

IBC: EASE OF DOING BUSINESS - A REVIEW

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Abstract

The Current global trend in terms of Entrepreneurship Development and Economic growth envisages better ranking of ease of doing business. The global scenario has changed in identifying the factors as to economic impediments and growth. The ease of entry and ease of exit of business is considered is one of the major factor for entrepreneurship development. The present present paper studied how the insolvency and bankruptcy reforms could address the ease of doing business and contributed for economic growth. The paper also addressed comprehensively the reviews and critical analysis on progress, process, problems and prospects from the perspective of ease of doing business during Pre-IBC Period and Post IBC period brings out what were the impediments for ease of doing business and how they are being solved successfully under IBC. The enactment of Insolvency and Bankruptcy Code, 2016(IBC) is a major path-breaking economic reform in India which brought paradigm shift in the entrepreneurship development and start-up business. IBC framework and process are simple but robust and dynamic. The Insolvency and Bankruptcy Board of India, (IBBI) and other ecosystem under IBC is unique in terms of its process, flexibility, conduciveness and strategic and behavioural perspective. The investment climate of investment and evolving role of investment climate in India is encouraging. In global scenario the resolving insolvency parameter improved from its place from 108 in 2018 to 52 in 2019. The average recovery period is reduced from 4.3 years in the year 2018 to 1.6 years in 2019. The Insolvency and Bankruptcy reforms prior to IBC could bring desired results in terms of corporate reorganization and resolution as there were no compatibility between policy, legal and Institutional framework under Sick Industrial Companies (Special Provisions)

Act, 1985, RDDBFI Act, 1993, SARFAESI Act, 2002 and other Legislations and RBI reforms. The paper also discussed several dimensions of ease of doing business especially in post IBC era with critical review.

Introduction:

The Insolvency and Bankruptcy Code, 2016 (IBC)¹ Prima-facie a path-breaking economic legislation focused on providing panacea to ease of doing business. The substratum of IBC include several elements for balancing the interest in the process of insolvency and bankruptcy viz., Timeline under CIRP; maximization of value of assets; change of credit culture of debtors in possession into creditors in control; ease of exit; ease of doing business and balancing the interest of stakeholders. The reviews

and critical analysis on progress, process, problems and prospects from the perspective of ease of doing business during Pre-IBC Period and Post IBC period brings out what were the impediments for ease of doing business and how they are being solved successfully under IBC. Ever since 1980, there were several attempts are made to provide Insolvency Reform in India. But the efforts were futile and only added confusion to the problem. The multiple laws **SICA², 1985, RDDBFI, 1993³,**

SARFAESI⁴ etc. have contributed for confusion in the Legal and Regulatory framework. The Policy, legal and institutional framework under IBC was possible with comprehensive Report of

Bankruptcy Law and Reforms Committee, 2015 headed by T.K. Vishwanathan. The Committee studies global trends in the insolvency reforms and necessity for ease of doing business accordingly paved way for IBC and its robust ecosystem. IBC a path breaking legislation created legal and institutional framework based on BLRC report policy framework. IBC created its own ecosystem, process and procedural framework. The design and implementation need to be traced with progress and prospects. Hence the present review based on articles of experts in this field. IBC a behavioural and path-breaking law provided as a major structural reform that has the potential to completely revolutionize insolvency resolution process in India. The lacuna and fractionalized framework of existing laws and regulations, process and procedures only furthered the corporate sickness, inefficiencies, mismanagement and contributed substantially for reduction in the value of assets and capital erosion. The IBC with timeline, maximization of value of assets and balancing the interests of stakeholders focused on resolution rather than liquidation.

This was an empowering tool to CoC and changed the relationship between debtors and creditors and corporate resolution methodology and approach.⁵

Accordingly, to reflect the current global trend of ease of doing business and its source from Policy initiative, the paper addressed the following objectives in this paper:

- (a) What and Why Insolvency and Bankruptcy Code was enacted? (b) What are the factors under IBC contributed for the Ease of Doing Business?
- (c) How IBC could sustain its Constitutional Validity and supremacy in terms of legal process for effective results?
- (d) What is uniqueness and Enforcement and Innovation in the IBC?
- (e) How IBC could contribute for Economic Growth and reviews of several factors contributed for ease of doing business?

