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COMPREHENSIVE EVOLUTION AND IMPLEMENTATION OF IBC IN INDIA

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ABSTRACT

A business is said to be insolvent or bankrupt when its debts are due and there aren't enough assets to pay them. It is said that a company is insolvent if it does not have sufficient cash in hand or if its assets are worth less than its debts. It portends serious financial difficulties and the inability to settle bills. Bankruptcy and insolvency affect financial institutions and, consequently, the entire economy, regardless of whether the debtor is an individual or a corporation. When insolvency or bankruptcy impacts banks and other financial intermediaries, such as the biggest unsecured debtors, non-bank financial organisations, and term supply companies, a legislative framework must be put in place to address these issues. It is wise to look for alternatives to liquidation when temporary financial incapacity occurs, including when liquidity constraints are to blame. Rescheduling loans, injecting cash, replacing management, and merging or amalgamating are all examples of such actions. The best course of action for a firm facing long-term and serious financial problems, when correcting them won't be enough, may be to pursue liquidation in order to try to recover some of the losses through the sale of assets. The rules regulating insolvency and bankruptcy must provide for liquidation.

The legal system plays a pivotal role in the economic development of any nation. A nation will certainly have high international prestige if its legal system is solid and well-executed. Post the passing of the GST Act of 2017, the new Insolvency and Bankruptcy Code of 2016 ranks as the second most remarkable legislative reform in India. This is due to the fact that the IBC bestows upon India not just a more robust legal framework, but also a fresh economic identity and global renown. Indian law pertaining to insolvency resolution has been consolidated and amended under this new Insolvency and Bankruptcy Code of 2016.

This dissertation explores the comprehensive evolution and implementation of the Insolvency and Bankruptcy Code in India. It examines the historical background, key features of the

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IBC, its impact on the Indian economy, challenges faced during implementation, and evaluates its effectiveness in resolving insolvency cases. This research seeks to yield insights into the development and effectiveness of the IBC in India.

Keywords: *Insolvency, Bankruptcy, Resolution, Revival, Liquidation, Rescue Culture, Cross-Border-Insolvency.*

INTRODUCTION

Every business is an 'organization', and the term 'organization' is taken from the term 'organ', which indicates that any 'organization' has several characteristics of an 'organ'. Like any 'organ', the organization has a chance to either develop or decay. Some professions, enterprises, and industries, corporate entities, all of which are unquestionably organizations, are necessary to be financially strong, while others stand in the need to be financially sick. After a few years, a healthy organization can become sick. Some diseased organizations will perish, while others may resurrect. It is impossible for all startups to succeed. Some will be successful, while others will be unsuccessful. Even if a startup is genuine, it may fail. Some startups are established/ initiated, with the sole purpose of defrauding the system and stealing public funds. The illness could be caused by a variety of internal and/ or external environmental factors. It could be short-term or long-term. It can also be chronic[2].

When a company's obligations become due and it has insufficient assets to cover them, it is considered insolvent or bankrupt. If a business does not have enough cash in hand or if the value of its assets does not cover its debts, it is considered insolvent. It's an indication of severe financial trouble and indicates an inability to pay debts. Whether it's a person or a company, insolvency and bankruptcy have repercussions for financial institutions and, by extension, the whole economy. that time banks alongside other financial intermediaries, including the largest unsecured debtors, non-bank financial organizations, and term supplying firms, are affected by insolvency or bankruptcy, it is necessary to construct a legislative framework to resolve issues related to insolvency or bankruptcy. In situations where a transitory financial incapacity arises, such as those caused by liquidity constraints, it is advisable to consider alternative courses of action to liquidation.

These may include loan rescheduling, capital injection, management replacement, and merging/ amalgamating. If a company's financial problems are long-term and severe enough

[2]Vijay Sambamurthi, "RECENT DEVELOPMENTS IN INDIAN LAW: IMPACT ON PRIVATE EQUITY TRANSACTIONS." "National Law School of India Review" http://www.jstor.org/stable/44283664. Last Visited 22 Jan. 2024.

that fixing them won't be enough, liquidation may be the best option to try to recoup some of the losses via the sale of assets. There must be room for liquidation under the laws governing insolvency and bankruptcy[3].

It was with the intention of developing a comprehensive structure for handling the insolvency and bankruptcy difficulties that are faced by corporations, individuals, and partnerships that the Insolvency and Bankruptcy Code, 2016 ("hereinafter referred to as **theIBC / the Code of 2016"**) came into effect in India. Providing a more simplified and effective procedure for the resolution of insolvency cases was the primary purpose of the Code of 2016, which was created with the intention of revamping India's outdated insolvency and bankruptcy legislation. Prior to the introduction of the Code of 2016, India's rules addressing insolvency and bankruptcy were out of date and fragmented. This created difficulties for creditors who were attempting to recover their debts, as well as for insolvent businesses that were attempting to reorganize or sell off their assets.

The objective of the IBC was to establish a unified and all-encompassing structure that would offer a time-limited and cost-efficient procedure for resolving insolvency and bankruptcy. The IBC was implemented and came into force on May 28, 2016, and has subsequently undergone multiple revisions, by way of amendments, to enhance its efficacy and tackle practical obstacles.

PROVISIONS AND LAWS BEFORE IBC

Without and prior to the Code of 2016, the laws governing insolvency and bankruptcy in India were complex, disjointed and not properly formed. The two pieces of legislation that were in place prior to independence were the Presidency Towns Insolvency Act of 1909 ("hereinafter referred to as **Act of 1909**") and the Provincial Insolvency Act of 1920 ("hereinafter referred to as **Act of 1920**"). Both of these pieces of legislation addressed individual insolvency and bankruptcy. These statutes continue to be applicable even though the sections of the Code that pertain to individual insolvency and bankruptcy have not yet been notified. This is something that should be taken into consideration.[4]

The laws pertaining to insolvency law were originally located within the Government of India Act, 1800 ("hereinafter referred to as **Act of 1800**"), specifically under Sections 23 and

[3] Burman, Anirudh. "India's Economic Slowdown and Why the IBC Matters." "*India's Sustained Economic RecoveryWill Require Changes to Its Bankruptcy Law"*, Carnegie Endowment for International Peace, 2021, pp. 2–4. *JSTOR*, http://www.jstor.org/stable/resrep31120.4. Accessed 22 Jan. 2024.

