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# IBC: Past, Present and Future of the 2016 Code

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## ABSTRACT

*"Commercial morality, and respect for the rule of law, may be said to constitute the very bedrock upon which the law of bankruptcy is founded."*

- *IAN F FLETCHER*

*The Insolvency and Bankruptcy Code 2016 is the cornerstone of efforts to create an environment for healthy enterprises. The need for the code was felt as the last step after the adoption of the 1991 liberation and globalization policies of foreign entities in India that enabled multinational enterprises and establishment of the competition act of 2002 for a fair playing field for international and national competition. The final step towards a good business climate was the creation of an effective and trustworthy insolvency and bankruptcy system to make the right to leave accessible. The 'Insolvency and Bankruptcy Code 2016' is aimed at ensuring effective exit rights for international firms.*

*IBC has played a significant role in establishing worldwide recognition of the quick and speedy mechanism which helped the improved the country's image for business relations at global level. However, being nearly 7-year-old there is a long way for to go for the code. And being hit by the global pandemic has increased the pressure on machinery.*

*The authors in this paper will briefly highlight the history of Insolvency and Bankruptcy laws In India and the developments which lead to the present Insolvency and Bankruptcy Code, working the IBC, its constitutional validity while discussing the major landmark judgments which lead to the present structure of the code. The authors would also touch upon the topic of cross border insolvency and provide suggestions on application of IBC in this ubiquitous era. The paper will rely on various reports and other instruments of legal doctrinal research.*


***Keywords:*** *Insolvency and Bankruptcy Code 2016; Cross Border Insolvency; IBC Post Pandemic.*

## I. INTRODUCTION

The insolvency and bankruptcy code, 2016 was adopted with the goal of providing foreign companies with an effective right to exit. The Code aimed towards establishing a positive

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corporate environment by providing an efficient and reliable mechanism for insolvency and bankruptcy and to ensure that the right to exit is also accessible. This ground-breaking drastically transformed India's global view as a business-friendly environment. [3]

World Bank's "Doing Business Report, 2020"[4] had stated that, "With the reorganisation procedure available (through the "insolvency and bankruptcy code, 2016"), "companies have effective tools to restore financial viability, and creditors have access to better tools to successfully negotiate and have greater chances to revert the money loaned at the end of insolvency proceedings." in reference of Insolvency regime in India."[5]

**(A) History of insolvency and bankruptcy in India**

When the Insolvency and Bankruptcy Code ('IBC') was enacted in May of 2016, the legal framework for insolvency resolution in India underwent a substantial structural overhaul. This single legislation replaces all bankruptcy acts, some of which goes back to 1924, and revamps India's insolvency and bankruptcy process.[6]

Prior to the implementation of the Insolvency and Bankruptcy Code 2016, the following laws controlled the nonperforming loans recovery procedure:

- SARFAESI Act, 2002
- The Presidency Towns Insolvency Act, 1909 and The Provincial Insolvency Act, 1920
- Companies Act, 2013
- The Recovery of Debts due to Banks and Financial Institutions Act, 1993
- The Sick Industrial Companies (Special Provisions) Act, 1985

The code was brought forth as a comprehensive piece of legislation that aims to "consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner" [7]consequently; the implementation of the legislation was not an easy task. The executive government has opted to implement it cautiously, the participation of the necessary stakeholder was essential towards the smooth implementation; further the provisions of the legislation were notified in a phased manner along with other rules and regulations.[8]

[3] World Bank, Doing Business Report, 2018
[4] World bank, doing Business Report, published on 24th October 2019.
[5] Id.
[6] "THE INSOLVENCY AND BANKRUPTCY CODE, 2016," [28th May, 2016.]
[7] Preamble of the Code.
[8] "Notification No. S.O. 3568(E), 3569(E). November 25, 2016"

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THUS, The Code can be characterized more appropriately as a "United Mechanism" encompassing the positive sides of every unsatisfactory insolvency scheme.' A really historic occasion was the model time line, the function of the awarding authority, the IBBI and the balance method with which the code was developed. Indian insolvency system has risen and fallen, each one replicating the previous and bringing nothing new with it. The IBC came up as a one-stop solution after a forward-looking cash flow strategy that had robust foundations that surpassed the current insolvency system.

