From Chairperson's Desk

A Resolve for Resolution

The Bill reinforces the need for time bound insolvency resolution of corporate debtors for maximisation of value of their assets.

Prior to the enactment of the Insolvency and Bankruptcy Code, 2016 (Code), India did not have any experience of a proactive, incentive-compliant, market-led, and time-bound insolvency law. Many institutions required for implementation of a state-of-the-art insolvency regime did not exist. The Code and the reform it embodies is, in many ways, a journey into an uncharted territory. It is, therefore, important to have course corrections in the initial years, to address deficiencies arising from implementation of the Code, in sync with the emerging market realities, to further its objectives. The Insolvency and Bankruptcy Code (Amendment) Bill, 2019 (Bill), introduced in the Parliament on 24th July, 2019 is one such attempt. The key features of this Bill are as follows:

Resolution Plan: The Code defines resolution plan to mean a plan for insolvency resolution of a corporate debtor (CD) as a 'going concern'. This gives an impression that the CD must continue to exist, post-resolution. The very first resolution plan approved under the Code extinguished the CD through its amalgamation, while providing for continuity of business (R1). This approval was appealed against *inter alia* on the ground that such extinguishment of the CD was not permissible under a resolution plan. While dismissing the appeal, the NCLAT clarified that a resolution plan may provide for merger and amalgamation (R2). The Bill makes explicit what was implicit and clarifies that a resolution plan may provide for restructuring of the CD, including by way of merger, amalgamation, and demerger. This would enable the market to come up with more innovative resolution plans for value maximisation.

Commencement of CIRP: In the early days of distress, the value of a CD is typically higher than its liquidation value and the stakeholders are more likely to resolve its insolvency rather than liquidate it. The Code, therefore, enables stakeholders to make an application to initiate corporate insolvency resolution process (CIRP) of the CD on default of a threshold amount. It requires the Adjudicating Authority (AA) to ascertain the existence of the default within 14 days of receipt of the application and initiate CIRP where it is satisfied that the default has occurred. It is, however, observed that some applications are taking longer than the statutory period of 14 days for disposal (R3), while the AA may dispose of an application after 14 days of its receipt, for reasons to be recorded in writing (R4). The Courts have held this timeline to be directory (R4 & R5). To avoid delays in admission of applications, especially in case of financial debt, where the default is generally undisputed , the Bill requires the AA to record its reasons in writing, where an application for admission is not disposed of within the stipulated time.

Closure of CIRP: The Code envisages closure of a CIRP in a time bound manner as undue delay is likely to reduce the value of the CD making its revival difficult. It mandates completion of a CIRP within 180 days, with a one-time extension of up to 90 days. While holding this timeline to be mandatory (R4 & R5), the Courts have allowed the AA to exclude certain periods from the CIRP period if the facts and circumstances justify such exclusion, including time spent on litigation (R6 & 7). Consequently, many CIRPs are continuing even after expiry of 270 days frustrating time bound resolution. To address the issue, the Bill requires that CIRP shall mandatorily be completed within 330 days, including any extension of time as well as any exclusion of time on account of legal proceedings. It further provides that an ongoing CIRP, which has not been closed yet within 330 days, shall be completed within next 90 days.

Voting Impasse: The Code provides for an authorised representative (AR) to represent a class of financial creditors (FCs) and to vote in respect of each FC in the committee of creditors (CoC). However, it was found difficult to secure the requisite votes where the CoC has class(es) of FCs, who are large in number, scattered all over the country and unorganised. To address the difficulty in CIRP of a real estate company where a class of creditors alone constituted the CoC, the threshold voting share of 66% was not considered mandatory and approval by simple majority was allowed (R8). Where CoC included a class of FCs, the voting share required for approval was considered mandatory and class wise voting was not allowed (R9). To facilitate decision making, the Bill provides that an AR shall vote for the FCs he represents in accordance with the decision taken by the class with more than 50% voting share of the FCs, who have cast their votes. This principle, however, shall not apply to voting for withdrawal of applications.

Resolution Waterfall: The Code provides for a waterfall for distribution of proceeds from the sale of liquidation assets. It does not provide for a similar waterfall for distribution of realisation under a resolution plan amongst the creditors. It, however, requires that the resolution plan shall provide at least the liquidation value for operational creditors (OCs). The Code, read with Regulations, incorporates the principle of fair and equitable dealing of rights of OCs (R10). The liquidation value for OCs, however, has been insignificant in many CIRPs. The distribution of realisation under resolution plans has been a bone of contention in several CIRPs and caused prolonged litigation and undue delay in completion of the process, occasionally disturbing pre-insolvency entitlements of creditors. The Bill provides that OCs shall be paid not less than the amount payable to them in the event of liquidation of the CD or the amount payable to them if realisations under the resolution plan were distributed in accordance with the priority in the liquidation waterfall, whichever is higher. It also provides that the dissenting FCs shall be paid not less than the amount payable to them under liquidation waterfall. It clarifies that distributions made in this manner shall be fair and equitable. This provision shall apply to all ongoing CIRPs, including the ones where approved resolution plans are under litigation.

