

# IBC - PREPARING FOR VERSION 2

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## IBC SO FAR AND VISION

The Insolvency and Bankruptcy Code, 2016 (IBC/Code) has been one of the biggest economic reforms that the Government has implemented in 2016 for resolution of mounting stress in corporates, and maximization of realization of economic value blocked therein.

After over six years, IBC has, to a large extent, been able to achieve what it was set out for considering the circumstances and limitations posed by the ecosystem at the time it was legislated in 2016. With its success and emerging challenges, expectations of stakeholders have increased particularly in regard to percentage of realisation, time taken in resolution, cost of resolution and prolonged litigation.

The Insolvency and Bankruptcy Board of India (IBBI/Board) has been proactive in addressing the issues and difficulties arising during corporate insolvency resolution process (CIRP). Judicial pronouncements, from time to time, have resolved many interpretational and legal hurdles. Insolvency Professional Agencies (IPAs) like IIPAI of ICAI have done considerable work in capacity building of Insolvency Professionals (IPs) and creating awareness in understanding of different stakeholders about IBC and their respective roles. IPs themselves have done very well in translating IBC into a reality at ground level, overcoming teething troubles. In substance, IBC has played an important role in creating an ecosystem for resolving stress in industry, reducing time in resolution thereof and salvaging economic value of distressed assets.

The success of the Code over last six years since its inception, as stated, has not only increased expectations for much better outcomes but has also made it imperative to address the difficulties and challenges faced so far. The ecosystem surrounding stressed assets and IBC now is much different than what it was pre 2016. There is an imminent need to deliberate and work upon what needs to be over a period of next five years. IBC deals with dynamic, economic, financial and industrial environment as it develops and therefore a long-term horizon for next 10 or 25 years may not be productive.

## MEASURES NEEDED

From this perspective, following measures are required in order to extend the application of the Code to cover important issues not considered in IBC in 2016 due to complexity involved and for waiting till IBC ecosystem matures:

- a) **Mechanism for group insolvency:** Most of the corporates have subsidiaries and associates with inter-se economic, financial and operational interests. This causes complexities, legal huddles and consequent delays in resolution. Based on the recommendations of a Committee set up by the Ministry of Corporate Affairs (MCA),

MCA has issued a discussion paper providing for procedural and substantial consolidation. There is sufficient international experience available as well to deal with legal and implementation issues.

- b) **Mechanism for cross-border insolvency:** IBC does provide for cross-border insolvency by empowering the Central Government to enter into bilateral agreements with foreign jurisdictions in order to resolve the issues of cross-border insolvency. It further empowers the Adjudicating Authority (AA) to issue a letter of request to courts of the country/ies where the corporate debtors (CDs) have economic, financial or operational interests and with which the Government has entered into bilateral agreement. However, cases of CDs having foreign subsidiaries or associates have considerable issues and challenges in the absence of a clear framework on institutional and procedural aspects. The Insolvency Law Committee of MCA has suggested, as a workable solution, for adoption of the UNCITRAL Model Law on Cross-Border Insolvency which has also been accepted in most of the jurisdictions worldwide.
- c) **Pre-packaged insolvency for non-MSMEs as well:** Pre-pack insolvency mechanism introduced during COVID-19 period provides for an efficient and cost-effective outcome out of court, while ensuring continuity of underlying business. Well intended though, it has not proved successful, with only a handful of micro, small and medium enterprises (MSMEs) opting due to lack of awareness and procedural difficulties. It being an out of court and amiable resolution for all stakeholders, should be extended to non-MSMEs as well while addressing procedural difficulties experienced.

### **NEW INITIATIVES ENVISAGED BY THE REGULATOR**

MCA and IBBI have initiated certain changes in IBC and its regulations, to address the imminent challenges before IBC. A number of discussion papers have been released by MCA and are in pipeline for further action. These include:

- a) Use of technology in the IBC ecosystem
- b) Restricting the right of the promoters to propose an Interim Resolution Professional
- c) Empowering the AA to impose penalties for violations of the Code
- d) Expanding the applicability of the pre-packaged insolvency resolution framework
- e) Incentivising interim finance providers
- f) Improving outcome of real estate cases
- g) Resolving issues in regard to inter-dependent (group) entities

- h) Expanding scope of pre-packaged insolvency framework
- i) Empowering IPs to finalize list of assets in certain situations

For some of these, discussion papers were floated by MCA/IBBI for inviting comments from the stakeholders. It is time to implement those after consideration of comments received from the stakeholders. Reforms related to group insolvency, cross-border insolvency and certain critical implementation issues require immediate action.