[4] Understanding the IBC- IBBI Handbook, https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf, Last visited 3rd Feb 2024.

24. The enactment of a Statute in 1828 signaled the initiation of legislation specifically addressing insolvency in India. This act was only made for the Presidency Towns of India namely, Bombay, Madras and Calcutta (now known as Mumbai, Chennai & Kolkata, respectively). Subsequently, the Indian Insolvency Act of 1848 ("hereinafter referred to as **Act of 1848**") was implemented, which established a clear differentiation between individuals engaged in trade and those who were not. The jurisdiction pertaining to insolvency was moved to the High Courts, hence restricting its authority solely to presidency towns. The Act of 1909 was enacted in 1909. Prior to 1907, there was no legal framework addressing insolvency in regions beyond the presidency territories. Consequently, the Provincial Insolvency Act of 1907 ("hereinafter referred to as **Act of 1907**") was enacted, which was subsequently superseded by the Act of 1920.

The, now repealed, Companies Act of 1956 ("hereinafter referred to as **Act of 1956**"), provided for the provisions for the process of winding up or liquidation for Corporate Persons. While the, now existing, Companies Act of 2013 ("hereinafter referred to as **Act of 2013**") replaced the Act of 1956, the specific sections pertaining to the process of winding up or liquidation under the Act of 2013 were not officially announced. Therefore, prior to the implementation of the Code of 2016, the process of winding up or liquidation of companies was regulated by the express provisions under the Act of 1956 and/ or Act of 2013.

The Act of 2013 includes provisions for voluntary schemes of financial reconstruction/ liquidation schemes, which are approved by any of the National Company Law Tribunals, as established under the Law. Such schemes involve arrangements and compromises with creditors and/ or members of the Corporate Person and are usually separate from the resolution process, although they can also be applied during the liquidation proceedings/ process.

The SICA, 1985, served as the main legislation for the rehabilitation of financially distressed industrial companies. It provided a framework for such companies to proactively commence a rescue and rehabilitation procedure if their net value had significantly declined. The failure of the system can be attributed to two primary factors: the continuous and unrestricted protection under moratorium, which used to be occasionally exploited by the debtors, who in possession, and the lack of a defined and time-limited revival process.

The Reserve Bank of India ("hereinafter referred to as **RBI**"), the only banking regulator in India, developed several voluntary mechanisms for debt restructuring. These mechanisms were communicated to banks through instructions or circulars. They include "corporate debt

restructuring, the joint lenders' forum mechanism, strategic debt restructuring, outside strategic debt restructuring, and the Scheme for Strategic Structuring of Stressed Assets.

The Code of 2016 repealed the erstwhile Act of 1909 and the Act of 1920, as well as amended 11 legislations, including[5]:

- Indian Partnership Act, 1932 ("hereinafter referred to as **Act of 1932**")
- The Act of 2013
- The Act of 2002;
- Limited Liability Partnership Act, 2008 ("hereinafter referred to as **LLP Act/ Act of 2008**")
- Sick Industrial Companies (Special Provisions) Repeal Act, 2003 ("hereinafter referred to as **Repeal Act of 2013**")

FORMATION OF THE COMMITTEES

ERADI COMMITTEE

In 1999, the Government of India formed a Central-Level Committee led by Justice Vettah Balakrishna Eradi (Retd.), Supreme Court of India to assess and propose modifications to the current legislation concerning the liquidation of companies. The objective was to enhance transparency and expedite the process of finalising the liquidation of companies. The Committee Report of Justice V. Balakrishna Eradi in 1999 proposed the establishment of an adjudicating authority namely National Company Law Tribunal ("hereinafter referred to as **NCLT**") with the authority and jurisdiction to handle the rehabilitation and rebirth of financially distressed industrial firms. Furthermore, it proposed revisions to the Act of 1956 that were passed into law but not officially announced. Additional suggestions included the implementation of the United Nations Commission on International Trade Law Model Law on Cross-Border-Insolvency, also called UNCITRAL Model Law for Cross Border Insolvency ("hereinafter referred to as **UNCITRAL Model Law**"), promoting the resolution/ revival and voluntary liquidation of Corporate Persons, and expanding the criteria for determining the financial distress of companies to encompass the incapacity to repay obligations.

[5]Summarizing the Insolvency of Bankruptcy code, 2nd August 2016, https://www.indialaw.in/blog/commercialcorporate/summarising-insolvency-bankruptcy-code-2016/, Last visited 3rd Feb 2024.

DR. NL MITRA ADVISORY COMMITTEE

The Central Government formed an Advisory Group on Bankruptcy Laws of India, Chaired by Dr. Nripendra Lal Mitra in 2001. The said Group, created by the RBI, provided numerous ideas on revisions to the bankruptcy legislation. One notable proposal was the merging of all existing bankruptcy laws into a distinct code. The Advisory Group extensively deliberated on the feasibility of eliminating dualism inside the system in order to streamline the entire process and prevent any delays.

Within that particular framework, the subsequent two approaches have been deliberated:

1. Establishing a National Tribunal with multiple branches across the nation, under the jurisdiction and supervision of each respective High Court, to handle all matters related to insolvency, liquidation and bankruptcy. Appeals can be made to the High Court, and further appeals can be made to the Supreme Court through a Special Leave Petition ("hereinafter referred to as **SLP**").
2. Establishing a specialized bench in each High Court to exclusively handle bankruptcy, reorganization (*very muchsimilar to Title 11 Reorganization Proceedings in the US Bankruptcy Code*), and insolvency cases, with the aim of expediting liquidation. The only avenue for appeal would be before the Hon'ble Apex Court through an SLP.

