

A STUDY OF THE INSTITUTIONAL SET-UP UNDER THE IBC

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ABSTRACT

The Insolvency and Bankruptcy Code, 2016 is the second key legal and economic reform in India after GST. IBC was framed to provide time-bound insolvency resolution process, ensure certainty in the insolvency and liquidation processes and address the concerns of both the domestic and foreign creditors by introducing inter-creditor dynamics to realign the existing practices of different creditors. It therefore promotes ease of doing business in India. The objective of the Code provides for the establishment of the Insolvency and Bankruptcy Board of India for the matters of insolvency and bankruptcy of the entities. The IBC creates a novel institutional framework, comprising of, the regulator (IBBI), the appointment of third party professionals (RPs), Information Utilities and adjudicatory mechanisms. The paper studies the role of the new robust institutional framework and a strong cadre of RPs under the Code in achieving its objectives.

KEYWORDS: IBBI, RP, IPA, IU and NCLT.

INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "IBC" or "Code") offers a complete and uniform insolvency laws to the entities. Before the advent of IBC there were several overlapping legislations and adjudicating forums to deal with the matters of financial failure and insolvency. This legal and institutional framework proved to be a failure as the recovery from these sources was 23% in 2007-17 while the same was 43% under the IBC from 2017-19¹. This recovery shows a significant rise in the recoveries made by the creditors.

For the purpose of facilitating a time bound and formal insolvency resolution process and liquidation, the Code creates a novel

institutional framework consisting of four critical pillars: a Regulator (IBBI), Insolvency Professionals, Information Utilities and Adjudicating Authority. This framework is designed to streamline the corporate insolvency resolution process (CIRP) smoothly, within the period of 330 days (after 16.08.2019)

a) **A REGULATOR-THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (IBBI OR THE BOARD):** The IBBI acts as a Regulator under the Code and was set up on October 01, 2016. The IBBI amends and consolidates the laws relating to reorganization and insolvency resolution of corporate persons, individuals and partnership firms within the timeline for maximization of the value of

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assets of such persons, for promoting entrepreneurship, availability of credit and for balancing the interests of all the stakeholders. The Board promotes, regulates a profession and the processes under the Code which are-Insolvency Professionals, Insolvency Professional Agencies, Insolvency Professional Entities and Information Utilities. It makes and enforces the rules for insolvency resolution processes and liquidation (of corporate and individuals). As per Section 189 of the Code, the Board consists of ten members, including agents from the Ministries of Law and Finance and the Reserve Bank of India. The powers and functions of the Board are specified under Section 196 of the Code. The Board has the power to register IPAs, IPs and IUs and renew, withdraw, suspend or cancel such registrations, has to promote development of and regulate the working and practices of IPAs, IPs and IUs and other institutions for furthering the purposes of the IBC, of specifying eligibility requirements, fees or other charges, standards for the functioning of IPAs, IPs and IUs and it performs such other functions as may be prescribed.

- b) **A REGULATED PROFESSION-INSOLVENCY PROFESSIONALS (IPS):** For the first time in India, the IBC has brought a regulated profession of IPs. The IPs play a catalytic role and manage the insolvency and bankruptcy cases. They act as resolution professional (RP) in corporate and non-corporate insolvency resolution, liquidator in case of corporate liquidation and bankruptcy trustee in individual bankruptcy. An IP has to be enrolled as a member of the Insolvency Professional Agency (IPA) and registered as an IP with the IBBI.²

The role of "insolvency representative" is recognized by the *UNCITRAL Legislative Guide*

*on Insolvency Law*³. The IP plays a crucial role in the effective and efficient implementation of the IBC along with the duty to protect the interests of all the stakeholders (corporate debtor, creditors, employees, etc). In CIRP, the IP performs the functions under the control of the Committee of Creditors (CoC) and takes over the management of the business of the corporate debtor (CD), from the date of his appointment. Functions and obligations of IPs are provided under Section 208 of the Code. The day-to-day operations of the CD are carried out by him. The powers of the Board of Directors of the CD are suspended and the same powers are exercised by the RP. He ensures that the business goes uninterrupted, brings the creditors on the table for having a feasible resolution plan prepared and agreed to by everyone. He has to act within the strict timeframe under the IBC and balance the interests of CD and creditors.

The final report of the BLRC, emphasized the role of an IP as follows –

"In an insolvency and bankruptcy resolution process driven by the law there are judicial decisions being taken by the adjudicator. But there are also checks and accounting as well as conduct of due process that are carried out by the IPs. Insolvency professionals form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process".

