be amicable in not deteriorating its current position. The disclosure must be made before the COC to establish RP's independence and unbiased role.¹²

Instilling Accountability: Good corporate governance stands on the pillar of accountability which is also important for attaining confidence in corporate form of structure. The provisions of IBC RP takes over the position of BOD which expedites the decision making process at the time holding accountable individuals responsible for any misdoing which led to the downfall of the corporate debtor. Thus the BOD are highly cautious about handing over control of their organizations. This has in turn led to exercising a careful approach, being extremely responsible, and avoidance of situations that may lead to insolvency.

- **Impact of IBC on Corporate Restructuring:**

The concept of corporate restructuring being utilized in India has drastically changed after the inception of Insolvency and Bankruptcy Code. It has made corporate restructuring more rationalized and impactful by creating a clear and time-bound foundation for insolvency resolution.

The advantageous effects of the Code are elevated through judicial precedents and illustrations of successful company reorganization under the code. The victorious resolution of the Bhushan Steel case, in this case the company's debt was restructured effectively through the procedure laid down under IBC, this stands as an illustration of how helpful the framework is in rescuing struggling businesses and bringing them back to smooth functioning.

¹² Daizy Chawla and Neha Mitta, Building a Better Boardroom: The role of IBC in advancing corporate governance in India, ET (Mar. 22, 2024, 2:55 PM), corporate governance: Building a Better Boardroom: The role of IBC in advancing corporate governance in India - The Economic Times (indiatimes.com).

By providing stringent deadlines for resolution, IBC has remarkably accelerated the corporate reorganization process. Therefore resulting in creditors to recover their money with ease and the time period for reorganization has also reduced dramatically, thereby improving the possibility of the bankrupt enterprise being resurrected.

- **Impact of IBC on Indian Economy:**

IBC has acted as a Stimulus in accelerating the Indian Economy. As a major economic reform, IBC has transferred the balance of power from the corporate debtor to the creditor. It has imbibed a significantly increased notion of fiscal and credit discipline in order to preserve economic value. The World Bank in its recent report of the year 2020 'Doing Business 2020: Comparing Business Regulation in 190 Economies' remarked, that India is among the few nations with the most commendable improvement in doing business. The report stated that India has secured the ranking of 63 out of 190 countries. The report also included Resolution of Insolvency as a major policy reform resulting in the ease of doing business in India and additionally states as below:

The "Make in India" initiative brought about by the Indian Prime Minister aimed at attracting foreign direct investment, strengthening the private sector particularly the manufacturing sector and further enhancing overall competitiveness. By utilizing the Doing Business criteria, the government aimed to showcase the commitment of India to reform and showcase tangible progress to potential investors. In the year 2015, the government targeted to further elevate the position of India within the top 50 countries in area of ease to do business by 2020. India witnessed a great advancement, climbing from 130th in the Doing Business 2016 ranking to 63rd in the Doing Business 2020 ranking.¹³

With regards to settling insolvency, the report goes on to say that: India has gained ease in resolving insolvency by promoting reorganization process in practicality. At the same time it has made resolving insolvency more difficult by not permitting dissenting creditors to gain as much under synonyms as they would receive in liquidation.

IV. CROSS-BORDER INSOLVENCY

The tremendous increase in trade, investment and business resulting from the implementation of new economic policy, 1991, also known as economic reforms or Liberalization, Privatization and Globalization (LPG) policy has led to an increase in cross-border disputes. Thus emphasizing the need to have a comprehensive legal framework dealing with disputes related to cross-border insolvencies. Cross-Border Insolvency refers to the situation where the corporate debtor has assets and creditors located in different countries having different procedures.¹⁴ And thus the cases arising out of these situations will have a contending and conflicting impact on the Insolvency Resolution Process, like facing challenges in protecting the diverse interests of the creditors residing in different jurisdictions, and dealing with different legal procedures. India does not have any legal provisions governing cross-border insolvency except for section 234¹⁵ and 235¹⁶ of the Insolvency and Bankruptcy Code 2016.

However, in 1997, the United Nations Commission on International Trade (UNCITRAL) drafted a model law for the facilitation of cross-border insolvency proceedings and protection of the interests of the

¹³ ICAI, Impact-IBC.pdf (icmai.in) (last visited Mar. 20, 2024).

¹⁴ LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=83c36e66-e1e2-4804-a2ca-329ddb9d8fc1> (last visited Mar. 22, 2024).

¹⁵ The Insolvency and Bankruptcy Code, 2016, § 234, No. 31, Act of Parliament, 2016 (India).

¹⁶ The Insolvency and Bankruptcy Code, 2016, § 235, No. 31, Act of Parliament, 2016 (India).

corporate debtor and creditors of different countries involved therein, which was thereafter adopted by the Indian Legislature as the Draft Part Z upon the recommendation of the Cross-Border Insolvency Rules/Regulations Committee.¹⁷ It has drafted a resilient layout having a modern and fair legal framework to address these cross-border insolvency proceedings in a more effective and efficient manner. This model law is mainly based on four principles for the proper facilitation and management of the cross border insolvency proceedings which are majorly providing access for the foreign courts and professionals to the domestic court's proceedings, recognizing the foreign proceedings, maintaining cooperation and coordination among the courts of different jurisdiction.¹⁸ Therefore in a nutshell, the UNCITRAL Model Law on Cross-Border Insolvency enumerates a resilient framework for the facilitation and management of the ongoing insolvency resolution proceedings being carried out in different jurisdictions. The purpose of this framework was to encourage cooperation, coordination, fairness and effectiveness in the resolution of international insolvency disputes and preserve and protect the rights and interests of the corporate debtor and creditors residing at different locations. However, there exist challenges too with regards to the implementation of this model law as having diverse legal systems, interpretation of laws, regional and cultural barriers, and political considerations.

V. CONCLUSION

Therefore, after conducting the required research and analyzing all the pros and cons of the research topic we can conclude that prior to the enforcement of IBC, 2016 there was no clear and comprehensive framework or legislation dealing with the disputes pertaining to the corporate restructuring, insolvency and bankruptcy in India. However there existed certain acts like SARFAESI Act 2002, RBI Guidelines 1970 related to corporate restructuring, Companies Act, 2013, etc. but they all were splintered and vague provisions governing these corporate disputes. The present code has been drafted in such a way that it came up with a though creditor-centric approach but thereby balances the interests of both the creditors as well as the corporate debtors. Moreover, the code focuses on concluding the process in a time bound manner. It gives us a robust and comprehensive framework to resolve all the insolvency related disputes by following the principle of going concern and thus focuses first on the revival of the businesses rather than putting them under liquidation and this revival is done via corporate restructuring.

¹⁷ UNCITRAL, Cross-Border Insolvency: Model Law on Cross-Border Insolvency, United Nations Commission on International Trade Law, https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency (last visited Mar. 23, 2024).

¹⁸ J. L. Howell, International Insolvency Law, 42 *The International Lawyer* 113 (2008), <http://www.jstor.org/stable/23824440> (last visited Mar. 23, 2024).