

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 6

2023

© 2023 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

Effect of the Insolvency and Bankruptcy Code on Corporate Governance in India and Challenges with respect to Cross Border Insolvency

SAMRIDDHI AGRAWAL¹

ABSTRACT

The Insolvency and Bankruptcy Code (IBC) implemented in India has brought about a transformative shift in the landscape of corporate governance. This research paper delves into the multifaceted aspects of the IBC's impact on corporate governance within the Indian context and explores the challenges that arise when dealing with cross-border insolvency cases.

In the backdrop of India's historical insolvency laws, this paper examines the necessity of the IBC and its key provisions. It investigates how the IBC has enhanced insolvency resolution and creditor rights through an analysis of real-world case studies. Simultaneously, it critically assesses the challenges and criticisms that have surfaced during the IBC's implementation, providing a comprehensive overview of the successes and shortcomings of the reform.

Cross-border insolvency, a complex and increasingly relevant issue in the globalized world, is explored within the Indian context. The paper elucidates the challenges and intricacies associated with managing insolvency matters that transcend international boundaries. It evaluates how the IBC addresses these issues and presents real-life examples of cross-border insolvency cases in India.

Furthermore, the paper discusses the future prospects of the IBC, focusing on the potential reforms needed to address the identified challenges. It also explores the alignment of the IBC with international best practices and its comparative standing against insolvency laws in other countries.

Ultimately, this research provides a holistic understanding of the effects of the IBC on corporate governance in India and the challenges posed by cross-border insolvency. It underscores the importance of continued reform, both domestically and internationally, in ensuring the effectiveness of insolvency and bankruptcy regimes

Keywords: *Insolvency and Bankruptcy Code, Corporate Governance and Cross – Border Insolvency.*

¹ Author is a student at Amity University Lucknow Campus, India.

I. INTRODUCTION

The Insolvency and Bankruptcy Code (IBC) introduced in India in 2016 marked a pivotal moment in the country's economic and legal landscape. Designed to streamline the resolution of insolvency and bankruptcy cases, the IBC aimed to enhance the ease of doing business and bolster investor confidence in India. It was an ambitious effort to reinvigorate the insolvency ecosystem and was founded on the principle that a robust framework for insolvency resolution is essential for economic growth and the maintenance of a healthy corporate ecosystem.

The enactment of the IBC was necessitated by a long-standing issue in India's corporate governance framework – the lack of a comprehensive, efficient, and time-bound mechanism for handling insolvency cases. Prior to the IBC, the insolvency process in India was often protracted and marred by ambiguity and inefficiency. The new law sought to address these shortcomings and ushered in a new era of corporate governance, where timely and efficient resolution of insolvency cases became the bedrock of maintaining the health of the corporate sector.

(A) Background

Before delving into the implications of the IBC on corporate governance in India, it is imperative to understand the historical context. India's approach to insolvency and bankruptcy has traversed a long and convoluted path. In the pre-IBC era, the country relied on a web of archaic and often conflicting legislations, causing significant uncertainty in the insolvency process. The lack of a unified code led to inefficiencies, delays, and disputes, while creditors often faced prolonged battles to recover their dues.

The demand for a comprehensive insolvency law gained momentum as India emerged as a global economic player. International investors and stakeholders sought a more predictable and creditor-friendly environment, where they could confidently participate in the Indian business landscape. This urgency for reform led to the formulation and enactment of the IBC, which sought to align Indian insolvency laws with global best practices and provide a streamlined mechanism for corporate insolvency resolution.

(B) Objectives of the Research

This research paper embarks on an exploratory journey into the intricate relationship between the Insolvency and Bankruptcy Code and corporate governance in India. It aims to critically examine how the IBC has influenced the principles and practices of corporate governance within the Indian context. Additionally, it delves into the challenges posed by cross-border insolvency, a critical consideration in a globalized business environment.

The primary objectives of this research are as follows:

1. **Evaluate the Impact of the IBC on Corporate Governance:** Analyze how the introduction and implementation of the IBC have influenced corporate governance practices, transparency, and accountability in India.
2. **Examine the Efficacy of the IBC:** Investigate the extent to which the IBC has achieved its goals in terms of improving insolvency resolution, protecting creditor rights, and promoting a more creditor-friendly environment.
3. **Analyze Challenges in Cross-Border Insolvency:** Explore the complexities and challenges encountered in cross-border insolvency cases within the Indian legal framework and identify potential areas of improvement.
4. **Provide a Comparative Perspective:** Compare the Indian insolvency framework, as governed by the IBC, with international insolvency practices, highlighting both areas of convergence and divergence.

