

Hits and/or misses - Discussion Paper on CIRP

The Insolvency and Bankruptcy Board of India had issued a Discussion Paper dated 27th August, 2021 soliciting comments from public on the issues related to corporate insolvency resolution process ('CIRP') and the proposed amendments.

This article deals with the issues identified and the proposed amendments to the Insolvency and Bankruptcy Code, 2016 ('the Code') intended to resolve the issues.

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Code of conduct for Committee of Creditors

It is imperative for all the stakeholders driving the CIRP process to be regulated to ensure that they all work towards value maximization and resolution of the Corporate Debtor within the stipulated timelines. Towards this end, the thirty-second report of the Parliamentary Standing Committee on finance had recommended an urgent need to have a professional code of conduct for the Committee of Creditors (CoC), which will define and circumscribe their decisions, as these have larger implications for the efficacy of the Code.

The framework of the code of conduct for the CoC has been drawn from the need for CoC as a key stakeholder to be fair and transparent in its decisions by making the participating members accountable for their actions or omissions and strengthening collective action. A member of the committee of creditors is required to abide by the code of conduct, both individually and jointly.

The CoC comprises of a set of differently positioned institutions and any decision by the CoC in relation to the CIRP of a corporate debtor is a determinant of various factors including but not limited to the exposure, underlying terms of the facilities granted; market determined circumstances and their internal guidelines/ management call on commercial aspects of the decision making. The decisions, per se, should be outside the purview of the regulations/ code of conduct.

While the draft code of conduct sets out objective standards of expectation, some of the recommendations (set out below) appear to be far-fetched:

"become fully aware of the provisions of the Code and rules/ regulations. It must have complete knowledge of the role and responsibilities assigned to it by the Code."

The issues confronting the banks/ financial institutions is not limited to resolution of stressed assets only. With the domain expertise restricted to banking and finance,

a member of the CoC would need continuous support from their internal legal teams/ external counsels on their role under the Code and to comprehend the ever-evolving insolvency regime. Understanding of their role within the insolvency process and the issues at hand as regards a particular account, would enable any CoC member take an objective decision in furtherance of the objectives of the Code.

"nominate representative with sufficient authorization to participate in meetings and make decisions during the process."

It may not always be possible for the CoC members to take decisions during the meetings. Some of the matters proposed to be discussed require more information and data for an decision making and often, such further information are made available and the developments gets deliberated during the meetings which may warrant reference by the representative (s) to their higher ups and might frustrate the requirement of decision making during the process.

Diligence and accountability in decision making process (particularly commercial calls) would always assume



significance, even if at the cost of non-adherence, if any, to the requirements of the code of conduct.

"ensure that timelines provided in the Code and Regulations are not breached."

The experience thus far indicates that the delays and non-adherence to the stipulated timelines, in most of the cases is not necessarily attributable to any one stakeholder. Fastening responsibility of adherence to timelines to a select few is unfair since each leg of the process has a role cut out for a class of stakeholder.

Apart from regulating the professionals, the CoC and streamlining the processes, the present dispensation should endeavour to strengthen the bench strength at the adjudicating authority level and restrict judicial interference and adjournments/

deferments to reduce pendency and consequent delays. The process of strengthening the NCLT's with more members has already commenced and the results would take some time for all to witness.

"endeavor to protect the CD as a running business and its assets and take necessary steps to protect the value of the assets of the CD."

An Interim Resolution Professional under sub-section (1) of section 20 of the Code and thereafter, the Resolution Professional by virtue of sub-section (2) of section 23 of the Code is vested with the responsibility of running the business/ maintaining going concern status of the CD, preserving and protecting the value of the assets of the CD.

The Resolution Professional is required to refer certain matters within this domain of his/ her responsibility to the CoC and be guided by the decisions of the CoC, thus effectively providing for the creditor in control structure.

The CoC as an institution may not necessarily have the expertise and the wherewithal to fulfil this ongoing obligation of protecting the CD as a running business. The proposed inclusion in the code of conduct for CoC needs to be revisited to ensure the changes do not further complicate the existing structure.

"extend interim finance to the extent required for completion of the process."

Extending interim finance to a CD is purely a commercial call of a member of the CoC and any regulatory prescription encroaching into an otherwise business call is bound to face legal impediments.

Apart from the above specifics, the interesting part would be to see how the proposed code of conduct for CoC will be enforced and the consequences of non-adherence thereto. In case of pecuniary liability, who pays it – the CoC as an institution or the erring members thereof. On the other side, administrative side of enforcement by issue of show cause notices and consequent curbs, if any, may have far reaching impact on the willingness to take time-bound decisions by members of CoC/ their representatives.

Request for resolution plans and use of Swiss challenge in CIRP

This part deals with the issue related to request for revision of request for resolution plan (RFRP) multiple times, and submission of unsolicited plans causing delay and uncertainty and the idea of using swiss challenge in the CIRP for value maximisation.

The proposed amendment seeks to provide a limit on the number of revisions to the RFRP to reduce the delay in resolution process caused by repeated revisions and consequent opportunity to the Resolution Applicant for the revised Resolution

Plan apart from the proposal to explore swiss challenge method to achieve value maximization.

The proposed amendment to restrict the number of revisions to RFRP is a welcome step. Also, since significant and time-consuming processes of diligence would have been already completed by serious resolution applicant(s), stipulating progressively decreasing timelines for each revision in resolution plan and subsequent negotiations might help reduce the process delays further.

Request for resolution plans and use of Swiss challenge in CIRP

The discussion paper discusses the issue of treatment of live bank guarantees and letter of credit as claims in a corporate insolvency resolution process (CIRP). The proposed amendment seeks to put at rest, the issues around the eligibility of live bank guarantee(s) and letter(s) of credit as admissible claims during CIRP.

While the treatment meted out to the contingent liabilities (as illustrated in the discussion paper) is well established with the judicial precedents on the subject, what is equally critical but has not found a place in the discussion paper is the manner in which such a contingent liability should be dealt with in a resolution plan?

Can a Resolution Applicant propose nil or part pay out against any liability that arises post CIRP upon devolvement of such live letter of credit (s) and/ or invocation of the bank guarantee (s). Though, a subject matter of commercial wisdom of the CoC, the treatment of contingent liabilities in a resolution plan builds a strong case for inclusion in the mandatory contents thereof as set out in the CIRP regulations.

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