International Journal of Law, Policy and Social Review
www.lawjournals.net
Online ISSN: 2664-6838, Print ISSN: 2664-682X
Received: 08-10-2022, Accepted: 25-10-2022, Published: 10-11-2022
Volume 4, Issue 4, 2022, Page No. 77-81

A clean slate theory in Insolvency and Bankruptcy Code, 2016

Ramit Mehta
Advocate, Rajasthan High Court, Managing Partner, Mehta Chambers (Law offices), Jodhpur, Rajasthan, India

Abstract
The Insolvency and Bankruptcy Code, 2016 (IBC) was enacted as a comprehensive legal framework to address the inefficiencies and delays that characterized India's earlier insolvency regime. Designed to consolidate multiple fragmented laws into a unified system, the Code seeks to ensure the timely resolution of insolvency, maximize the value of distressed assets, and balance the interests of creditors and debtors while promoting ease of doing business. The legislation was passed by Parliament in May 2016 and brought into force in a phased manner, with certain provisions—particularly those relating to individuals and partnership firms—yet to be fully implemented.
Prior to the IBC, India's insolvency framework was governed by a patchwork of laws, including the Sick Industrial Companies (Special Provisions) Act, 1985, the Companies Act, the SARFAESI Act, and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. These laws often resulted in prolonged litigation, jurisdictional overlaps, and debtor-friendly outcomes, thereby hindering effective debt recovery and resolution. The failure of these mechanisms and the need for a time-bound, creditor-driven process led to the establishment of the Bankruptcy Law Reform Committee, which ultimately shaped the IBC.
This paper examines the evolution of India's insolvency regime, analyzes the shortcomings of the pre-IBC framework, and evaluates how the IBC attempts to address these challenges through a structured and time-bound resolution process.

Keywords: Insolvency and Bankruptcy Code, 2016, Insolvency resolution, bankruptcy law, corporate insolvency, SARFAESI act

Introduction
The Insolvency and Bankruptcy Code, 2016 is a special law, which has been ordained for the purpose of bringing out an industry from distress and to ensure that its assets do not go to waste by liquidation. IBC is the bankruptcy law of India which seeks to consolidate the existing framework by creating a single law for insolvency and bankruptcy. The code aims to protect the interests of small investors and make the process of doing business less cumbersome.The Insolvency and Bankruptcy Code was passed by Lok Sabha on 5thMay 2016 and by Rajya Sabha on 11thMay 2016 and thereafter received the assent of the President of India on 28thMay 2016.
The Code outlines separate insolvency resolution processes for individuals, companies and partnership firms. The process may be initiated by either the debtor or the creditors. IBC was enacted and came into force w.e.f. 28th May 2016, however, some of the sections were made effective on various dates to implement in a systematic manner. Some of the parts have not even been notified till date e.g. bankruptcy process for partnership firms and individuals.

Scenario Preceding IBC
That prior to the promulgation of the IBC, the bankruptcy and insolvency legal regime was more like the adversarial legal system and tilted in favour of debtors. The Era before IBC was having various scattered laws relating to insolvency and bankruptcy which caused inadequate and ineffective results with undue delays. Moreover previous experiments that had failed and adverted to certain judgments to show that the failure of previous acts were due to enormous delays in disposal of cases. Previous Acts are:- The Sick Industrial Companies (Special Provisions) Act, 1985 for revival of sick companies, Companies Act for liquidation and winding up of the company, SARFAESI – (Securitization and reconstruction of financial assets and enforcement of security interest) Act for security enforcement and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993for debt recovery by banks and financial institutions.
Due to Ineffective implementation, conflict in one of these laws and the time-consuming procedure in the aforementioned laws, made the Bankruptcy Law Reform Committee to draft and introduce Insolvency and Bankruptcy Law bill.

Holy Grail of IBC and Its Methodology
The Preamble of the Code states that it is "An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto " To enable this, detailed timelines have been prescribed in the Code.
The Insolvency and Bankruptcy Code has been a big sigh of relief for MSMEs which would, ensure faster debt recovery or liquidation process through the Corporate Insolvency Resolution Process (CIRP) or through liquidation of defaulting debtor entity. This law has simplified winding up process in respect of companies, which was earlier fragmented due to multiplicity of statutes as well as forums.

