

IBC: A Dynamic Framework, Now Shaping for Version 2

The Insolvency and Bankruptcy Code (IBC) 2016 has recently completed five years amidst multiple and varied commentaries in media and otherwise as to whether IBC has been successful or not. While the criticism of IBC seems to be pointing towards its deficiencies, the alternative narrative seems to suggest that critics have not been able to appreciate the IBC's performance from the right prism. A holistic view is needed to appreciate the salutary aspects of IBC regime in the direction of making it more robust in its next iteration or version 2.0. Read on...



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IBC - A Showcase Legislation

IBC has been considered as showcase legislation and a major economic reform in India, hailed, among others, by the World Bank as reflected in improvement in India's 'Ease of Doing Business' ranking. The founding principle of IBC is to rescue ailing businesses as going concern rather than simply recovering dues through liquidation. The promise of IBC framework is reflected in the fact that since inception, realization by Financial Creditors under

resolution plans in comparison to liquidation value, is 174%, while the realization by them in comparison to their claims is 39%, much better than that in earlier regime. The recent data show that by the end of June 2021, total 4,541 CIRP cases were initiated out of which 2,859 were closed while the rest are pending in courts. Further analysis reveals that ~39% of cases were either withdrawn or closed on appeal or review or settled. So far, 396 business have been rescued through resolution plans from which ₹ 2.54 lakh crore have been realized. This amount is 174% of



value of these companies at the time of initiation of the CIRP i.e., liquidation value amounting ₹ 1.46 lakh crore. Furthermore, 254 companies which were liquidated, have yielded ₹1,207 crore against their asset value of ₹1,195 crore. While these numbers are impressive, the contribution of IBC in bringing about qualitative changes in the industry ecosystem and in particular, relationship between a company and its financial and operational creditors have been enormous and long-lasting.

IBC - Evolved and Further Evolving

In the initial couple of years, the jurisprudence got settled particularly through judgments bringing clarity on constitutionality of law, roles/responsibilities of different pillars in ecosystem, and primacy of COC's commercial wisdom. This was aided by timely amendments in the form of, inter alia, (i) Section 29A debarring existing management to participate in resolution process as applicant (ii) allowing allottees in real-estate project, to participate in resolution process as financial creditors. The former amendment proved to be a significant deterrent in altering the psychology of borrowers away from hitherto divine right to continue in the saddle of a distressed corporate. And this behavioural change in fact has resulted in large number of prospective insolvency cases being withdrawn or settled out of court. The latter amendment on the other hand,

was an embodiment of public interest being promoted by the economic legislation like IBC in an unprecedented way. During about five years' period since inception, six amendments in IBC have been promulgated, which indicates complexities involved in implementation of IBC in Indian context on one hand and alacrity of the regulator in squarely responding to those, on the other. The momentum for IBC to adapt to newer emerging realities, is expected to continue in future as well.

COVID-19 A Black Swan Event as a catalyst in shaping IBC

Having begun on a positive note, the IBC regime in India had been gearing up for the next phase comprising cross-border, pre-pack, Individual and group insolvency framework(s) amongst others, when the covid pandemic struck the economy hard as a black swan event, one wave after another and more deadlier. The covid pandemic crippled most businesses resulting in shutdowns, job losses, and labour-migratory challenges. This halted the Indian economy in its tracks, adversely affecting several development agenda of the Government. The recent data of the Ministry of Statistics and Program Implementation reveals that the country's GDP shrunk by 7.3% in 2020-21. The estimates suggest that about 10 million skilled and non-skilled workers migrated from metros and urban areas to villages.

In the context of insolvency regime, these developments meant impending surge of distressed businesses on one hand and least probability of finding a suitor or rescuer as resolution applicant, given the uncertainty and priority for remaining liquid. As an unintended outcome of said predicament, this also meant that more businesses would be pushed into liquidation as against the preferred course of resolution. The small and medium business segment was even more vulnerable in this context. As per an initial estimate the NPAs in Indian banks were likely to nearly double from ~7.5% of gross bank advances in Sept.'20 to ~13.5% in Sept.'21, stung by the twin balance sheet problems, not to talk of consequent cascading impacts. The financial meltdown seemed imminent and drastic efforts were need of the hour.