What and Why IBC

The IBC is a dynamic and comprehensive reform of one stop solution in place of the SICA regime witnessed fragmented corporate insolvency legal & regulatory framework. There was no compatibility between policy, legal and Institutional framework in achieving the objectives of the SICA, hence SICA was a failure in all respects. It was not market driven and creditors driven. The Debtors were under control which deprived the rights of creditors. This IBC regime enabled development of ecosystem and provided more liquidity to creditors. This approach brought transformation among promoters to come out of their closely knit control mechanism and created conducive environment for balancing the interest of stakeholders. There is a sea change in investment climate and perception. IBC expedited the legal and regulatory process with well-structured reformative legal framework and ecosystem. Is a paradigm shift in the insolvency reforms process with behavioural legal process. The IBC created sea change in the credit culture and entrepreneurship development and socioeconomic perspective of corporate restructure and reorganization.

Ease of doing business:

IBC framework and process are simple but robust and dynamic. The IBBI and other ecosystem under IBC is unique in terms of its process, flexibility, conduciveness and strategic and behavioural perspective. The investment climate of investment and evolving role of investment climate in India is encouraging. In global scenario the resolving insolvency parameter improved from its place from 108 in 2018 to 52 in 2019. The average recovery period is reduced from 4.3 years in the year 2018 to 1.6 years in 2019.⁶

According to Dr. Sahoo,⁷ he then Chairperson, IBBI, IBC maximizes the value of the existing assets, not of the assets which do not exist. This was substantiated in respect of 200 companies as

march, 2020, which were rescued by Dec. 2019. The Resolution plan says Rs. 4 lakh crores were due to creditors, as against realizable value of assets available with them was Rs. 0.8 lakh crores. At the end the IBC process enabled them recover from creditors Rs. 1.6 lakh crores around 200 percentage of the realization value of assets of the said companies.

The amendments supported the entrepreneurial risk seeking perception in respect of viable companies operating on going concern basis. This protects the investors and creditors. The IBC again has played an important role in providing that transparency and clarity and preventing avoidable losses to the creditors. This has contributed for good governance. The legislative intent under IBC is unparalleled and it is an unprecedented economic legislative reform. It is a sequel against deterrent for lags and delays. It provides panacea to the lacunae of SICA regime

Insolvency code in USA is justifiably considered extremely company friendly, because of its automatic stay provision. An advisory on World Bank's Doing Business website provides an inter-jurisdictional analysis of research conducted on insolvency resolution across the world, and mentions how 'Economy-specific research has shown that insolvency reforms that encourage debt restructuring and reorganization reduce both failure rates among small and medium-size enterprises and the liquidation of profitable businesses. The finding says in Italy it postulates how 'thereform that accelerated the liquidation procedure not only decreased firms' cost of finance but also relaxed credit constraints. Research has also shown that bankruptcy reform can support the quick recovery of an economy during a recession.'⁸

The Bankruptcy procedures varies among several countries which has impact on the efficiency of debt enforcement. However, Insolvency Code is more or less similar among the countries. The effective role of Court matters a lot in reducing informal discussing among the debtors and creditors. The effective role of court can reduce uncertainty in insolvency resolution. In Brazil, differences in court enforcement of the same bankruptcy law, affected the impact of financial reforms on firm access to finance, investment and size⁹. These reforms are contributing for ease of doing business. The IBC and IBBI under the framework of IBC, are designed to understand the market dynamics and according and design and deliver legal, regulatory and procedural requirements. It is unique and model code of India.

Constitutional validity of IBC

In the year 2019 Justices R. Nariman and N. Sinha¹⁰, when dismissing several petitions challenging the IBC, upheld the constitutional validity of IBC. They have also established that it is good in law and enforceable. The Supreme Court further upheld the commercial wisdom of committee of creditors and accordingly held that the same cannot be interfered with judicially. It was also held that IBC has no provision enabling Tribunals to interfere with commercial decision of CoC¹¹. This is great relief to IBC.

BLRC also intended for the same and only suggested for safeguarding interests of operational and dissenting creditors and not beyond that. These safeguards are in line with the UNCITRAL Legislative Guide as well as the World Bank DBR parameters to prevent holdouts. So long as such safeguards are met, the Tribunal is not required to intervene, or manifest any violation of law or process. This protocol and culture have given confidence among creditors and investors. These are the great contribution of ease of doing business with global perspective.

Also addressed in the landmark judgment by the Supreme Court was the right to experimentation in economic legislation, and the positive role of the IBC, through timely and confidence enhancing resolution and recovery of debts, within an ethical framework. The Apex Court has settled a variety of issues pertaining to the IBC. Confidence in the system and outcome dependability will greatly help the time bound nature of the IBC. In fact, the amendment to the IBC in August, 2019 that mandates closure of CIRP in 330 days, includes the time spent on litigation,

and is widely considered the speediest resolution framework in the world.

