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Promoting common good amidst anti-common behaviour of stakeholders: Role of Committee of Creditors

Sudhaker Shukla and Kokila Jayaram

'Treating the limited assets of the insolvent debtor as a common pool problem is often used to explain the need for and raison d'être of insolvency law. The second theory is the less well known theory of anticommons. Anticommons can arise in situations where there is a joint good or resource, to which several parties have a legal interest and the parties have it within their power to effectively block the use by others.'

Dr. R. J. de Weijs[1]

COLLECTIVE ACTION AND THE IDEA OF COMMONS

The idea of commons originated with an essay written by British economist William Forster Lloyd in 1833, where he discussed an example of the effects of overgrazing on common land in Britain followed by the Garrett Hardin's 1968 study -'Tragedy of the commons'.[2] The word and the idea became the starting point for understanding the issues; and to find solutions to degradation of natural resources and the environment. It was after this that the word 'commons' came to refer 'common pool resources' and 'common property'. The global goal of 'sustainable development' owes its genesis to this idea. It led to the study of human behaviour under socio-economic and political settings, collectively failing in fostering the objectives of common good.

People work together while they deal with the different kinds of commons. They work towards a common goal or objective to solve a common problem. Just like in sharing a resource, issues arise in working collectively. Collective action became the point of convergence. Research on breaking down the workings of collective action includes the development of theoretical explanations, experiments, real world empirical studies and the construction of dilemma's emerging from game theory. The new institutional economics approach to study collective action has been predominantly used to better understand the underlying principles and applications.

The role of law, rules and norms in dealing with problems of heterogeneous nature, was recognised and so evolved the idea of 'institutions' under the new institutional economics school of thought. The framework of commons was subsequently extended to deal with urban commons and knowledge commons. In the present-day, access to information, distribution and ownership of informational resources and technology are considered as digital commons. This emerging area further traverses financial commons and the application of commons to businesses and business ethics as well. Fournier, 2013[3] explores the idea of commons as a social process of organisation and production under the aegis of a capitalist system, to address the failure of markets and states with the increasing 'commodification' and 'enclosure' of goods and services. The study extends the idea to processes of organising 'for the commons' and 'of the commons' building on the earlier studies of organising 'in commons'. While suggesting that the relationship between commons and capitalism remains ambivalent, the study emphasises that capitalism's dependence on the commons may become even more pronounced as it falls into ever deeper ecological and economic crises.

The field of commons and collective action has extended itself to several domains of economics, sociology, behavioural sciences, and business. The predominant approach of study, however, remains the institutions approach, developed from and for the sustainable use of common pool resources as designed and developed in Ostrom (1990)[4] and built upon by several others since then.

The study of common pool resources and application of the collective action principle for successful and sustainable management of resources has been ongoing since the 1970s. The organisation of collective action in areas of irrigation water management, forest produce collection and development of forestry has been practiced in India traditionally and has been co-opted into Government schemes and programmes. Extensive research is available in these areas of policy making analysing the application and impact of collective action. Application of collective action has been attempted in domains of finance and credit since the decade of 1990. The hugely successful self-help group movement and the associated micro-finance system was built on collective action among women at the grassroots. This system has expanded financial inclusion in the country and has helped participating women/families to improve their incomes, financial position and overall well-being.

This paper is an attempt to understand the working of collective action in the insolvency domain. Consequent to this introductory section the paper is organised into three sections: (i) earlier attempts at collective action for resolution of stress; (ii) collective action in the insolvency space, which includes the application of collective action design principles to the mechanism in the Insolvency and Bankruptcy Code, 2016 (Code/IBC), and (iii) the actual working of collective action mechanism under the Code.

EARLIER ATTEMPTS FOR RESOLUTION OF STRESS AND THE USE OF COLLECTIVE ACTION

The Reserve Bank of India (RBI) has made several efforts to create a functional stress resolution process. The RBI's regulatory approach has evolved over time and has been a 'carrot and stick approach which has ensured that the borrowers have maintained their skin in the game' (FSR, 2017)[5].

