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Insolvency proceedings in slow motion

Processes like pre-packaged insolvency resolution and mediation and conciliation, which are not adjudication-intensive, may be encouraged

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A corporate insolvency resolution process is like an orchestra with broadly two sets of actors. The first set, comprising the Adjudicating Authority (AA), Insolvency and Bankruptcy Board of India, information utilities, and insolvency professionals, provides oversight and facilitation of the process. The second set, comprising the company and its management, creditors, committee of creditors, and resolution applicants, takes commercial decisions. The Insolvency and Bankruptcy Code, 2016, defines the roles of these actors and stipulates timelines for each of the tasks in the process. The USP of the Code is insolvency resolution "in a time bound manner". Any deviation from the timelines defeats the object and purpose of the Code (Supreme Court in Amtek Auto Limited, December 1, 2021).

The Code incentivises the actors in the second set to proceed in accordance with the timeline. However, despite their timely performance, the process may not get closed if the actors in the first set do not discharge their responsibilities promptly. Fast paced, revolutionary changes in technology and business models have sharply

reduced the life and life cycle of products/companies. Sky is no more the limit for the adventurous entrepreneur who seeks unicorn status overnight. In such changed business environment, suppose a resolution plan remains pending before the AA for a few years, making it unviable. The resolution applicant, however, cannot back out of the plan (Supreme Court in *Ebix Singapore Private Limited, September 13, 2021*), though its implementation may fail to rescue the company; resources infused under the plan may go down the drain, probably dragging the applicant as well into insolvency.

It is a huge risk for an applicant to implement an unviable resolution plan. Prospective applicants may refrain from submitting resolution plans to avoid such delay-induced risk. Drying up resolution plans and consequent liquidation of even viable companies could be inevitable. In Ebix Singapore v. Committee of Creditors of Educomp, while noting the concerns arising from delays in approving resolution plans, the Supreme Court advised the AA to clear pending resolution plans forthwith. "Judicial delay was one of the major reasons for the failure of the insolvency regime that was in effect prior to the IBC. We cannot let the present insolvency regime meet the same fate," the Court noted in its judgment.

The delays are not only because of capacity constraints of the AA; powerful vested interests using the judicial process to their advantage are also to blame. Other actors in this orchestra also contribute their unfair share in prolonging the intervals. For want of space, this article focuses on strengthening the AA, which can be addressed by a determined State. If the State fails to address, the State may be failing a transformational legislation, in which it has invested so much.

Lessons can be drawn from the United States, a mature bankruptcy jurisdiction. The US Bankruptcy Courts have exclusive jurisdiction on all matters [chapters 7, 9, 11, 12, 13, and 15] under the bankruptcy code, with an authorised judgeship of 350. This number is based on an assessment of workload using time study data, by the Government Accountability Office. Though a bankruptcy judge is appointed for a term of 14 years, retired judges are recalled to man temporary/transitional vacancies to avoid any disruptions. A judge conducts and disposes of bankruptcy proceedings in accordance with the Federal Rules of Bankruptcy Procedure.

Given its geographical and economic magnitudes, India needs a much more strengthened and streamlined AA. A unified, dedicated AA to deal with insolvency, liquidation, and bankruptcy processes of corporates and individuals is ideal to promote specialisation. Considering insolvency proceedings are not adversarial (Supreme Court in Swiss Ribbons, January 25, 2019), and commercial matters are

outside its domain (Supreme Court in Kalparaj Dharamshi, March 10, 2021), the AA may comprise one member. This will double the existing capacity of the AA immediately, while a longer tenure with adequate legal and research support will build expertise.

Modernising the apparatus of the AA and its procedure is a necessity. Its administration may scrutinise the filings for accuracy, completeness, and compliance to enable the AA to focus on adjudication. Information technology should manage the cases and their scheduling. The National Company Law Tribunal and Debt Recovery Tribunal act as the AA for corporate and individual insolvency proceedings, respectively. Neither the insolvency proceeding is litigation (NCLAT in Shobhanath & Ors.) nor the AA a tribunal/court. They need tailor-made rules of procedure, instead of the DRT/NCLT Rules. Such rules can avoid the trappings of a court, restrict adjournments, prevent frivolous applications, and even limit the time available to a party to present its case. Simpler processes such as a fresh start and voluntary liquidation, which do not entail major disputes, may be handled administratively, outside the AA. Processes like pre-packaged insolvency resolution and mediation and conciliation, which are not adjudication-intensive, may be encouraged. These will reduce the load on the AA. While some of the measures may take time, immediate relief will come from increasing the strength of the AA. A back of the envelope calculation, using the US parallel and methodology and considering the present caseload of the NCLT and disposal by two-member benches, indicates a requirement of 360 members, from the present level of 63. Admittedly, the US parallel is not strictly appropriate. Yet the huge gap needs to be bridged, that too, urgently.

An economic legislation with so much potential and expectations should not be allowed to slide back from its 20th-century structures to imitate the 19th-century Sick Industrial Companies Act. It should be enabled and harmonised to catch up fast with the 21st-century business-technology dynamics. Otherwise, it will be a great national loss; an economic-business loss of gigantic magnitude; as well as a loss of faith in our capabilities as a nation.

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