One plan, three judgments, five judges

SUBHASH CHANDRA CASE. Keep company-law adjudication with the NCLT, but create an insolvency AA designed for insolvency

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The extraordinary bench composition in the Subhash Chandra matter points to a deeper institutional problem. The National Company Law Tribunal (NCLT) began with a two-member bench comprising a Judicial Member and a Technical Member. When the two differed, the Companies Act required a third member to resolve the difference. But the third member took a view different from both members. The two-member Bench consequently held that no majority view had emerged and that no order could be passed. The matter has now reached a five-member bench.

The repayment plan was approved by creditors holding 80.81 per cent of the votes cast. Five of the 23 creditors, which the dissenting banks allege are linked to the debtor's family, together held 61.78 per cent of the voting share, and that share was the difference between approval and rejection. The objection was that these five were associates of the debtor within the meaning of the Insolvency and Bankruptcy Code and were therefore not entitled to vote. Exclude them and the creditors who voted for the plan hold under 16 per cent of the voting share, fewer than the 18 per cent who voted against.

The first view treated the disputed creditors as eligible to vote under the statutory test. On that view, the Adjudicating Authority (AA) under the Code had no legislative warrant to add to or depart from the statutory definition, and the plan had to be dealt with based on the creditors' report. The second view considered that a literal application of the definition produced an anomalous result: it could treat an individual as an associate while allowing a company controlled by that individual to escape the same treatment. It therefore considered the provision in light of the mischief it was intended to address and questioned the validity of the votes.

The third member agreed with the first view on who was entitled to vote, but departed from it on the consequence of the vote, holding the approved plan binding on all creditors, including dissenters. Thus, the same voting majority generated three different judicial positions: on the composition of the electorate, on the interpretation of the statutory test, and on the legal effect of the resulting vote.

This is what makes the multiplication of benches so striking. The underlying question was capable of being framed with considerable precision: who was entitled to vote, and what follows from a vote validly cast by those entitled to vote? Instead, because the matter sat within an institutional structure designed to resolve differences between two members, a disagreement produced a third member; the third member produced a third view; the absence of a majority then produced a five-member bench. What began as a question about the composition and consequence of a creditor vote became a question about the composition of the AA itself.

INSTITUTIONAL PROBLEM

This is an institutional problem for insolvency. The AA under the Code is not constituted to primarily resolve bilateral disputes. Its task is to supervise a collective statutory process in which creditors, within the framework prescribed by the Code, make commercial decisions. Where the electorate is validly constituted, the AA is not expected to substitute its commercial judgment for that of the creditors. The critical judicial question is therefore whether the process has complied with the statutory framework, not what outcome the AA itself considers commercially preferable.

> **Under Part III, the AA is being asked to police the integrity of the vote without a framework** governing the electorate and the manner in which its composition is to be established

That makes the question of who is entitled to vote especially important. Deference to creditor commercial wisdom cannot extend to a vote whose composition is itself unlawful. But the answer is to ensure that the electorate is properly constituted under the Code, not to create an open-ended judicial process around every creditor decision. Part II addresses this through several safeguards: related-party financial creditors are excluded from the committee of creditors; specified persons are excluded from bidding; dissenting creditors receive their statutory entitlement; and suspect transactions are examined before creditors vote. These safeguards provide the institutional foundation for deference to creditor commercial wisdom.

Part III has no comparable architecture. Yet it requires the AA to approve or reject a repayment plan on the basis of the report of the creditors' meeting. The Chandra litigation exposes the difficulty: the AA is being asked to police the integrity of the vote without an equally developed statutory framework governing the electorate and the manner in which its composition is to be established.

There is a deeper lesson here. The Code did not create an AA for itself; it designated the NCLT, an institution created under the Companies Act. The consequence is that insolvency inherits the Companies Act's institutional design, including the Judicial Member-Technical Member combination and its mechanism for resolving differences of opinion. The third member, and now the five-member bench, are products of that architecture.

REVAMP ARCHITECTURE

But the architecture is poorly suited to insolvency. Bankruptcy adjudication in jurisdictions such as the US ordinarily takes place before a single bankruptcy judge. There is no need for a second member to create a split, a third to resolve it, or a larger bench when the third member takes a different view. The design reflects the nature of the proceeding.

India should do the same for the IBC. A dedicated AA, operating under the IBC rather than the Companies Act, should ordinarily sit with a single member. One member is sufficient because the AA is not exercising the commercial wisdom of creditors; it is supervising the statutory boundaries within which that wisdom operates. Questions of law of wider significance can continue to be settled through the appellate hierarchy.

The reform should therefore be simple: let the AA be a single-member authority, but dedicate it to the entire IBC. Give it its own procedure, case-management architecture and specialised members. Keep company-law adjudication with the NCLT, but create an insolvency AA designed around the distinctive requirements of insolvency: speed, collective decision-making, commercial certainty and preservation of value.

The Chandra matter offers the perfect shorthand for the institutional problem: one plan, three judgments, five judges. An AA designed for the IBC should not need either.

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