## II. IBC AND ITS CONSTITUTIONAL VALIDITY

### (A) Introduction

The Code framework demonstrated a significant shift from the preceding system. The code established a creditor-in-control system for corporate entities, a time-bound settlement procedure, and a judicial intervention framework with a limited scope. It also established institutions like the IBBI, as well as insolvency professionals and information utilities, to provide a fast track process.[9]

### (B) Constitutionality validity of the Code

The constitutional legality of several parts of the Code has been contested since the introduction of this new framework before several courts.

The insolvency procedure was not linked with natural justice principles, according to one argument made against the Code's legality. In the case of *Sree Metaliks Ltd. v. Union of India*[10], the constitutional validity of section 7 of the Act was challenged on the grounds that it does not provide the corporate debtor with an opportunity to be heard before an application for initiation of insolvency proceedings is filed against it. Because the Code's provisions are silent on a corporate debtor's right to be heard, the petitioner contended that the right to be heard should be included into the provision by implication. The Apex court relying upon section 424, concluded that even when the law on right of hearing of corporate debtor"where a legislation is silent on the right of being heard and does not expressly contradict natural justice principles, the same can and should be read into it." As a result, the Court determined that the Adjudicating Authority is required to provide the corporate debtor with a reasonable opportunity to be heard.

The Apex court in *Shivam Water Treaters Pvt. Limited v. Union of India*[11], recommended that the Gujarat state High Court abstain from addressing the validity of the "insolvency and

[9] "Bankruptcy Law Reforms Committee, The Interim Report of the Bankruptcy Law Reforms Committee" (2015)
[10] SreeMetaliks Ltd. v. Union of India, Writ Petition 7144 (W) of 2017. Decision date- 07.04.2017
[11] Shivam Water Treaters Pvt. Ltd. v. Union of India, SLP No.1740/2018.

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bankruptcy code, 2016" or the constitutional validity of the NCLT. Although, the same was not able to exclude petitioners from contesting the decision before the Apex Court under Article 32 of the Constitution.

The constitutionality the Code was subsequently challenged before the Apex Court. In its judgement in *Swiss Ribbons Pvt. Ltd. v. Union of India,*[12] the Apex Court ruled that, while examining the constitutional validity of economic legislation the judiciary should exercise restriction because "in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call trial and error method and therefore, its validity cannot be tested on any rigid prior considerations or on the application of any straitjacket formula." Consequently, the SC upheld the constitutional validity of the same.

Additionally, the petitioner contented that by vesting adjudicatory power in a non.judicial authority, – i.e. resolution professional, the Code infringes fundamental characteristics of judicial system and access to justice. The Court again dismissed the claim, stating that "the resolution professional is essentially a facilitator of the resolution process, whose administrative activities are controlled by the committee of creditors and the Adjudicating Authority."[13]

Further, "The provisions of the Code governing the initiation of the CIRP, voting in the creditors' committee, distribution in liquidation, disqualification from submitting a resolution plan, withdrawal of the corporate insolvency resolution process, information utilities, and powers of the resolution professional have all been found to be constitutional".[14]

The numerous rulings of the NCLT and the Hon'ble Supreme Court strengthened the Code's overriding stance and offered an additional opportunity for bankrupt firms to continue as a concern.

## III. CROSS BORDER INSOLVENCY: INTRODUCTION AND JUDICIAL APPROACH

### (A) Introduction

It is possible that relying solely on national legislation in dealing with international corporations might be inadequate. A solid institutional framework is thus required in order to enhance greater with conflicts that have international implications in the first place. Previously, nations had intra-jurisdiction focused bankruptcy rules that operated inside their borders[15], which resulted in problems in the restructuring of a foreign-based business debtor's debt. As a result, in 1997,

[12] Swiss Ribbons Pvt. Ltd. &Anr. v. Union of India, Writ Petition (Civil) No. 99 of 2018.
[13] Id.
[14] Id.
[15] In Ran Chakrabarti's Key Issues in Cross-Border Insolvency, published in the 30th National Law School of India Review, 119-135. (2018).

"the United Nations Commission on International Trade Law" developed the UNCITRAL Model Law on Cross-Border Insolvency (hereafter referred to as "the Model Law"), with the ultimate goal of facilitating a consistent approach to cross-border insolvency.