DR. J.J. IRANI COMMITTEE

The Dr. Jamshed J. Irani Committee Report was set up in 2005 to examine and amend the then existing Company Law in India, with a particular focus on establishing a transparent framework for an international-level bankruptcy, also called Cross-Border Insolvency, and procedures pertaining to financial structuring. The J.J. Irani Committee of 2005, proposed modifications to the legislation to expedite the process of restructuring/ insolvency and winding up/ liquidation. The recommendations aimed to establish a unified framework for resolving corporate insolvency through a specialised adjudicatory institution, being the NCLT.

DR. T.K. VISWANATHAN COMMITTEE

A Committee was established on 22nd Aug, 2014, under the leadership of Dr. T. K. Viswanathan, Chairman, Bankruptcy Law Reforms Committee, former Secretary General of the Lok Sabha and former Union Law Secretary. The purpose of the committee was to

examine the legal framework for corporate bankruptcy in India and present a report. Notable features:

- The Committee proposed consolidating the current legal framework by eliminating two statutes and making amendments to six others. The proposal was to revoke the Act of 1909 and the Act of 1920. Furthermore, it had suggested modifications to the following legislations: (i) Act of 2013, (ii) Repeal Act of 2013, (iii) LLP Act, 2008, (iv) Act of 2002, (v) RDB Act, and (vi) Act of 1932.
- The Committee had recommended the establishment of a creditors committee, called as Committee of Creditors, in which the financial creditors will be allocated votes based on the size/ portion of their debt. The creditors committee will engage in negotiations with the debtor as well as the Resolution Professional and Resolution Applicant to formulate a strategy for either resolution or repayment.
- The Committee's Report delineates the process of resolution from insolvency for both corporate entities as well as individuals or partnership firms. The initiation of the process can be done by either the debtor itself or by its creditors.
- According to the Committee's Report, only financial creditors who have obtained collateral against debts were eligible to submit an application for classifying a company as financially distressed. The Committee had suggested granting operational creditors, including employees with outstanding salaries, the authority to initiate/ launch the insolvency resolution procedure of a corporate person.
- A licensed insolvency specialist, called the Resolution/ Insolvency Professional, will oversee the entire insolvency resolution process of an entity. Throughout the Corporate Insolvency Resolution Process ("hereinafter referred to as **CIRP**"), the insolvency professional will exercise authority and oversee the management of the debtor's assets, ensuring their safeguarding during the negotiating phase, since the Directors are suspended as soon as a CIRP is initiated/ admitted against a Corporate Debtor.
- The Committee had recommended the establishment of Insolvency Professional Agencies ("hereinafter referred to as **IPAs**"). The agency will accept/ enroll resolution professionals as its members under its roll and regulate such professionals enrolled.
- The report of the committee suggested expeditious settlement of insolvency and negotiations with strict time limits between creditors and debtors. In order to guarantee this, it had been suggested that a time frame of 180 days be allocated for the

completion of the IRP. In instances of significant complexity, the duration may be extended by an additional period of ninety (90) days, contingent upon the consensus of 75% of the Committee of Creditors.

- The committee had suggested the creation of information utilities that would store various information about companies. This will help prevent delays in the CIRP under the Code of 2016, which are often caused due to the sole reason of lack of data as Evidence.
- The Committee had recommended the establishment of a board namely, the Insolvency and Bankruptcy Board of India ("hereinafter referred to as **IBBI/ the Board**") as the regulatory authority responsible for supervising resolution of Corporate Entities in India. The IBBI would oversee the supervision of IPAs and information utilities, as well as establish regulations for insolvency resolution in India.
- The Committee suggested the establishment of two tribunals to settle disputes under the law: (i) the Adjudicating Authority, being the NCLT, which will retain its authority over the resolution of insolvency and liquidation cases involving corporate persons and limited liability partnerships; and (ii) the Debt Recovery Tribunal ("hereinafter referred to as **DRT**") will have jurisdiction over the resolution of insolvency and bankruptcy cases involving individuals and/ or partnership firms.

NEED FOR THE CODE

- The primary and main objective of current insolvency law in India i.e., the Code of 2016, is not recovery or the dissolution/ liquidation of insolvent entities, but rather the revival/ revitalization of financial assets and the gradual rebuilding of the financial standing of corporate entities facing monetary challenges, in order to facilitate their revival and business operations. In certain circumstances & nations, it is considered a criminal offence for a business to continue operating in the commercial sector while being financially ruined, according to their bankruptcy laws & rules. For recovery, we already have existing laws namely the RDB Act, 1993 and SARFAESI Act, 2002. With the enactment of the Code of 2016, one major difference that we saw was a change/ shift in paradigm from the culture of Debtor-in-Possession to Creditor-in-Control.

- For the purpose of regulating any act, function or duty, we rely on the law. The purpose of any statute is to strike a balance between things that are beneficial to society, and a society that is decent need laws in order to ensure that the rights of individuals are respected. In the event that we are discussing traffic regulations, for example, what would occur if there were no traffic laws? What would happen is that there would be anarchy everywhere. It is true that there will be, and as a result, we are aware that nothing could continue to function properly and regularly until we have a properly drafted and detailed mechanism to regulates it, and for us, that mechanism is a statute/ legislation.[6]

The primary purposes that were considered while drafting the provisions of the IBC were as follows[7] -

1. Make improvements to the process of resolving conflicts that are associated with insolvency and bankruptcy. The IBC establishes a simpler approach that is focused on achieving results via the resolution of all legal & economical conflicts and that too in a strictly time-bound manner.
2. To assist in the restructuring of the outstanding liability of the corporate debtor in such a way that it does not result in any of the parties concerned suffering a loss, the Code of 2016 assists in adding value to the entity, rather than just going for selling the assets of the corporate debtor for the restricted purpose of satisfying the dues that are expected to be paid or recovered by the Creditors. In the event that there is no other choice but to liquidate the assets of a company, the mechanism that has been established under the IBC is also applicable in this scenario.
3. The Code of 2016 clearly provides a big landscape of efficiency and growth for the entities rather than recovery as the final object of the Code of 2016 is to do what is best for the debtor/ business, creditors and the economy i.e., timely revival without losing the value of assets. It is not necessary to liquidate all the assets but in case it is felt that liquidation is in the best interest of the entity and is the only viable option left to obtain maximization of assets' value, the procedure will proceed in that manner. To provide the best resolution is what makes this legislation unique and one-of-its-kind.

