Insolvency and Bankruptcy Board of India

Sub: Balancing the Interests of Stakeholders and other matters related to CIRP

I. Balancing Interests of Stakeholders

The preamble to the Insolvency and Bankruptcy Code, 2016 (Code) reads: *"An Act to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and* ***balance the interests of all the stakeholders*** *including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.*" In the matter of Prowess International Pvt. Ltd. Vs. Parker Hannifin India Pvt. Ltd., the Hon'ble NCLAT held: *"In the circumstances, instead of interfering with the impugned order, we remit the case to the Adjudicating Authority for its satisfaction* ***whether the interest of all stakeholders have been satisfied*** *and whether one or other creditor has not raised any claim like Punjab National Bank, after giving notice to individual claimant and taking into consideration of the Insolvency Resolution plan and report of the Insolvency Resolution Professional as may be prepared, the Adjudicating Authority may close the proceedings.*" The Code and the case laws emphasize the fact that the process under the Code needs to balance the interests of all stakeholders. The Code provides specific balances, such as repayment to operational creditors under section 30(2)(b) and the order of priority for distribution of proceeds from sale of liquidation assets under section 53.

2. It is useful to reproduce the definition of various stakeholders and their stakes from the Code:

a. Section 2 (6): "claim" means—

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

b. Section 2 (10): "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder;

c. Section 2 (11): "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;
d. Section 2 (30): "secured creditor" means a creditor in favour of whom security interest is created;
e. Section 5 (7): "financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to;
f. Section 5 (8): "financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes—

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g. Section 5 (10): "information memorandum" means a memorandum prepared by resolution professional under sub-section (1) of section 29;
h. Section 5 (20): "operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;
i. Section 5 (21): "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;
j. Section 30 (2): The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—

(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor;

(b) provides for the repayment of the debts of operational creditors in such manner as may be specified by the Board which shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53;

(c) provides for the management of the affairs of the corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) conforms to such other requirements as may be specified by the Board.

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k. Section 53 (1): Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely: -

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following: -

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following: —

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

3. The Code provides for two key processes, namely, (a) Corporate Insolvency Resolution Process (CIRP) and (b) Corporate Liquidation Process (CLP), in respect of corporate debtor. Select stakeholders have certain rights and privileges in these processes. Financial creditors (FC) have a right to trigger a CIRP and join the committee of creditors (CoC), which approves the resolution plan. The operational creditors (OC) have a right to trigger a CIRP, a right to join the CoC in certain circumstances, a right to attend (not vote in) the meetings of the CoC in certain circumstances, and a right to the repayment of their debts which is not less than the amount to be paid to them in the event of a liquidation of the corporate debtor.

4. Section 13 read with section 15 of the Code requires a *public announcement calling for the* ***submission of claims*****.** Section 18**(**1**)** of the Code requires the interim resolution professional (IRP) to *receive and* ***collate all the claims*** *submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15. S*ection 25 (2) (e) requires a resolution professional to maintain an **updated list of claims.** CIRP regulations require the information memorandum to include details of claims of creditors. These provisions, read with definitions cited above, envisage submission and collation of all claims - operational debt, financial debt or other debts - of FCs, OCs and other creditors.

5. While disposing of the matter of Innoventive Industries Ltd. Vs. ICICI Bank and ANR, the Hon'ble Supreme Court gleaned through the report of the Bankruptcy Law Reforms Committee to have an insight into why the Code was enacted. It excerpted: "*The limited liability company is a contract between equity and debt. As long as debt obligations are met, equity owners have complete control, and creditors have no say in how the business is run. When default takes place, control is supposed to transfer to the creditors; equity owners have no say.* It held: *"we thought it necessary to deliver a detailed judgment so that all Courts and Tribunals may take notice of a paradigm shift in the law. Entrenched managements are no longer allowed to continue in management if they cannot pay their debts*." Thus, the Code is based on the premise that a corporate has two broad categories of stakeholders, namely, creditors and equity owners, who can be in control, and when the equity owners have failed to service the debts, the creditors would have control over the corporate debtor in default to work out a resolution plan.