Resilient Response by Stakeholders

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The Ministry of Corporate Affairs (MCA), through a notification, in March 2020, increased the minimum default from ₹ 1 lakh to ₹ 1

crore for filing the insolvency cases. Furthermore, with the promulgation of The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 filing of fresh insolvency cases on account of default due to Covid was prohibited, by suspending Section 7, 9, and 10 of the IBC for a period of six months w.e.f. March 25, 2020. However, the suspension continued till March 24, 2021, through two consecutive extensions. Any default occurring during the said Covid period on or after March 25, 2020 was deemed to be Covid-induced and hence was made ineligible for initiating insolvency during such period. IBBI also came out with clarification in the regulations for excluding Covid period from the mandated timelines under the IBC framework.

Leading from the front, Hon'ble Supreme Court started virtual hearing of the cases from March



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2020 through videoconferencing and took up about 7,000 cases till June'20. As the pendency of insolvency cases initiated earlier under IBC, came across as main concern, Hon'ble National Company Appellate Tribunal (NCLAT) started virtual hearing from June 01, 2020, of all urgent cases and came out with detailed Standard Operating Procedures (SOP) for filing the matter before it for online hearing. Subsequently, NCLT benches too resorted to online mode of hearing. The Ministry of Corporate Affairs (MCA) took up project for implementation of e-courts in all 16 benches of NCLT. Government relaxed the timelines and manners for various compliances under the Companies Act and other corporate laws. Besides, IBBI provided the professionals the facility to file and view regulatory forms, virtually.

To ease the distress in economy and unburden IBC regime, Reserve Bank of India (RBI) rolled out 'Resolution Framework for COVID 19-related Stress – Financial Parameters'. During second covid wave, RBI further announced Resolution Framework 2.0 in May 2021, expanding the scope further to small businesses after the government decided not to extend the suspension of IBC beyond March 24, 2021. These apart, RBI took series of fiscal measures to ease the liquidity in economy and facilitate lending to businesses - small, medium, and large.

Amidst highly challenging and uncertain environment wherein businesses were facing stress due to Covid-19 and increasingly grim prospects of resolution of corporate stress, in April 2021, the Government focused on alternative mechanisms. There



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was a sense of urgency to release the pressure on IBC and preserve and enhance the value of existing and potential corporate debtors. The IBC was amended through an ordinance introducing a new regime, Pre-Packaged Insolvency Resolution Process (PPIRP) providing for a quicker, more cost-effective, and less invasive insolvency regime for MSMEs. The amendment offers MSMEs the option to resolve financial stress through a semi-formal regime which allows for out-of-court resolution to some extent, while preserving the sanctity of a formal insolvency process under law. To be able to trigger the PPIRP by any MSME, the minimum threshold for default has been announced at ₹10 lacs as compared to ₹1 crore under CIRP.

Amid second wave, during first quarter of Fiscal 2021-22, and aggravating stress in banking and



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financial sector, Government launched National Asset Reconstruction Company Limited (NARCL) or Bad Bank. It is expected that upon resuming regular operations during the current year, 22 stressed loans amounting to over ₹80,000 crore shall be transferred from various banks to NARCL for resolution through a focused approach including via IBC framework. This has a potential of upending the manner of managing and resolving stressed assets and is certainly a positive step forward.

The Paradigm Shift towards IBC 2.0

Amidst the chaotic environment triggered by covid waves, a paradigm shift had been playing out without probably attracting much attention. The public interest is the soul or underlying theme of insolvency law that can be served through ethical conduct of its stakeholders. The pandemic has heightened the imperativeness of public interest and ethics in the minds of stakeholders across the insolvency ecosystem.

Moreover, as a parallel narrative,

as stated elsewhere, stakeholders across the board including courts, regulators, lenders, professionals, and others resorted to technology as an enabler and a force multiplier, in unimaginably swifter ways. The usage of these solutions though available even earlier, has been advanced by constraints posed by the pandemic. IBC now is poised towards its version 2, having established foothold as per its initial design and made salutary impact both in quantitative and qualitative terms.

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- IPs started using 'platform for distressed assets' (PDA), for instance, created by Information Utility, NeSL. Such technological solution can be viewed as an enabler to access and manage record of default or ROD, end-to-end case management, virtual data room or VDR, e-Voting, platform for e-auction covering expression of interest and even interim finance.
- Development of market for distressed assets in India by providing information portal, for instance, Investment Grid platform by Govt. of India, newer/innovative financing products and institutional structures compatible with financing stressed assets. The announcement regarding creation of NARCL or Bad bank, as mentioned previously, is another significant development in

this regard.