[6] Hritika Sharma –"Evolution of Insolvency and Bankruptcy Laws in India", https://ibclaw.in/wp-content/uploads/2021/05/EVOLUTION-OF-INSOLVENCY-AND-BANKRUPTCY.pdf, last visited 3rd Feb 2024.

[7] Why do we need the Insolvency and bankruptcy code?, Published on 28th Dec 2021, https://www.lawyered.in/legal-disrupt/articles/why-do-we-need-insolvency-and-bankruptcy-code/, Last visited 3rd Feb 2024.

4. The Code of 2016 helps in recognizing the maximum value of the assets because the end goal is not just to pay back dues to the creditors but to do what is the best way forward for the business in the long run, the assets are analyzed and then only a resolution process is decided upon. This process helps in the assessment of the entity and its assets as a whole and helps in recognizing the best way forward.
5. To make certain that there is an equality in regard to the treatment with the creditors under the Code of 2016, another such special feature of this Code of 2016 is that all classes of creditors are treated in a fair & just manner depending on their fraction of share of dues outstanding.
6. The Code of 2016 also ensures and clearly provides that it is a duty on the part of the Committee of Creditors as well as the Resolution/ Insolvency Professional to keep running the Corporate Debtor as a going concern, i.e., the Debtor will keep functioning normally without any stay on its operations.
7. The Code of 2016 assists in calling for a revival plan for the corporate entity in a time-bound, effective and unprejudiced manner. The Code of 2016 has expressly given a timeline for different processes under it, that have to be executed as per its provisions. This helps in eliminating the unwarranted delay that often happens during the resolution/ liquidation process under the provisions of the Code of 2016. The time period beings from an initial 180 days, with an option to extend not more than 90 days. The IBC also provides that the whole CIRP must be completed within a total time of 330 days (*this implies that an additional period of 60 days is also available, as per the discretion of the adjudicating authority*).
8. A transparent and predictable insolvency law that incentivizes information - information is the most powerful tool. For the said reason, the Code of 2016 provides for establishment of Information Utilities ("hereinafter referred to as **IUs**"). These IUs provide all the necessary information, pertaining to existence of liability, that is important for the CIRP Process as enshrined under the IBC, which act as an Evidence/ Proof of Debt. The role of an IU is to collect and store information that will act as a record and will come in use of such creditors who want to initiate CIRP against defaulting Corporate Persons. As of this date and since the inception of the Code of 2016, there has been only one (1) Information Utility in India namely, NeSL ("National E-Governance Services Limited").

9. The IBC provides for clearly setting proper provisions for all classes of creditors and the priority in which their claims will be treated under CIRP or Liquidation, as the case may be, a distribution/ waterfall mechanism of sort. This is accomplished by the recognition of current creditors and their rights, as well as the ranking of the priority of claims.

IBC has proven to be highly beneficial for all entities experiencing bankruptcy. This code facilitates the provision of optimal solutions and resolutions in a prompt and effective manner. The primary objective of the Code is to safeguard against any financial harm or detriment to any party, be it an organization or a person to whom money is owed, while simultaneously prioritizing the debtor's welfare.

IBC, 2016 AND THE RESCUE CULTURE

The IBC is a comprehensive law that specifically deals with insolvency. The IBC introduced the concept of a resolution plan as a solution for struggling enterprises and corporate creditors. It was a source of relief for many people. Section 5(26) of the Code[8] provides the definition of the word 'resolution plan' as,

"Resolution Plan means a plan proposed by a resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II"

The Insolvency and Bankruptcy (Second Amendment) Act, 2018[9] ("hereinafter referred to as **Amendment Act of 2018**") clarified the inclusion of corporate resolution plans in the resolution plan, emphasized the importance of financial creditors in asset distribution proposed by the resolution applicant, and specified the impact of the resolution plan on all legal aspects. A major achievement for the Corporate Debtors and Resolution Applicants was when the amendment specified that if the resolution plan considers restructuring the corporate debtor through merger, amalgamation, or demerger, the corporate debtor is not obligated to comply with the Merger Framework outlined in the Act of 2013 and its associated Rules. One major concern in implementation of any Resolution Plan is dealing with conflicting classes of creditors. According to Section 30(4) of the Code[10], a resolution/ revival plan must be approved by sixty-six percent (66 %) of the democratic total fraction of the financial creditors to be accepted by the NCLT/ Adjudicating Authority.

The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate

[8] Insolvency & Bankruptcy Code, 2016 (Act No 31 of 2016), s. 5(26).
[9] Insolvency and Bankruptcy (Second Amendment) Act, 2018 (Act No 26 2018)
[10] Insolvency & Bankruptcy Code, 2016 (Act No 31 of 2016), s. 30(4).

Persons) Regulations of 2016 (‘hereinafter referred to as **CIRP Regulations of 2016**”) defined "dissenting financial creditors" as financial lenders who have voted against the resolution plan approved by the committee of creditors. The Board/ IBBI amended the CIRP Regulations of 2016 to include financial creditors who abstained from voting in support of the resolution plan as dissenting financial creditors. The Board/ IBBI, through its circular dated September 14, 2018, clarified that financial creditors who are not part of the Committee of Creditors do not get the right to vote. Therefore, they cannot be classified as either opposing or dissenting creditors when it comes to approving a resolution process. All authorities/ bodies under the Code of 2016, including the NCLT, the regulatory authority being the Board/ IBBI, and the members, aim for a seamless approval and implementation of the Resolution Plan. The latest IBBI Report states that Code of 2016 operates as a economic system where global entities compete to provide the highest value for the company through a resolution plan. The resolution/ revival plans have produced approximately double the value that could have been produced through the process of liquidation.