The model law provides only legislative guidelines for Countries, as opposed to other international treaties. In order to handle cross-border insolvency issues properly and quickly, it is the fundamental aim of the IA to help Nations in equipping their insolvency legislation with a contemporary, harmonised, and equitable framework.[16] The World Bank has observed that bankruptcy procedures may include many interests and that, as such, a nation's legal system must provide for unequivocal law about jurisdiction, recognition of international cases, collaboration with foreign courts and the choice of law.[17] Furthermore, the "International Monetary Fund" (IMF) encourages States to adopt a model law in view of the increasing importance of cross-border insolvability as it provides "an effective mechanism for the recognition of foreign proceedings and cooperation between different court and administrative bodies." [18]

**(B) The judicial approach in solving cross-border insolvency cases**

There are several difficulties with regard to the application in jurisdictions throughout the world of the legislation governing cross-border insolvencies. Countries governed by common law have long debated the ramifications of the Court of Appeal judgement in Gibbs & Sons v. La Societe Industrielle et Commerciale des Metaux. [19] Where it was ruled that full release of debtor obligation to certain of the creditors provided in a contract concluded and executed in England by a foreign court may not be acceptable in the English Court.

These difficulties in cross-border insolvencies may not stop there; they are replicated in other countries' bankruptcy rules as well. In the Indian context, several of the highly valuable firms have been admitted to the bankruptcy resolution process during the previous years with holdings and creditors outside of India's territorial zone, thereby generating questions about the procedural approach to be taken in these instances. In 1908 in P. MacFadyen & Co., In re, India witnessed its first cross-border insolvency in the case involving the dissolution of an Anglo-Indian partnership following the death of one of the partners. Therefore, the London & Madras Trustees agreed into, confirmed by their respective courts, an agreement promising to return the extra amount to the other worldwide distribution process. When the legality of this contract was

[16] Insolvency Beyond the UNCITRAL: A Case for Cross-Border Insolvency, Sudhaker Shukla et al., IBBI
[17] "World Bank, Principles for Effective Insolvency and Creditor/Debtor Regimes": A Guide for Policymakers (2015).
[18] International Monetary Fund, Orderly and Effective Insolvency Procedures (1999).
[19] (1890) 25 QBD 399

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questioned, the English courts ruled that it was "obviously a legitimate and sensible commercial arrangement" that was "manifestly for the advantage of all parties concerned." [20]

*Therefore, the judiciary had no alternative but to establish a favorable precedent for all similar future affairs, without any constructive legislation dealing categorically with cross-border parlance.*

- ***Jet Airways Case: First Indian cross-border insolvency case***

In 2019, as a result of the NCLT judgement ordering a "Joint Corporate Bankruptcy Resolution Process" under the IBC, Jet Airways has become the first Indian corporation to be subject to cross-border insolvency[21] to establish a breakthrough in developing insolvency legislation in the nation. The critical issue concerns the late debt-ridden Indian-international airline, located in Mumbai, which is expected to owe its domestic and external lenders, including operational creditors, total responsibility of well over Rs 36,000 crores.

The major issue which has reinvigorated debate in this immediate case is the power of the Court of the Netherlands to proceed with the bankruptcy of an airline registered as well as incorporated in India and also to give appropriate restructuring instructions.

In early June 2019, the State Bank of India led a creditors consortia to NCLT requesting a formal declaration of bankruptcy of Jet and start of CIRP proceedings to prevent asset transfer in accordance with IBC Section 14. On 20 June, Jets was admitted to CIRP and after which the Adjudicating Court was informed that “two months earlier, the fact is that a bankruptcy petition was filed by the two European creditors of the group seeking seizure of one of the group's asserted claims for unpaid dues of almost Rs 280 crores against the airline in the North Holland district court of the Dutch.” Thereafter, the Netherlands Court then appointed a Dutch “bankruptcy administrator” to take over Dutch Jet assets.

Soon after Jet Airways had been admitted to CIRP in India, the Dutch Court-appointed Administrator petitioned NCLT, Mumbai Bench, seeking that the bankruptcy proceedings in the Netherlands be recognised and the CIRP procedures held in India be rejected. Nevertheless, the NCLT refused to retain the indian proceedings on the ground that the government had not yet notified the twin provisions of sections 234 and 235, concerning cross-border insolvency as per the IBC, and in the absence of such a law, strictly prevented the administrator so named by the Netherlands Court to take part in IBC proceedings.

