

A Critical Analysis on Insolvency and Bankruptcy Code, 2016

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Abstract

Insolvency and Bankruptcy Code was introduced by Finance Minister Sri Arun Jaitley in the year 2015. But it came into existence in May, 2016. Since 2014, the Reserve Bank of India (RBI) has cracked down significantly on the bad loans situation accumulated in the banking system. Government had tried to supplement the problem by very progressive and constructive initiatives such as the Joint Lenders Forum (JLF), Strategic Debt Restructuring (SDR) — with and without change in control — and S4A. These frameworks, though unable to address all situations, are a step forward towards a resolution culture. Default resolution is and will always remain unique to each situation. The Insolvency and Bankruptcy Code, from that respect, is timely as it focusses on a turnaround plan with a deadline, which, if not met, results in liquidation. Thus, this Code resulted in a great change in the economy. Although having many advantages this Code also has some limitations that occurred due to mismanagement and inappropriate usage of the Code. This paper makes an attempt to analyze the impact of IBC on the Indian economy, the loopholes in it and intends to provide an insight on how to improve the Code further to make the perfect use of it.

Keywords: Insolvency and Bankruptcy Code; Insolvency and Bankruptcy Board of India; Revival and Liquidation process; Insolvency Professional; National Company Law Tribunal; Investors; Creditors.

1. Introduction

Finance Minister Sri Arun Jaitley introduced the Insolvency and Bankruptcy Code 2016 in the Lok Sabha in December 2015. The Code seeks to achieve certainty for recovery and enforcement proceedings and to this extent; it will specifically be a useful tool for creditors and investors. It would be of specific interest to international creditors and investors, who are generally looking for opportunities to invest in India. This Code in specific, when implemented in letter and spirit, provide a major boost to the Indian economy, especially because of timely resolution and certainty in recovery. Thus, from the introduction of the Code till date it had played a prominent role in the Indian industry. It has a great impact on the business, banks, real estates and on the young entrepreneurs. Now in this paper we will see the need of the Code and its impact on the present economy.

“Insolvency” is a state that happens when the defaulter is not able to pay back the loan taken from the creditor. For the present corporate firm, the signs of that state would result in slowdown in sales, missing of the payments by the time of limit, etc. bankruptcy is the lawful affirmation of company’s insolvency. It was previously a financial condition that latter turned into a legal position. This emerging Code has a chronological process of insolvency tenacity in failing will result in bankruptcy. The Code pursues to attain conviction for retrieval and implementation proceedings and to the level, it will surely be a beneficial tool for “creditors and investors”. As the Code has recently introduced, it is just in the evolving stage thus it will be helpful in doing research in this area which in turn helps the economy to understand the booming Code and also will be useful in effective implementation of the Code for better Indian industry in future.

2. Literature review

The “Insolvency and Bankruptcy Code, 2016 (IBC)” is the impoverishment rule of India which looks to merge the present structure by forming a particular law for insolvency and bankruptcy. “*IBC 2016 is a law that was implemented through an act of Parliament*” cited by. (Deccan chronical, 2017). (Edwitty, 2018) called insolvency as a state of not able to meet their financial obligations and the Code seeks to create a unified framework for resolution or revival.

(Prof. M. Guruprasad, 2017) said in 2015 the IBC was introduced and passed in Lok Sabha and the proposed legislation adjusts the issues in context of insolvency and winding up in the current scenario. (KPMG, 2016) stated that for individuals, corporates as well as SMEs insolvency and bankruptcy

code, 2016 delivers a specialized medium to administer all insolvency and liquidation related actions. In case of non-payment of a lawful claim, all the creditors are authorized to stimulate a resolution process. It affords for insolvency professional to take switch of the corporate debtors. (Mohapatra, 2016) said that IBC, 2016 targets to amalgamate and modify the laws concerning to the resolve process of companies, LLPs, and individuals as well as partnerships.