One of the main purposes of this code is to empower the creditor wherein he or she can get back the dues through the Corporate Insolvency Resolution Process (CIRP) or through liquidation of defaulting debtor entity. The Insolvency and Bankruptcy code at present can only be triggered if there is a minimum default of Rs 1 Crore. This process can be triggered by way of filing an application before the National Company Law Tribunal (NCLT). The process can be initiated by two classes of creditors which would include financial creditors and operational creditors. But for the application to be admitted, the creditor will have to show that a requisite default is ascertainable.

Another important aspect that has to be seen in respect of Insolvency and Bankruptcy Code is that at present only companies (both private and public limited company) and Limited Liability Partnerships can be considered as defaulting corporate debtors. This code also contains provisions in respect of individual insolvency, but these provisions have not been notified they have consequently not come into force yet. Therefore cases relating to unpaid debts against individuals and partnership firms would fall outside the purview of this code.

Time-Bound Procedure

Speed is of essence for the working of the bankruptcy code, for two reasons. First, while the calm period can keep an organisation afloat, without the full clarity of ownership and control, significant decisions cannot be made. Without effective leadership, the firm will tend to atrophy and fail. The longer the delay, the more likely it is that liquidation will be the only answer. Second, the liquidation value tends to go down with time as many assets suffer from a high economic rate of depreciation. From the viewpoint of creditors, a good realisation can generally be obtained if the firm is sold as a going concern. Hence, when delays induce liquidation, there is value destruction. Further, even in liquidation, the realisation is lower when there are delays. Hence, delays cause value destruction. Thus, achieving a high recovery rate is primarily about identifying and combating the sources of delay. This same idea is found in FSLRC's treatment of the failure of financial firms. The most important objective in designing a legal framework for dealing with firm failure is the need for speed.

That Section 12 of the IBC provides a strict timeline for the completion of the entire resolution process.At the stage of admission of an application for initiating insolvency proceedings, the Code provides 14 days' time to the NCLT to make a decision regarding admission or rejection and before rejecting an application the NCLT is required to provide 7 days' time to the applicant to rectify defects in the application, if any.

A maximum time limit, for completion of the insolvency resolution process, has been set for corporates and individuals. For companies, the process will have to be completed in 180 days, which may be extended by 90 days, if a majority of the creditors agree. For small companies and other companies (with asset less than Rs. 1 crore), resolution process would be completed within 90 days of initiation of request which may be extended by 45 days.

The Code stipulates fixed timelines to ensure timely resolution for corporate debtors, for the benefit of all stakeholders. Judicial interpretation has, by and large, promoted this objective by mandating that various parts of the timeline be adhered to and mandating that the outer time-limit provided in section 12 cannot be extended. However, certain time periods may be excluded from the calculation of the total time periods for the insolvency resolution process, including time taken in litigation.

Mantle of the Resolution Professional

The role of the resolution professional in the revival of the corporate debtor is stated in detail in several Sections of the IBC read with the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

The ball starts rolling with the Adjudicating Authority, after admitting an application under either Sections 7, 9 or 10, ordering that a public announcement of the initiation of the CIRP together with calling for the submission of claims under Section 15 shall be made. For this purpose, the Adjudicating Authority appoints an interim resolution professional in the manner laid down in Section 16. In the public announcement of the CIRP, under Section 15(1), information as to the last date for submission of claims, as may be specified, is to be given; details of the interim resolution professional, who shall be vested with the management of the corporate debtor and be responsible for receiving claims, shall also be given, and the date on which the CIRP shall close is also to be given.

Under Section 17 of the Code, the management of the affairs of the corporate debtor shall vest in the interim resolution professional, the Board of Directors of the corporate debtor standing suspended by law. Among the important duties of the interim resolution professional is the receiving and collating of all claims submitted by creditors and the constitution of a Committee of Creditors.

Under Section 20 of the Code, the interim resolution professional is to make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern.

At the first meeting of the Committee of Creditors, which shall be held within 7 days of its constitution, the Committee, by majority vote of not less than 66% of the voting share of financial creditors, must immediately resolve to appoint the interim resolution professional as a resolution professional, or to replace the interim resolution professional by another resolution professional.