The corporate debt restructuring scheme introduced in 2001, brought together lenders to deal with stress instead of acting unilaterally. It was made available for assets under consortium-based and multiple-lending arrangements. It also included common legal documentation and a voting process to ensure collective action. It provided 180 days for completion of a restructuring process. Subsequently, the Framework for Revitalising Distressed Assets in the Economy was laid down in January, 2014 with the objective of addressing coordination problems in large, consortium accounts, and envisaged constitution of the Joint Lenders' Forum (JLF). Bankers had the option to form a JLF where there is any interest/principal overdue from a debtor in cases where they desire. Setting up the JLF was mandatory in accounts with more than ₹ 100 crore in aggregate exposure. The JLF was empowered to follow a corrective action plan, which included a three-step sequential process–rectification, restructuring and recovery. A key constraint of this framework was that the dissenting creditor's exception hampered the restructuring process. Inherent agency and incentive failure issues constrained the JLFs from achieving the very objective for which they were envisioned for.

The RBI then introduced the Strategic Debt Restructuring (SDR), which permitted lenders to require change in ownership or management. However, the SDR did not bring expected results as there were a very few stakeholders to subsequently take over such companies from banks (FSR, 2017)[6]. Subsequently, the RBI introduced the Scheme for Sustainable Structuring of Stressed Assets (S4A) to deal with debts more than ₹ 500 crore that may need deep restructuring. The S4A guideline also gave the JLF option to reduce equity of promoters and change the management to a third party. All these efforts build on each other but included the fundamental principle where all the lenders worked together. The JLF is the institutional mechanism that carried forward collective action operationalised through an agreement incorporating the broad rules for functioning of the JLF. Functioning of the JLF was further strengthened in May, 2017 to reduce the anti-common behaviour potentially thwarting common and collective action. The threshold level of approval was reduced to 60 % from the earlier 75 % to enable successful collective action. Dissenting lenders can exit by complying with certain conditions within the stipulated time or adhere to the decision of the JLF, hence allowing a 'cram down'. All participating banks are bound by the decision of the JLF. The RBI has also issued advisories and instructions to smoothen the issues of coordination.

In June, 2019 the RBI introduced the Prudential Framework for Resolution of Stressed Assets (Prudential Framework) giving fresh directions to lenders on the resolution of stressed assets and withdrew all the earlier schemes. The Prudential Framework laid out certain fundamental principles like early recognition and reporting; flexibility to lenders in designing the resolution plan; disincentives for delaying resolution; clear definition of financial difficulty and the signing of inter-creditor agreement (ICA). It aimed at ensuring early resolution of stressed assets in a transparent and timebound manner, with collective action clauses. Unlike earlier schemes, flexibility was given to banks to formulate the ground rules in dealing with borrowers who have exposures with multiple banks and to implement resolution plans that are tailored to internal policies and risk appetites.[7] It ensured collective action with specific voting thresholds for various decisions including the invocation of resolution plans and put in place measures that will bring in requisite discipline for such collective action by creditors.[8] The principle of collective action is embedded in the ICA also. The ICA provides the rules for finalisation and implementation of a resolution plan and decisions are made through a voting process in the JLF. The decisions so made are binding on all lenders under the terms of the ICA.

The emphasis on collective action by lenders has increased with every new scheme the RBI introduced. The approach has been to enable cooperation amongst lenders and to strengthen collective action by addressing specific challenges like information asymmetry and reducing anti-commons behaviour.

