

**NATIONAL COLLOQUIUM ON 'CORPORATE INSOLVENCY RESOLUTION  
PROCESS: UNDERSTANDING EMERGING ISSUES AND CHALLENGES'**

19<sup>TH</sup> SEPTEMBER 2020

In her proceedings on 19<sup>th</sup> September 2020, the Finance Minister Nirmala Sitharaman pointed out that in the current IBC regime, it is necessary to save a business than recovery of stressed assets. Looking at the newly passed Insolvency and Bankruptcy Code (Second Amendment) Bill, 2020 has been passed in Rajya Sabha. In the month of June 2020, an ordinance promulgated stating that insolvency proceedings will not be initiated for at least six months from March 25<sup>th</sup>. Keeping the newly arising issues in mind GNLU Centre for Corporate and Insolvency Law has organized National Colloquium on Corporate Insolvency Resolution Process: Understanding Emerging Issues and Challenges on 19<sup>th</sup> September 2020 coincidental to the date when the new amendment has been passed by Rajya Sabha on the same subject. The Colloquium has seen a participation of 31 papers from academicians, professionals and students around the country, the deliberations of which took place through 04 parallel sessions.

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**Prof. (Dr.) S Shanthakumar, Director, GNLU:**

1. CIRP process is a recovery mechanism utilized by Financial Creditor, Operational Creditor or the Corporate itself if it becomes insolvent. The 2016 IBC Code was aimed by Government to locate the insolvent amount of 10,000 crores (INR) stuck in diverse sectors of Cement, Steel, Infrastructure Financing, Housing and Jewellery etc.
2. However, IBC Mechanism, since its inception has had mixed growth due to numerous reasons such as vested interest, protracted litigation and periodic re-interpretation of the law.
3. In the famous Essar Insolvency Case, different payment to different classes of creditors was justified with Principle of Equality (Article 14 of Constitution), where it was held that different classes of creditors should be treated differently by Committee of Creditors. Secondly, Tribunals like NCLT and NCLAT cannot interfere with the commercial decisions taken by Committee of Creditors. Lastly, the 330 days mandatory deadline for CIRP process was done away with, since it was a violation of Right to Equality (Article 14) and Right to Freedom of Trade & Profession (Article 19(1) (g)).
4. According to World Bank, before IBC process, process of recovery of stressed assets took an average of 4.3 years. The IBC Code 2016 has firstly improved the recovery rate of stressed assets by 48% and reduced the duration to 1-1.5 years.

5. The Bankruptcy law in USA took almost 10 years to be stable; however, IBC 2016 started providing efficient results in 4 years itself. Further, due to IBC's resolution process, more and more creditors have started to repay the borrowed assets amount in fear of the same.
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**Prof. (Dr.) Mamata Biswal, Dean, Academic & Faculty Affairs, GNLU:**

1. With the introduction of IBC, 2016 a number of changes were brought to different Economic legislations in India namely Companies Act 2013 and Sick Industrial Companies Act 1985. Technicalities such as the stage at which CIRP process can be initiated; the status of insolvency cases pending then in high courts, application of limitation act, Constitutional validity of IBC code etc. led to a number of concerns.
  2. One of the recent concerns which the CIRP process has started facing is that with the advent of COVID 19 pandemic, the date and the stage at which a corporation should be help insolvent. Further, owing to the hit in the economy by COVID-19 outbreak, the question of moratorium (time during the loan where borrower is not required to pay) has been raised by many creditors. Also, with the insertion of Section 32A (Immunity to Corporate Debtors) has been a question of concern.
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**Mr. Ajay Bahl, Co-Founder and Managing Partner, AZB & Partners**

1. Due to advent of IBC Code and the CIRP process, a completely new profession has taken birth – Resolution Professional. An altogether new and better approach to creation of employment by creation of a new profession is magnificent. Secondly, the Creditor behavior has changed with the introduction of CIRP process. It has been seen that the creditors around the countries have started to resolve the debts even before the resolution process begins in the fear of the harsh steps taken by authorities if the company/corporation is proven insolvent. So, this leads to asset realization pre-resolution itself.
2. Looking forward to it, the quantum of recovery has to be focused now which is directly linked to the time taken in the recovery process of an insolvent corporation. The timeline however is not strictly adhered to, which is provided by the Courts.
3. IBC code should be looked as a role model for legislators in the country since in the short span of 04 years since the first Code has come, there have been 05 different amendments to it as and when need arises. This means that the legislators have been proactively involved in betterment of this law since its inception.
4. From a practitioner's point of view, speed of resolution process can be increased by active involvement of different departments of Government of India such as Enforcement Directorate,

Ministry of Corporate Affairs, and Revenue Department etc. The interplay between these departments in a certain issue can improve the speed of resolution.

5. Institutional training and creation of specialized benches of National Company Law Tribunal can be another way for improvement of speed in resolution process. Also, an improvement in the recruitment process in the technical members of these specialized benches can improve the efficiency of the bench.
  6. An improvement in the Clawback process of CIRP mechanism can prove to be a cherry on the top in increasing the speed of resolution.
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### **Mr. Sudhaker Shukla, Whole Time Member, Insolvency & Bankruptcy Board of India**