To comprehend the resolution/ revival culture in India, one must grasp the whole CIRP as outlined under Section 6 to Section 32 of Chapter II, Part II of the Code of 2016[11]. “If a corporate debtor fails to pay a debt that is due and payable, the corporate resolution process can be commenced according to Chapter II of the Code of 2016. The IBC, 2016 highlights the importance of promptly identifying financial difficulties for quick resolution. It specifies that a CIRP can be initiated by any financial creditor, an operational creditor, or the corporate debtor itself. The financial creditor may file an appropriate application before the respective NCLT having the proper territorial jurisdiction, along with evidence/ proof of debt and the proposed/ elected resolution/ insolvency professional who will act as an Interim Resolution Professional (“hereinafter referred to as **IRP**”). Once the concerned NCLT confirms the presence of a default, it will then go on to admit such application, filed under either Section 7 of the Code of 2016[12]. The method for initiating a CIRP by an operational creditor against a Corporate Debtor differs from that of a financial creditor due to the smaller and recurrent nature of operational obligations, as compared to financial debts. After a default has occurred, the operating creditor must provide a statutory demand notice of 10 days or an invoice for payment of the debt in default under the provisions of Section 8 of the Code of 2016[13]. This prevents operational creditors with lower debt claims from prematurely triggering the

[11]Insolvency & Bankruptcy Code, 2016 (Act No 31 of 2016), ss. 6 – 32.
[12] Insolvency & Bankruptcy Code, 2016 (Act No 31 of 2016), s. 7.
[13] Insolvency & Bankruptcy Code, 2016 (Act No 31 of 2016), s. 8.

insolvency resolution process or doing so for unrelated reasons. Within this period of 10 days, the Corporate Debtor can either pay-back the whole outstanding dues to the concerned Operational Creditor, or it can bring to the knowledge of such Operational Creditor about any pre-existing dispute.

The II Chapter of the Code specifies a "time restriction of 180 days, which can be extended by an additional 90 days for completing the corporate insolvency process. Within fourteen (14) days of receiving the application, the NCLT either admits or rejects such applications, and selects an IRP who plays a crucial role in the corporate resolution process. The NCLT also imposes a Moratorium on the legal affairs of the concerned Corporate Debtor. The IRP performs several functions such as collecting claims, obtaining information on the corporate debtor, organizing a committee of creditors, managing the company's activities temporarily, and monitoring assets until a final resolution professional is selected. Once the resolution professional is appointed, they may create an information memorandum to help a resolution applicant develop a resolution plan. An information memorandum will be prepared to help prospective participants find strategies for resolving the insolvency of the corporate debtor. Anyone can initiate a CIRP as long as they follow the relevant provisions of the legislation. The Resolution Professional must present every filed resolution plan to the creditors' committee for their approval or disapproval". If approved by the creditors, it will be sent to the NCLT for final approval. Once approved, the same will be implemented. If not approved, the NCLT will go ahead and pass an order for liquidation of the Corporate Entity.

The resolution plan in the Insolvency and Bankruptcy Code, 2016 is basically a strategy designed to assist a struggling firm in returning to its financial stability. "The resolution applicant, who is not disqualified under Section 29A of the Code of 2016[14], submits the plan to the resolution professional. The resolution professional ensures that the plan does not violate any requirements and complies with Section 30(2) of the Code". The Appellate Authority under the Code of 2016, being the National Company Law Appellate Tribunal ("hereinafter referred to as **NCLAT**") in the case of ***Binani Industries Limited v. Bank of Baroda &Anr[15]*** established "several regulations that must be adhered to in a resolution plan.

a) The Resolution Plan focuses on resolving the Corporate Debtor as a viable entity, rather than through methods like sale, auction, recovery, or liquidation.

[14] Insolvency & Bankruptcy Code, 2016 (Act No 31 of 2016), s. 29A.
[15] 2018 SCC OnLine NCLAT 521

b) The primary goal of the Resolution plan is to mitigate the danger of insolvency by maximizing earnings and enhancing the equitable interests of debtors and creditors.
c) The resolution strategy must be distinguished from the concept of recovery. The Insolvency and Bankruptcy Code restricts recovery but promotes the resolution plan.

d) The resolution strategy necessitates significant consideration and must be distinguished from the concept of liquidation. A resolution strategy must support a continuously expanding economy.
e) The resolution plan must treat all parties/ creditors equally & fairly. If it shows favoritism towards any class of creditors, it would violate the fundamental purpose of Section 5(26) of the Code, which would lead to non-approval of the revival plan by the Committee of Creditors and/ or by the concerned NCLT".

PERSONAL GUARANTORS

Prior to addressing the jurisdictional difficulty of the personal guarantee to a corporate debtor, it is crucial to have a clear grasp of the idea of personal guarantor as defined in the Code. According to Section 5(22) of the Code of 2016[16], "*a personal guarantor is an individual who acts as a surety in a contract of guarantee to a corporate debtor*". In essence, a personal guarantor could be any person who commits to assuming a borrower's liability if it fails to fulfill their duty. According to the Code, "the personal guarantors are responsible for providing guarantees for the loan or any other sort of facility obtained by the corporate debtor from the main borrower". As a result, when a company that owes money fails to make payments on these financial arrangements, the responsibility of the individual who guaranteed the debt becomes active.

The justification for conducting parallel proceedings against the personal guarantors originates from the foundational principle of equal liability of a personal guarantor, who is a surety, towards the main debtor. In relation to the IBC, 2016, the Apex Court in the matter of ***Lalit Kumar Jain v. Union of India***[17] case determined that if a resolution plan is approval for a Corporate Entity, the said fact does not automatically release the sureties/ personal guarantors from their obligations under the guarantee contract. The structure of the Code for the specified adjudicating authority to resolve issues is evident and unequivocal. The National Company Law Tribunal is the adjudicating body for the insolvency processes

[16] Insolvency & Bankruptcy Code, 2016 (Act No 31 of 2016), s. 5(22)
[17] 2021 SCC Online SC 396

outlined in Part II of the Code.

