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# **THE CHALLENGES AND OPPORTUNITIES POSED BY THE INCUMBENT IBC REGIME: A CRITICAL ANALYSIS**

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**Abstract** - The Insolvency and Bankruptcy Code was created and presented to the Lok Sabha in 2015. Finally getting passed in 2016. Under the Special Companies Act (SICA) Repeal Act, 2003, the National Company Law Tribunal issued the notification. As a result, the SICA will be abolished on December 1, 2016.

As a result, the government declared that all active projects prior to the BIFR and AAIFR would be suspended and terminated. On the other hand, a business that has had its appeal, referral, or inquiry denied may file new paperwork with the National Company Law Tribunal (NCLT).

According to the provisions of the Bankruptcy Code, the defence is based on Article 14 of the IBC 2016 within 180 days after the entry into force of the Bankruptcy Code. IBC provides a place for healing and problem solving. This provides an opportunity for all key players to participate in the bankruptcy process and jointly assess the potential of the illegal office.

By offering a dependable and clear legal framework for handling bankruptcy, the IBC raises investment trust. Because investors are guaranteed a strong framework to protect their investments, this promotes investment from both domestic and foreign sources.

## **I Shortcomings of IBCCapacity Restraints**

The implementation of the IBC has been challenging due to a lack of adequate infrastructure and resources, notably a shortage of insolvency experts and National Company Law Tribunal (NCLT) benches. These inefficiencies and delays have complicated the settlement procedure.

### **Litigation Risk**

The IBC has encountered legal challenges on several occasions, which has caused the settlement process to be delayed. The efficacy of the IBC has been undermined by stakeholder uncertainty caused by interpretation problems and inconsistent rulings.

### **Haircuts for Creditors**

During the resolution process, creditors may occasionally be required to accept large haircuts on their dues if the worth of the assets is less than the existing debt. As a result, creditors can experience financial losses, which might make them less inclined to lend money.

### **Effect on Promoters**

Promoters may suffer as a result of the strict IBC requirements, which include the prospect of losing control over the firm and the implementation of a moratorium. This might deter risk-taking and entrepreneurship, especially in small and medium-sized businesses.

### **Stressed Asset Market**

The capacity of distressed enterprises to be sold or restructured on a strong market for stressed assets is essential to the IBC's success. But the resolution process has been hampered by the stressed asset market's lack of liquidity, which has limited creditors' alternatives.

### **Operational Difficulties**

There are a number of operational difficulties in putting the CoC-approved resolution plans into action and making sure that company activities continue after the resolution. Sometimes, the absence of collaboration between stakeholders and legal obstacles may make it difficult for resolution strategies to be implemented successfully.

### **What are the shortcomings ??**

- The code provides insufficient safeguards to protect the business's interests before handing over administration to the resolution specialist.

- A major component of the Code is the undisputed word of the creditors.
- The Code does not allow the corporate debtor to present their argument at any stage of the settlement procedure.
- The Code's failure to outline the prerequisites for certification as both an interim and final bankruptcy resolution specialist is another defect.
- In addition, it gives the IP much too much power; it infringes on the right to business by making information memos prepared by the insolvency professional accessible to all parties without enforcing confidentiality obligations or limiting competitors.
- The Code lacks a definition for a resolution applicant. These resolution plans are all put up to the creditors and implemented through NCLT orders.
- The company will be liquidated by default if the creditors are unable to come to a settlement. Withdrawing an application after it has been approved is prohibited under the Code. Consequently, there isn't any space for resolution. There are still certain problems with the Indian Insolvency and Bankruptcy Code (IBC), despite the fact that it has greatly improved the circumstances surrounding corporate insolvency and bankruptcy. Here are some often brought up criticisms: Protracted Resolution Process: Despite efforts to expedite the procedure, it occasionally takes longer than expected to settle cases under the IBC. These kinds of delays might result in the depreciation of assets and the delay of timely relief for stakeholders and creditors.

### **NCLT Capacity**

The National Company Law Tribunal's (NCLT) capacity to handle insolvency cases has been questioned. Hearing delays and a backlog of cases have allegedly made it more difficult to settle bankruptcy cases quickly.