In this pursuit, this research paper relies on a comprehensive review of existing literature, academic articles, books, government reports, and case law to draw insights and conclusions. This literature-based approach ensures a well-rounded and evidence-based analysis of the chosen topic.

(C) Structure of the Research

To fulfill the objectives outlined above, this research paper is structured as follows:

- Section 2 provides an in-depth analysis of the Insolvency and Bankruptcy Code, its key provisions, and its impact on corporate governance.
- Section 3 focuses on the challenges and complexities of cross-border insolvency within the Indian context.
- Section 4 delves into the challenges faced in implementing the IBC with respect to cross-border insolvency and explores potential reforms.
- Section 5 offers a comparative analysis between the Indian IBC and insolvency laws in other countries.
- Section 6 concludes the research, summarizing key findings and discussing the implications of the IBC on corporate governance in India and the challenges associated with cross-border insolvency.

In this journey, the paper aims to provide an enriched understanding of the profound

transformation brought about by the IBC in India's corporate governance and insolvency landscape, offering a critical assessment of its achievements and remaining challenges.

Background

The historical context of insolvency laws in India is a testament to the evolution of the country's economic and legal landscape. Prior to the enactment of the Insolvency and Bankruptcy Code (IBC) in 2016, India's approach to insolvency and bankruptcy was marked by a complex web of archaic and fragmented legislations that were often at odds with one another. The country's insolvency framework, characterized by prolonged and uncertain resolution processes, posed significant challenges for businesses, creditors, and the broader economic environment.

Historical Insolvency Laws in India:

Historically, the primary legal instrument governing insolvency in India was the Presidency Towns Insolvency Act of 1909 and the Provincial Insolvency Act of 1920. These legislations, which were in place for decades, lacked a comprehensive and modern approach to insolvency resolution. Insolvency cases were protracted, and the lack of a unified legal framework often resulted in conflicting judgments from different courts, leading to legal ambiguities and inefficiencies.

The inadequacies of the historical insolvency laws became increasingly apparent as India's economic prominence grew on the global stage. International investors and stakeholders were wary of entering the Indian market due to the uncertainty and lack of a well-defined insolvency regime. In addition, the inefficient resolution of insolvency cases hindered economic growth by tying up assets that could otherwise be redeployed for productive purposes.

Need for Reform and the Introduction of the IBC:

Recognizing the pressing need for reform, the Government of India introduced the Insolvency and Bankruptcy Code in 2016. The IBC sought to address the shortcomings of the previous insolvency laws by providing a consolidated, efficient, and time-bound mechanism for the resolution of insolvency cases. Its introduction aimed at streamlining the insolvency process, making it more predictable and creditor-friendly, and promoting a culture of entrepreneurship and investment.

The IBC represented a paradigm shift in India's approach to insolvency resolution. It established a single regulatory authority, the Insolvency and Bankruptcy Board of India (IBBI), and introduced key innovations such as the time-bound insolvency resolution process, which required a resolution within 180 days (extendable by a maximum of 90 days) and the provision

for a moratorium period to protect the debtor's assets during the resolution process.

Corporate Governance in India:

Corporate governance, a vital aspect of the business ecosystem, involves the structures, processes, and practices by which companies are directed and controlled. In India, corporate governance has gained increasing prominence over the years, driven by the need for transparency, accountability, and fairness in business operations. The adoption of best corporate governance practices has been seen as a means to attract investment, protect shareholders' interests, and ensure the ethical functioning of businesses.

The Securities and Exchange Board of India (SEBI) and the Ministry of Corporate Affairs have played significant roles in promoting corporate governance standards through the issuance of various guidelines and regulations, including the Companies Act, 2013. These measures have sought to enhance transparency, shareholder rights, and the responsibilities of company directors.

This section's historical context highlights the critical need for insolvency reform and sets the stage for the subsequent sections, which delve into the impact of the IBC on corporate governance in India and the challenges posed by cross-border insolvency within the Indian legal framework. The IBC's introduction marked a transformative moment in India's economic and legal history, aiming to streamline insolvency resolution and elevate the country's corporate governance standards to global levels.