6. It follows from Para 4 that claims from all creditors need to be collected. It follows from Para 5 that creditors would have control of corporate debtor when the equity owners have failed to service debts. However, as stated in Para 3, only FCs and OCs have specific rights and privileges. The creditors other than FCs and OCs do not appear to have explicitly specific rights or privileges in the CIRP, though their interests have to be taken into account. The CIRP regulations earlier provided for specific forms for submission of claims by FCs and OCs. By an amendment to the regulations on 16th August, 2017, creditors other than FCs and OCs have been provided a new form for this purpose.

7. The Code segregates commercial aspects of insolvency resolution from judicial aspects and empowers stakeholders and adjudicating authority to decide matters within their domain

expeditiously. The CoC first approves the resolution plan and then it is submitted to adjudicating authority for approval. The resolution plan approved by the adjudicating authority under section 31 is ***binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders*** involved in the resolution plan.

8. Keeping in view the preamble to the Code and observations of the NCLAT, as stated in Para 1 above, and the binding nature of resolution plan under section 31, the adjudicating authority needs to satisfy itself whether the interest of all stakeholders have been balanced, while approving a resolution plan. If the adjudicating authority is not satisfied, it may reject the resolution plan and in that case, the corporate debtor goes for liquidation. Thus, even though other creditors do not have explicitly specific rights and privileges, the CoC is obliged to consider their interests in the resolution plan at least to the extent necessary for balancing the interests of stakeholders.

9. If a corporate debtor goes into liquidation, section 35 (1) (j) requires the liquidator to invite and settle claims of **creditors and claimants** and distribute proceeds in accordance with the provisions of the Code. Section 35 (2) empowers the liquidator to consult any of the **stakeholders** entitled to a distribution of proceeds under section 53. Section 38 (1) obliges the liquidator to receive or collect the **claims of creditors** within a period of thirty days from the date of the commencement of the liquidation process. Other subsections of section 38 provide the manner of submission of claims by FCs and OCs. Section 53 provides a waterfall (order of priority) for distribution of sale proceeds of liquidation assets. The CLP regulations provide separate forms for submission of claims by FCs, OCs and other stakeholders. It may be noted that even though the Code provides for claims by FCs and OCs in CLP, it does not provide any special rights or entitlement for them as FCs or OCs as such. It accords priority to debts owed to secured creditors, followed by financial debts owed to unsecured creditors, followed by dues to the Government. Then follows 'any remaining debts and dues', which cover OCs and other stakeholders.

10. Given the above scheme of the Code, the issues requiring considerations are:
a. Who is a creditor other than a FC and OC? Alternatively, how does one classify a creditor as a FC, OC or other creditor?
b. What should be the rights or privileges of the other creditors in CIRP? Alternatively, is the requirement of balancing the interests of stakeholders good enough to take care of their

interests? Or, should the law prescribe minimum protection for them and if so, what kind or how much?

c. The Code read with regulations provides certain protection for OCs. The Code, however, allows the Board to provide higher protection for them. Is there a case for providing higher protection to them in CIRP and if so, how much?

d. If other creditors are bracketed with OCs in the waterfall under CLP, should they be treated differently from OCs under CIRP?

e. It is possible that the other creditor is a customer and is entitled to protection under the applicable laws. Should the CIRP provide at least the same protection, as available to them under the applicable laws, such as RERA?

f. The resolution plan is the domain of FCs. Do they have adequate incentive to take care of interests of all stakeholders, including OCs and other creditors? Or, is the fear that the adjudicating authority may not approve a resolution and then consequently the corporate debtor goes into liquidation good enough to persuade them to work in the interests of all stakeholders.

g. If the law provides minimum protection for OCs and other creditors, it is likely to influence the choice of FCs in favour of either liquidation or resolution. How much protection for OCs and other creditors would make the FCs neutral between the resolution or liquidation, or at the least, influence their choice in favour of resolution?

h. To balance the interests of all stakeholders, including other creditors, should and can the Board use its powers under section 30(2)(f) to specify additional requirements in the resolution plan to protect the interests of other creditors? Or, should and can it use its powers under section 36 (4) (e) to exclude certain assets, which are identifiable to other creditors or customers from the liquidation estate?