### **Haircuts for Creditors**

Throughout the resolution process, creditors have often been made to take significant financial hits (i.e., smaller repayment amounts) on their debts. As a result, they could lose trust in the system and experience financial instability.

### **Lack of Clarity**

The IBC is silent on how to handle cross-border insolvency, which creates difficulties when dealing with multinational corporations that have assets and creditors spread

across many countries.

**Operational Creditor Obstacles** Compared to financial creditors, operational creditors—such as suppliers and vendors—have more hurdles when it comes to launching bankruptcy procedures under the IBC because of higher thresholds and more complicated legal procedures.

### **Absence of a Pre-packaged Insolvency Framework**

Despite the IBC's introduction of provisions for MSMEs' pre-packaged insolvency resolution procedures (PPIRP), no all-encompassing framework for pre-packaged insolvency exists, which might further speed up the resolution process.

**Ineffectiveness in Certain Situations:** Although the IBC aims to encourage settlement rather than liquidation, there have been situations in which workable resolution plans were not realised, resulting in the liquidation of assets and loss of value.

### **Difficulties in Rehab**

Legal issues, implementation delays, and asset realisation complications have posed obstacles to the enforcement of settlement plans and asset recovery, particularly in situations involving tangible assets such as real estate.

In order to achieve quicker resolution, greater protection of creditor interests, and enhanced efficiency in the bankruptcy resolution process, addressing these issues needs continual changes and improvements in the IBC's implementation.

## **II RECENT AMMENDMENDTS IN IBC**

Under the Indian Insolvency and Bankruptcy Code (IBC), a company's creditor is liable in default. A Corporate Insolvency Resolution Procedure (CIRP) is introduced following a default. According to the IBC, "default" does not pay the debt when it is due and payable. This can be verified by the lender, the debtor or the debtor company itself. CIRP can be initiated by submitting an application to the National Company Law Tribunal (NCLT) once defects are identified. After examining the application, the NCLT allows it if it is satisfied, thereby triggering the payment process of the debtor company.

Additional clauses and obligations which will be presented at the end of the explanation have been added by the Legislature to expand the meaning of “temporary financing” under section 5

(15) of the Act. The term “interim funds” essentially means that funds are temporarily needed to continue trading under the CIRP.

In order to preserve and safeguard the value of a corporate debtor's (or CD) assets and to fulfil its obligations as a continuing concern, the Code permits an IRP/RP to raise money as needed. The cost of seeking interim funding for a corporate debtor is included, together with any temporary money raised, in the phrase "insolvency resolution process cost," as per the Code. The necessity that the costs related to the bankruptcy resolution process—which includes such temporary financing—be given the utmost consideration is covered in Section 53 of the Code. In this sense, the Parliament has expanded the meaning of "interim finance," emphasising its significance in the administration of CD's obligations and seeking to furnish the IRP and Committee of Creditors (abbreviated "CoC") some discretion in running and running the company as a continuing concern.

Interim financing, also known as debtor-in-possession (DIP) financing or interim finance, is a necessary step in the bankruptcy resolution process under India's Bankruptcy and Bankruptcy Code (IBC). It talks about providing funding to a failing company that is filing for bankruptcy so that it may carry on with operations and receive assistance with restructuring until a resolution plan is approved.

Some important information regarding the IBC's interim funding is as follows: Ensuring uninterrupted business operations during the bankruptcy resolution process is the primary objective of interim financing. Giving the necessary liquidity to meet pressing obligations such as paying bills, payroll, and other essential expenses prevents the company's financial status from degrading downwards.

To start CIRP, the 2020 Amendment Act raises the base edge for specific financial credit classes. It also bolsters the need that at least 100 of these creditors, or 10% of their entire number, accompany the application that these creditors file under Section 7(1) of the Code. These categories include land

allottees, holders of security or stores, and trustees or experts whocommunicate with them. The amendment also makes it clear that if the 2020 Amendment Act is enacted before the Adjudicating Authority has not approved an application to start the CIRP against a CD.