Enforcement and Innovation in the IBC

The Four pillars primarily focused on maximization of value of assets in a time frame primarily on-going concern basis with balancing the interests of stakeholders. The four pillars are perfect design and execution of ecosystem which pave the way to resolve their stress. The Insolvency Professional are regulated by IBBI under IBC. They play vital role in both in the efficiency and effectiveness of insolvency, liquidation and bankruptcy processes. Their professional approach and strategic role of balancing the interest and drawing a resolution plan in time-frame is critical. The IBBI regulates professions as well as processes and their role are legislative, regulatory, quasi-judicial and administrative.

The BLRC Report observed the efficient working of Code envisages stakeholders to come out with clarity of ownership and control without delay in respect of stressed assets. The maximization of value of assets, timeline and going concern are critical for resolution.¹² The August, 2019 amendment prescribing time line of 330 days contributed for the confidence among the stakeholders. The December, 2019 amendment essentially released the corporate debtor from liability pertaining to offences committed under the prior management even before the commencement of the CIRP. These measures builds problem solving positive culture and provides diagnostic tools for corporate rejuvenation in declining firms.

IBC and Economic growth:

IBC not only focused on corporate restructuring but also providing conducive business environment of ease of doing business and exit. De-criminalisation under IBC is a step towards pragmatic approach in removing apprehensions among genuine entrepreneurs who might mistake. It is a building framework for friendly ecosystem and developing positive culture to march ahead. Accordingly, de-criminalisation of minor offences as a focus area for reform which is creating good relationship among stakeholders. The risk of imprisonment for actions or omissions, which may not be fraudulent or male-fide of intent is a big hurdle for the private investors. The investors may make genuine mistakes in making investment decisions while doing business operations. Criminal penalties for minor offences act as major hurdle to investment initiative. This negatively impacts business environment. This may discourage investment.

Already, de-criminalisation of technical and procedural violations under the Companies Act, 2013 to reduce the burden on the Courts has led to the shift of 16 offences/sections to a penalty structure, through the Companies (Amendment) Bill, 2019 which was notified on July 31, 2019. Actions taken on these aspects would go a long way in further improving ease of doing business and will also help in unclogging the court system.

Major reform identification and repeal of archaic and obsolete laws. Around 1500 archaic laws have been repealed. All these put together along with the IBC form a major reform effort in bettering the investment climate in India for private foreign and domestic investors.¹³ These are the critical areas directly and indirectly contributing for ease of doing business.

Pandemic Period

As an effort during the COVID-19 pandemic, a moratorium under IBC has been announced. To protect MSMEs, the eligibility for initiation of corporate insolvency process under the IBC has been raised to Rs. 1 crore from Rs. 1 lakh.¹⁴

For IBC, robustness and dynamism is absolutely the major positive factor. IBBI has taken initiative in increasing capacity, incorporating leading practices, and remaining on top of policy tweaks, the IBC has remained agile and responsive to emerging realities and challenges. As a part of this initiative, the two-year Graduate Insolvency Programme to impart skill and education tool for building capacity and training insolvency professionals is introduced. The initiatives by way of pre-packaged insolvency, group insolvency and other initiatives to bring about reforms in CoC,

IPs are all appreciated¹⁵.

The PPIRP could help bring (i) consensus for lenders together in a particular issue, (ii) incentivise management and promoters to participate productively and proactively in the process (iv) suitable checks and balances, (v) can look after the interests of non-participating affected parties as well (vi) permit efficient, bid-free restructuring of debt. The UK has an innovative concept known as a 'prepack pool' which is an independent body of experienced professionals that provides expert opinion and recommendations regarding pre-packed deals. This could be usefully considered also for IBC scenario in India.

Accordingly, a report by the Vidhi Centre¹⁶ for Legal Policy titled (in Feb. 2020) 'Designing a Framework for Pre-packaged Insolvency Resolution in India' narrated the beneficial aspects of pre-packs. According to them (i) speed, (ii) confidentiality, (iii) statutory sanction and (iv) lower costs are major benefits. Three kinds of pre-packed (i) prepackaged insolvency resolution process, (ii) pre-arranged insolvency resolution process, and (iii) lastly a pre-arranged sale are referred by them. These are customized options of Vidhi Centre's observations.

