

Delays, even with no jurisdiction

C K G Nair and M S Sahoo

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An impediment in the current insolvency regime is judicial delays. Consider the following examples of judicial pronouncements related to corporate insolvency from the last few years:

(a) On September 5, 2018, the adjudicating authority (AA) struck down a regulation that provided for the issue of invitation of expression of interest for being ultra vires of the Insolvency and Bankruptcy Code, 2016 (IBC) (*State Bank of India vs Su-Kam Power Systems Ltd*). On November 22, 2022, the Delhi High Court set aside the said order with a finding that the jurisdiction to deal with the validity and legality of the regulations is not conferred upon the AA.

(b) On September 16, 2020, the AA found a regulation that provided for the sale of corporate debtor as a going concern beyond the competence of the Insolvency and Bankruptcy Board of India (IBBI) (*Invest Asset Securitisations & Reconstruction Pvt Ltd vs M/s Mohan Gems & Jewels Pvt Ltd*). On August 24, 2021, the Appellate Authority set aside this finding, with an observation that the legality and propriety of any regulation cannot be looked into by the AA.

(c) On June 29, 2021, the AA held the regulation that provides the procedure for withdrawal as being inconsistent with the provisions of the IBC and, therefore, cannot be used (*Sintex Plastics Technology Ltd vs Zielem Industries Pvt Ltd & Anr*). On January 3, 2023, the Appellate Authority held that the AA does not have the jurisdiction to comment on the illegality or appropriateness of any provision of the IBC or regulation framed thereunder.

The temporal dimension in these pronouncements is indicative of the ecosystem's suffering in terms of legal uncertainty, associated costs and foregone transactions in the market, besides the pain of avoidable litigation. This also reflects the tendency to step into the shoes of other authorities and of courts to determine the legality of the regulations; the committee of creditors to consider commercials of a resolution plan; and the IBBI to take disciplinary action against an insolvency professional, which take away considerable time in an otherwise time-bound insolvency processes.

It is not uncommon that it takes as long as two years to admit an application and another two years to approve a resolution plan. This has a telling effect on the IBC outcomes, which could be better if the entire time at the disposal of the AA is devoted to discharging its assigned role.

The shift to a market economy required two major changes in the governance edifice—namely, the institutional environment and the institutional arrangement. The IBC provides the institutional environment or the backbone but it needs to evolve in tune with the dynamics of the ecosystem for the institutional arrangement (regulators and tribunals) that is mandated with implementing the law to work efficiently.

While effecting these institutional changes, the law clearly demarcates the roles of three organs of the government as well the regulator and the tribunal in respect of markets. For best market outcomes, these agencies need to discharge their assigned roles and not usurp others' roles.

A regulator typically makes regulations and enforces them. The law provides for the procedure for these actions, as well as for scrutiny of these actions. The legislature may modify or rescind the regulations and the judiciary may strike them down for procedural and substantive lapses. A tribunal typically acts as the appellate authority against the orders of the regulator. It may strike down or modify an order of the regulator on procedural and substantive grounds. Such a decision of the tribunal is binding on the regulator until it is reversed on further appeal. The law does not empower a tribunal to scrutinise regulations, which is an exclusive domain of the courts. An aggrieved person may challenge the validity of the regulations by filing an appropriate petition before the high court.

The IBC provides for a regulator in the form of the IBBI, which makes regulations relating to resolution processes. It provides for an AA to adjudicate matters in relation to insolvency proceedings. It designates the National Company Law Tribunal to act as the AA for corporate insolvency proceedings. The market participants and insolvency professionals conduct processes in accordance with the IBC and the regulations and submit them to the AA for adjudication. The AA accepts that a tribunal cannot test the legality of the parent legislation, but claims that it is competent to test the legality of regulations, including the competence of the IBBI to make a regulation. Accordingly it has been striking down regulations in collateral proceedings.

Such instances are not limited to the IBC and insolvency process. Some other tribunals and appellate tribunals have also resorted to self-aggrandisement. They invariably faced serious setbacks from the Supreme Court. The Court ruled in 2010 (*PTC India Ltd vs Central Electricity Regulatory Commission*) and in 2013 (*BSNL vs Telecom Regulatory Authority of India*) that the appellate tribunal does not have the jurisdiction to entertain challenges to regulations framed by the Central Electricity Regulatory Commission and the Telecom Regulatory Authority of India, respectively. In 2017, it further ruled that even circulars issued by the Securities and Exchange Board of India are outside the appellate jurisdiction of the appellate tribunal (*National Securities Depository Ltd vs Securities and Exchange Board of India*).

The AA/tribunal may take a wrong view on matters it has to decide; it enables the parties to appeal. However, taking a view on a matter that is beyond its purview is too costly for the system. The exhortation of the Supreme Court: "... the need for judicial intervention or innovation from the NCLT and NCLAT should be kept at its bare minimum and should not disturb the foundational principles of the IBC" (*Arun Kumar Jagatramka vs Jindal Steel and Power Ltd & Anr* 2021) is very clear and loud. Despite such strong rulings, adventurism in inventing powers by the AAs and tribunals remains a matter of concern.

Nair is director, National Institute of Securities Markets. Sahoo is distinguished professor, National Law University, Delhi. The views are personal

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