11. It is observed that the Code uses the terms FC, OC, creditor, claimant, stakeholder often interchangeably. However, read with the definitions of *debt*, *financial debt* and *operational debt*, the FCs and OCs have principle based definition making it clear that there are creditors/ stakeholders/ claimants other than FCs and OCs. It would have been otherwise if operational debt were defined to mean any debt other than financial debt. Because of principle based definition, it is necessary to apply mind to arrive at if a claimant is a FC, OC or any other.

12. Take the example of a home buyer. In the matter of Prabodh Kumar Gupta vs. Jaypee Infratech Limited and others, the NCLT observed: "*we feel appropriate to observe as such that the position of present petitioner is undisputedly of stakeholders. Therefore, the IRP appointed*

by this Court in respect of the corporate debtor company is equally expected to consider and take care of the interests of the petitioner along with other creditors/ stake holders (e.g. home/ flat buyers) and to receive/ collect their respective claims in accordance with laws." Thus, a home buyer is a stakeholder and is entitled to make a claim in CIRP and the IRP must take care of his interest.

13. What kind of stakeholder is a homebuyer? A home buyer, Mr. Nikhil Mehta claimed to be a FC and filed an application under section 7 of the Code to initiate CIRP of AMR Infrastructure. As per the Memorandum of Understanding executed between the parties, Mr. Mehta was to be paid a monthly 'assured returns' till the possession of the flat. The Respondent defaulted in payment of such assured returns. The NCLT, vide order dated 23rd January, 2017, held that the applicant is not a FC and hence dismissed the application. It reiterated that the essential requirements for a debt to qualify as a 'financial debt' is that it is '*disbursed against the consideration for the time value of money'*. Financial debt is usually for a sum of money received today to be paid over a period of time in the future in a single or series of payments in future. The instant case is a pure and simple agreement of sale or purchase of a property. It observed: *"Merely because some 'assured amount' of return has been promised and it stands breached, such a transaction would not acquire the status of a 'financial debt' as the transaction does not have consideration for the time value of money, which is a substantive ingredient to be satisfied for fulfilling requirements of the expression 'Financial Debt'".*

14. Another home buyer, Col. Vinod Awasthy filed an application under section 9 of the Code to initiate CIRP of AMR Infrastructure Ltd. in respect of default in payment of assured returns till possession of a flat, as contemplated under an MoU executed between the parties. The NCLT, vide order dated 20th February, 2017, dismissed the application as the applicant is not an OC. It observed that the 'operational debt' under the Code is a claim in respect of provision of goods or services, including dues on account of employment or a debt in respect of repayment of dues arising under any law for the time being in force and payable to Central or State Government or local authority. Hence operational debt is confined to four categories like goods, services, employment and Government dues. It is not any debt other than financial debt. Hence, non-payment of aforesaid assured return is not an operational debt and the applicant is not an OC.

15. The order of the NCLT referred to in Para 13 came up on appeal before the Hon'ble NCLAT in the matter of *Nikhil Mehta and Sons Vs. AMR Infrastructure Limited.* The Hon'ble NCLAT perused the agreement between the parties and the 'annual returns' of the respondent and based on the same, observed that the amount paid by the appellants (flat buyers) fulfilled the condition of 'disbursement against the consideration of time value of money'. The corporate debtor raised the amount through transactions of sale and purchase agreement having the commercial effect of a borrowing as per section 5 (8) (f) of the Code and hence the appellants are FCs under section 5 (7) of the Code.

