



# Resolving Insolvency and Bankruptcy Code

*The Insolvency and Bankruptcy Code, 2016 ('the Code') has, with the proactive approach of the legislature, the judiciary, the regulator and the market participants, been successful in infusing much needed credit discipline and has significantly changed the way businesses are run in India.*

*While the Code has evolved with six amendments thereto from time to time since its enactment in May 2016, there is no denying that the sheen of this legislation is waning away with delays in insolvency resolution and resultantly, diminution in value of the underlying asset.*

*The observations and recommendations as contained in the Thirty-Second Report of Standing Committee on Finance (Seventeenth Lok Sabha) on the Implementation of Insolvency and Bankruptcy Code ('the Report') is an outcome of deliberations between the legislator and key stakeholders of the insolvency regime to identify the issues and recommend measures to improve the performance of the Code. This article is an attempt to analyze some of the recommendations of the Report.*

*\* Mr. Y. Srinivas Arun*

## **1) Quantum of hair-cuts taken by the financial creditors**

The core objective of the Code as reiterated from time to time, is timely resolution and maximization of value of a Corporate Debtor either by insolvency process or in the event of failure thereof, by liquidation. The recovery for the financial creditors, admittedly, is an incidental event.

The quantum of 'hair cut' which is a determinant of various factors – specific to the corporate debtor and the markets, in general, should not, inter alia, be the

yard stick to determine effectiveness of the Code and call for the legislators to recommend changes therein on this ground itself.

Nevertheless, it would be interesting to see how the "global standards" are moderated and adopted to suit Indian business models and norms for credit availability to ensure that the recommended benchmark for the quantum of "hair-cut" (comparable with global standards) is achieved.

## **2) Regulating the Resolution Professionals**

The Insolvency Professional is by large the most regulated – by the statutorily recognized other pillars of the Code viz. Insolvency Professional Agencies; Adjudicating Authorities and the Insolvency and Bankruptcy Code of India on one hand and informally by the ‘creditor(s) in control’ on the other.

IBBI as a regulator has oversight over the Insolvency Professionals, Insolvency Professional Agencies, Insolvency Professional Entities and Information Utilities. One cannot agree more to the fact that IBBI has done a commendable job as a pillar to the insolvency ecosystem having regard to the steps taken by it to equip the professionals by knowledge management as also to regulate the Insolvency Professionals (given the number of inspection and consequent disciplinary proceedings).

The recommendation to have yet another professional body to regulate only IPs at this juncture, lacks adequate reasoning and is bound to create ripples in the existing set up which is otherwise poised to achieve consolidation. The need of the hour is to fine tune the existing processes and conduct of market forces to strengthen its efficacy by timely resolution of stressed assets.

Excessive regulation of any one class of stakeholder is bound to result in indecisiveness in most of the cases, if not all.

### **3. Professional code of conduct for the Committee of Creditors (COC)**

The Committee of Creditors comprises of a diverse group and the individual decision making thereat is a determinant of varying terms of their exposure to the Corporate Debtor – nature of exposure; underlying security; constitution of such creditor etc. to name a few and above all, the ability to absorb losses on account of low recovery. Any attempt to balance the interests of a varied group of creditors by a misfit straight jacket approach might further complicate the decision-making exercise which is already marred with delays in most



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of the cases.

The contours of the proposed code of conduct should at best, restrict itself to mandating timely decision making by the CoC, since any mandate beyond this may unintendedly creep into the market driven/ determined decision making of the Committee of Creditors which has thus far enjoyed the supremacy under the Code, duly reinforced by judicial precedents.

### **4. Performance Review of NCLT System**

The committee recommended the following while analyzing the performance of NCLT:

- a. NCLT should accept defaulters within 30 days and transfer control to a resolution process within this time period.
- b. No post hoc bids are allowed during the resolution process.
- c. The recruitment process for NCLT Members to be suitably planned in advance.
- d. NCLT judicial members should be at least Hon'ble High Court judges so that the country can benefit from their judicial and procedural experience and wisdom.
- e. Specialized benches for sectors such as MSMEs with requisite domain expertise.

The above are all welcome steps and expected to address the concerns regarding adherence to the timelines stipulated under the Code.

### **5. More Flexible Resolution Plans**

The Committee recommended sale of various divisions/ assets/ undertaking of the Corporate Debtor to various bidders for maximization of value under the insolvency process. This might

not be a possibility in all the cases and wherever feasible, sale of various divisions/ assets to multiple bidders might result in there being nothing within the Corporate Debtor capable of being revived, thus frustrating the core objective of resolution.

With the bidders' interest restricted to the respective asset/ division/ undertaking acquired by it, who would take the onus of revival/ implementation of such a resolution plan. It is therefore better to leave this option of sale of assets to various bidders under liquidation process (which is already in place), where the objective (in view of absence of a viable resolution) is limited to realization, distribution and dissolution of the corporate debtor.

### 6. Strengthening Homebuyer Rights

The Committee observed that the homebuyers are facing practical difficulties in gathering the required number of homebuyers to initiate insolvency proceedings against the real estate owner and therefore,

recommended that once a single homebuyer decides to initiate insolvency proceedings in NCLT, the real estate owner should be obligated in the Rules/ Guidelines to provide details of other homebuyers of the project to the concerned homebuyer so that the required 10% or 100 homebuyers can be mobilised.

The moot question is how the amended rules/ guidelines of the Code would be applicable to the real estate owner prior to the commencement of insolvency proceedings thereof. The alternate could be to cast such an obligation on the real estate owner under the Real Estate (Regulation and Development) Act, 2016 by mandating the real estate owner to share information about other homebuyers of the said project to a homebuyer at the time of allotment and a further obligation to periodically update such information (till the completion of the project).

The above recommendations have still a long way to go before and if so, they find a place in the Code and only time would determine the extent to

which the intended objectives are achieved.

Lastly, the curious case of the following less fortunate issues which could have been subject of assessment and recommendations:

- ▶ Approved resolution plans – status of implementation and key challenges therein;
- ▶ Separate status of operational creditors generally and MSME's specifically within the waterfall mechanism under section 53 which needs a revisit given the miniscule (at times nil) payouts to this class of stakeholders; and
- ▶ The unique case of sector regulator/ authority (the likes of TRAI/ NHA) – balancing their interests as against those of the secured financial creditors to ensure revival is not derailed.

*\* Partner, Link Legal*

*(The views expressed herein are his personal views)*

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