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Assessing The Impact Of Evolving Insolvency And Bankruptcy Laws On Industry Dynamics

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Abstract:

The purpose of the Insolvency and Bankruptcy Code, which was passed into law in 2016, was to create a single legislation that would govern both insolvency and bankruptcy. This was done with the objective of consolidating the current framework. It should be brought to your attention that one of the primary goals of the Code is to safeguard the obligations and rights of the creditors. A shift away from the debtor-in-possession model, which was prevalent in the previous regime, and towards a model in which both creditors and debtors operate within a framework of equity and fairness to all stakeholders in order to preserve the value of the Company was one of the goals of the Code, which aimed to remedy the various "illnesses" that were caused by the insolvency laws that were in place during the previous regime. On the other hand, the Code was not flawless in any way, shape, or form; it is still a work in progress. In addition, as a result of the epidemic caused by the COVID-19 virus, the government has changed its attention to safeguarding the interests of corporations. Despite the fact that the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 appears to have been enacted with the purpose of shielding companies and promoters from no fault liability as a result of the Covid-19 pandemic, the ambiguities that are present in the legislation appear to raise more questions than they do answers. As a matter of fact, the most recent ordinance seems to be indicating a shift to the former paradigm, which was adverse to the interests of the creditors. Since this is the case, the purpose of this article is to discuss and examine the problems and ambiguities that are specifically related to the 2020 Ordinance.

Keywords: Insolvency, Bankruptcy Laws, Industry Dynamics, Legislative Shifts, Adaptation Strategies

Introduction:

The inability to pay one's debts is what is meant by the word "insolvency," as stated in the Black's legal dictionary. Within the context of the current business climate, the use of credit by enterprises is of critical importance [1]. Nevertheless, the creditors are exposed to a significant amount of danger over the course of this procedure. To put it another way, if this credit cycle is interrupted, the whole economy may come to a complete and

utter halt. In light of this, the purpose of insolvency law is to safeguard the interests of creditors in the event that corporate debtors fail to fulfil their obligations ("Company"). In point of fact, one of the primary objectives of the insolvency law is to replace this free-for-all regime with one in which creditors' rights and remedies are suspended and a process is established for the orderly collection and realisation of the debtor's assets, as well as the equitable distribution of these assets according to the claims of creditors [2].

Insolvency regulations do not provide for any wiggle room when it comes to the collapse of corporations [3]. Due to the fact that going into business requires taking risks and dealing with crises on a regular basis, the only people who will be able to survive are those who are able to effectively compete with one another [4]. There are a lot of ill corporations that may. Some businesses would undoubtedly be driven to the point of bankruptcy if there was a competitive environment in the market that was effective (applying the neocapitalist theory). It is possible to draw the conclusion that the businesses that operate in our day and age operate, to a greater or lesser extent, according to the concept of "survival of the fittest." Inadequate financial controls, bad management, and adverse market circumstances are some of the factors that may lead to the demise of a corporation. Therefore, the purpose of the insolvency laws is to provide a solution to a business failure by reorganising the corporate body in order to rework all of those problems [5].

Evolution of the Code:

The Insolvency and Bankruptcy Code (also known as the "Code") was enacted in 2016 with the purpose of consolidating and amending the laws that pertain to the reorganisation and insolvency resolution of corporate persons, partnership firms, and individuals in a time-bound manner. The goal of the Code is to maximise the value of assets of a company that is facing the possibility of filing for bankruptcy (also known as a "Corporate Debtor"). The Code was enacted with the intention of making it easier for businesses to operate in India, which was one of the primary goals of legislation. In the years leading up to the implementation of the Code, the legal framework that governed the process of winding up businesses was, to put it bluntly, just as ill as the enterprises themselves. 6 Since the previous administration was more of an antagonistic one that was skewed in favour of the debtors, this is the reason why. During the insolvency processes, the debtor was able to maintain control over the administration of the company under the prior regime, which is the reason why this view exists. This problem is addressed by the Code, which transfers the administration of the Company to the resolution expert in an effort to find a solution. In point of fact, the insolvency processes were very disjointed as a result of the excessive number of laws that were in place under the previous administration. During the bankruptcy processes, there was a great deal of uncertainty about the rights of the creditors and the debtors. This was owing

to the fact that the powers were supplied under a variety of different legislations, which resulted in the plurality of laws. When the Code came into effect, it consolidated and codified a number of laws that dealt with the insolvency process under the previous regime. These laws included the Sick Industrial Companies Act of 1985 (also known as "SICA"), the Recovery of Debt Due to Banks and Financial Institutions Act of 1993 (also known as "RDDBFI"), the Companies Act of 2013, and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act of 2002 (also known as "SARFAESI"). For this reason, the Code endeavoured to combine all of these different pieces of legislation into a single consolidated code in an attempt to find a solution to the problem of the overwhelming number of laws that pertain to the topic.