The key feature of this code is to provide resolution and maximizing the value of debtor's assets in a time bound manner. This code helps the sick companies either in winding up its business or in suggesting a revival plans for future proceedings. (Prof. M. Guruprasad, 2017) mentioned that IBC 2016 is an Indian law of bankruptcy, which pursues to associate the present structure by designing a distinct law for insolvency and bankruptcy. For international creditors and investors, the new law will be a useful tool from the outlook of private equity funds in enduring to grow their investments in India. (EY, 2017) discussed that the code distinct between the insolvency and the bankruptcy. The previous is an instant incapability of repaying the liabilities that owed by the business. The objectives of the code, which was established by the Bankruptcy Law Reforms Committee (BLRC), are aiming for higher recovery in a time bound manner. (Trilegal, 2016) stated that the code consists of a "controller, insolvency professionals, information utilities, and adjudicatory mechanisms" creating a new influential framework providing a formal and assured period for insolvency resolution process and liquidation. BYJUS (2016) said that Bankruptcy is a legal status generally imposed, by a firm or an individual who is incapable of repaying the debt obligations.

(Dixit.) termed some of the needs of IBC, 2016. The main need of IBC in today's industry is that, business can be easy than making complicated and encourage entrepreneurship and innovations through giving them easy entry and exit opportunities. (Narayan, 2016) mentioned that, the banking industry in India is in thores of crisis. Bads debts are piling up at banks. If any company goes liquidated it is a difficult task for the shareholders to get their money. Therefore, this Code helps in assuring the balance of interest to all the stakeholders of the sick company. It also modifies the order of importance of imbursement of government dues. When any company gets into insolvency then there are many chances of misinterpretations between the creditors and the debtors. This Code helps in better and depth information flow between creditors and debtors enables to build confidence in development of the business. It also provides assurance to the investors of their rights and their enforcement. It has been two years since the Code came into existence, but it is making a much better difference in the present economy.

This IBC, 2016 has a great impact on the business, real estates and banks. Some of the authors discussed the impacts in the following way.

(Dubey, 2016) Said that the code had a significant impact on the way corporate India functions. According to her the changes after the code came into existence are, change in the application of the code, invitation of resolution applicants, qualifying criteria for resolution applicants, disqualification from submitting resolution plan, resolution plan submission, and no specific punishment was provided. (SME TIMES News Bureau, 2017).

Justice A.K Sikri while addressing the gathering as special chief guest states that revival of sick companies benefits the companies but also assist in achieving high Gross Domestic Product, generate employment and eventually realistic and faster growth in the economy. Indian economy should show its interest in looking for all possible options to revive the sick companies. The significant provision of IBC, 2016 is in charge of management in a sick company. *“Insolvency and Bankruptcy Code, 2016 is a game changer.”*

The above studies say that IBC 2016 is an appropriate measure taken by the board or IBBI for the revival or liquidation of the sick companies. It is a time bound tool that helps in fast recovery of the debts. Yet, much studies did not show the reasons and experts perspective regarding the effective implementation of the IBC. Hence the present study made an attempt to study the expert opinion and finding loopholes in the present Code said to be a robust design.

3. Research methodology

The study is exploratory in nature. It intends to assess the practical constraints of the IBC,2016. It aims to study the impact of IBC, 2016 on the present Indian industry by collecting the expertise opinions. With this focus the objectives were formulated.

3.1 Objectives

- To identify the practical constraints in the implementation of the Code.
- To understand the attitude of expertise on IBC impacting on Indian industry.

3.2 Data collection

There are mainly two types of data gathering methods namely primary data and secondary data.

Primary data that is appropriate for this research is structured interviews. Interview for this research is done only for the professionals (CA, CMA, CS, Bank Professionals, and Financial Professionals). As these professionals mostly use the Code, for better understanding the data is collected only from them. Secondary data, collected for this research, is mostly from the IBBI. Many newspaper articles were also used for the purpose of understanding and analysing the Code. As part of the secondary data, some of the reputed company's reports were also used for better analyses of the Code.