These processes pertain to the resolution and liquidation of business entities. The Insolvency Resolution, Fresh Start as well as the Bankruptcy process under Part-III of the Code of 2016 for Individual (personal guarantors included) and partnership firms, will be overseen by the Debts Recovery Tribunal ("hereinafter referred to as **DRTs**") as the appointed adjudicating body. Thus, upon a careful examination of the legal provisions, the difference is clear and unambiguous. However, the adoption of the Amendment Act of 2018 led to a conflict and overlapping of jurisdiction in cases involving personal guarantors. The concept of a personal guarantor is considered an individual insolvency and is therefore governed by Part III of the Code. Nevertheless, this modification introduced a separate classification for personal guarantors, which deviates from the overall structure of the Code. Consequently, the insolvency resolution plan for personal guarantors will be addressed in Part II of the Code of 2016.

The constitutionality of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 ("hereinafter referred to as **Personal Guarantor Rules, 2019**")[18] was challenged in the case of ***Lalit Kumar Jain versus Union of India***[19]. The Supreme Court has confirmed the validity of the 2019 Rules, so establishing a separate and definitive classification for personal guarantors.

The peculiarity in the jurisdictional process regarding the personal guarantor's process, as a result, the provisions of Section 60 of the Code of 2016[20] were made possible, among other things, by the aforementioned Amendment and the Rules which contemplated four (4) scenarios wherein an application for initiating CIRP against any Personal Guarantor falls within the jurisdiction of the NCLT instead of DRTs[21]:

- The NCLT before which such application is filed against any personal guarantor, shall have the proper territorial jurisdiction.
- At the time of filing of such application, the main CIRP against the Borrower/ Debtor Borrower should be pending adjudication at such NCLT.

[18]"Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019"

[19] (2021) 9 SCC 321

[20] Insolvency and Bankruptcy Code, 2016 (Act No 31 of 2016), s. 60.

[21]"Understanding the jurisdictional dilemma in personal guarantor's insolvency resolution Process, Published on 21st Feb 2022, https://www.scconline.com/blog/post/2022/02/21/understanding-the-jurisdictional-dilemma-in-personal-guarantors-insolvency-resolution-process/," Last visited 19th Feb 2024.

- When, the Application for CIRP of the Personal Guarantor is filed and while such application is pending, the application for initiating CIRP against the Principle Borrower, the Personal Guarantor's case should be transferred to such NCLT.
- While heading and deciding such Personal Guarantor applications, the NCLT will be exercising such powers, as granted to the DRTs.

In this scenario, we have a situation in which a case has been launched, is pending, or is in the process of being admitted against the corporate debtor. In such a scenario, the decision about whether or not to begin/ start the CIRP against such surety/ personal guarantor will be made by the NCLT[22].

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

Insolvency and bankruptcy processes in the country are governed by the Board/ IBBI, which is the regulatory authority for these proceedings. On October 1, 2016, the Board/ IBBI was constituted in accordance with the Code of 2016. The execution of the IBC is under its purview of responsibility. The Code of 2016 is a time-bound legislation that modifies and consolidates the laws that pertain to the resolution/ revival of insolvency matters involving individuals, partnership businesses, and corporate persons.

In addition, it is responsible for "monitoring the operations of individuals and organizations such as the IPAs, the Resolution Professionals, the IUs, as well as Registered Valuers and Registered Valuers Organizations. Under the provisions of the IBC, the IBBI is responsible for formulating and enforcing regulations that establish guidelines for the resolution of corporate insolvency, individual insolvency, corporate liquidation, and individual bankruptcy".

IBBI is a significant pillar in the implementation of the IBC, which is responsible for implementing and overseeing the complete CIRP of Corporate Persons, Individuals as well as Partnership Firms in a specified time-period for all of the concerned parties involved.

The Board is a one-of-a-kind regulator because it governs not only a profession but also the processes for that profession. During the same time period, it simultaneously performs its quasi-legislative, executive, and quasi-judicial tasks. The development of the profession as well as the degree of transactions is another objective. In the ecosystem that is responsible for putting the IBC into action and is created by the IBC, the Board/ IBBI is an essential component.

[22] Ibid

CROSS-BORDER INSOLVENCY RESOLUTION PLAN UNDER IBC, 2016

When a Corporate Debtor, has assets and/ or creditors in more than one country, and such debtor becomes insolvent and proceedings about the same are initiated in more than one such countries, this scenario may be termed as "Cross-Border-Insolvency".[23]

Professor Ian F. Fletcher, defined Cross-Border-Insolvency as *"a situation where an insolvency occurs in circumstances which in some way transcend the confines of a single legal system so that a single set of domestic insolvency law provisions cannot be immediately and exclusively applied without regard to the issues raised by the foreign elements of the case"*[24]

INDIAN LEGAL STRUCTURE REGULATING CROSS-BORDER INSOLVENCY

A situation relating to Cross-Border-Insolvency typically occurs when a borrower possesses assets or creditors in various countries, or when insolvency cases are initiated in multiple countries. The cross-border insolvency mechanism essentially regulates insolvency processes that extend outside local jurisdiction and its limits. Generally, a cross-border insolvency involves the following aspects:

a) Ensuring fair treatment for both local and foreign creditors' interests.
b) Protecting the debtor's assets in multiple jurisdictions.
c) Coordinating courts and legal authorities in different jurisdictions and their respective laws.
d) Ensuring consistency in insolvency laws and procedures across various jurisdictions.

The fundamental legislation in India that regulates insolvency is the IBC, 2016. Although the IBC has gained significant progress in standardizing the insolvency proceedings, it lacks a robust mechanism to govern cross-border insolvency procedures. Two provision in the Code of 2016, Section 234 and Section 235, aid in resolving cross-border insolvency disputes. Section 234, authorizes the Union Government to engage in bilateral treaties with different countries to enforce the provisions of the IBC. Section 235 allows the NCLTs to send a formal requisition to any foreign court/ tribunal situated in such nation where a treaty under Section 234 of the IBC has been executed, to handle all the properties located in such nation in a specific way.