Strategically putting together an MSME and non-MSME structure in place to help expedite this process. Information utilities is providing practical and useful option to meet the stakeholders' requirement for information supply¹⁷. To expedite the process of outcome Artificial intelligence tools, automated technology driven platforms are used to expedite the process of outcome in insolvency initiatives. Further, innovative practices viz e-courts, use technology case listings, flow management and online hearings are used to enhance efficiency of the IBC process.

"Ease of Exit The IBC" by Way Bibek Debroy and Aparajita Gupta – a review

The article of Bibek Debroy of Bibek Desroy and Aparajita Gupta¹⁸ focused on how IBC is a dynamic path-breaking economic legislation intended for ease to doing business and ease of exit? What was the philosophy of IBC has created which created impact on Micro, MSMEs? How could improve its Ease of Doing Business ranking as measured by the World Bank. The third part of the Report studies the impact of IBC on Micro, Small and Medium Enterprises (MSMEs). The fourth part highlights despite amendments made, there are several issues still need to be addressed.

IBC is making the amendments with a focus of achieving its objectives. In business environment, ensuring compatible legal environment is prerequisite for the free entry and exit. At micro level it is ultimately competitiveness of a firm that matters for the survival and growth. Competition obviously envisages freedom of entry and freedom of exit of firms. This is ensured in case of doing business with ongoing efforts to further streamline process. The corporate exit route is obscure and murky – IBC comprehensive with Strategic, socioeconomic and socio-cultural perspective

IBC: Shift in the approach and dynamics and the effectiveness in outcomes.

The recovery rate of Banks after IBC considerably improved. As regards timeline under IBC. Based on data in respect of 2170 CIRP cases as on March, 2020, 34 percent of cases took 270 days or more, 23 percent of cases took between 180 to 270 days, 26 percent took between 90 and 180 days and 17 percent cases took less than 90 days. This indicates the efforts for maximization of value of the assets with timeline as compared to SICA regime which was very low or negative. The capital erosion was substantial in SICA regime which furthered the corporate sickness and took the units to death knell. It is observed that in respect of 221 cases of resolutions plans CIRPs took 415 days, in respect of 69 cases of liquidation took 270 days. These time frameworks improved very much as compared to 4.3 years taken earlier as reported by World Bank's Doing Business Report 2019. This figure substantially reduced in 2020. The World Bank in its Doing Business Report 2020 acknowledged the fact of substantial improvement in improving its rank by 56 positions as time

required for recovery of debt reduced to 1.6 years.

IBC and India's Improving Ease of doing business ranking

In both the Doing Business 2016 and 2017 Reports of the World Bank, India was ranked at 136th on the 'Resolving Insolvency' indicator. In the next edition of the report (Doing Business 2018), India drastically improved its rank to 103rd on the same indicator. The Report recognized the importance of enacting IBC.

Review of IBC a landmark stature –

Poornima Advani¹⁹ According to Poornima Advani IBC thrust is to 'resolve', 'revive' and 'reinforce' the recovery efforts of the creditors. This process ultimately leads to recovery. The robust legal framework based on the market forces automatically set to take care of commercial needs and the legal framework. It is a churning process focused on the substratum. In the entire process maximization of value of assets based on going concern approach is achieved. Further timeline is ensured for resolution for stressed assets and distressed debts, this in turn brings of change in credit culture and develops credit markets and encourage entrepreneurship. Ultimately, in the process, non-performers would exit. The said process envisaged to improve 'ease of doing business', facilitating more investments and paving the way for higher economic growth and development.²⁰

The crux of the process aimed at **balancing the interests of all stakeholders**.

In this entire experimentation several stakeholders' and market-driven needs have been considered at judicial forums leading to a meaningful amendment to IBC in a more refined manner.

We have observed two things (i) the constitutional questions were well resolved and (b) **supremacy of IBC is established** for smooth sailing is its journey. It has started with simple framework and grown into a dynamic code with complex structure with clarity. Finally, in 2019, Hon'ble Supreme Court of India (SC) in *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors*,²¹ (hereinafter 'Swiss Ribbons') upheld the constitutional validity of the Code in its entirety. The Court, laying to rest several issues which arose due to the departure of the Code from previous laws governing insolvency, reiterated the legislature's right to experimentation in the field of economic legislation and the courts' obligation to stay away from interfering with the same.