Under Section 23(1), there solution professional shall conduct the entire CIRP and manage the operations of the corporate debtor during the same. Importantly, all meetings of the Committee of Creditors are to be conducted by there solution professional, who shall give notice of such meetings to the members of the Committee of Creditors, the members of the suspended board of directors, and operational creditors, provided the amount of their aggregate dues is not less than 10% of the entire debt owed.

Like the duties of the interim resolution professional under Section 18 of the Code, it shall be the duty of the resolution professional to preserve and protect assets of the corporate debtor including the continued business operations of the corporate debtor. For this purpose, he is to maintain an updated list of claims; convene and attend all meetings of the Committee of Creditors; prepare the information memorandum in accordance with Section 29 of the Code; invite prospective resolution applicants; and present all resolution plans at the meetings of the Committee of Creditors.

Under Section 29(1) of the Code, the resolution professional shall prepare an information memorandum containing all relevant information, as may be specified, so that a resolution plan may then be formulated by a prospective resolution applicant.

Under Section 30of the Code, the resolution applicant must then submit a resolution plan to the resolution professional, prepared on the basis of the information memorandum. After this, the resolution professional must present to the Committee of Creditors, for its approval, such resolution plans which conform to the conditions referred to in Section 30(2) of the Code. If the resolution plan is approved by the requisite majority of the Committee of Creditors, it is then the duty of the resolution professional to submit the resolution plan as approved by the Committee of Creditors to the Adjudicating Authority – see Section 30(6) of the Code.

The aforesaid provisions of the Code are then fleshed out in the2016 Regulations. Under Chapter IV of the Regulations of 2016, claims by operational creditors, financial creditors, other creditors, workmen and employees are to be submitted to the resolution professional along with proofs thereof.

Thereafter, under Regulation 13, the resolution professional shall verify each claim as on the insolvency commencement date, and thereupon maintain a list of creditors containing the names of creditors along with the amounts claimed by them, the amounts admitted by him, and the security interest, if any, in respect of such claims, and constantly update the aforesaid list.

After receipt of the resolution plans in accordance with the Code and the Regulations, the resolution professional shall then provide the fair value and liquidation value to every member of the Committee of Creditors under Regulation 36-A, the resolution professional shall then publish brief particulars of the invitation for expression of interest in Form G of the Schedule.

The resolution professional, once he receives a proposed resolution plan, must then conduct due diligence based on the material on record, in order that the prospective resolution applicant complies with Section 25(2)(h) of the Code (which, inter alia, requires prospective resolution applicants to fulfil such criteria as may be laid down, having regard to the complexity and scale of operations of the business of the corporate debtor) and other requirements as may be specified in the invitation for expression of interest. Once this is done, the resolution professional shall issue a provisional list of eligible prospective resolution applicants to the Committee of Creditors, and after considering any objection to their inclusion or exclusion, shall then issue the final list of prospective resolution applicants to the Committee of Creditors.

Under Regulation 36-B, the resolution professional shall issue the information memorandum, evaluation matrix, as defined by Regulation 2(h)(a)3and a request for resolution plan within the time stated. Importantly, the resolution professional shall endeavour to submit the resolution plan approved by the Committee of Creditors to the Adjudicating Authority, at least15 days before the maximum period for completion of CIRP, alongwith a compliance certificate in Form H of the Schedule.

Role of the Committee of Creditors in the Corporate Resolution Process

That the commercial intelligence of the Committee of Creditors decides to whether or not to rehabilitate the corporate debtor by means of acceptance of a particular resolution plan, the provisions of the Code and the Regulations outline in detail the importance of setting up of such Committee, and leaving decisions to be made by the requisite majority of the members of the aforesaid Committee in its discretion. Hence, Section 21(2) of the Code mandates that the Committee of Creditors shall comprise all financial creditors of the corporate debtor.

Regulation 18 to 26 of the 2016 Regulations deal with meetings to be conducted by the Committee of Creditors. Regulation 39(3) fleshes out Section 30(4) of the Code, making it clear that ultimately it is the commercial wisdom of the Committee of Creditors which operates to approve what is deemed by a majority of such creditors to be the best resolution plan, which is finally accepted after negotiation of its terms by such Committee with prospective resolution applicants.