The application may be changed to comply with the aforementioned standards within thirty days after the said Act's start; if not, the application will be considered withdrawn before it is confirmed. The legislature has made an effort to allay developer worries around government assistance enactments and the abuse of healing; yet, homebuyers remain uneasy about the intended use of the alteration. The fundamental edge criteria are riddled with real-world issues since the sale or trade is a constant process. In a real estate project, for instance, how would a buyer find out how many apartments have been offered to calculate the 10% of all units sold, particularly if 10% is less than 100?

Business Debtors are qualified to submit an application -

Section 4 of the 2020 Amendment Act includes a clarification of Section 11 of the Code. It says that a corporate debtor may apply to start CIRP against other corporate debtors if it is already in CIRP, has finished CIRP a year before the application's creation date, has been the target of a liquidation request, and so on. This innovation will probably improve the optimisation of a corporate debtor's value.

It is crucial to keep in mind that the NCLT, Delhi, and Mumbai had taken two contradictory positions in *Jai Ambe Enterprise v. S. N. Plumbings Pvt. Ltd.* and *Asian Plumbings and Mandhana Industries Ltd. v. Instyle Exports Pvt. Ltd.*, respectively, and that an explanation was urgently required.

By agreeing with the NCLT, Mumbai, and maintaining its position that recovering the extraordinary obligations of a CD, against whom the CIRP is currently pending, is one of the RP's responsibilities and that this is a proper course of action for resolving the financial difficulties of the financially troubled company, the governing body has now resolved the debate over the most recent amendment and clarification to Section 11.

The moratorium clause featured in the Indian Bankruptcy & Bankruptcy Code (IBC) is a crucial part of the bankruptcy settlement process. Upon the initiation of insolvency processes, some legal activity, including the enforcement of debts and the filing of

lawsuits against the debtor, are temporarily suspended or frozen.

The fundamental objective of the moratorium is to provide the debtor some breathing room so that the settlement procedure may proceed more smoothly. The following are the essential details of the IBC moratorium. Its objective is to prevent creditors from bringing separate lawsuits against the debtor because doing so might complicate the settlement process and perhaps lower the debtor's asset value.

### Section 23: CD Operational Management

The Code's replacement for Proviso u/s 23(1) states that an RP will continue to handle the CD's endeavours until the AA endorses the Resolution Plan u/s 31(1), or until the AA appoints a liquidator u/s 34 in the event that the goals plan is dismissed for failing to meet the requirements mentioned in Section 30. This eliminates the need to document an infinite number of applications in search of suitable bearings and is depended upon to make an RP operate more easily. Additionally, it clearly authorises RP to carry out undertakings during the interim period between RP's discharge and the appointment or arrangement of a liquidator.

The code's addition of Section 32 A - The most significant change made by the government to the Code is Section 32A, which aims to protect successful resolution candidates and their assets from potential criminal prosecution for the crimes committed by the CD's former promoters.

According to the recently added Section 32A(1) of the Code, a CD's responsibility for an offence reported before the start of the CIRP will terminate on the day the resolution plan is approved by the AA under Section 31 of the Code, and the CD will not be charged for such an offence.

More explanation has been given, saying that the administrative head shouldn't be the one for whom an investigating body determines that he helped or orchestrated the offence and has registered or recorded a protest or report with the appropriate statutory position or Court. Even though Section 32A protects the CD, the people who are with it might still be victims of crimes such as these:

- a. Every individual who fulfilled the conditions outlined in Section 2(j) of the Limited

Liability Partnership Act, 2008 for an allocated accomplice;

b. An official who, as specified by condition (60) of Section 2 of the Companies Act, 2013, is in default; c. Anybody who was in any way in charge of, qualified

to oversee, or associated with the CD in any way; and

d. A person who was either directly or indirectly involved in the commission of the offence, according to the report submitted or the complaints recorded by the investigative agency.