COLLECTIVE ACTION IN BUSINESS RESTRUCTURING AND INSOLVENCY

Collective action in insolvency

The United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Insolvency (UNCITRAL, 2005)[9] defines 'Insolvency proceedings: collective proceedings, subject to court supervision, either for reorganization or liquidation'. It goes on to describe it as a 'legal mechanism to address the collective satisfaction of the outstanding claims from assets (whether tangible or intangible) of the debtor'. We find usage of terms such as 'collective negotiations', 'collective view', 'enforcement of the collective rights of creditors', 'collective interest of creditors/collective benefit of all creditors', 'collective disadvantage of all creditors', 'collective aims/collective goals', 'collective bargaining', 'collective choice', 'collective value of assets' and 'collective action'. It becomes clear that collective action is core to the spirit and fundamental to the operational aspects of an insolvency regime. The Guide refers to collectivisation in an insolvency proceeding at several levels and to different degrees as a part of the comprehensive insolvency framework it suggests.

Views of the Bankruptcy Law Reform Committee

While considering the problem of assessing viability in an insolvency resolution process the Bankruptcy Law Reform Committee (BLRC)[10] stated that though there is no fixed or unique approach to this, under ideal situations it would be the outcome of a collective decision. It recognised collective mechanism for resolving insolvency as one of the core features of most well-developed bankruptcy and insolvency resolution regimes. It proposed a law ensuring a collective process to assess viability and to establish a negotiation process for creditors. It envisaged a first phase in the resolution process for collective negotiation to rationally assess the viability of the debtor. It aimed to create a framework that incentivised collective action over individual recovery in order to realise higher economic value in the first phase. It emphasised greater flexibility to allow individual action in the subsequent phase of bankruptcy or liquidation while incentivising collective action in the second phase also. The BLRC, however, provided for individual action in the liquidation process and provided a waterfall mechanism for entitlement of stakeholders participating in the collective process. Collectivisation is also enabled through the formation of a liquidation estate which is held in trust by the Liquidator.

Collective action under the Code

From the views of the BLRC it is evident that the insolvency framework it recommended envisaged ‘collective action’ to be its central principle along with ‘resolution’ and ‘value maximisation’. The Code, in its spirit, upholds this principle though the word ‘collective’ is not included in the text of the legislation. The Code puts in place a framework knit together from debt recovery laws and collective action laws (Ravi, 2015)[11]. The principle of collective action is operationalised through the institution of the committee of creditors (CoC) towards achieving the objective of value maximisation. It holds the life of the corporate debtor (CD) in its hands along with it, the fate of employees and workmen in the company. The satisfaction of dues of the other creditors, those who are not part of the CoC also depends on the CoC. It is obvious that the CoC is required to act in a fair and transparent manner. It is the CoC *Dharma*[12] to maximise value with fairness and balance the interest of non-participating stakeholders as well.

The creditor-in-control approach of the corporate insolvency resolution process (CIRP) while strengthening the creditors’ rights puts the financial creditors (FCs) in a unique position *vis-à-vis* other stakeholders. The FCs are decision makers, the decisions, however, are ought to be made representing interest of all other stakeholders and are not on the basis of their own qualified interests. The Code hence places them in a position of ‘trust’ and hence the power vested in the CoC has to be exercised with caution, reason and fairness. The CoC is a creation of statute (*Numetal Ltd. v. Satish Kumar Gupta & Anr.)*[13]. Its powers and duties are provided in the Code making it a statutory institution and it discharges a public function. It is designed (and expected to act) as a responsible, empowered and accountable institution and shall not be guided by anti-common interests. Anti-common behaviour and such action by members of CoC works against the basic feature of maximisation of value and fostering distributive justice.

The Code clearly details the duties of CoC without ambiguity. Given the complex and dynamic nature of businesses, the role of CoC is a difficult one. However, the Code has empowered the CoC with the services of a capable and trained Resolution Professional (RP) to conduct the process under its guidance. The role of the CoC in helping keep the CD as a going concern and in assessing viability of the business is crucial to the entire insolvency process in search of liquidation remote solutions. The CoC is at a vantage position to decide on meeting the needs of the company to remain as a going concern including raising interim finance. The CoC also decides on what and how expenses are to be made and approve the process cost. It also decides the professional fees for the services of the Insolvency Professional (IP) it chooses to conduct the process. In addition, the CoC makes the decision to retain or replace the IP.