The debtor-in-possession model is essentially replaced by a model in which creditors and debtors both operate within a framework of equity and justice to all stakeholders in order to maintain the value of the company [7]. This is the core of the Code transition. According to the Supreme Court of India's interpretation of the Code, which was summarised in the Swiss Ribbons Case [8], the following was determined:

> *As a piece of law, the Insolvency Code addresses issues pertaining to the economy and, in a more general sense, addresses the economy of the nation as a whole. As we have seen, earlier experiments, in terms of legislations having failed, 'trial' having led to repeated blunders, finally led to the creation of the Code. This will be discussed more in the following paragraphs. Given that the experiment that is included in the Code is evaluated based on the breadth of its provisions, rather than the so-called crudities and injustices that have been brought to the attention of the petitioners, it is deemed to be constitutionally acceptable [9].*

Therefore, it is possible to observe, as stated by Justice Norman, that the "debtor's paradise" has been lost as a result of the implementation of the Code. All decisions concerning a company that is going through insolvency proceedings are now handled by the Insolvency Resolution Professionals (also known as "IRP") and the Committee of Creditors (also known as "CoC") [10]. The IBC has achieved remarkable success in a very short amount of time because to the implementation of formats [11], despite the fact that it has inherited some extremely ill "zombie" enterprises from the previous administration.

Objectives of the Code:

The fact that the society in this period makes it easier for businesses to make use of credit is a fact that is commonly understood by everyone. In point of fact, many companies are unable to survive without taking on any debt since doing so satisfies the need to be able to finance investments and costs [12]. With the condition that the debt can be serviced

and returned, and that the corporate debtor has the financial wherewithal to do so, it is acceptable for the corporation to incur debt [13]. On the other hand, there is a significant possibility that the creditors may endure significant hardship in the event that the corporate debtor is unable to settle the loan by the date that it is due [14]. In addition, the Code gives the creditor the ability to recoup the money owed to them by either using the Corporate Insolvency Resolution Process (commonly known as "CIRP") or by liquidating the debtor who has defaulted on their payments.

With a broader scope and the intention of resolving the concerns via more effective provisions and execution, the International Business Convention (IBC) came into being. Reorganization and insolvency resolution concerns are the subject matter of this act, which is an act that consolidates and amends the laws that handle these matters. In the event of any insolvency, liquidation, voluntary liquidation, or bankruptcy proceedings, it was applicable to corporations, partnership businesses, limited liability partnerships, corporate persons, and individuals among other types of entities. The following is the goal that the code aims to achieve:

> *"An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms, and individuals in a time bound manner for the purpose of maximising the value of assets of such persons, promote entrepreneurship, increase the availability of credit, and strike a balance between the interests of all the stakeholders, including a change in the order of priority for the payment of government dues, and to establish an Insolvency and Bankruptcy Board of India, as well as for matters connected therewith or incidental to the aforementioned act [15].*

Therefore, it is possible to observe that the primary focus of the IBC is not only to recover the money that was owed to the creditor, but also to ensure the revival and continuation of the corporate debtor by shielding him from the management of the corporation from a "Corporate death" through the process of liquidation [16].

Speedy Resolution Process:

In addition to simplifying and speeding up the process of bankruptcy proceedings, the Code intends to combine and revise the current legislation pertaining to insolvency. There were a number of different laws that were spread about in relation to insolvency and bankruptcy before to the passage of the IBC. These laws led to outcomes that were insufficient and ineffective, as well as delays that were excessive. In point of fact, previous to the implementation of the Insolvency and Bankruptcy Code (IBC), the average time it took to resolve an insolvency case in India was 4.3 years, but in the United Kingdom it took just one year and in the United States of America it took 1.5 years [17]. Consequently, the legislature made an effort to rectify these

errors by enacting the IBC, which aimed to streamline and expedite the process of winding up or liquidating a business. The IBC has a number of primary goals, one of which is to ensure that underlying assets are resolved in a timely manner while also preserving their value. 18 The Code has always been advertised as a statute that aims to finish the insolvency process in a timely manner. This has been the case from the beginning. In accordance with the rules of section 12 of the Code, which stipulates that the insolvency procedure must be finished within 180+90 days, this aim of a rapid resolution process is not acceptable. The justification for this purpose of getting a resolution as quickly as possible is provided by the Bankruptcy Law Reforms Committee as follows:

> *When it comes to the operation of the bankruptcy legislation, speed is of the utmost importance for two reasons. In the first place, while the "quiet phase" might be beneficial to the survival of a company, it is impossible to make critical choices in the absence of complete clarity on ownership and control. It is likely that the company will deteriorate and collapse if it does not have strong leadership. If the delay continues for a longer period of time, the likelihood that liquidation will be the sole solution increases. Second, the majority of assets have a high economic rate of depreciation, which causes the liquidation value to decrease with time. This is a common phenomenon. Generally speaking, if the company is sold as a continuing concern, it is possible to receive a satisfactory realisation from the perspective of the creditors. Therefore, there is a loss of value if there is a delay that results in liquidation. Additionally, even in the case of liquidation, the realisation is reduced when there are additional delays. Because of this, delays result in the loss of value. Furthermore, in order to achieve a high recovery rate, it is mainly necessary to identify and eliminate the factors that cause delays [19].*

The International Business Convention (IBC) is not without flaws, notwithstanding the efforts that were put into its execution. The earlier time period of 180+90 days for the insolvency process, despite appearing to be an effective remedy prima facie, was not practical in India prior to the amendment that was passed in 2019. This was due to the slow regulatory process that was carried out by various government agencies, such as the approval that was required by the Competition Commission of India (CCI). As a consequence of this, questions regarding the efficiency of the IBC proceedings have been raised. These questions include (1) whether the rescue operations that are envisioned under the IBC are used to avoid the CCI regulations and (2) whether the corporate debtor can use the loopholes in the law to prevent the CoC from taking the decisions regarding restructuring. It is possible to do an analysis of these topics by conducting a

short case study of the acquisitions that UltraTech Cements took.

Case Studies:

- **An analysis of the Code through the case-study of the rescue acquisitions of UltraTech cements**

It should be brought to your attention that the massive debts and the 'Zombie' Companies were the driving forces for the implementation of the Code. However, it is noteworthy to note that despite the Code's implementation, many promoters worked to find solutions to their financial issues that were beyond the purview of the Code. This was done in an attempt to maximise their value, which is paradoxically one of the primary goals of the code. In addition, the recovery rates that are set out by the Code are, unexpectedly, on the lower end of the spectrum. In point of fact, no more than 120 of the 2,162 cases that were filed under the Insolvency and Bankruptcy Code have been resolved as of the 30th of June, 2019. It is worth noting that out of the 2.53 trillion claims that were accepted via the IBC procedure, only 42.8% of the claims that were valued at □1.08 trillion were successfully recovered [20]. Over the course of the period beginning in January 2015 and ending in April 2019, there were seven significant purchases of distressed assets that amounted to a total of $23 billion [21]. The reason why a great number of businesses went through slump sales, the selling of assets, and mergers was to save themselves from going bankrupt. Surprisingly, it seemed as if the regulating authority had chosen to ignore these practises. The methods in question were troublesome since they brought up a great deal of competitive difficulties. A more in-depth examination of the cement industry in India will shed more light on the procedures that are being conducted.

- **The Binani**

Case The Binani Cements case, on the other hand, revealed itself to be a test case for the application of the Code, despite the fact that it had taken a great deal of unexpected turns. Consequently, UltraTech Cement, which has been competing for an acquisition, provided a letter of comfort to Binani with a promise to acquire the assets at a much higher amount. This prompted the promoters of Binani Cement to seek an out of court settlement from NCLT, which was not an option that was available at the given time [22]. In this particular instance, the IRP approved the bid that Dalmia Bharat submitted based on the primary bids. One thing that is noteworthy to notice is that the adjudicating authorities did not show any resistance to this out-of-court settlement. An important decision was made by the adjudicating body when it approved UltraTech's bid to acquire Binani cements. The adjudicating body reached the conclusion that the insolvency resolution process ought to have the objective of obtaining the highest possible value from the auction of stressed assets [23]. By accepting UltraTech's proposal, this judgement opened the floodgates to litigation, so opening up new possibilities for defaulting corporations to discover new and better ways out of a procedure that had

been otherwise strict up until this point. In addition, UltraTech was able to acquire Binani cements, which provided the latter with a significant market share and a competitive edge in western India [24]. This was in addition to the previously mentioned purchases that UltraTech had made. Prior to the establishment of the Indian Business Commission, UltraTech's purchase of this nature would have been likely to get the attention of the Competition Commission of India. The 180+90 time restriction, on the other hand, ensured that this transaction was completed without any problems (pre-2019 amendment case).

