

Balancing the Interests of Stakeholders

The Committee of Creditors needs to act in the best interest of all the stakeholders of the corporate debtor.

A corporate is an amalgam of various stakeholders. It is expected to maximise the value of its assets and consequently the interests of all its stakeholders. However, it may not always have the motivation to maximize the value of a corporate and/or promote the interests of all stakeholders simultaneously or equitably. Therefore, the law prescribes governance norms to ensure that a corporate maximizes the value of its assets, today and tomorrow, and balances the interests of all the stakeholders, and assigns the responsibility for compliance with those norms primarily to a professional, the Company Secretary, and a custodian, the Board of Directors.

A corporate (other than a financial service provider) has broadly two sources of funds, namely, equity and debt. Usually, the equity owners control and run the corporate. The Insolvency and Bankruptcy Code, 2016 (Code), however, envisages that if they fail to service the debt, the corporate in default undergoes corporate insolvency resolution process (CIRP). An Insolvency Professional (IP) carries on the business operations of the corporate as a going concern until the Committee of Creditors (CoC) draws up a resolution plan that would keep the business of the corporate going on for ever. The Code, as stated in the long title, requires a CIRP to (a) maximise value of assets of the corporate, and (b) while doing so, balance the interests of all the stakeholders, and assigns this responsibility primarily to the IP, and the CoC comprising non-related financial creditors.

The Code maximizes the value by striking a balance between resolution and liquidation. It encourages and facilitates resolution in most cases where creditors would receive at least as much as they would in liquidation. This would happen where enterprise value is 'sufficiently' higher than the liquidation value. In such cases, resolution preserves and maximizes the enterprise value as a going concern. In the remaining cases, the Code facilitates liquidation as that maximizes the value for stakeholders.

The Code enables initiation of CIRP at the earliest, even at the very first default, when enterprise value is usually higher than the liquidation value and hence the CoC has the motivation to resolve insolvency of the corporate rather than liquidate it. It mandates resolution in a time bound manner to prevent decline in enterprise value with time, reducing motivation of the CoC to opt for liquidation. It facilitates resolution; makes a cadre of professionals available to run the corporate as a going concern; prohibits suspension or termination of supply of essential services; enables raising interim finances required for running the corporate; etc.

In contrast, the Code prohibits any action to foreclose, recover or

enforce any security interest during CIRP and thereby prevents a creditor(s) from maximising his interests. It expects the creditors to recover their default amounts collectively from future earnings of the corporate rather than from sale of its assets. In the matter of Prowess International Pvt. Ltd. Vs. Parker Hannifin India Pvt. Ltd., the NCLAT reiterated: *"It is made clear that Insolvency Resolution Process is not a recovery proceeding to recover the dues of the creditors."* Further, the Code enables a financial creditor to trigger CIRP even when the corporate has defaulted to another creditor and thereby prevents any preferential treatment to a creditor over others. In the matter of Parker Hannifin India Pvt. Ltd. Vs. Prowess International Pvt. Ltd., the NCLT observed: *"The nature of insolvency petition changes to representative suit and the lis does not remain only between a creditor and the corporate debtor."*

Resolution maximizes the value of assets of the corporate and enables every stakeholder to continue with the corporate to share its fate. All of them stand to gain or lose from resolution, while stakeholders in a category receive similar treatment. In contrast, liquidation allows satisfaction of their claims one after another. If there is any surplus after satisfying the claims of one set of stakeholders fully, the claim of the next set of stakeholders is considered. On both counts, maximization of value of assets and balancing the interests, resolution triumphs over recovery as well as liquidation in most cases.

Balancing interests under CIRP assumes significance as every corporate may not have enough resources at the commencement of CIRP to satisfy the claims of all stakeholders fully, while resolution provides an opportunity to the CoC to consider and balance their interests. In fact, the Code prescribes several balances in resolution process: repayment of at least liquidation value to operational creditors; repayment of interim finance in priority; approval of resolution plan by 75% voting power; etc.