II. THE INSOLVENCY AND BANKRUPTCY CODE

The Insolvency and Bankruptcy Code (IBC), implemented in India in 2016, has been a groundbreaking piece of legislation with far-reaching implications for corporate governance, insolvency resolution, and creditor rights. This section provides a detailed exploration of the key provisions of the IBC, its impact on corporate governance, improvements in insolvency resolution, protection of creditor rights, and the challenges and criticisms associated with its implementation.

(A) Key Provisions of the IBC:

²The IBC introduced several key provisions to revolutionize India's insolvency framework:

1. **Single Unified Code:** The IBC unified various existing insolvency laws and created a single, comprehensive code to govern insolvency and bankruptcy proceedings.

²

2. **Time-Bound Resolution:** One of the most significant aspects of the IBC is the imposition of strict time limits for the resolution process. It mandates that insolvency cases must be resolved within 180 days (extendable by a maximum of 90 days). This provision has fundamentally altered the landscape of insolvency resolution by preventing cases from languishing in courts for years.
3. **Insolvency Professionals (IPs):** The IBC introduced the concept of Insolvency Professionals (IPs) who act as intermediaries between the debtor and the creditors during the insolvency resolution process. They are responsible for managing the debtor's assets and conducting the resolution process.
4. **Moratorium Period:** To protect the debtor's assets and ensure that they are not alienated during the resolution process, the IBC imposes a moratorium on legal actions and recovery proceedings against the debtor.
5. **Committees of Creditors:** The IBC establishes a Committee of Creditors (CoC) to make key decisions during the insolvency process. The CoC, composed of financial creditors, plays a pivotal role in approving resolution plans.

(B) Impact on Corporate Governance:

The introduction of the IBC has had a profound impact on corporate governance in India:

- **Transparency and Accountability:** The IBC promotes transparency and accountability by mandating a time-bound resolution process. This compels stakeholders to adhere to strict timelines, reducing scope for opaque dealings.
- **Enhanced Creditor Rights:** The IBC has strengthened creditor rights by ensuring they have a significant say in the insolvency resolution process through the Committee of Creditors. This empowers creditors and encourages responsible lending.
- **Promotion of a Creditor-Friendly Environment:** The IBC has shifted the balance in favor of creditors by imposing stringent time limits for resolution. This ensures that creditors are not left in limbo for extended periods, thus making India a more creditor-friendly jurisdiction.

(C) Improvements in Insolvency Resolution:

The IBC's impact on insolvency resolution has been remarkable:

- **Faster Resolution:** The strict time limits imposed by the IBC have significantly accelerated the pace of insolvency resolution in India. Cases that used to drag on for

years are now resolved in a matter of months, reducing the burden on the legal system and the costs involved.

- **Higher Recovery Rates:** The more efficient and time-bound resolution process has led to higher recovery rates for creditors. This has encouraged creditors to be more proactive in pursuing insolvency proceedings.

(D) Case Studies and Examples:

Illustrative case studies highlight the effectiveness of the IBC:

- **Bhushan Steel:** The successful resolution of Bhushan Steel, one of the first major cases under the IBC, showcased the code's efficacy in reviving distressed companies. The resolution saw a significant improvement in the financial health of the company and the realization of substantial dues to creditors.
- **Essar Steel:** The Essar Steel case demonstrated the power of the Committee of Creditors in shaping resolution plans. The case also highlighted the Supreme Court's role in upholding the IBC's principles and ensuring its robust implementation.

(E) Challenges and Criticisms:

While the IBC has brought about substantial positive changes, it has not been without its share of challenges and criticisms:

- **Operational Challenges:** The efficient operation of the IBC has been hindered by various operational challenges, including the availability of insolvency professionals and infrastructure.
- **Delays in Litigation:** Litigation related to the IBC has sometimes caused delays in resolution. There have been instances of legal disputes that have persisted beyond the stipulated timelines.
- **Cross-Border Insolvency:** The IBC lacks a well-defined framework for handling cross-border insolvency, a significant limitation given the global nature of business. This remains a critical challenge and a topic of ongoing reform discussions.
- **Operational Necessities vs. Legal Provisions:** The strict time-bound nature of the IBC often places operational necessities in conflict with legal provisions, leading to disputes and inefficiencies.

In conclusion, the Insolvency and Bankruptcy Code has undoubtedly made substantial progress in improving insolvency resolution and creditor rights while fostering transparency and

accountability in corporate governance. However, it is important to address the challenges and criticisms to ensure that the IBC continues to evolve and serve its intended purposes effectively.