[20] Id.

[21] SBI v. Jet Airways (India) Ltd., CP 2205 (IB)/MB/2019

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Agitated by the adjudicating authority's judgement, the Dutch Court established an appeal administrator against the order of the NCLT. The Appellate Tribunal, in an underlying guarantee that the administrator would not detach the airline from offshore assets, set aside the ruling of the NCLT and permitted the Dutch administrator to collaborate and participate in "CoC" meetings with the Indian Insolvency Resolution Professional. The NCLAT has continued to allow the Indian parties and their Dutch counterpart to cooperate seamlessly to finalise a settlement plan for the better interests of Jet Airways and all its stakeholders.

In its judgement, NCLAT managed to strike a balance, in keeping with the purpose of the Model Law Framework, between the aid provided to foreign representatives and those impacted by the relief. Interestingly, the Jet Airways case is one of several examples which demonstrated the need to include the cross-border insolvency process in current legislation.

## IV. Analysis of IBC

The new insolvency and bankruptcy code (IBC) has completed a successful 5-year journey. The code has been often criticised for low recovery rate. But it is a new law and as the law stabilises, there will be more favorable results. Here are some of the key outcomes:

**1.** By invoking IBC, operational creditors benefit the most.

The IBC code has been used to recover money from defaulters, contrary to popular belief, and it has been used to recover money from defaulters by operational creditors rather than financial creditors or lending institutions. Business creditors are suppliers of goods or services. Operational creditors also include employees and factory workers. Of the total cases admitted, 2,225 were launched by operational lenders, followed by 1,875 by financial lenders by March 2021. The lower Rs 1 lakh default threshold was partly the reason operational lenders invoked more aggressively by IBC. This limit was changed at Rs 1 crore during the pandemic breakout. Operational creditors make the most by triggering IBC

**2.** More liquidation than restructuring

Most instances under IBC have been liquidated, which means that the company's assets are sold as junk. Of the total cases disposed of, 2,653 resulted in the liquidation of nearly half of the cases. In just 13% of situations, approval of a plan was granted. The increased liquidation was also due to banks' transfer of most of their problematic assets, including old written cases, to IBC. The bankers have always worried the CBI, CVC and CAG and had resisted disposing of toxic assets from books without an IBC process.

**3.** The real estate and construction industries are the most vulnerable to bankruptcy.

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With the exception of manufacturing, which accounted for 41% of allowed cases under the IBC, industries such as real estate accounted for 30% of admitted cases. A factor contributing to this was the conjunction of demonetisation, the GST, and RERA. The three policy reforms had the most influence on smaller businesses. The economic slowdown that accompanied with the IBC changes had an effect on real estate sales as well.

**4.** The deadline deviates from the usual.

The IBC has set a limit of T270 days for the resolution of a defaulting case through restructuring or liquidation. This was initially 180-day grace period, with an extra 90-day grace period for any delays. More than 80% of the cases that were admitted had beyond the 270-day limit for resolving the issues involved. It was predicted that the deadline would be missed because the law was fresh and there were numerous problems due to defaulters' failure to incorporate as well as litigation. Many of the instances or interpretations have since been resolved by a number of different courts. With the opposition bids and the challenges associated in settling complicated cases, a revised deadline of 330 days has been set, which is more feasible given the current situation.

**5.** Pre-packaged Insolvency Resolution Process (PPIRP):

In June 2020, under the supervision of Dr. M. S. Sahoo, Chairman of the IBBI, the Government had set up a subcommittee, Insolvency Law Committee (ILC), to submit recommendations about the insolvency resolution pre-package procedure (PPIRP). It was recommended to immediately implement the aforementioned PPIRP in order to reform the MSME sector. This is the largest reform to reorganise the MSME sector.

In India, revolutionary PPIRP for the MSME sector was adopted by ""The Insolvency and Bankruptcy Board of India (Pre-Packaged Insolvency Resolution Process) Regulations, 2021" which was officially notified by centre government through an extra-ordinary ordinance issued on 04/04/2021. The PPIRP is a substitute for the CIRP mandated under the IBC.