Assessing viability of the business is done by the CoC at two levels; one an *ex-post* analysis of financial position of the debtor's business when the insolvency proceeding is initiated, to understand the reasons for insolvency; and two an *ex-ante* evaluation of the feasibility and viability of a resolution plan in addressing the cause of insolvency and putting the CD back in business in a sustainable manner. Such assessment forms the basis for the identification of criteria that prospective resolution applicants (RAs) have to meet and construction of the evaluation matrix on which resolution plans are evaluated.

The CoC carries out its functions through its meetings and these meetings are a sacred ritual. Recognising the need for sanctity of these meetings the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) provides in detail, the manner in which these have to be conducted.

Ritual of the CoC meetings and voting

The meetings are convened and chaired by the RP in his/her capacity as Interim Resolution Professional (IRP) or RP, as the case may be. The notice period for a meeting is specified at five days, which the CoC can reduce to not less than 24 hours (48 hours if there are a class of creditors). The notice should contain the time, date, and venue of the meeting; and matters to be discussed in the meeting along with all relevant documents should be shared with the participants. The notice should be shared with all its members- the unrelated FCs including the authorised representative of a class of creditors; members of the suspended Board of Directors or Partners of the CD and operational creditors (OCs) or their representatives if their aggregate dues is not less than 10% of the debt. The notice can be shared electronically also. The notice should contain the details of how participants who choose to attend the meeting using electronic/audio and visual means can do so. The notice should also list the agenda items that are required to be voted upon separately. Where participants authorise other persons to attend on their behalf, information regarding the same has to be shared with the RP in advance.

Quorum of at least 33% of the voting rights are present either in person or by video conferencing or other audio and visual means is required for conduct of a meeting. If this is not achieved the meeting stands adjourned to the same time and place on the next day. The CoC has the power to modify the quorum requirement. The quorum requirement is to be maintained throughout the conduct of the meeting.

The CoC exercises its power of decision making through the process of voting. The Code provides that the thresholds for general decision making in the CoC should not be less than 51%. Instances involving significant actions that impact the working of the CD or the CIRP *inter alia* include raising of interim finance; creating security interest on assets of the CD; change in ownership or capital structure; amend constitutional documents of the CD; change management of the CD or its subsidiary; appointment of statutory auditor or internal auditor and replacement of a RP require a higher threshold of 66%. Where the CoC decides to accept the applicants' request for withdrawal which has the effect of terminating the CIRP midway requires a still higher threshold of 90%. These are statutory requirements to which the CoC is bound.

The solemnity of decisions the CoC is required to make warrants the process of voting be done in a manner that is beyond doubt and is uncompromising of the integrity of the process. The amount of detailing that the CIRP Regulations provides is a reflection of the importance of the voting process.

Instructions regarding the process and manner of voting are to be communicated as part of the notice. The RP is required to share the decision on all items at the end of the meeting along with voting decisions of the members. Minutes are to be circulated within 48 hours of the meeting. The RP has been tasked with the responsibility to provide secure system for voting through electronic systems. The CIRP Regulations go to the extent of describing the requirements of a secured system of electronic voting in detail. Where the CoC includes an authorised representative for a class of creditors, the CIRP Regulations provides for his working with the creditors and the RP. He participates and votes in the CoC meetings after taking views of the class of creditors and longer time limits to accommodate the voting of creditors in a class.

APPLYING THE DESIGN PRINCIPLES OF COLLECTIVE ACTION TO CoC

Institutions of collective action are extensively discussed in Ostrom (1990)[14] where the design principles for organisation of collective action have been laid down. These principles have since been tested empirically on several common resource regimes and extended to other domains. The eight broad principles are divided into three groups namely, (i) first three principles that provide the structure and working framework; (ii) second set of three principles that deal with efficiency and effectiveness of the collective action institution and (iii) the seventh principle of external agency. The eighth principle is not of significance in the context of Indian jurisdiction as it is relevant in a group insolvency situation where multiple CoCs are functioning for respective entities and one overarching decision-making creditor forum is also provided for. In such situations, there are two or more levels of decision making amongst creditors necessitating the coordination between levels becoming a relevant consideration. The Code presently does not include provisions for dealing with group insolvency situations and hence this principle does not require further detailing.