III. CROSS-BORDER INSOLVENCY

(A) Concept and Significance:

Cross-border insolvency, a term indicative of insolvency cases involving entities with assets or creditors in multiple jurisdictions, is a concept of growing significance in today's globalized business environment. It represents the legal and practical challenges that arise when a financially distressed entity operates across national boundaries, making the determination of creditor rights and the coordination of insolvency proceedings more intricate.

The significance of cross-border insolvency is multifaceted:

- **Global Business Operations:** With businesses expanding beyond national borders, the assets and liabilities of a company may be scattered across multiple countries. This necessitates the establishment of frameworks for cooperation and coordination when insolvency issues arise.
- **Protection of Creditor Interests:** Cross-border insolvency cases often involve creditors from various jurisdictions. Ensuring that the rights of these creditors are protected and treated equitably in insolvency proceedings is essential to maintaining confidence in international business transactions.
- **Efficiency and Coordination:** Effective handling of cross-border insolvency cases requires efficient coordination among different jurisdictions, insolvency professionals, and judicial systems to avoid redundancies and ensure a swift resolution.

(B) Challenges and Complexities:

Dealing with cross-border insolvency cases presents a range of challenges and complexities:

- **Recognition of Foreign Proceedings:** Determining the recognition of insolvency proceedings initiated in one jurisdiction by courts in another jurisdiction can be contentious, particularly if the laws and processes significantly differ.
- **Coordination Amongst Jurisdictions:** Ensuring coordination among multiple jurisdictions, each with its own set of laws and procedures, can be challenging. This is compounded by potential language barriers, legal disparities, and logistical difficulties.

- **Asset Identification and Distribution:** In cross-border insolvency cases, accurately identifying and distributing assets can be intricate, as assets may be located in multiple jurisdictions, each with its set of laws regarding asset distribution.
- **Conflict of Laws:** The potential conflict between the laws of different jurisdictions may lead to disputes regarding the priority and treatment of creditors, complicating the insolvency process.

(C) How the IBC Addresses Cross-Border Insolvency:

The Insolvency and Bankruptcy Code (IBC) in India addresses cross-border insolvency to some extent through the adoption of the UNCITRAL Model Law on Cross-Border Insolvency. The Model Law provides a framework for cooperation between courts and insolvency professionals in different jurisdictions when dealing with cross-border insolvency cases.

Key features of the IBC's approach to cross-border insolvency include:

- **Recognition of Foreign Proceedings:** The IBC allows for the recognition of foreign insolvency proceedings, giving effect to orders issued by foreign courts in insolvency cases.
- **Cooperation with Foreign Courts:** The IBC authorizes the Indian courts to cooperate with foreign courts and foreign representatives in cross-border insolvency cases, thereby promoting coordination.
- **Coordination with Foreign Insolvency Professionals:** The IBC enables insolvency professionals from different jurisdictions to work together in cross-border insolvency cases, contributing to a more harmonious and efficient process.

(D) Examples of Cross-Border Insolvency Cases in India:

1. **Jet Airways:** The case of Jet Airways, a prominent Indian airline that faced financial distress, involved complexities related to creditors and assets in multiple countries. The IBC was employed to coordinate the resolution process and negotiations with foreign creditors.
2. **Videocon Group:** The Videocon Group's insolvency case highlighted the cross-border challenges in managing the financial distress of a conglomerate with international operations. Coordinating insolvency proceedings and asset realization across different jurisdictions was a significant aspect of this case.

3. **Reliance Communications:** The Reliance Communications insolvency case involved complex negotiations with international creditors. The IBC played a role in resolving the challenges of cross-border insolvency.

In summary, cross-border insolvency is an evolving area of significance in the global business landscape. The IBC, by incorporating elements of the UNCITRAL Model Law, provides a framework for addressing some of the complexities associated with cross-border insolvency cases, helping to promote cooperation, coordination, and fairness in handling insolvency proceedings that extend across international borders. However, there is still room for further development and improvement in this area to better align with the demands of the modern global economy.