The 2019 Amendment:

In order to raise the maximum amount of time that may be spent on the resolution procedure to 330 days, the Insolvency and Bankruptcy Code (Amendment) Act, 2019 (Amendment Act) included two provisos to section 12(3) of the Code. This period of 330 days includes (a) the normal CIRP period, which is 180 days; (b) any one-time extension, if they are granted by the Adjudicating Authority, up to 90 days of such CIRP period; and (c) the amount of time that is spent in legal proceedings in relation to the CIRP of the Corporate Debtor [25]. This 330-day time frame would include not only the amount of time spent in legal processes but also any extensions that were decided upon by the body in charge of adjudication. 28 In the event that the CIRP procedure is not finished within the allotted time frame, the organisation will be subject to liquidation, which is an alternative that is not practicable for the stakeholders concerned [26]. The purpose of this change was to fill in the gaps in the regulatory time frame, particularly with regard to the Competition Commission of India. The time restriction of 330 days was in accordance with the timescale that the Competition Commission had established for the inquiry process. By establishing this non-derivable time limit, the government had clearly disregarded the fact that the failure to comply with this deadline would force the Corporate Debtor into liquidation, which could be equally detrimental to his interests. This was done despite the fact that the government's intention was to protect the value of assets, which would decrease if the CIRP process continued for an extended period of time. During the course of the Essar Steels lawsuit [27], this matter was brought up. In this particular case, it was decided that the CIRP must be completed within 330 days; however, the adjudicating authority has the ability to extend this time period in situations where the short amount of time remaining for the completion of the CIRP is due to the fact that the action that is currently being considered is still pending or the adjudicating authority is inefficient [28]. Despite the fact that the Essar Steels decision allowed for some degree of flexibility in the time period, it did not address two significant issues. These issues are as follows: (1) the standard that must be satisfied in order to convince the tribunal that they themselves have caused the delay in the CIRP process; and (2) whether or not they can be a limit to the

extensions that can be granted beyond the 330-day limit [29]. In the absence of a restriction, it is possible that the goal of the amendment that was passed in 2019 would not be accomplished.

Conclusion:

Upon first inspection, it is possible to detect that the Code is an attempt to address the problems that have been occurring, such as the widespread use of the debtor-in-possession model, which was prevalent in the previous regime. Nevertheless, in light of the recent developments in the legal system, one can draw the conclusion that the legal system seems to be returning to the previous paradigm. It is presently being disregarded in an attempt to "defend the interests of the firm," which is contrary to the primary aim of the Code, which was to safeguard the interests of the creditors. The uncertainties in the regulation seem to produce more problems than they do answers, despite the fact that the 2020 Ordinance appears to have been established with the goal of insulating firms and promoters from no fault liability owing to the Covid-19 epidemic. To prevent the Ordinance from becoming a double-edged sword that has the potential to defraud or affect the interests of small-scale vendors, micro, small, and medium-sized enterprises (MSMEs), and individual creditors, who most of the time fall into the category of operational creditors, particularly those whose credit falls below one crore rupees, it is imperative that the Ordinance not become such a weapon. It is the responsibility of the legislative branch to make certain that Section 10A does not turn into a device that may be used to reclaim the paradise of defaulters, which is what the Code was originally intended to do. In addition, the legislature and the authority that is responsible for adjudicating cases need to be mindful of the implementation of the ordinance, which may potentially open a great deal of floodgates to litigation. This is due to the provisions that were introduced in the ordinance, which include provisions that provide an exemption period for defaults and restrictions on the filing of fraudulent or wrongful trading applications by resolution professionals, among other things.

References:

[1]. Bharat Chugh & Avaya Hari Singh, A to Z of the Insolvency and Bankruptcy Code, https://www.livelaw.in/columns/a-to-z-of-the-insolvency-and-bankruptcy-code-a-beginners-guide-157569 (last visited 11 June 2020)

[2]. Sameer Sharma, How Do We Ensure India's Insolvency and Bankruptcy Code Keeps Working Well?, https://thewire.in/banking/india-ibc-solvency-bankruptcy, (last visited assessed 15 June 2020).