The importance of the majority decision of the Committee of Creditors is stated in Section 31(1) of the Code. Thus, what is left to the majority decision of the Committee of Creditors is the "feasibility and viability" of a resolution plan, which obviously takes into account all aspects of the plan, including the manner of distribution of funds among the various classes of creditors. As an example, take the case of a resolution plan which does not provide for payment of electricity dues. It is certainly open to the Committee of Creditors to suggest a modification to the prospective resolution applicant to the effect that such dues ought to be paid in full, so that the carrying on of the business of the corporate debtor does not become impossible for want of a most basic and essential element for the carrying on of such business, namely, electricity. This may, in turn, be accepted by the resolution applicant with a consequent modification as to distribution of funds, payment being provided to a certain type of operational creditor, namely, the electricity distribution company, out of upfront payment offered by the proposed resolution applicant which may also result in a consequent reduction of amounts payable to other financial and operational creditors. What is important is that it is the commercial wisdom of this majority of creditors which is to determine, through negotiation with the prospective resolution applicant, as to how and in what manner the corporate resolution process is to take place.

Major Amendments in IBC, 2016

That time by time through rapid amendments in 4 years, many issues were dealt with and made this code at par with global standards. The recent amendments sought to fasten the process of resolution and liquidation. The major amendment is that now instead of 270 days the resolution now needs to be completed within 330 days. The reason for prolonging the period is because in litigation lots of time is exhausted and resolution process cannot be completed within time period and courts through their discretion used to extend the time limit which makes the provision redundant. But now the time period of 330 days also includes litigation time within which the resolution process has to compulsorily completed. After the said period the company's assets will have to go for liquidation. Amongst all this is the most important amendment.

More power is given to Committee of Creditors (CoC) in terms of making decisions on the distribution of funds to various creditor categories. Under the code, financial creditors have a priority over operational creditors in case of

distribution under a resolution plan. But, the Code was silent on distribution to creditors other than financial and operational creditor, the Committee of Creditors have now power to decide how claims will be distributed on the basis of commercial consideration. The purpose of the amendment was to apply Section 53 rationally and not blanketly. Section 53 talks about distribution of proceeds from the sale of the liquidation assets shall be distributed in a particular order of priority as provided in the section.

Voting threshold is reduced from 75% to 50% for the decisions of Committee of Creditors (CoC). So, if more than half of these creditors who are present approve a plan, it will be considered that the entire class of creditors has approved it. Whereas certain key decisions like appointment of resolution professional, approval of the resolution plan and increasing time limit for insolvency resolution process threshold has been reduced from 75% to 66%.

Under Real Estate Projects, homebuyers are now part of financial creditors. Now as per section 7, which is on Initiation of corporate insolvency resolution process by financial creditor, homebuyers are also categorised as financial creditors. The government has also addressed a longstanding demand of homebuyers who have filed cases against builders for non-delivery of flats.

The amendment adds a clarification that a plan will be binding on all stakeholders including the central and any state government or a local authority which has dues from a corporate debtor.

The amendment has also sought to reduce delays at the beginning of insolvency proceedings initiated by financial creditors by requiring NCLT benches to explain why an application has not been admitted or rejected within fourteen days. The proposed amendments also seek to enhance the flexibility available to applicants by clarifying that a resolution plan may include corporate restructuring programmes such as mergers, demergers and amalgamation.

The government was taking care of the interest of home buyers and the requirement of minimum number of home buyers in the IBC has been included to avoid "frivolous litigations" and to remove bottlenecks and streamline the corporate insolvency resolution process. It aims to provide protection to new owners of a loan defaulter company against prosecution for misdeeds of previous owners. The government has added a clause to Section 7 of the IBC that at least 100 individuals or 10 per cent of creditors such as homebuyers have to come together to initiate corporate insolvency proceedings under the amendments to the Insolvency and Bankruptcy Code (IBC).Moreover 30 days time has been prescribed by the amendment for cases where a single homebuyer has taken a company to insolvency, to comply with the revised criteria from the time of the commencement of the Act.