Before attempting to apply the principles, certain fundamental differences need to be highlighted. The principles were defined for collective action in the resource regime and focus on regimes that originate in society as a common pool resource sharing system that continues to exist for as long as the resource is in use. The insolvency regime is put in place by legislation. The entire mechanism is a creation of a statute that exists in the context of a specific company undergoing CIRP and exists for the period of the process only.

The membership of the CoC is defined by law, leaving no room for discretion. Similarly, the Code also distinguishes the role of the CoC in the resolution process. It has also empowered the CoC in terms of all significant decisions and provided the assistance of the IP to conduct the process and manage the affairs of the CD. Despite the elaborate regulations in terms of the functioning of the CoC, the Code provides some bounded flexibility for the CoC to manage its workings. The CoC as a collective action institution has the first three principles designed into it by law, providing a clear structure and working framework.

The Code goes a measure forward in providing clear disincentives for anti-commons behaviour. Creditors who have secured rights over the CDs assets are prone to move away from cooperation and take up individual recovery action. Such moves are outlawed as all financial creditors are mandated to participate in the CoC and the moratorium in place under section 14 of the Code protects against all proceedings, suits including recovery measures. Another key design aspect of the Code is that any difference in kind of charge or priority of security interests of creditors in the pre-insolvency period is negated. All secured creditors are accorded the same priority in the waterfall provided under section 53.

For facilitating successful collective action, the Code was amended in 2018 to reduce the threshold for approval of a resolution plan from 75% to 66%. This measure to prevent anti-commons behaviour, in a few instances hasn't yielded desired results. There are instances where the CD is sent to liquidation as even the 66% voting threshold is not met despite the availability of resolution plan(s). The provision of Code under section 30(2) of the Code is expected to provide a shield against any anti-commons behaviour that may defeat the fairness principle for distribution by way of protecting the rights of OCs and dissenting FCs. This protection, oftentimes, acts as an incentive for creditors to dissent and recover the minimum assured payment instead of assenting to a resolution plan on merits. In such instances, creditors are inclined to dissent where the expected realisable value of a proposed resolution plan is closer to the liquidation value of assets, thereby prioritising self-interest over common good. Similarly, in opposite situations, in cases where expected value from resolution plan(s) is much above the liquidation value, on pure consideration of avoiding in landing in the category of dissenting FC, almost all CoC members tend to vote to available resolution plans in affirmation with or without any consideration of merits of eligible plans so received.

CoC is the decision-making body in the CIRP. The Code and the courts have left a wide ambit of commercial and business decisions to the CoC. The RP chairing the meetings of the CoC serves as a means to address coordination issues in the CoC and ensure adherence to objective and timelines of the CIRP. The RP, however, has no monitoring role over the CoC and in fact, he is under the supervision of the CoC. Functioning of the CoC lacks any other mechanism of monitoring. The Code does not provide a mechanism for sanctions against the members of a CoC for any omission or commission. Voting mechanism which is the instrument of decision making is hard wired in law, along with the threshold levels of voting share required for specific decisions. There exists a lacuna in envisaging instances of conflicts within the CoC that stymies the CIRP as also the non-functioning of the CoC. The second set of three principles are apparently deficient in the design of the CoC. This has become evident in the working of the CoC as will be discussed in the next section.

The third set includes the role of external agents, the courts and the regulator – Insolvency and Bankruptcy Board of India (IBBI) in this case. The Code places the Adjudicating Authority (AA) in the role of enforcing the Code and the AA also acts as the conflict resolution mechanism. IBBI has supervisory function over IPs and powers to prosecute contraventions to the Code by stakeholders.