1. Back in 2016, when the Insolvency and Bankruptcy regime had to be laid down for the first time, the demands were to create an incentive based, market led and time bound procedure. However, looking at the absence of an ecosystem to create that regime, the need was to lay down the law firstly, creation of infrastructure, capacity building, professions & market had to be developed and lastly the awareness of stakeholders had to be created. Within the 06 months of the advent of code, first resolution plan (case) was developed successfully. Time and again, with the need in the market behavior, the changes were brought in the code with help of numerous stakeholders.
2. Currently, Adjudicating Authority under the code has been setup under 15 cities, IBC Board is fully functional; over 3000 Insolvency professionals are in place, 03 Insolvency professional agencies are in place, 3000 registered valuers are in place and over 14 registered valuer agencies are also present. Some of industry best practices across the world have also emerged from India.
3. Over 13000 firms moved away from pre-resolution process and realized for about 3 lac crore (INR) due to behavioral change in the creditors because of fear of IBC. This is visible in India's rank improvement for 136<sup>th</sup> to 52<sup>nd</sup> in Ease of doing business rankings; and improvement in India's rank from 111<sup>th</sup> to 47<sup>th</sup> in Global Innovation Index; all of it also due to ease of resolving insolvency.
4. The fifth and the latest amendment which took place in the Code suspended certain sections of the code meanwhile so that in the light of affected economic and paying capacity due to COVID-19, the creditors are not forced to go through the resolution process. However, the applications filed before suspension of the code will be functioning.
5. One of the challenges in the code is the absence of any form of negotiation once the resolution plan has been accepted by the Adjudicating Authority. Following the same, another challenge which is coming up recently is the demand by Committee of Creditors to extend the timelines of the resolution process due to extraordinary situation of COVID-19. Furthermore, Reserve Bank of India is of the opinion that Asset Reconstruction Company's role in buying the assets in a resolution



process should not be allowed, however Insolvency and Bankruptcy Board of India is the opposite view. So, a consensus has to be brought here.

6. IBBI closely monitoring the decision of the Bankruptcy court to decide if sale, transfer of rights to use, of spectrum can be allowed under insolvency law or not. Further, when it comes to the improvement in Clawback process in the CIRP regime, the interests of the stakeholders has to be looked by IBBI too.
  7. The IBC 2016 can be strengthened with mediation and conciliation process which can be introduced and the idea is in the pipeline for under Section 230 of the code. Secondly, the RBI prudential framework for resolution of stressed assets and pre-resolution release of stressed assets are some of the growth factors to be considered in future.
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### **Mr. Injeti Srinivas, Chairman, International Financial Services Centre Authority**

1. Sick Industrial Companies Act 1985 (SICA), could never strangle the borrowers to pay off their debts. The process used to go on for years, the asset could never be realized and the otherwise good law could not prove to be useful. This is why the IBC code aimed at tackling these issues when it was introduced in 2016. A strict timeline and movement of possession from debtor to creditor were certain key factors which did not make IBC another SICA.
2. Amidst the social conundrum of being an insolvent, which is socially left out, the IBC intended to replenish the working of the corporation which has become insolvent by removing those members from the management of the company who have non-performing assets for more than a year (along with other provisional requirements in Section 29A).
3. IBC Ordinance was the need of the hour in 2016 which is why the law was drafted in a period of 08 months, without testing it on field and adopting certain models of the law from western nations. However, in all the 04 amendments, Supreme Court upheld its Constitutional validity.
4. Further, IBC has passed all the tests of a well working legislation. It is a well drafted law with framework, has created capacity, emerged with new professions, regulatory bodies under the framework have been created. IBC passed these tests in the record timing of 02 years itself which is a commendable job for a law. Furthermore, Graduate Insolvency Programme (GIP) by Indian Institute of Corporate Affairs is a unique step in this direction. Compared it with the Chartered Accountants profession which started in 1949 still has its challenges whereas GIP has produced more than 3000 Insolvency professionals in past 03 years.
5. Late Shri Arun Jaitely (who was then Finance Minister) mentioned that the IBC law has performed really well for a piece of legislation which had so less time and so much to perform. Because of this code, the creditors now have started to own up their liabilities. There has been drastic behavioral in creditors.

6. Avoidance Transactions have to be focused with much more attention even further where the debtor has to avoid preferential transactions, undervalued transactions and extortionate credit transactions. These transactions, if happening and the loans are being provided even if the Corporate has non-performing assets, the cycle will not break and the NPA's will keep on piling up. The data however will show less Non-Performing Assets since the loans are being given to due to Avoidance Transactions and the Corporations are not being declared insolvent. This was the reason that even amidst the hefty hike in the credit facilities the NPA's in India were 13 percent in 2002 and later 4 percent in 2008.
  7. Due to June 2020 promulgation Ordinance, the authorities will presume that the assets, if non performing, is happening due to effect on the economy by COVID-19. However, it is necessary right now to look at the already pending 10,000 cases and not on the cases growing out of COVID. There stands no need to intellectualize and criticize the drafting flaws of IBC right now since the intention is to replenish and save the insolvent corporations and not to impose them with the resolution penalties. While USA was dealing with its Sub-Prime crisis of 2008, it even went aboard to save the banking institutions which were the reason of the crisis in the first place.
  8. Similarly, amidst the 14% non-performing assets, it is necessary for government to save the banking institutions. If banks will collapse, it will lead to an economic crisis naturally. IBC right now is in its footsteps of growth when it will start taking into consideration issues such as Cross-Border Insolvency and Group Insolvency. There are model laws of UNCITRAL available on these issues which will be looked further and a step is needed in this direction.
  9. Another area of growth as well as concern is Individual Insolvency. Individuals, per se, do not default willfully and they payback high amount of interest too, which in itself is high amount of realization of an asset. So, it becomes pertinent to create an Online Adjudicatory Mechanism for resolving Individual Insolvency.
  10. Lastly, a new mechanism is being developed where Insolvency and Bankruptcy Board of India, Micro Small and Medium Enterprises (MSME) are going to interplay within themselves to create a procedure for Resolution where the creditor in place can stay in possession of the asset too.
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