The study has been conducted keeping in mind all the aspects. This study is a deductive approach. Along with this approach, a qualitative research technique known content analysis has been used to further understanding and analyses of the data. In fact, the deductive approach of the study with the content analysis being the pillars of the study.

Content analysis is the method used in the research for the analysis of textual data. As the study was done using two types of content analysis, which are conventional content analysis, and summative content analysis. In the earlier method the coding and analysis of the text happens simultaneously. While the primary coding was done on the understanding of the responses that were collected, the next part of the analysis was done using these primary codes as the base and building on additionally which is a technique of summative analysis.

4. Data analysis and interpretation

For the purpose of the study and analysis of the data collected, the researcher had used the MAXQDA 18 software. The required data to measure the impact of the Code on Indian industry is done through taking interviews by the expertise who have better knowledge in the field. A standardised questionnaire was made for interviewing the sample. The respondents data was coded in MAXQDA 18 software.

4.1 Analysis: Impact on the Indian industry

The Code was introduced in the economy at a perfect timing. It is actually important for our present Indian industry to develop. There are many cases that deals with liquidity and insolvency. As there were codes before implementing IBC but they were not much helpful for the industry. They all the more made it difficult for revival of the sick companies. Thus there was a need to introduce IBC. Now it's been two years of its presence in the economy, we can see a much better result in the system. These are the results of how exactly expertise feel about the impact of IBC in the Indian industry. The figure 5.14 exactly shows the result of experts who agree with positive impact and negative impact on the Indian industry.

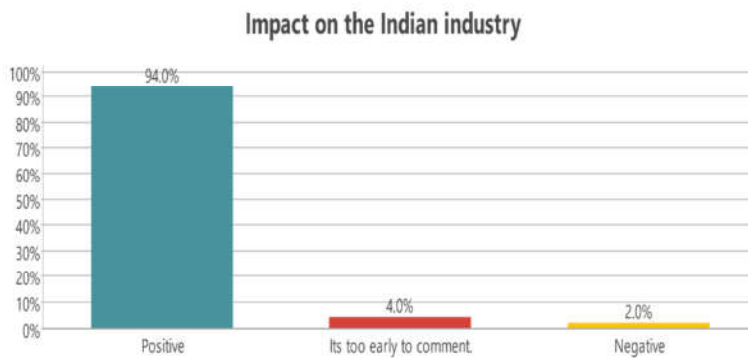


Figure 4. 1 Statistics of the Code “Impact on the Indian Industry”



“The IBC provides India with a self-correcting marketplace for the secure and transparent disposal of distressed assets” by Aditya Mittal, President and CEO, Arcelor Mittal.

Source: IBC- A Code in need of urgent upgrade.

It has been two years since the IBC came into effect. This modern bankruptcy framework is one of the most noteworthy reforms that was introduced by the government. It exemplified a big change in the power equation between creditors and debtors. According to view of the study it is said that the whole debtor-creditor relationship has undergone a change and this is a positive perspective of improving Indian industry’s credit culture. This also helps in a better availability of credit and eventually in improving the ease of doing business. It maintains the financial discipline for the borrowers of the industry.

As per the study the responses that were collected said that 94 percent of the experts agree that the IBC made a good impact on the Indian industry. As it is known that after the introduction of the Code it is seen that many of the cases were solved faster than before. The other 4 percent of the respondents said that as it is newly introduced code it takes some time to estimate the practicality of the code on the Indian industry. The rest 2 percent said that it is not making any new change in the industry, it again depends on the time bound which is its main aim.

The study says that it is certainly helpful for the Indian industry by way of providing a faster resolution of the revival process, and bringing the idle assets into use. Since, this enactment has come into effect recently and the industries facing problems from a very long time. At present IBC helping more to the lenders or creditors in recovering of dues. It started regularizing the promoters which

helps in increasing the economy. Before introducing the code there was many confusions and dishonest in repaying the loans. But, now that the code is introduced it is strictly tackling the menace of corporate defaulters. This code is also helping in regulating financial markets as well as the genuine business transactions. As per the study, it is said that it is a “revolutionary act for Indian economy”.