16. In the matter of *Rubina Chadha & Anr. Vs. AMR Infrastructure Ltd.,* the Hon'ble NCLAT observed: "*The appellants herein, whether they are 'Financial Creditor' or 'Operational Creditor' or 'Secured Creditor' or 'Unsecured Creditor', as claim to be creditors are now entitled to file their respective claims before the 'Interim Resolution Professional', as may be appointed and the advertisement as may be published in the newspaper calling of such application(s) with regard to resolution of 'Corporate Debtor'- AMR Infrastructure Ltd. In such case, their claim should be considered by the Interim Resolution Professional (IRP) and the Committee of Creditors, in accordance with the provisions of the 'I&B Code'.*

17. From the above it is clear that a home buyer is a stakeholder and is entitled to submit a claim. The IRP is required to decide whether he is a FC, OC or other creditor, based on application of mind as to the nature of contract the parties have and other attending circumstances. Further, there are many other kinds of dues arising from a variety of contracts - simple contracts for the sale of goods; short-term or long-term leases of land; and complicated contracts for franchises or for the construction and operation of major facilities, etc. It may not be possible to escape performance of the contract in certain cases. In some cases, one may escape on paying the full contract price. In some cases, continuation of the contract may be beneficial to both corporate debtor and creditors. How contracts of corporate debtor need to be dealt under CIRP would depend on the relative importance given to upholding contract law vis-a-vis the justification for interference with that. The IRP would similarly be required to determine if claimants under various contracts would be considered as FCs, OCs or other creditors depending on the terms of the contract.

18. If other creditors are treated as FCs, they would form part of CoC and have to share the fate with FCs. If they are OCs, they would share fate with them, that is, liquidation value in priority

over FCs. If they are other creditors, there is no clear provision about their entitlement. The issue acquires significance where the corporate debtor has inadequate resources to meet the claims of FCs, OCs and other creditors. Would it be fair to ask customers to take a haircut at par with either FCs or OCs or require only FCs and OCs to take haircut and customer take full value in priority? There are several views. One, the FCs and OCs generally take risks on the debtor and hence may have to take a haircut. Other creditors, most often being customers, do not take such risk and hence they may not have any haircut. Second, the assets built from money of customers or money collected from customers could be considered bankruptcy-remote and should not be included in the liquidation assets and not be available for distribution among the stakeholders under section 53. Third, wherever the value of claims of customers is significant or higher than those of FCs and OCs, such corporate debtors should not be allowed to be liquidated. That means, the obligations towards customers should be met by the corporate debtor as a going concern.

19. In the early days of the implementation of the Code, the corporate debtors having default since long would come up for resolution. The liquidation value available in most such cases for OCs could be insignificant. This may mean that OCs would stand to lose from CIRP and accordingly the business of OCs may be adversely impacted. Should the Board consider providing better protection under section 30(2)(b) for OCs?

20. While considering protection for OCs and other creditors, one should not lose sight of its impact on choice of the decision makers, namely, FCs. The FCs constitute the CoC. The CoC has two choices, namely, resolution and liquidation, subject to compliance with the Code and approval of adjudicating authority, wherever required. One would expect that it would be guided by the interests of FCs in making the choice. If the FCs stand to gain more from liquidation as compared to what they would get from resolution, the CoC may decide on day one to liquidate the corporate debtor, may not come up with a resolution within the prescribed time, or comes up with a plan which does not meet the requirements of the Code.

21. Quite often, the likely gain or loss of FCs would depend on what the OCs and other creditors are entitled to get from these processes under the law. If relatively higher protection is given to OCs and other creditors in CIRP, as compared to what they would get under CLP, the FCs may be tempted to prefer CLP to CIRP. There is a danger of providing excessive protection to OCs and other creditors in CIRP. However, if the law does not require any protection for OCs and

other creditors, it is possible that the FCs may not provide any protection. Should the law be calibrated to increase or decrease the rights or entitlement of OCs and other creditors vis-a-vis FCs depending on the public policy objective. Further, the CoC may like to give more than their entitlement to OCs and other creditors in CIRP, if it finds that the process would also benefit the FCs more or it apprehends that the adjudicating authority may not approve otherwise and consequently, the corporate debtor will be pushed to liquidation and that liquidation may not be in the interests of the FCs.