The Amendment provides that the company will not be liable for any offence committed prior to the insolvency resolution process, if there is a change in the management or control of the company. Under the Code, the insolvency resolution process commences when the Insolvency Resolution Professional (IRP) is appointed. The amendment states that the IRP must be appointed on the date of admission of the application by NCLT, which will be considered as the insolvency commencement date.

The Central Government in exercise of the powers conferred by the proviso to Section 4 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), has increased the threshold for initiation of Corporate Insolvency Resolution Process ('CIRP') under the Insolvency and Bankruptcy Code ('IBC') against the erring companies from Rupees 1 lakh to Rupees 1 crore, vide MCA Notification No. S.O.1205(E). The decision was made in view of the lockdown announced by the Prime Minister to prevent the widespread of COVID-19. The increase in the trigger amount will supposedly benefit small companies and particularly the MSMEs (medium, small and micro enterprises) which are struggling during this lockdown period. This action will save a lot of businesses which are already facing a threat of default and thus avoid large scale insolvencies.

The Central Government has recently exempted all Covid-related debt from the definition of default under the insolvency and bankruptcy code (IBC) and suspended any fresh initiation of insolvency for up to a year.

Recent Case Laws

That recently Rajasthan High court in the case of Ultratech Nathdwara Cement Ltd. Vs Union of India & ors. has held that as per the amended Section 31 of the IBC referred to supra, the Central Govt., State Govt. or any other local authority to whom, a debt in respect of payment of dues arising under any law for the time being in force are owed, have been brought under the umbrella of the resolution plan approved by the adjudicating officer which has been made binding on such governments and local authorities. The purpose of the IBC is salutary as it has been enacted to ensure that an industry under distress does not fade into oblivion and can be revived by virtue of the resolution plan. Once the offer of the resolution applicant is accepted and the resolution plan is approved by the appropriate authority, the same is binding on all concerned to whom the industry concern may be having statutory dues. No right of audience is given in the resolution proceedings to the operational creditors *viz*. the Central Govt. or the State Govt. as the case maybe. It has been further stated that the reply given by Hon'ble the Finance Minister (in relation to the amendment in section 31) emphatically conveys that the revival of the dying industry is of primacy and to secure this objective, the government would be ready to sacrifice, leaving its interest finally in the hands of the resolution professional and the COC as the case may be. Precedence in the Scheme of the Act is given to secure the interest of the financial creditors. It is clear that the financial creditors have to be given precedence in the ratio of payments when the resolution plan is being finalized. It is the financial creditors who are given right to vote in the COC whereas, the operational creditors *viz*. Commercial Taxes Department of the Central Government or the State Government as the case may be, have no right of audience. The purpose of the statute is very clear that it intends to revive the dying industry by providing an opportunity to a resolution applicant to take over the same and begin the operation on a clean slate. For that purpose, the evaluation of all dues and liabilities as they exist on the date of finalization of the resolution plan have been left in the exclusive domain of the resolution professional with the approval of the COC. The courts are given an extremely limited power of judicial review into the resolution plan duly approved by the COC.

Conclusion

To wrap up, it is imperative to note that the failure of some business plans is integral to the process of the market

economy. When business failure takes place, the best outcome for society is to have a rapid renegotiation between the financiers, to finance the going concern using a new arrangement of liabilities and with a new management team. If this cannot be done, the best outcome for society is a rapid liquidation. When such arrangements can be put into place, the market process of creative destruction will work smoothly, with greater competitive vigour and greater competition. In view of the above discussion and in humble opinion of the author, the interpretation of Section 31 of IBC was always clear that the resolution plan once approved by the Hon'ble NCLT is binding on all stakeholders. However, it was only on account of never ending claims and demands of tax authorities of unpaid taxes, the legislature conspicuously introduced a clarificatory amendment in Section 31 of the IBC through Insolvency and Bankruptcy Code (Amendment) Act, 2019 to include the words "including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed," and the said provision ensures that the successful resolution applicant starts running the business of the corporate debtor with a "Clean Slate". Moreover the importance of the insolvency resolution process is that not only is the corporate debtor to be put back on its feet, but that the resolution applicant whose plan is accepted must be able to start on a fresh slate. Thus, for creating a robust IBC, the need of hour is to provide progressive statesmanship rather than narrow and myopic interpretations.

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