[3]. Swiss Ribbons Pvt. Ltd. V. Union of India (2019) SCC OnLine SC 73 (India).

[4]. supra.

[5]. supra.

[6]. FINCH, supra note 1, at 9.

[7]. Rao Pramod, Critique of the insolvency & Bankruptcy Code, 2016, http://www.insolindia.com/uploads_insol/resources/files/critique-of-ibc-by-pramod-rao-1040.pdf (last visited 10 May 2020). 13 supra. 14 FINCH, supra note 1, at 9

[8]. Swiss Ribbons Pvt. Ltd. V. Union of India (2019) SCC OnLine SC 73 (India).

[9]. The report of the Bankruptcy Law Reforms Committee, 2015, https://ibbi.gov.in/BLRCReportVol1_04112015.pdf

[10]. FINCH, supra note 1, at 9.

[11]. Swiss Ribbons Pvt. Ltd. V. Union of India (2019) SCC OnLine SC 73 (India).

[12]. Chugh & Singh, supra note 5.

[13]. Vivek Kaul, Why IBC success in recovering bad loans is middling, https://www.livemint.com/industry/banking/why-ibc-success-in-recovering-bad-loans-is-middling1565551101789.html

[14]. Ridhima Saxena, Distressed asset acquisitions, consolidation behind large M&A transactions, https://www.livemint.com/companies/news/distressed-deals-consolidation-driving-large-m-a-deals-in-india-bain-co1569482593936.html (last visited 11 June 2020).

[15]. Bankruptcy Law - A game changer, https://indiancementreview.com/special-report/Bankruptcy-Law---A-gamechanger/111698

[16]. Binani Industries Ltd. v. Bank of Baroda (2018) SCC OnLine NCLAT 521 (India)

[17]. Thomas & Vyas, NCLAT nod to UltraTech'sBinani Cement bid sets precedent, https://www.livemint.com/Companies/3jejXNs2MOCmiailsJDtsL/NCLAT-approves-UltraTechs-Rs-7900-croreoffer-for-Binani-Ce.html>

[18]. Insolvency and Bankruptcy Board of India Notification CIRP-13011/1/2019-IBBI dated 11 November 2019

[19]. Committee of Creditors of Essar Steel India Limited Through Authorized Signatory v. Satish Kumar Gupta (2019) SCC OnLine SC 1478 (India).

[20]. AnantMerathia&Poornima Devi, IBC Amendment Ordinance 2020: No fresh insolvency for default after lockdown declaration, https://www.newindianexpress.com/business/2020/jun/08/ibc-amendment-ordinance-2020- no-fresh-insolvency-for-default-after-lockdown-declaration-2153907.html

[21]. Srivastava, Khare & Kishore, Insolvency And Bankruptcy Amendment Ordinance: June 2020, https://www.mondaq.com/india/insolvencybankruptcy/952306/insolvency-and-bankruptcy-amendment-ordinancejune-2020

[22]. G.P. Madaan & Aditya Madaan, IBC Amendment Ordinance 2020 : Ambiguities leave more questions

than answers, https://www.livelaw.in/columns/ibc-amendment-ordinance-2020-ambiguities-leave-more-questions-thananswers-157916

[23]. Ridhima Saxena, Distressed asset acquisitions, consolidation behind large M&A transactions, https://www.livemint.com/companies/news/distressed-deals-consolidation-driving-large-m-a-deals-in-india-bain-co1569482593936.html (last visited 11 June 2020).

[24]. Bankruptcy Law - A game changer, https://indiancementreview.com/special-report/Bankruptcy-Law---A-gamechanger/111698

[25]. Binani Industries Ltd. v. Bank of Baroda (2018) SCC OnLine NCLAT 521 (India)

[26]. Thomas & Vyas, NCLAT nod to UltraTech'sBinani Cement bid sets precedent, https://www.livemint.com/Companies/3jejXNs2MOCmiailsJDtsL/NCLAT-approves-UltraTechs-Rs-7900-croreoffer-for-Binani-Ce.html>

[27]. Insolvency and Bankruptcy Board of India Notification CIRP-13011/1/2019-IBBI dated 11 November 2019

[28]. Committee of Creditors of Essar Steel India Limited Through Authorized Signatory v. Satish Kumar Gupta (2019) SCC OnLine SC 1478 (India).

[29]. FINCH, supra note 1, at 9.