II. Representation of FCs in CoC

22. Section 21 (2) of the Code provides that the CoC shall comprise all FCs of the corporate debtor. There are a few corporate debtors who have a large number of FCs. Generally, the number of fixed deposit holders or debenture holders is quite large. The stakeholders have expressed difficulty with conducting meeting with such large number of FCs. One way could be to allow participation of these FCs through their representatives, as the workmen and employees have been allowed. It is doubtful if this can be done through regulations.

III. CIRP Period

23. The timeline is the USP of the Code. The insolvency needs to be resolved in a time bound manner as undue delay is likely to reduce the organizational capital of the firm. When the firm is not in the pink of health, prolonged uncertainty about its ownership and control may make the possibility of resolution remote, impinging on economic growth. Therefore, the Code provides a maximum time of 180 days for completion of CIRP. However, regulation 39 of CIRP Regulations provides that a resolution applicant shall endeavour to submit a resolution plan prepared in accordance with the Code and these Regulations to the resolution professional, thirty days before expiry of the maximum period permitted under section 12 for the completion of the CIRP, that is, up to 150 days from the CIRP commencement. This gives an impression that the resolution plan cannot be finalised until 150 days.

24. In the matter of *Prowess International Pvt. Ltd. Vs. Parker Hannifin India Pvt Ltd.,* the Hon'ble Appellate Authority observed: "…*in case (s) where all the creditors have been satisfied and there is no default with any other creditor, the formality of submission of resolution plan under section 30 or its approval under section 31 is required to be expedited on the basis of the plan if prepared. In such a case, the Adjudication Authority without waiting for 180 days of resolution process, may approve the resolution plan under section 31, after*

recording its satisfaction that all creditors have been paid/satisfied and any other creditor do not claim any amount in absence of default and required to close the Insolvency Resolution Process." It may be useful to clarify that it is not necessary to wait for 150 days.

25. Regulation 36 (1) of the CIRP Regulations requires that the IRP or the resolution professional shall submit an information memorandum in electronic form to each member of the committee and any potential resolution applicant. Based on this information memorandum, prospective resolution applicants are expected to submit resolution plans. It is not clear if the CoC can approve a resolution plan, without inviting resolution plan.

26. Regulation 36 (2) of the CIRP Regulations specify the contents of an information memorandum. It shall include, among others, (i) the liquidation value; and (ii) the liquidation value due to OCs. The disclosure of liquidation value is likely to impact the enterprise valuation. While the liquidation value should be disclosed to enable dissenting creditors to take an informed decision, its disclosure could be delayed till after receipt of resolution plans. The contrary view is that unless liquidation value is disclosed, the prospective resolution applicant cannot know its obligation to OCs and hence cannot arrive at enterprise value.

IV. Cost of Submission of Claims

27. The purpose of notarization is to lend authenticity to a document under the Oaths Act, 1969 which mandates a person to swear to the truth. A false declaration on oath may lead to prosecution under section 191 of the Indian Penal Code, 1860. There may be apprehension that without notarization, there may not be enough prosecutorial powers to sue persons for making false statements under this section. Accordingly, the CIRP Regulation requires submission of claims with affidavit before Notary / Oath Commissioner. However, it is understood that the requirement of a notarized affidavit for filing claims appears to be burdensome for claimants, especially if they are situated outside India. It is also understood that the cost of notarisation in the locality goes up suddenly if thousands of creditors need to submit claims. Probably, this requirement can be dispensed with particularly when section 199 of the IPC penalizes making of false statements in declarations which by law are receivable as evidence.

V. Market Mechanism

28. The Code provides a market mechanism for resolution of insolvency in a time bound manner. The corporate processes under the Code would be facilitated by efficient and liquid

markets for interim finance, resolution plans and liquidation assets. It is necessary to promote development of market mechanism to facilitate funding for these purposes.