The IBC 2016 effectively can curb unduly long pending cases of mounting NPAs which have rather been crippling the lending activities of Financial Institutions and the banks by ensuring either quicker resolutions or liquidations that will definitely help in revival of the industry. Revival of sick companies not only helps the company but also assists in achieving the High Gross Domestic Product. It plays a major role in generating employment and ultimately economy grows at a reasonably faster pace. This is one of the best steps that were taken by the government in the betterment of Indian economy by looking forward all the possible options to revive the troubled companies. It is well known that many foreign companies invest in India to get good returns. But due to the consequences that were raised before a decade, made them to think a bit about investing in the Indian companies but as the new code is introduced, the fast revival plans gave confidence among the investors. It is also known as a weapon with secured creditors which can be used against corporate affairs. An early check on financial solvency status should be implemented. It is the measure that has eased out several hurdles and leap frogged the Indian industry, on the ease of doing business index by several notches.

4.2 Observations:

As per the observations of the study the outlook of IBC is optimistic and has positive impact on the industrial growth. It is helpful for rejuvenating entity. This rationalization of IBC is the need of the hour. As we know that the economy is going down it very important to take a forward step for development of the economy. Thus IBC will definitely help Indian industries as the main aim is actually cleaning the Banking and Corporates Nexus from the corrupt practice. After the positive impact on the economy the promoters are realising the need to pay back the borrowed money. It will also help with the restructuring and revival of the bad loans/NPAs for the banking sector. Actually if the economy wants improvement the industry has to be vigilant and have to manage their cash flow properly. Earlier there was a choice to pay or defer payment, which as per terms was due. Now any creditor having undisputed dues of ₹100000 and above, can initiate CIRP.

As per the study IBC is quite helpful due to the following factors

- Cost and time over run in rehabilitation matters in winding up issues in High Courts which secures speedy justice.
- IBC take away a lot of work load existing judiciary system

- Transferred power of mergers and amalgamations from High Courts to NCLT, the adjudicating authority under IBC
- Issues relating to oppression to minority shareholders have been transferred to NCLT under IBC from Company Law Board.

There are also some of the views that should be taken into consideration of the further improvement is, IBC is mostly only for the benefit of creditors. In maximum cases, shareholders lose everything and the concept of equity will gradually erode. Nevertheless, as a whole, it is helpful to the industry if we ignore litigations in few cases; certainly, IBC is giving its good performance by realizing the dead/freeze asset in the country.

5. Summary

5.1 How does the Code impacts on the Indian industry?

The aims of the Code provided a sufficient answer of how it affects the Indian industry. The main aim of the Code was listed as below

- To have a time limit of 180 days for CIRP
- To encourage and motivate entrepreneurship and innovation
- To bring a sustainable growth in the economy
- To develop credit and bond market
- To eliminate the confusion created by the previous codes.
- To retain confidence and interest among the investors for investing in the Indian companies.

As the study showed many of these objectives or aims of the Code were realized. If we see about the time bound manner it is absolutely making it possible. Before with the previous Codes the resolution for a sick company was used to be a never-ending process but with introduction of the Code, it is giving hope for the companies. Giving revival plan for the company not only helps the company but also helps the whole industry and the economy as well. Then if we see about bringing confidence among the investors and lenders, it is before because of improper functioning of the codes it resulted in never ending resolution plans. Now that we have a time limit and it is sure that it should be done investors gained their confidence that even if the companies go into losses, by using this Code they can get their money back. In previous years it was very difficult for the loss making company to leave the business and go for another business to make profits but now as the Code helps them in liquidation process it became very easy for the companies to exit and start the new ventures. By

seeing the companies at past many of the entrepreneurs stepped back for new start-ups. Now as the exit became easy many entrepreneurs are willing to start their own ventures that in turn helps the economy to grow. Thus by this it is said that the new Code is giving a positive impact on the Indian industry. If further support is giving in developing the Code, the industry can end with the amazing results.