[23]"Manasi Lad Gudhate- Cross Border Insolvency, April 2023, https://www.icsi.edu/media/webmodules/CSJ/April/15ArticleManasiLadGudhate.pdf," Last visited 17th Feb 2024.

[24] "Insolvency in Private International Law: National and International Approaches" (2000) Bogdan, M. and Ian F. Fletcher.

CROSS-BORDER INSOLVENCY GUIDELINES RECOMMENDED BY THE INSOLVENCY LAW COMMITTEE

The UNCITRAL Model Law on Cross-Border Insolvency ("hereinafter referred to as **UNCITRAL Model Law**"), established in 1997, offers legislative direction to governments regarding cross-border insolvency. The UNCITRAL Model Law is highly regarded for offering a comprehensive solution to address cross-border insolvency matters. The World Bank recognizes the global dimensions of insolvency procedures and emphasizes the importance of including provisions in insolvency legislation for jurisdiction, choice of law, inter-court cooperation between various nations, and recognition of decisions/ orders of foreign courts. The International Monetary Fund ("hereinafter referred to as **IMF**") also supports the implementation of the UNCITRAL Model Law since it offers an efficient way to alleviate difficulties in disputes related to cross-border insolvency and promote cooperation and alignment between courts and regulatory bodies in multiple countries.

Access, Recognition, Relief and Cooperation are the primary principles that govern the UNCITRAL Model Law. There are also four further principles. It is intended to give foreign professionals and creditors direct access to domestic courts, which will, in turn, make it possible for them to take part in domestic insolvency procedures against the debtor in question and/or to initiate such actions. On the subject of recognition, the UNCITRAL Model Law takes into consideration the recognition of foreign actions in domestic courts and gives the courts the ability to evaluate the remedies that should be awarded in accordance with the recognition. In addition, the UNCITRAL Model Law includes provisions that ensure coordination in order to effectively manage the conduct of concurrent processes in several jurisdictions. These provisions are designed to facilitate effective cooperation between insolvency experts and courts located in different countries. It would appear that the purpose of the UNCITRAL Model Law is to provide assistance to states in the process of shaping their cross-border-insolvency provisions into a framework that is contemporary, harmonised, and unprejudiced to ensure efficiently addressing matters related to cross-border insolvency. Rather than seeking to integrate the numerous national laws, it focuses largely on enhancing

collaboration and coordination between nations, while also acknowledging and respecting the diversity that exist among the respective national laws.[25]

Several notable characteristics of the Model Law are emphasized below:

- This Model Law is only applicable to corporate persons/ entities and not on LLPs, Partnership Firms or Individual Debtors. The reason for this differentiation may be described as a prudent strategy, as the legislative body may consider it wiser to analyze and assess the implication of the Model Law on Corporate Persons before making it applicable on LLPs, Partnership Firms or Individuals.
- The proposed Model Law includes the condition of symbiosis, making it applicable solely on countries who have similarly implemented the UNCITRAL Model Law in their respective domestic statutes/ legislations. Therefore, the issue of cross-border-insolvency procedures in such nations where UNCITRAL Model Law is not implemented remains unresolved.
- The Model Law differentiates between two categories of foreign proceedings: Primary Non-Primary Proceedings. A Primary Foreign proceeding is a legal process taking place in the country where the borrower's key interests can be located. A Non-Primary proceeding are those proceedings which take place in such country where the borrower has a presence, excluding the primary international action. This distinction is needed to grasp, ascertain, and define the extent of control a foreign court/ proceeding can have over the insolvency proceedings in India, along with the kind and degree of relief that can be provided by the Adjudicating Authority concerning such foreign proceedings.
- Section 14 of the Model Law provides guidance on determining the Centre of Main Interests ("hereinafter referred to as **COMI**"). An apparent conjecture is established that COMI is where the borrower' registered address is, unless contrary is supported with proof. However, this assumption can be applied only when a registered office of the borrower cannot be located in another country within a period of ninety (90) days before the insolvency procedures begin in such country. The NCLT will analyze as to where the borrower's central administration is situated to determine the corporate debtor's COMI. The evaluation should consider parameters specified by the Union Government and be conducted in a way that is verifiable by third parties, such as the

[25]"India: Cross Border Insolvency Regime in India, 31st Oct 2021, https://www.mondaq.com/india/insolvencybankruptcy/1123982/cross-border-insolvency-regime-in-india," Last visited 17th Feb 2024.

borrower's creditors.

CONCLUSION

Any capitalist society must include rules and laws pertaining to Insolvency as an essential component, since it is one of the ways of exiting from a business/ venture. These laws act as the fundamental for the properly winding up any business or reorganization by way of restructuring, of all types of business models, including but not limited to Corporate Entities, Private & Public Limited Companies, LLPs, Partnership Firms, Sole Proprietorships, etc. Therefore, from an economic point of view, insolvency laws make it possible to efficiently circulate cash that has been infused in a corporation that has failed and making funds available in the market. As a result of the fact that bankruptcy laws require striking a balance between the competing interests of numerous stakeholders like Creditors, Investors, Members, Employees, Vendors, as well as the Government, there are, without any fail, distributional implications that occur during any bankruptcy procedure. Because of this, bankruptcy rules are sensitive to the necessities of both the political and economic spheres. Apart from laws and policies being made for easily setting up businesses, there is also a strict need in all such countries/ societies for an Exit Law i.e., the Code of 2016 in India.

Concerns have been raised because the Code has introduced an excessive number of modifications all at once, which may have contributed to the problems. The IBC has advanced an enormous overhaul of statutes, rules, practice, and framework in India, which is certain to be subject to hangovers from the erstwhile regimes, hinderance to quick administration/ imposition from the fraternity, and eventually weaken in its impact. This Code has advocated a major revamp of these items, particularly in India, where it is impossible to enforce any changes in the legal system.