Interim Finance

29. Section 20 of the Code mandates an IRP to make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern. For these purposes, the IRP has the authority to raise interim finance provided that no security interest is created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property. However, no prior consent of the creditor is required where the value of such property is not less than the amount equivalent to twice the amount of the debt. Section 25 of the Code mandates the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor. For these purposes, the resolution professional has authority to raise interim finances subject to the approval of the committee of creditors. Under section 5 (13) of the Code, "insolvency resolution process costs" includes the amount of any interim finance and the costs incurred in raising such finance. Resolution plan identifies specific sources of funds that is used to pay the insolvency resolution process cost.

30. During the CIRP, the IRP or resolution professional needs to run the corporate debtor as a going concern. However, it may be difficult for him if the corporate debtor is not in pink of its health or does not have adequate liquid assets to continue its operation, at least at the same level of capacity and efficiency as in the pre-CIRP period. The failure to operate it as a going concern may reduce the enterprise value of the corporate debtor and may fail to attract good valuation or viable resolution plans. This may eventually push the corporate debtors in some cases towards liquidation, which may not be consistent with the objective of the Code. Therefore, it may be useful to facilitate development of a market mechanism that makes available flow of interim finance to corporate debtors under CIRP.

31. It may be difficult to obtain interim finance for the corporate debtor undergoing CIRP despite the protection available under the Code. Possibly, the corporate debtor has already granted security interests over all its assets, and is left with no unencumbered assets for interim finance. A lender may be willing to extend interim finance, which is a short term and risky finance, if he is offered above normal interest rates, as well as legal protections. The existing

creditors may not have capacity to extend interim finance. They may not be willing to do so as they sometimes apprehend that the interim finance would be used to pay dues of vendors who are typically related parties of existing promoters.

32. The US Bankruptcy Code offers legal protections to interim financiers in the form of an escalating series of inducements. These range from granting post-petition finance the status of unsecured first-priority administrative expense, all the way to a lien that is senior or equal in priority to pre-existing liens. The UK insolvency law also allows new loans that have higher priority over existing charges.

33. Under the circumstances, the questions are: (a) Are the extant provisions in law adequate to make adequate interim finance available required for corporate debtors under CIRP; (b) How can the market for interim finance be created and deepened? (c) What safeguards are required to ensure that interim finance is not used for ever-greening or otherwise misused? and (d) What safeguards are required to protect the interests of providers of interim finance?

Resolution Plans

34. The Code envisages resolution within the firm as a going concern, as closure of the firm destroys organisational capital and renders resources idle till reallocation to alternate uses. It empowers and facilitates the stakeholders to complete the resolution process in time. It expects the best possible resolution. It therefore envisages anybody and everybody, including the promoters and the corporate debtor, to propose resolution plans and empowers the Committee of Creditors to choose the best of them. It envisages limitless possibilities of resolution – with or without the existing promoter, existing products, technology or business model and it can be a turn-around, buy-out, merger, acquisition, takeover, and what not. It is useful to facilitate development of a market mechanism that encourages submission of many competitive resolution plans.

35. A resolution plan, irrespective of its form and content, represents a value for all stakeholders of the corporate debtor. The objective of every resolution plan is to maximise the aggregate value, which is usually expressed in monetary terms, as price. The following issues could be relevant for facilitating maximisation of the price:

- No. of participants: The greater the number of resolution applicants (participants on buy side), the higher the prices are likely to be. The chances of resolution would be

maximised if a wide range of applicants, with matching financial muscle and the expertise, find it easy to participate in the market for resolution plans of every corporate debtor undergoing CIRP. The gates should be open as wide as possible to enable maximal participation by all potential resolution applicants.