- Virtual meetings by lenders as COC members, allowing senior officials from remote locations, to participate effectively, thereby enhancing the quality and pace of decisions. The ease of data storage and retrieval solutions aligned with regulatory requirement for document retention, is another progressive development in this context.
- The IBC seems to be well in place to catapult into next phase marked by individual insolvency, group, and cross-border insolvency features in a comprehensive manner. As a matter of fact, committee(s) constituted by Government, are currently examining various procedural and substantive aspects of group and cross-border insolvency, keeping in view the international experience before inducting these frameworks formally under IBC. Individual insolvency is touted to be next big development, providing significant 'ease of exit' and creating professional



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opportunities.

- Mediation and arbitration in a far more expeditious and transparent manner, may in near future, become first and preferred option for resolution of stress particularly for MSMEs. With experience of pre-pack framework in the MSME environment, it is expected to be even made applicable to larger corporate segment. As originally envisaged, corporate insolvency resolution process (CIRP) was meant to be a last resort option. However, given the shape of Indian ecosystem, CIRP came about as a first preference. In this context, the pre-pack framework, negotiated settlement, and mediation, could be seen as preferred routes over CIRP towards a transparent and out-of-court settlement.
- In pursuance of the principles of value maximization and timeliness as the key objectives of IBC, apart from recent regulatory amendments, a code of conduct for COC members is also expected soon. This would also lend trust and confidence in processes in and around COC which enjoys supremacy in commercial matters like consideration and finalization of resolution plans.

IIIP of ICAI - a Prominent Player in Shaping of IBC

The Indian Institute of Insolvency Professionals of ICAI (IIPI) as front-line regulator and the largest IPA in India, has aligned its strategy and work-plans with the changing paradigm, and has now been recognized as a valued partner in IBC framework. IIPI

focused on being a think tank for policy and implementation measures, towards strengthening of IBC and IPs, formulating best practices, apart from capacity building measures including webinars, virtually trainings, web-based discussion forum for members, e-publications, publishing a high-quality quarterly journal, and covid helplines for members. In this direction, very recently, IIPI presented a report of a roundtable, to IBBI, in respect of 'Impact of covid Resurgence on Insolvency Regime'.

As a body representing more than 60% of IPs having role in managing 75% of the CIRPs so far in the country, IIPI is cognizant of and is gearing up well to play its developmental role as a front-line regulator and quasi-judicial body in ensuring holistic development of insolvency profession as is reflected in its vision statement viz. "to be a leading institution for development of an independent, ethical, and world-class insolvency profession responding to needs and expectations of the stakeholders". IIPI too is bracing for IBC version 2.0 with many aces up its sleeves including research initiatives with the research fund being set up, development of best practices to strengthen the insolvency ecosystem and measures for building capacity of IP members and other stakeholders.

Summing up

In nutshell, IBC has not only been a revolutionary step, but it has revolutionized the entire industrial ecosystem. IBC has virtually become a model law for the world. It is an evolutionary and transformational law as it brings the regime in a phased manner, keeping in view the



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ground realities and complexities of the Indian economic, industrial, political, and social systems and is poised for next stage of evolution. Expanding the adoption of technological solutions as such, besides keeping impact of any more Covid waves at bay, could go a long way in improving the dispensation, efficiently and effectively even during post-covid period. Of course, much depends upon the stakeholders and the pillars of IBC, including regulatory bodies and judiciary to take the legacy forward.

As acknowledged in the recently released report by parliamentary committee, by allowing closure of non-viable firms, wherever required, the Code enables an entrepreneur to get in and get out of business with ease, undeterred by failure (honest failure for business reasons). In the final analysis and drawing the analogy for IBC's achievement of its intended objectives, it is neither a glass half full nor half empty, it is in fact a glass which is filled and is filling up. The stakeholders would need to increasingly focus on entire value chain beginning from healthy investment decisions avoiding sickness at the conception stage, to identifying incipient sickness and finally on resolution of distress in a commercial manner under a credible and legally sustainable framework. ■■■