It applies to all corporate enterprises (registered corporations under the Companies Act, limited liability partnerships, and other corporate entities) that fall within the definition of ‘MSME’ as specified under section 7 of the "Micro, Small and Medium Enterprises Development Act, 2006." The IPPIRP Regulations, 2021 have been issued to aid in operationalizing "the pre-packaged insolvency resolution process" for MSMEs by setting default standard, the minimum amount required to initiate in this IPPIRP is Rs. 10 Lacs.

The following characterizations of a General PPIRP can be observed:

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- Pre-packaged Insolvency is a quasi-formal process that incorporates the spirit of an out-of-court private rehabilitation with the essence of a formal bankruptcy in a single transaction.
- It would be voluntary, with both creditors and failing debtors agreeing to restructure the firm or corporation.
- It may include an agreed-upon "pre-approved pre-packaged resolution plan" (referred to as the "Base resolution plan") between the debtor and creditor.
- It may be targeted at a particular sector or classification of entities with the intention of reforming them.
- It might be a pre-planned insolvency proceeding in which a resolution strategy is developed and decided prior to the commencement of official proceedings.
- The pre-pack is indeed the resolution of a failing company's debt by an agreement among creditors and investors rather than through a public bidding procedure.

## V. THE PATH AHEAD FOR IBC AND CONCLUSION

### (A) Introduction

The COVID-19 outbreak has spawned a new problem for economies worldwide, including India. The liquidity faucets have been loosened by central banks. However, these methods are not without their limitations, particularly for a nation like India. Banking authorities have declared a suspension on loan repayments and a waiver from rigorous capital adequacy requirements for financial businesses. Governments have introduced fiscal stimulus on a scale previously unheard of. The early months have been focused on expanding healthcare infrastructure and providing social support to the most disadvantaged segments of the community. However, as the economic hardship associated with protracted or recurrent lockdowns becomes intolerable, actions to reintroduce and restore productive activity must now take precedence. Support must include the rescue of viable businesses that are unable to withstand pandemic-induced shocks.

Interventions must be in place to deal with instances that exhibit early indications of stress as well as those that go beyond the early phases. In a rapidly evolving scenario, the bankruptcy resolution process may play a critical role by being adaptable and responsive to the requirements of both debtors and lenders. MSMEs, as well as specialised sectors affected by the epidemic, require special care.

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### (B) Re-examining IBC in a post-pandemic world

As a result of the pandemic situation that has developed in the country over the last six months, certain districts and municipal regions remain under lockdown for the time being. In many sections of the country, normal economic operations have yet to return. Although the initiation of fresh insolvency proceedings have started yet again since March 25, 2021, the people are yet to recover from the time impact of second wave of Coronavirus. Thus, there is a slowdown in filling of fresh application in the present time. In this instance, it may be required to implement further steps in addition to those already indicated. Several of these may include the following:

It is critical that businesses that are viable and have not violated any laws are aided in their survival and growth during these trying times. This requires an active structure for the resolution of cases through prompt restructuring and rehabilitation of strained accounts before such enterprises reach the stage of insolvency. The banking industry, the Reserve Bank of India, and the government must work together to establish a non-discriminatory framework that benefits both businesses and the banking sector.

## VI. CONCLUSION

The IBC 2016 has been hailed as one of the largest legislative changes in the country's economic growth targeted at addressing worrisome failure of the banking sector's assets (NPAs). The Code has repeatedly underwritten a detailed review and concomitant changes to reconcile and adapt to the pragmatic demands of the banking and financial sector the operation of its provisions. Much of the effectiveness of the Code in the prompt resolution of insolvencies may be ascribed with judicial additions that cover the deficiencies in the functioning of the Code. The code, which is still in its infancy, depends a lot to court interpretations which make its work relevant and effective.

As unveiled through the course of this paper, the Hon’ble Supreme Court through various the Landmark Judgements has established that this instrument should be utilised with caution and should be used in a situation of inconsistency.

The author would also like to suggest, keeping in mind post coronavirus and the future prospects, the government should focus on proving further aid, include saving viable firms unable to sustain pandemic shocks. There must be treatments for cases with early symptoms of stress and even after-stage cases.

Lastly, author would like to conclude by stating that all though the IBC has gone leaps and beyond from its enactment in 2016, there is still weird area of matters that remains untouched.

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The important factors that would play key role in shaping the code in upcoming years would the development in sphere of cross border insolvency and group insolvencies.

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