The petitioners had challenged the constitutionality of various provisions of the Code such as sections 7, 9, 12A, 21, 24, 29A, and 53. The principal argument was that the distinction between FCs and OCs was uncalled for and discriminatory. The Supreme Court based its verdict on commercial realities. The distinction is based on intelligible differentia. Finally, the Hon'ble SC concluded that the distinction is 'neither discriminatory, nor arbitrary, nor violative of Article 14 of the Constitution of India' and these amendments stood ground.

Judicial engineering has also brought in a Lessor- Lessee relation within the ambit of the Insolvency laws. In *Mobilox Innovations Private Limited v. Kirusa Software Private Limited* the SC, relying on the BLRC brought in a lessor into the Code as an OC. Accordingly, the Court held, that 'arrears of rent' would be like operational debts within the Code. Judiciary has also brought home buyers within the scope of the law. The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 brought the changes.

Timelines: lifeblood of the resolution process

The Insolvency and Bankruptcy (Amendment) Act, 2019, introduced section 12(3), which capped the time limits at 330 days from the insolvency commencement date (ICD). The 2019 amendment followed the resolution process of Essar Steel Ltd, where the time taken for the entire CIRP process was over 700 days, as against the 180 days prescribed in the Code.

Socioeconomic perspective of time line: The SC after taking note of sections 12, 13 to 15, 17, 18

(1), 21, 22, 29, 30 and 40 A, re-emphasized that a reasonable and balanced construction of the statute is necessary and 'the time (is) taken in legal proceedings to decide the matter cannot possibly be excluded, as otherwise, a good resolution plan may have to be shelved, resulting in corporate death and the consequent displacement of employees and workers.

Overriding powers of the code:

Section 238 of the IBC has significance in judicial discourse. Section 238 provides overriding powers to the IBC over any other legislation. With this effective empowering tool, the Code faces several challenges. In *Sterling Sez Infrastructure Ltd v. Deputy Director of Enforcement*, the NCLT²² held that attachment of property by the Enforcement Directorate under Prevention of Money Laundering Act, 2002 (PMLA), while the moratorium is in force, would be null and void on several justifications, including section 238, which lends supremacy to the Code over any other statute.

In another case a contrary view was expressed by the Delhi HC in *The Deputy Director Directorate of Enforcement Delhi v. Axis Bank*²³ where the Court held, besides other points, that section 71 of the PMLA, would have an overriding effect over other existing laws in the matter of dealing with 'money-laundering' and 'proceeds of crime'. At the same time, the Court cautioned that other 'debt recovery statutes like Recovery of Debts and Bankruptcy Act, 1993, Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) and the Code must co-exist in harmony with PMLA'.

There could be several fallouts of such reasoning. Firstly, the IBC is not a just 'recovery' law but is highly focussed on resolution and restructuring. We observe under the Code's waterfall mechanism, the Government stands last in the priority in receiving its dues. Hence, the overriding effect of the PMLA may just be a less time consuming route for the Government in claiming its dues. Lately, in *Bhanu Ram v. HBN Dairies*²⁴, the NCLT held that the Code has precedence over the Securities and Exchange Board of India Act, 1992 (SEBI Act).

Issues and implications of amendments to IBC

The Insolvency Law Committee (ILC) felt that the new section 29A should only disqualify those who had contributed to CD's downfall either directly or indirectly. The SC elucidated this issue in *Chitra Sharma v. Union of India*: 'the provisions of section 29A are intended to ensure that among others, persons responsible for the insolvency of the CD do not participate in the resolution process.' Section 29A was provided foundational stability by virtue of clause (c). **Anuradha Guru and Medha Shekar**²⁵. In the interest of better ecosystem of effective corporate restructuring, unviable units

must be permitted to exit. Accordingly, to Joseph Schumpeter²⁶, ease of entry and exit provides a great boost to entrepreneurship in the ecosystem. IBC provides a platform and systematic mechanism for the same.

Conclusion

The Ease of Doing business reflects as one major global scenario in contributing for the economic growth and entrepreneurship development. The Policy, legal and institutional framework under IBC was possible with comprehensive Report of Bankruptcy Law and Reforms Committee, 2015 headed by T.K. Vishwanathan. The Committee studied global trends in the insolvency reforms and necessity for ease of doing business accordingly paved way for IBC and its robust ecosystem. It is observed that the impediments faced in pre-IBC period is resolved under Post-IBC period with insolvency reforms sailing with global scenario. The several reviews on ease of doing business substantiates how the ease of doing business was possible under IBC and it contributed for economic growth.

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