REFORM PATH

IT IS POSSIBLE TO GREATLY ENHANCE IBC'S PERFORMANCE WITH NON-LEGISLATIVE FIXES WHILE LIMITING LEGISLATIVE ONES TO WHAT IS ABSOLUTELY ESSENTIAL

IBC doesn't need too many legislative fixes

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Views are personal

THE INSOLVENCY AND BANKRUPTCY CODE (IBC) has established the primacy of markets and the rule of law in insolvency resolution of firms.. The legislature has been nurturing it with great care, with six interventions in as many years. Another is in the offing, with value-added features aiming to make the IBC processes smoother and faster.

A law evolves with time. Legislative provisions are fundamental principles around which case-laws get built to provide clarity as may be required in specific contexts. Frequent legislative changes limit the natural process of institutional maturity, unsettle jurisprudence, undermine the evolution of market solutions, and provide a convenient cover-up for sub-optimal outcomes. They instil a false sense of confidence that every issue has a legislative fix. It is possible to greatly enhance IBC's performance with non-legislative fixes while limiting legislative ones to essentials.

IBC has only one objective: time-bound insolvency resolution. Barring exceptions, the experience has been anything but that. On priority, we should remove the rigidities and impediments that limit resolution and timeliness. Many of them do not require any legislative fix.

Corporate insolvency resolution process (CIRP) envisages resolution either by reviving the firm through a resolution plan or liquidation. A resolution plan resolves insolvency of a firm as a going concern. The plan should bring the firm back on its feet and improve its earnings, increasing valuation of the firm year after year post resolution. That should improve the prospect of realisation for creditors, as compared to pre-resolution, where creditors have a skin in the game; however, most resolution plans resemble a mechanism of recovery for creditors with immediate pay outs for them, often at deep haircuts. The creditors must switch from recovery to resolution mode to rescue viable firms, which, in all likelihood, would reduce haircuts.

IBC envisages the closure of unviable firms and the rescue of viable ones. As soon as the committee of creditors (CoC) is constituted, it allows a the liquidation decision for an unviable firm. For viable firms, it requires the CoC to consider feasible resolution plans from credible and capable applicants. Identifying firms' viability, specifying eligibility for resolution applicants, and considering feasibility and viability of resolution plans require considerable business dexterity. IBC entrusts these tasks to the CoC on the premise that it has such dexterity, keeps its decisions outside judicial scrutiny, and makes its decisions binding.

A commercially-wise CoC can identify most unviable firms for liquidation by the 30th day of the CIRP. However, 255 CIRPs which ended with orders for liquidation during April-December 2021 took, on average, 615 days. If a CoC finds a firm viable, it should make the best efforts to generate resolution plans. A majority of CIRPs running the full course should rescue the firms. However, 76% of CIRPs, after running the full course, ended with orders for liquidations. This gives an impression that the CoC passively waits for the CIRP to throw up a resolution plan within the CIRP period or extended period, yielding a threshold amount for its members. This results in inappropriate resolutions and elongates the CIRP period, minimising value realisation for stakeholders. This necessitates massive capacity building to elevate the CoC to a higher orbit of commercial wisdom.

IBC provides for resolution in case of default. This should encourage firms to be resolvable to have access to credit. Where the value of a firm lies in informal, off-the record arrangements or personal relationships among promoters, prospective resolution applicants may find it hard to trace and harness its value, making resolution of the firm remote. A firm should, therefore, create and maintain value, which is visible and readily transferable to resolution applicants. Having a sort of 'living will' would make resolution easier and faster. Creditors should prefer to extend credit to a 'resolvable' firm and require it to remain so. Stakeholders should notice stress and initiate resolution early for better outcomes.

While strengthening the Adjudicating Authority in keeping with the workload, the Centre should avoid litigation in relation to its claims and dues, permits and licenses, and enforcement actions

In the face of competition and innovation, it is natural for some firms to run into stress. Given the Indian economy's scale and growth, it has and will continue to have a steady flow of distressed assets to market. Platforms for distressed assets that provide full information can help resolutions at a fair value through resolution plans or the sale of liquidation assets. Two such platforms have come up to match the demand for and supply of distressed assets. Engagement with market participants, due diligence of insolvency professionals, and predictability of insolvency processes can make them vibrant.

There are issues of conduct on the part of professionals, debtors, creditors, and resolution applicants. At times, they deviate from their mandated role, engage in futile protracted litigation, renege on contracts on flimsy excuses, and occasionally act *mala fide*. They must strictly play by the rules of the game and do everything to facilitate time-bound resolution. Quick and predictable consequences must follow in case of aberration.

The Adjudicating Authority must dispose of matters in time—dispose of applications for commencement of CIRP in two weeks, pass liquidation orders promptly if no resolution plan is received within the CIRP period, approve resolution plans in about a month of receipt, issue orders for dissolution in about a month of receipt of the final report of liquidation, dispose of applications for avoidance transactions before the closure of CIRP etc, by following a non-adversarial procedure without getting into the commercials of decisions. While strengthening and enabling the Adjudicating Authority commensurate with the workload, the Centre should avoid litigation in relation to its claims and dues, permits and licenses, and enforcement actions.

Advocacy is required to promote evaluation of outcomes in terms of resolution— whether it resolved insolvency by rescuing viable firms and closing all unviable ones, and the quality, cost, and time of such resolution. The tendency to evaluate in terms of incidence of liquidations or the extent of haircuts must be eschewed to ensure that IBC remains on track. A stable law is necessary to help develop and mature the structures necessary to address these issues.