### **REAL-ESTATE PROJECTS: ADDRESSING EMERGING DIFFICULTIES AND CHALLENGES**

Insolvency resolution of CDs in real estate sector is a different ball game than of other CDs and need a different or modified version of IBC. Allottees or applicants of a real estate project are now treated as financial creditors (FCs). However, their position and interests are different than other FCs such as lenders in nature, rights, and quantum, with their life savings and aspirations at stake, though amount involved may be small unlike FCs. Their interest lies in possession of house and not in recovering of amount deposited with the developer. Another issue is whether or not, and, if yes, under what circumstances one or more projects by the same developer should be considered for stress resolution in a particular project.

To protect the interests of allottees, several judicial interventions have been made such as ‘reverse CIRP’ and ‘project-specific resolution’. However, for want of clarity and regulatory provisions on the subject, many CIRPs of real-estate cases are languishing in courts. It is, therefore, necessary that IBC should provide for a specialised framework for real estate projects. The discussion paper by MCA referred to earlier, does provide for such a dispensation. The proposals in the said discussion paper attempts to remove anomalies noted above and creates a conducive framework keeping in mind the peculiarities involved. Another area to be addressed is lack of coordination between IBC and Real Estate Regulatory Authority (RERA) framework as a sector specific law. RERA provides largely a *in personam* dispensation while IBC provides *in rem* dispensation. Further, unlike under RERA, proceedings under IBC are considered non-adversarial in nature. In view of the non obstante provision, IBC provisions would have an overriding effect. Given some amount of overlap between the two frameworks, there is a need to create a mutually harmonised framework.

### **NEW INITIATIVES NEEDED**

#### **a) More focus on mediation under IBC**

IBC needs to encourage and emphasise on mediation as a first step. It needs suitable amendments in regard to moratorium for ongoing civil proceedings and making mediated settlements binding

and enforceable. It also needs regulations for streamlining and bringing in transparency in pre-mediation, mediation and post mediation process. IBC law and practice, in fact, should encourage and emphasise on stress resolution by the CD together with stakeholders or, through other alternative mechanisms before CD is required to take recourse to legal or judicial mechanism under IBC.

**b) Promoting and emphasizing technology application in IBC process**

Technology has transformed regulatory compliance and enforcement in regulatory requirements. Pre and post CIRP processes, and interface between AAs, IBC, IPAs, committee of creditors (CoC) and IPs need to be based on the use of technology, artificial intelligence, and data analytics. This would be useful in streamlining the processes, documentation, and regulatory oversight considerably reducing the cost and time in resolution.

**c) Addressing legal hurdles**

From time to time, many judgements of Hon'ble Supreme Court, National Company Law Appellate Tribunal (NCLAT), National Company Law Tribunal (NCLT) and the Government through amendments in IBC, have provided much needed clarity and balance between intent of law and its practice. However, there have been instances where judicial pronouncements do not appear to be consistent with the intent of law. Lack of clarity in IBC and in relevant regulations, have also resulted in a large number of litigations and mounting legal cost and delays.

**d) Institutional strengthening and capacity building**

- i) Apart from changes required in IBC for streamlining the interface of different stakeholders with NCLT, causing unnecessary or frivolous litigation and delays, NCLT needs to be strengthened by increasing number of benches and timely appointment of its members. Digitisation of NCLT and interface of internal proceedings in NCLT needs to be expedited. Time has come that specialised benches in NCLT and NCLAT are set up considering size and nature of CDs and commercial nature of issues involved in CIRP.
- ii) IPs are important for successful implementation of IBC at ground level. Their contribution in success of IBC so far has been significant. They however need to strengthen themselves by developing corresponding organisational capabilities, digitisation and adaptation of technology, and capacity building to enable CIRP of different sizes and complexities of CDs and to co-op with new developments like cross-border insolvency,

group insolvency and mediation. IPAs need to organise and prepare themselves as well as IPs for emerging and imminent developments as mentioned earlier.

- iii) CoC needs to be made more accountable for participation and timely decisions in the matters placed before CoC. Similarly, banks are required to be made accountable for taking timely decisions on matters related to IBC. The Code should facilitate commercial decisions at all levels in a fair and transparent manner without fear of being questioned by vigilance or enforcement agencies without establishing *mens rea*.

## **CONCLUDING THOUGHTS**

IBC has been successful in achieving objectives for which it was enacted in 2016. However, expectations of stakeholders have increased and rightly so with the changing ecosystem. The extent of haircuts need to be reduced and so the time taken and costs under IBC till resolution or liquidation. The Government has been proactive in responding to challenges. However, new measures initiated need to be implemented early by legislative changes or institutional strengthening. At the same time, level of awareness and appreciation of realities of corporate stress and limitations posed by those, is required to be enhanced among different stakeholders. The Board of IIIPI of ICAI has set up a Committee to suggest vision and measures for IBC- Version 2, and for strengthening IIIPI and IPs for this. The Report of the Committee will be shared in public domain when the same is ready.