The CIRP regulations also provide for several balances. They allow a dissenting financial creditor to exit at the liquidation value and thereby protect its interests. Many creditors, however, may not like to exit at the liquidation value. And those who exit, leave the enterprise value behind. This balances the interests of financial creditors *inter-se* while tilting the balance in favour of resolution. The regulations also require a resolution plan to include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors, of the corporate debtor.

The judicial pronouncements require consideration of the interests of all stakeholders in a resolution. In the matter of Prowess International Pvt. Ltd. Vs. Parker Hannifin India Pvt. Ltd., the 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 ..."* In the matter of Prabodh Kumar Gupta Vs. Jaypee Infratech Limited and others, the NCLT observed: *"...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....”

The Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law reiterates these norms: “When a debtor is unable to pay its debts and other liabilities as they become due, most legal systems provide a legal mechanism to address the collective satisfaction of the outstanding claims from assets (whether tangible or intangible) of the debtor. A range of interests needs to be accommodated by that legal mechanism: ... Generally, the mechanism must strike a balance not only between the different interests of these stakeholders, but also between these interests and the relevant social, political and other

policy considerations that have an impact on the economic and legal goals of insolvency proceedings.”

When the fundamental aim of the Code is to facilitate recasting a corporate faltering in its debt obligations, it needs to take care of the interests of all the stakeholders with equity. The CoC, which is placed in a unique position of custodian of a corporate under CIRP, has a duty to strive for resolution, and through resolution, maximize the value of assets of the corporate and balance the interests of all the stakeholders rather than one set of stakeholders.

(Dr. M. S. Sahoo)

IBBI Updates



- Hon'ble Minister of State for Corporate Affairs and Law & Justice, Shri P. P. Chaudhary interacting with Board Members and Officers of IBBI on 21st September, 2017.

Visit of Hon'ble Minister of State for Corporate Affairs

Hon'ble Minister of State for Corporate Affairs and Law & Justice, Shri P. P. Chaudhary made a special visit to the office of the Insolvency and Bankruptcy Board of India in Mayur Bhawan, Connaught Circus, New Delhi on 21st September, 2017. He reviewed the progress made in the implementation of the Insolvency and Bankruptcy Code, 2016. He discussed various issues and the challenges being faced on the way. He emphasized the need for capacity building of various constituents of the institutional infrastructure and the financial creditors who are taking business decisions under the Code.

Strategy Meet

IBBI held its first Strategy Meet on 21st-22nd July, 2017 to draw up the Strategic Action Plan for the balance period of 2017-18 outlining the specific actions and sub-actions to achieve the desired outcomes, and evolve a broad vision for the next three years. The meet was held at the Retreat Centre of 'The Energy and Resources Institute' at Gurugram. All Members of the Governing Board and all officers of IBBI participated in the Strategy Meet. It was followed by a meeting of the Governing Board.

Disciplinary Committee

On 23rd August, 2017, IBBI reconstituted the Disciplinary Committee under section 220(1) of the Code to comprise Dr. (Ms.) Mukulita Vijayawargiya, Whole Time Member, till further orders.

Advisory Committees

Advisory Committee on Corporate Insolvency and Liquidation

IBBI reconstituted the Advisory Committee on Corporate Insolvency and Liquidation on 25th August, 2017 in pursuance of the IBBI (Advisory Committee) Regulations, 2017. Upon reconstitution, the composition of the Advisory Committee is as shown in Table 1.

Advisory Committee on Service Providers

IBBI reconstituted the Advisory Committee on Service Providers on 30th August, 2017 in pursuance of the IBBI (Advisory Committee) Regulations, 2017. Upon reconstitution, the composition of the Advisory Committee is as shown in Table 2.

Advisory Committee on Individual Insolvency and Bankruptcy

IBBI constituted the Advisory Committee on Individual Insolvency



- Board Members and Officers at the Strategy Meet held during 21st-22nd July, 2017 at the Retreat Centre of The Energy and Resources Institute, Gurugram.