The following table summarises the application of principles to collective action to the insolvency process:

Collective action design Principle	Extended to institution of CoC under the Code
Clearly defined boundaries	Clearly defined role for the creditors provided by law
Congruence between appropriation and provision rules and local conditions	Congruence between the responsibilities and powers of the CoC provided in law and strengthened by the courts
Collective choice arrangements	Internal rule making freedom available with the CoC but put to limited use
Monitoring Graduated sanctions Conflict resolution mechanisms	Dependent on the courts
Role of external agents	Oversight of the courts and the regulator to a limited extend
Multiple layers of governance	Limited relevance for insolvency resolution process in individual companies. More relevant in group insolvency situations.

WORKING OF THE COLLECTIVE ACTION MECHANISM

The Code places the CoC in control of the insolvency process. The courts have subsequently sanctified the decision-making power of the CoC. CoC's decision with requisite voting share in relation to the resolution plan is sacrosanct. The approved plan as stamped by the court is binding on all stakeholders including the dissenting creditors. The choice of resolution plan has been placed under the ambit of the 'commercial wisdom' of the CoC and is unchallenged. The Hon'ble Supreme Court (SC) reiterated in its judgement in the *K. Sashidhar v. Indian Overseas Bank & Ors.*[15], case held that,

> … the commercial wisdom of CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed… the legislature has consciously not provided any ground to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable.

The courts have reiterated the primacy of the CoC's commercial wisdom on several occasions and restrained from interfering with its decision or commenting on the plan on merit. The ambit of commercial wisdom *per se* is a matter beyond the scope of this paper. The working of the CoC in fulfilling the objective of the Code and in the exercise of its commercial wisdom has been left wanting.

By end of June 2021, 394 CIRPs ended with approval of resolution plans. These processes took on average 406 days, but this is after the courts have excluded the delays that are excludable. The total time taken, without excluding any delays due to litigation is 459 days. Until end of June 2021, there were 1349 CIRPs in which liquidation was ordered and such orders were issued after 383 days since commencement of CIRP. The Code provides a time-bound process as a means to preserve and maximise value for the creditors. When creditors contribute to the delay in the CIRP, they often work against their own best interests. Being in control, the CoC bears the larger share of responsibility for delays in processes.

The AA, in several instances, pointed out the deficiencies in the decision-making process of the CoC. At times, the representatives of creditors participate in the meetings with no authorisation to make decisions. They are in mere attendance whereas the decisions come from higher hierarchy in their respective institutions. They act as glorified representatives and are not empowered with adequate decision-making powers. This calls into question not only the competence of the participating representatives[16] but also puts question mark on its role as part of the CoC from the perspective of the financial institutions approach. The indecision of the CoC leads to delay in the process militating against the CoC's sole purpose. The court called such creditors, '*speed breakers and roadblocks obviously cause obstacles to achieve the targets of speedy disposal….*'.[17]

On the other hand, there are instances where the CoC uses its power to take steps that are clearly in violation of the Code and regulations and is detrimental to the collective process of resolution. CoC seems to bear its weight on IPs conducting the CIRP while deciding on the distribution of proceeds, on inclusion of expense as part of the CIRP cost, in attempting to decide the categorisation of creditors etc. The CoC overreaching and clearly working against the need for being unbiased and fair. The National Company Law Appellate Tribunal (NCLAT)[18] observed that,

> It is surprising and interesting to note that Members recorded that "despite the Order passed by Hon'ble NCLT Allahabad the CoC is of the view that they no longer wish to continue

> M/s BVN Traders in the category of the "Financial Creditor" in the CoC and want to review their decision in this regard." "No Longer wish"? This is strange. This is the danger due to which collating is not left to CoC……. Thus CoC sat in Appeal over Impugned Order and passed resolutions to the contrary, which cannot be said to be legal.