The 2020 Amendment Act amends Section 32A of the IBC by adding a new subsection (2). As long as the property is covered by the objectives plan that the AA has authorised, this sub-section forbids any action pertaining to the attachment,

seizure, maintenance, or appropriation of CD property based on a crime recorded prior to the start of CIRP. As per current u/s 32A, in order to be immune to such behaviour, the executives of the CD or the progress in charge need to fulfil specific conditions (1). In any instance, it should

be emphasised that any individual other than the CD or the person who got the property through CIRP or the liquidation procedure may have action brought against them under the applicable laws. Even with immunity, Section 32A mandates basic cooperation and assistance from the CD and everyone else who could be requested to help any authority investigating an offence that was reported before the CIRP began.

Section 32A was included to the IBC to allay worries over the responsibility of the resolution applicants, or new owners, for the previous debts and wrongdoings of the corporate debtor filing for bankruptcy.

**Immunity from Pre-Existing Liabilities:** Prior to the bankruptcy commencement date, all obligations arising from misconduct by the corporate debtor's previous management are shielded from the successful resolution applicant, or new owner, per Section 32A.

This suggests that the new owner is not held

accountable for the corporate debtor's past actions or mistakes.

The purpose of Section 32A is to incentivize resolution applicants to participate in the bankruptcy resolution process without fear of being held liable for the prior obligations of the corporate debtor. This is intended to entice prospective investors into financially troubled businesses and assist in the recovery of distressed assets.

### **Legal Clarity**

Section 32A provides resolution applicants with legal certainty and clarity on their obligation after obtaining stressed assets via the bankruptcy resolution process. It aims to boost investor confidence and facilitate more smoother sales of distressed companies.

All things considered, striking a balance between defending the rights of new owners and prosecuting past wrongdoers is the main objective of Section 32A of the IBC.

## **III HOW IBC IS SOLVING THE PROBLEM**

**Resolution over Liquidation** Encouraging the resolution of distressed assets as opposed to their liquidation is one of the IBC's main goals. This promotes economic growth by preserving firms and optimising the value of assets.

### **Timely Resolution**

The IBC includes a framework for time-bound resolution that aids in resolving stressed assets quickly. This guarantees that the claims of creditors are settled quickly, saving money and effort on protracted legal disputes.

### **Empowerment of Creditors**

The IBC gives creditors more authority by providing them with a systematic means of recovering their money. The establishment of the Committee of Creditors (CoC) has granted creditors the ability to participate actively in the resolution process and provide informed decisions on the bankrupt company's future.

### **Clear Claim Hierarchy**

The IBC creates a distinct claim hierarchy that ranks creditors' payments according to the kind of claim. As a result, the proceeds are distributed fairly among creditors and the settlement process is made more transparent and equitable.

### **Encourages Entrepreneurship**

The IBC encourages entrepreneurship and risk-taking by offering a system for the effective resolution of troubled enterprises. Knowing that failure can be addressed

through a clear procedure makes entrepreneurs more inclined to launch new projects rather than being mired in drawn-out legal disputes.

### **Investment trust**

By offering a dependable and clear legal framework for handling bankruptcy, the IBC raises investment trust. Because investors are guaranteed a strong framework to protect their investments, this promotes investment from both domestic and foreign sources.

## **IV ROLE OF CORPORATE GOVERNANCE IN MAKING IBC MORE EFFECTIVE**

**Encouraging Corporate Governance:** Using the Insolvency and Bankruptcy Code (IBC) as Catalyst for Effective resolution is important.

The Bankruptcy Code offering a strong framework for the resolution of corporate bankruptcy. The code places significant emphasis on the role that corporate governance plays in the restructuring and recovery of financially troubled enterprises. This paper highlights important ideas, difficulties, and best practices as it examines the crucial relationship between governance and the efficiency of bankruptcy.

**Corporate Governance's Significance in Insolvency Resolution** For a number of reasons, successful corporate bankruptcy resolution under the IBC depends on effective corporate governance.

### **Disclosure & Transparency**

Accurate and timely financial information is disclosed via transparent corporate governance standards, allowing stakeholders to make knowledgeable decisions throughout the bankruptcy resolution process. Among creditors, investors, and other stakeholders, clear communication promotes confidence and trust, which facilitates discussions and consensus-building. Robust corporate governance frameworks foster responsibility among directors, executives, and management teams, guaranteeing that they behave. Strong supervision procedures, such as independent board committees and audit processes, reduce the likelihood of misbehavior or fraud and aid in identifying governance shortcomings.