- Legal certainty: A resolution applicant would offer the best price only when it gets clean rights over control and assets of the corporate debtor, so that it would be in a position to implement the resolution plan expeditiously. It would be useful to identify what the legal clarities and certainties are required and how can be they be facilitated.
- Further approvals: Implementation of resolution plan may require further approvals under other laws from stakeholders or authorities. For example, a resolution plan may have an element that requires approval of the members of the corporate debtor under the Companies Act, 2013. This approval may delay implementation. Further, the promoter members, who may be in majority, may not approve the element if the promoter is not the successful resolution applicant. Similarly, there could be certain inalienable rights attached to the corporate debtor. If resolution plan provides for takeover / merger of the corporate debtor by any other entity, it may be difficult to implement the plan if that right cannot be transferred. In fact, inability to transfer that right may limit the number of resolution applicants to one, that is, existing promoters. It would be useful to identify such approvals and facilitate either exemption or availability of those approvals.
- Pre-packs: In many jurisdictions, pre-packaged arrangements are used in the insolvency process. This puts the corporate debtor on track expeditiously, much before the timeline available for CIRP. It would be useful to develop capacity – technical, financial and execution - in the economy that can offer viable pre-packs for each kind of corporate debtor to facilitate quick closure of CIRP.
- Information asymmetry: The existing promoters are in an advantageous position as they know the true position of the corporate debtor and can come up with a realistic resolution plan in their wisdom and capability. The purpose of the information memorandum prepared by the RP is to level the playing field by making high-quality information available to all resolution applicants. It may still be difficult to provide as much details as available to the existing promoters. However, the prospective resolution applicant may need to have independent due diligence. It is necessary to ensure that the information memorandum provides comprehensive and accurate information and that

the IRP makes further details available, as may be required, to resolution applicants, without compromising confidentiality and providing scope for insider trading.

- Interested parties: Quite often big CIRP transactions have a number of advisers and consultants, some of them engaged by the resolution professional and others by financial creditors. These advisers and consultants may promote the resolution plans from interested parties and in the process, may distort efficient price discovery.
- Cost: If the process under IBC is not cost effective, the stakeholders may not like to use it, particularly when they have other options to arrive at the same resolution plan. It is necessary to streamline process and adopt cost effective procedures.
- Perception Management: In the early days of the implementation of the Code, the corporate debtors having default since long would come up for resolution. In these cases, particularly the cases transferred from BIFR, the outcome may not be very attractive as compared to book values, though attractive as compared to liquidation value. This may create a wrong perception about effectiveness of the IBC mechanism and may inhibit discovery of fair price.

Liquidation

36. Where resolution is not possible, an insolvent corporate debtor needs to exit with the least disruption and cost, and release the idle resources in an orderly manner for fresh allocation to efficient uses. The Code envisages a process of liquidation and provides for a liquidator to conduct the process. The Code empowers the liquidator to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels. The regulation enables the liquidator to (a) sell an asset on a standalone basis; or (b) sell the assets in a slump sale, a set of assets collectively, or the assets in parcels. The liquidator shall ordinarily sell the assets of the corporate debtor through an auction and may sell the assets of the corporate debtor by means of private sale in certain circumstances.

37. There is no formal market place where the assets of the corporate debtors, particularly specialised equipment or high value assets, can be bought and sold conveniently. Notwithstanding the economic principles ‘supply creates its own demand’ and ‘everything sells if price is right’, development of market for any asset needs facilitation at least in the initial days. It is necessary to facilitate development of a market mechanism which enables competing

bids to buy assets and the sale of the asset to the highest bidder, the objective being the highest realisation for the stakeholders.

38. This note has been submitted to the Advisory Committee on Corporate Insolvency for its consideration in its meeting scheduled on 13th September, 2017. The advice of the Committee, as may be received, will be submitted to the Governing Board. The decisions that may be arrived at by the Governing Board in respect of the issues discussed in Paras 1 to 27 of this note may need to be implemented through amendments to: (i) the Insolvency and Bankruptcy Board of India **(**Insolvency Resolution Process for Corporate Persons**)** Regulations, 2016, (ii) the Insolvency and Bankruptcy Board of India **(**Fast Track Insolvency Resolution Process for Corporate Persons**)** Regulations, 2017. These regulations, as may be required, will be amended.