The CoC have also in several cases acted purely in self-interest. Larger responsibilities of the CoC have been set aside in cases where the creditors approve settlement plan proposed by the promoter who is ineligible to submit a resolution plan under the Code. The AA observed that, '*This also raises doubt about the functionality of the CoC. Such an act of CoC can never be treated as an act of commercial wisdom.*'[19] Similarly the NCLAT observed that,

> This in itself raises eyebrows. This is further compounded by approval of the Restructuring Plan camouflaged as Resolution Plan emanating from an ineligible person which renders the role of the Committee of Creditors questionable. Such circumstances justify raising of inference of complicity.[20]

Similarly, the National Company Law Tribunal (NCLT) noted how the CoC has acted beyond its powers by postponing the issue of expression of interest and delaying the CIRP all the while awaiting to settle with the erstwhile promoters on the basis of an uncertain proposal. In strong words it noted, '*… thereby CoC in this case has taken Law into its hands and not complied with applicable provisions of I&B Code and CIRP.*'[21]

The courts have reprimanded the FCs for taking their role lightly and has recorded its reprimand. The AA observed that, '*..functioning of these three banks prima facie do not adhere to the preamble of IBC…., therefore functioning of these three Banks in resolving bad loans deserves to be scrutinised by the RBI which is the regulatory authority for the Banking Sector.*'[22] In another instance, the integrity of the CoC itself is questioned as despite clear conflicts of interests related party creditors are allowed to continue in the committee. The matter had to reach the Apex Court where the creditors finally accepted to act by the fundamental principle of the Code that the creditors have to be unrelated to the company and be free of any conflict of interest while acting as the CoC. The Hon'ble SC observed that, '*The objects and purposes of the Code are best served when the CIRP is driven by external creditors, so as ensure that the CoC is not sabotaged by related parties of the corporate debtor*'[23], while disallowing participation of creditors related to the CD in the CoC.

There are also several instances of omissions because the CoC does not take active interest in the process. The decision to raise interim finance is seldom made in favour of the business. It is probably as the creditors are apprehensive of putting more monies in a sinking ship. The CoC by using its power of approving expenses hinders other key activities like the conduct of a transaction order to determine the existence of avoidable transactions and marketing of the stressed assets in the market to enable value maximisation. The omission of the CoC to consider such decisions in favour of the CoC comes at a cost to the CD and value maximisation.

CONCLUSION AND WAY FORWARD

Members of the CoC are FCs and represent banks and other financial institutions. They have been exposed to collective action mechanisms under the earlier frameworks of the RBI. They are not new at this and are now more empowered by the Code and supported by the IP. However, the working of the CoC is found lacking in terms of competence and conduct, thus, adversely affecting outcomes for all stakeholders. The lack of a mechanism for monitoring the functioning of the CoC is apparent and so is the fact that despite having powers to manage its working, the CoC takes no efforts to devise internal mechanisms or timelines to run the process and reach a solution.

Similarly, the effects omissions of the CoC can be rectified only through the courts and any legal process is long drawn. There is no mechanism in the Code or the regulations for sanctioning the misdeeds and negligence of the CoC. The accountability of members in a CoC in their parent institutions is relevant only if the respective institution is made aware of the issues and done so in time. It is required that the accountability of members for their work in the CoC should be provided for in the Code and should be applicable over and above the sanction system of the parent institutions.

Another obvious gap is the absence of a mechanism to resolve any conflicts that arise in the CoC and to rein in the creditors in cases where the one with majority voting share rides rough shod over other minority creditors. The IBBI has opened a dialogue on developing a model code of conduct for the creditors / members of the CoC. It is high time that the sanctified powers of the CoC are balanced with commensurate accountability and responsibility.

As discussed in the earlier sections, the measures brought in to promote collective action need a more nuanced approach in implementation, for collective action to be successful. The present study provides the theoretical precepts for understanding how collective action happens under the Code and identifies concerns in its workings. It is, however, not exhaustive in the instances and circumstances analysed. Though it brings out clearly the deficiencies in design of the CoC as an institution of collective action, it requires to be expanded to include empirical studies and case studies to develop an in-depth understanding of issues and to present solutions.

NOTES

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