CoC's Domain: The Code segregates commercial aspects of insolvency resolution from judicial aspects. The commercial decisions of the CoC are not generally open to any judicial review by the AA (R11). What is commercial and what is not has, however, been debatable. It is not clear whether *inter* se distribution of realisation under resolution plans among creditors is a commercial matter. It was held in a matter that the CoC cannot distribute realisation amongst creditors, as the FCs constituting CoC, being claimants at par with other creditors, have a conflict of interests (R12). To set the matter at rest, the Bill makes it clear that the CoC may approve a resolution plan after considering its feasibility and viability, and the manner of distribution of realisation under the plan, keeping in view priority of the creditors and their security interests.

Binding effect: The Code provides that a resolution plan approved by the AA is binding on the CD, its members, creditors and other stakeholders. It is now settled that tax dues being operational debt (R13), Government is an OC. A resolution plan, which settles dues of the creditors, should be binding on Government. There have been instances where Government followed up for the balance dues after approval of resolution plan. This was creating uncertainty and discouraging potential resolution applicants. The Bill provides that resolution plan shall be binding on Central Government, any State Government and any local authority to whom the CD owes debt under any law.

Early Liquidation: The Code does not allow a stakeholder to initiate liquidation directly. It, however, empowers the CoC to decide to liquidate a CD at any time during the CIRP. However, there have been a few instances where the AA has insisted that a liquidation order may be passed only after failure of the CIRP to yield a resolution plan (R14). There are instances where early liquidation would maximise the value while running the entire CIRP would be an empty formality. The Bill clarifies that CoC may decide to liquidate a CD at any time during CIRP, even before preparation of the information memorandum.

A dynamic law is one which is crafted in the context of life. Given that life is ever evolving, the Code, even in a short span, has shown extraordinary dynamism in addressing many of the pressing concerns on resolving corporate insolvency for the benefit of people and the economy. The Bill, embedded on market realities, further strengthens the hands of stakeholders to take commercial decisions and enables time bound, innovative resolutions to ensure value maximisation.

References:

R1. Order dated 2nd August, 2017 of the NCLT in the matter of Synergies Dooray Automative Limited.

R2. Judgement dated 14th December, 2018 of the NCLAT in the matter of Edelweiss Asset Reconstruction Company Ltd. Vs. Synergies Dooray Automotive Ltd. & Ors.

R3. Order dated 1st July, 2019 of the NCLAT in the matter of ICICI Bank Ltd. Vs. Jaiprakash Associates Ltd.

R4. Judgement dated 1st May, 2017 of the NCLAT in the matter of JK Jute Mills Company Limited Vs. M/s. Surendra Trading Company.

R5. Judgement dated 19th September, 2017 of the Supreme Court in the matter of M/s. Surendra Trading Company Vs. M/s. Juggilal Kamlapat Jute Mills Company Limited & Ors.

R6. Judgement dated 8th May, 2018 of the NCLAT in the matter of Quinn Logistics India Pvt. Ltd. Vs. Mack Soft Tech Pvt. Ltd. and Ors.

R7. Judgement dated 4th October, 2018 of the Supreme Court of India in the matter of Arcelor Mittal India Private Limited Vs. Satish Kumar Gupta and Ors.

R8. Order dated 28th September, 2018 of the NCLT in the matter of Nikhil Mehta & Sons & Ors. Vs. M/s. AMR Infrastructure Ltd.

R9. Order dated 24th May, 2019 of the NCLT in the matter of IDBI Bank Limited Vs. Jaypee Infratech Ltd.

R10. Judgement dated 25th January, 2019 of the Supreme Court of India in the matter of Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors.

R11. Judgement dated 5th February, 2019 of the Supreme Court of India in the matter of K. Sashidhar Vs. Indian Overseas Bank & Ors.

R12. Judgement dated 4th July, 2019 of the NCLAT in the matter of Standard Chartered Bank Vs. Satish Kumar Gupta & Ors.

R13. Judgement dated 20th March, 2019 of the NCLAT in the matter of Pr. Director General of Income Tax Vs. M/s. Synergies Dooray Automotive Ltd. & Ors.

R14. Order dated 4th May, 2018 of the NCLT in the matter of Punjab National Bank Vs. Siddhi Vinayak Logistic Limited.

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Insolvency and Bankruptcy Board of India Research Initiative, 2019

IBBI, in its endeavour to promote research - legal, economic and interdisciplinary - and discourse in areas relevant for the evolving insolvency and bankruptcy regime in general, and that in India, has announced the Insolvency and Bankruptcy Board of India Research Initiative, 2019.

A Researcher may submit a research proposal under this Initiative. The research proposal shall be screened by IBBI to verify that it is properly structured and is covered under the Initiative. It will be reviewed by an external referee on the criteria: (a) Does the proposal address an important issue in insolvency and bankruptcy regime in India; and (b) Does the proposal offer a clear methodology to address the said issue. If the proposal is accepted by IBBI on advice of the referee, the researcher needs to submit the research paper within six months. The research paper shall be reviewed similarly by an external referee. IBBI shall endeavour to support the researcher with data, to the extent available with it, on request.

Researchers are invited to submit research proposals from 1st August, 2019 in accordance with the Initiative. Further details are available at www.ibbi.gov.in.