5.2 What are the practical constraints of IBC?

IBC is a booming model and an appropriate instrument in use. Even after having a good start it has some constraints that are not allowing the Code to make its best. The first problem is to identify the eligible bidder. This question was raised due to the case of Essar Steel. There were only two bidders who were ready to take over the company but it that both the bidders are already having their own NPAs. Thus it is the difficult point to decide the solution.

The second constraint is, do the Insolvency Resolution Professional is responsible to give the details of the sick company to the bidders whose bids have been rejected? This is raised because each bid is different in terms, conditions etc. Judgment has to be made for this query for the better implementation. The next constraint which is actually a bit important to think is that, if there is any bid which is higher than the previous one but the bid has come after completing the final bid of the winner. Whether the bid should be accepted because it is higher or to drop the deal as per the terms that after final bid no other party can bid further? This is surely a step which has to be implemented.

6. Suggestions

The suggestions given in this chapter are based on the findings of both primary and secondary data. Based on the awareness, understanding and the perspective of the impact of IBC few suggestions are given to the government for the further improvement of the Code.

“IBC is not just the Code; it is the sign of development.”

IBC is a brave step taken by the government for handling the business failures in a smooth manner. It also helps the exit from the business easy. This is termed as ease of doing business. As compared to the other codes, this IBC made a drastic change in the economy. This Code considered the weaknesses of the other codes to make a great impact on the economy. Not much but there are some loopholes that are existing in implementation of the Code. If these loopholes are taken into consideration and if the Code is restructured according to it, then it will be the best step taken by the

government for the growth of economy. Some of the suggestions for making better use of the Code are as follows.

For Government

- The fact is that after the cases have been disposed by the NCLT they would head for the Court and then appealed to the NCLAT. Instead it would be better if the cases are handled only by the NCLT and NCLAT and the cases should be finalized by the tribunals.
- The cases should try to be completed by the time limit. Because the main aim of the Code is reducing time limit, if it is not practiced then there are chances of losing the confidence by the creditors and other foreign investors.
- As seen in reality many cases were kept pending due to lack of buyers. Instead of extending the time, if they had made it liquidated or tried any other option for it, then it would be the better solution.
- It would be better if there were sufficient infrastructure to implement the Code. This helps in fast resolutions and can achieve the goals of the Code.
- Ensure to curtail the interventions and biased decision.

7. Conclusion

IBC is one of the best structural reforms implemented by the Government of India. It is mainly grounded on three principles, firstly there has to be an appropriate result within 180days (270 days for rare, difficult cases), worsening which there will be the credible hazard of liquidation. Secondly, the “Committee of Creditors (CoCs), whose money is at stake, should take viable judgements concerning resolution and practicality. Third one is that, NCLT part should be judging dire matters of fairness and the priority should be given to IPs. The Code aims to justify the processes and procedures for bankruptcy and insolvency. It intends to advance the recovery rates of debt and increase creditor assurance in Indian investments, and it should highlight the rights of investors to impose security in a distress condition and potentially bringing down the rate of non-performing loans. However, as the Code is still in initial stage many of the revival plans are postponed hence the main aim of the Code, the ‘time bound resolution’ is not exactly on the mark.

As there are no buyers for the sick companies and because the government alone cannot buy them or revive them, the time is postponing until the buyers are available. As the Code is newly introduced, there is less awareness among the people in India. Many of them exactly were not exposed to what

exactly the Code is and what is the role of NCLT in the IBC. Evolution of the IBC highlights how the scales are tilted in favor of financial creditors, because at the resolution stage, the immediate focus tends to be on debt payouts to lenders rather than on charting a course to get the company back on its feet. The aim of encouraging the entrepreneurs may take time but it is very sure that it influences positively on the new start-ups. The Code brought a revolutionary positive change and showed good impact. Though some loopholes are yet to be rectified other than that the implementation of the code is accelerating effectively for the purpose it is meant for.

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