As a result, the resolution process is perceived as more credible. **Stakeholder Protection:**

The protection of stakeholder interests, such as those of creditors, shareholders,

workers, and clients, is given first priority under corporate governance standards. Building trust and protecting the company's worth throughout bankruptcy proceedings requires treating stakeholders fairly, distributing value fairly, and abiding by the law and ethical norms. Long-Term Value Creation: By balancing management's interests with those of shareholders and creditors, good corporate governance promotes a culture of long-term value creation and sustainable business practices.

Under the IBC, insolvency resolution necessitates a strategic reorganisation and revitalization of the business with an eye towards long-term value maximization for all stakeholders.

**Issues with Corporate Governance During Bankruptcy.**

Even though corporate governance is crucial to the resolution of insolvencies, there are a number of obstacles that might prevent it from working effectively: Board competency and Independence: Maintaining the board of directors' competency and independence is essential for efficient governance during bankruptcy. Nonetheless, the capacity of directors of business jeopardized by conflicts of interest, board entrenchment, and insufficient knowledge.

### **Stakeholder Coordination and Communication**

During bankruptcy proceedings, it can be difficult to coordinate and communicate with a variety of stakeholders, including as creditors, shareholders, workers, and regulators. Building agreement and moving the resolution process forward may be hampered by competing interests, knowledge asymmetry, and communication breakdowns.

Rebuilding confidence and credibility following insolvency depends on two key factors: holding management responsible for prior actions and guaranteeing openness in financial reporting. Nonetheless, management might fend off investigation, falsify financial data, or act opportunistically, jeopardising the resolution process's integrity.

**Legal and Regulatory Compliance** The validity and enforcement

of bankruptcy resolution plans depend on adherence to all relevant laws, rules, and court orders. Stakeholders may encounter difficulties negotiating intricate legal frameworks, regulatory regulations, and judicial processes, which might cause delays and uncertainty in the settlement process.

### **Top Corporate Governance Techniques for Resolving Insolvencies**

The following best practices are suggested in order to overcome these issues and improve the efficiency of corporate governance in bankruptcy resolution under the IBC:

**Board Independence and supervision** Make sure the board of directors is competent, diverse, and independent, with an emphasis on strategic decision-making, responsibility, and supervision. Create independent boards with committees for audit, risk, and compensation to improve the efficacy of governance and reduce conflicts of interest.

### **Participation and Communication with Stakeholders**

Throughout the insolvency resolution process, encourage open and honest communication with all parties involved by giving timely information, resolving issues, and asking for input. To encourage discussion and cooperation, set up clear routes of communication through frequent meetings, specialised websites, and stakeholder forums. Hold management responsible for previous deeds and choices, placing a strong emphasis on moral behaviour, integrity, and commitment to company principles. In order to identify and stop fraud, wrongdoing, and conflicts of interest, put in place strong internal controls, compliance procedures, and whistleblower programmes.

### **Compliance with Laws and Regulations**

Make sure that the insolvency processes out in accordance with court orders. These include the Companies Act, IBC, and RBI instructions. To efficiently manage the insolvency system, get legal counsel, collaborate with skilled specialists, and remain up to speed on regulatory developments.

### **Stakeholder Value Maximisation**

Give top priority to long-term stakeholder value maximization, keeping in mind the

interests of shareholders, creditors, workers, and other stakeholders. Create thorough restructuring plans with an emphasis on operational effectiveness, debt restructuring, and strategic investments that strike a balance between immediate cash demands and long-term viability.

In conclusion, corporate governance is essential to the IBC's successful bankruptcy resolution process since it guarantees stakeholder protection, accountability, and openness. By adhering to the values of honesty, autonomy, and openness, businesses may successfully negotiate the difficulties of bankruptcy, win back the confidence of their stakeholders, and grow stronger and more resilient business distress under the IBC, strong governance frameworks, stakeholder involvement, and compliance procedures are crucial. Two significant judicial entities in India that have different functions in the settlement of debt and bankruptcy related cases.

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