One of the most significant accomplishments of the Code is that it makes an effort to differentiate between the judicial considerations and the business aspects of the insolvency processes. While Insolvency Professionals will be responsible for managing business related factors like the administration of the borrower company, smoothening the creation of committees of creditors, conducting such meetings, and examining the revival plan, among other things, proposed by the NCLTs or DRTs, as the case may be, will be in charge of judicial issues. The workload of the judicial system would be reduced, and delays would be eliminated as a result.

As a conclusion, it is possible to declare that the Code has been a huge boon, and the mere

prospect of losing control over the debtor company has changed the behavior of debtors, making them less likely to default on payments. This is a statement that can be made. Nevertheless, additional actions are required to be taken in order to achieve its goals and protect the interests of stakeholders, which encompass the "creditors" as well as the debtor who is currently financial insolvent.[26] In light of the fact that the operation of the Code will have a significant influence on debtors and creditors inside the country, as well as, ultimately, on the economy of India itself, it is of the utmost importance that the Code be updated in order to increase its effectiveness. Therefore, the efficacy of the Code is even more vital in light of the economic devastation that was caused by the pandemic known as "Covid-19." As a result, the Code needs to be amended on a regular basis and with a high priority in order to guarantee that the insolvency framework operates without any hiccups and to address any potential issues as soon as they may appear.

A significant number of alterations were brought about in the country's large company landscape as a result of IBC, 2016. Since it was initially introduced with the object of shortening the amount of time required to address the problem of bankruptcy, the code has evolved into something that is propelling this nation toward a new era of economic development. However, it is not yet clear what the potential outcomes of this path of expansion could be. To ensure that our financial situation is in order and that we do not ever become bankrupt is the best thing that we can do. Not even a decade has been passed since the enactment of the Code of 2016, many statutes take multiple years to show their efficiency. The IBC, being in existence for merely 8 years, has proved itself to be effective and has helped in revival of failing/ failed businesses.

SUGGESTIONS AND WAY FORWARD

Although the IBC has been successful, there are several difficulties that require attention, in order to enhance the functioning and efficiency of the Code of 2016. The backlog of cases in the NCLT is a significant challenge that is causing delays in the resolution process. Another obstacle is the insufficient infrastructure and skilled personnel to oversee the insolvency process. The scarcity of resolution professionals has caused a surge in the need for their services, resulting in increased prices for the resolution process. The government has implemented various initiatives to tackle these obstacles, including as expanding the NCLT benches, boosting the number of resolution professionals, and modifying the IBC to meet

[26] IBBI, ―Annual Report 2018-19‖ (2020).

practical issues.

Currently, the Code of 2016 is the primary statute for resolution, liquidation, and reorganization of failed enterprises, diminishing the significance of erstwhile legislations. The application of the Code of 2016 addressed a constantly rising legal deficiency in dealing with NPAs. The RBI eliminated all previous Corporate Debt Restructuring ("hereinafter referred to as **CDR**") rules with a unified and simpler framework for resolving distressed assets through IBC in its circular dated 12 February 2018. The Supreme Court invalidated RBI's 12 February circular on 2 April 2019, which required lenders to start resolving or restructuring loans after a single day of default. Despite this, the circular represents the initial change in upholding the importance of debt agreements.

- The objective is to improve the predictability of the IBC process in order to attract a larger variety of strategic purchasers who are ready to bid for assets and provide resolution plans that are in conformity with the code.
- Promoters of MSMEs are free to submit resolution plans for these businesses. When adequate precautions are in place, similar methods of relaxation can be applied to large organizations. MSMEs are basically an exception to Section 29A of the Code by virtue of Section 240A of the Code of 2016[27].
- A time restriction should be established for contesting the approval of a "resolution plan." Currently, as the Adjudicating Authorities take time to decide on the admission of a "resolution plan", more objections are submitted while the awaiting approval, causing more delays by different involved parties ranging from creditors to the resolution applicant itself.
- Efforts should not be duplicated in the insolvency and bankruptcy procedure. During the CIRP, the Resolution Professional verifies the claims of creditors. However, in a liquidation process, the claim filing process starts afresh. The liquidator must continue the liquidation process using the creditors' claims confirmed by the IRP and the RP, unless a claim is disputed or needs correction by any party or by the liquidator themselves. This will save time, money and speed up the process, which will lead to getting the maximum asset value.
- The expedited process for CIRP should be revised to include a concise and quicker procedure compared to the regular CIRP. This can be achieved by implementing measures like reducing the time limit for appeals and allowing automatic approvals,

[27] *Ibid*

such as the Interim RP being deemed as the RP unless the NCLT specifies otherwise for valid reasons.

- Enhancing information utilities is necessary to provide judicial authorities with easy access to detailed transaction records, hence reducing their workload. As of today, and since the enactment of the Code of 2016, there has been and is only one (1) Information Utility/ IU in India. More IUs will ease up the process and make such data more accessible.

- By establishing more Asset Reconstruction Companies ("hereinafter referred to as **ARC**") like the National Asset Reconstruction Company Limited ("hereinafter referred to as **NARCL**"), also popularly known as the "Bad Bank," financial institutions will be given the option to gradually address the aforementioned concerns. It is the responsibility of the government to guarantee that it is adequately staffed and that it functions efficiently.
- When it comes to the National Company Law Tribunals, capacity building encompasses more than just subjects pertaining to the Code of 2016. In addition to this, they investigate various scenarios that are covered by the Act of 2013, such as business mergers and persecution. Raising the strength of the NCLT is essential in order to raise the efficiency of the IBC. The Government should set up more Tribunals throughout the country, which will reduce the burden of existing Tribunals. Further, the number of benches at a single tribunal should also be increased for an efficient and quick disposal of matters.
- IBC is not the only way that can be used to deal with stress; there are other options available. In addition to Pre-IBC proceedings, Mediation, One-Time Settlements ("OTS"), and Restructuring packages, it is important to strongly advocate the implementation of additional options instead of just approaching the Tribunals.