An IP has to adhere to the procedures of law, accounting and finance related functions. He has to manage the assets of the debtor during insolvency proceedings, prepare resolution proposal, negotiation and mediation of deals and also distribution of realization proceeds under insolvency resolution. The adjudicator depends upon the expertise of the IP in carrying out the tasks in professional and efficient manner, so, he acts as an agent of the

adjudicator. He is regarded as fulcrum of the resolution process and is the link between the adjudicating authority and the stakeholders (debtors, creditors and resolution applicants). Therefore, his role is important in the efficient running of the insolvency resolution and bankruptcy process. It is important to note that the powers of RP is not unfettered, his powers are subject to the authority of the CoC.

c) **INFORMATION UTILITIES (IUS):** The IUs are the professional organizations registered with the IBBI⁴ and they provide high-quality authenticated information about the CD's debts and defaults. The infrastructure of IUs is provided in the Code for removing information asymmetry and the dependency on the management of the CD for critical information required in insolvency proceedings. The Creditors are required to provide financial information about the creditors to utilities on an ongoing basis. This information will be available to IPs, creditors, liquidators and other stakeholders in the insolvency proceedings. IUs maintain the information in centralized electronic databases.

It has been two years since, the Code came into force and it has been observed that lack of information is the major roadblock in the way of resolution. A lot of time was wasted in courts in determining whether a debt exists or not, who the claimants are and what contracts are in force, etc. Hence, in order to address this issue the IUs gather, assemble, validate, classify, store and distribute all the possible relevant data of the debtors under the IBC. They play critical role as they not only help the creditors in taking informed decision but also make the debtor cautious because the information of the debtors are available with them. A person before investing can rely on the information provided by the IU for ensuring secured investment.

The Bankruptcy Law Reforms Committee (BLRC) had given the solution to digitize credit transactions and make them accessible on a digital platform and this solution was then mandated by the Code by creating the regulated information industry in the form of IU.⁵ The first IU in India is the National E-Governance Services Limited (NeSL) registered under the Code. NeSL is set up by the leading public institutions.⁶ The objective of NeSL is to expeditiously facilitate the completion of insolvency proceedings under the IBC in a time-bound manner.

d) **ADJUDICATING AUTHORITIES:** The Code specifies the National Company Law Tribunal (NCLT)⁷ to be the adjudicating authority to exercise judicial control over the insolvency and bankruptcy process of the companies. All the appeals from the NCLT shall lie with the National Company Law Appellate Tribunal (NCLAT). The Supreme Court of India shall have the appellate jurisdiction over NCLAT.

In consonance with the broad philosophy of the Code the insolvency resolution process is commercially and professionally driven rather than being Court driven. Therefore, the role of adjudicating authorities is limited to ensure due process instead of adjudicating on the merits of insolvency resolution. The NCLT is vested with the power to deal with the matters of Winding up under the Companies Act, 2013 and Board for Industrial and Financial Reconstruction (BIFR) and to adjudicate with respect to matters arising out of and incidental to the insolvency proceedings.

NCLT plays an active role in the insolvency and bankruptcy proceedings under the IBC and is assisted by the IPs and IPAs. The insolvency resolution process is triggered upon the insolvency petition made to the NCLT. The following are the three persons who can initiate CIRP before the NCLT under the IBC:

- i. Financial Creditor,
- ii. Operational Creditor and
- iii. The Corporate Debtor himself.

Then the NCLT identifies whether the default is committed by the debtor in repayment of the debt. If the NCLT finds that default is committed by the debtor then the NCLT allows the petition to go through else it dismisses the petition. In India there is no judicial precedent available in relation with insolvency and bankruptcy cases, as IBC is a new legal regime. So, in IBC the judges have to decide each case freely and independently of previous decisions by applying the IBC provisions.

- e) **INSOLVENCY PROFESSIONAL AGENCIES (IPAS):** Section 3(20) of the Code says that an IPA is an entity registered with the Board.⁸ The IPs are enrolled with the IPAs as members. The IPA works for regulating and promoting the professional development of IPs, services of competent IPs, protecting the interests of debtors, creditors and other persons specified and promoting their own growth. The IPA is responsible for granting membership to, suspending or cancelling the membership of IPs, laying down standards of professional conduct of the members, monitoring their performance, safeguarding their rights, privileges and interests of members, redressing the grievances against IPs and publishing list of members and their performance.⁹ Presently there are three IPAs in India namely – IIP-ICAI, ICSI-IIP and IPA-ICAI.

SUMMARY

The IBC is heralded as a landmark piece of economic legislation as it promises to provide major facelift to the existing corporate

restructuring and insolvency and bankruptcy regime in India. The Code provides an insolvency and bankruptcy framework which is comparable with international standards. The Code is in its initial stage and has attempted to bring major changes to rectify the lacunae and fill in the gaps of the earlier insolvency legislations. It is the only law which is available to debtors and financial & operational creditors alike. The IBC lays special thrust on creditor driven insolvency resolution within the strict timeline and to achieve it creates a new institutional setup with the Board, IPAs, IPs, IUs and the NCLT. These institutions will help in ensuring effective implementation and governance of the provisions of the Code and the success of the IBC hinges on the way it is implemented.

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