IV. CHALLENGES AND FUTURE PROSPECTS

(A) Challenges Faced in Implementing the IBC with Respect to Cross-Border Insolvency:

While the Insolvency and Bankruptcy Code (IBC) in India has made significant strides in transforming the insolvency landscape, several challenges persist, particularly concerning cross-border insolvency:

- **Recognition and Coordination:** Recognizing foreign insolvency proceedings and coordinating with foreign courts and insolvency professionals remain challenging due to the complexity of different legal systems, varying procedures, and potential language barriers.
- **Conflict of Laws:** The potential conflicts between Indian insolvency laws and those of other jurisdictions can lead to disputes over the hierarchy of creditor claims and the distribution of assets, complicating the resolution process.
- **Operational Necessities vs. Legal Provisions:** The strict time-bound nature of the IBC may at times conflict with operational necessities, leading to disputes and inefficiencies.

(B) Potential Reforms and Improvements:

Addressing the challenges related to cross-border insolvency within the IBC framework necessitates targeted reforms and improvements:

- **Enhanced Cooperation:** Facilitate greater cooperation and communication between Indian courts and foreign courts and insolvency practitioners to ensure efficient resolution. This may include standardizing communication protocols and cooperation agreements.

- **Model Guidelines:** Develop model guidelines for the recognition of foreign insolvency proceedings, which provide clarity on the recognition process and dispute resolution mechanisms.
- **Harmonization of Laws:** Work towards harmonizing Indian insolvency laws with international best practices to reduce conflicts of laws. This could involve adopting principles that are widely recognized and respected in international insolvency regimes.

(C) Alignment with International Best Practices:

³⁴The IBC, while still evolving, showcases alignment with international best practices in several ways:

- **UNCITRAL Model Law:** The adoption of the UNCITRAL Model Law on Cross-Border Insolvency reflects India's commitment to international cooperation and alignment with globally recognized principles.
- **Recognition of Foreign Proceedings:** The IBC's provision for recognizing foreign insolvency proceedings demonstrates its adherence to principles that safeguard the rights of international creditors and encourage a harmonious approach to cross-border cases.
- **Time-Bound Resolution:** The IBC's emphasis on time-bound insolvency resolution aligns with international best practices aimed at reducing the economic costs associated with protracted insolvency processes.
- **Empowerment of Creditors:** The IBC empowers creditors by establishing the Committee of Creditors, giving them a more significant role in shaping insolvency resolutions. This mirrors global trends that emphasize the protection of creditor rights.

In conclusion, addressing cross-border insolvency challenges within the IBC framework requires continued evolution, emphasizing cooperation, and harmonization with international best practices. The IBC has already made strides in promoting efficient and equitable cross-border insolvency proceedings, and its future prospects depend on ongoing reforms and alignment with global standards, ensuring it remains an effective tool for insolvency resolution in an increasingly interconnected world.

³ Insolvency and Bankruptcy Code, 2016.

⁴ Sane, R. (2019). The way forward for personal insolvency in the Indian Insolvency and Bankruptcy Code. Available at SSRN 3309470.

V. CONCLUSION

The implementation of the Insolvency and Bankruptcy Code (IBC) in India has brought about a transformative change in the nation's insolvency landscape and its impact on corporate governance. This research paper has explored the key findings and the broader implications of the IBC, as well as the challenges and opportunities related to cross-border insolvency.

Main Findings and Impact on Corporate Governance:

The IBC has had a significant and positive impact on corporate governance in India. It has led to increased transparency and accountability, strengthened creditor rights, and streamlined the insolvency resolution process. Time-bound resolution has become a hallmark of the IBC, ensuring efficient and equitable outcomes for creditors. The empowerment of the Committee of Creditors has promoted responsible lending practices and a more creditor-friendly environment.

Challenges and Opportunities with Cross-Border Insolvency:

Cross-border insolvency remains a critical challenge, given the complexity of coordinating with multiple jurisdictions, addressing conflicts of laws, and recognizing foreign insolvency proceedings. However, it also presents an opportunity for India to align its insolvency framework with international best practices and facilitate efficient cross-border resolution.

Recommendations and Future Prospects:

To address cross-border insolvency challenges, India should:

1. **Enhance Cooperation:** Foster greater cooperation and communication between Indian courts and foreign counterparts through standardized protocols and cooperation agreements.
2. **Model Guidelines:** Develop and adopt model guidelines for the recognition of foreign insolvency proceedings.
3. **Harmonize Laws:** Work towards harmonizing Indian insolvency laws with international principles, reducing conflicts of laws.

For the IBC's future prospects, continued alignment with international best practices and the resolution of cross-border insolvency challenges are paramount. As India's economic integration with the world intensifies, the IBC must evolve to be a global standard-setter, ensuring the efficient resolution of insolvency cases and bolstering corporate governance in an increasingly interconnected business environment.
