

THE INSOLVENCY & BANKRUPTCY CODE, 2016

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Two years ago, India was accorded number 130 in the World Bank's Ease of Doing Business 2017 rankings¹, with the average time for resolution standing at 4.3 years. Low recovery rates had led to a dip in the number of high-risk high-return ventures, as investment returns could not be guaranteed to investors' satisfaction. However, with the onset of the Insolvency and Bankruptcy Code, 2016 ("IBC"), there has been a sea change in the restructuring space, leading to an increasingly diligent business environment and a quicker turnaround on account of resolution plans being completed within a year of the commencement of the IBC in several cases. India displayed rapid progress as per the Ease of Doing Business 2018 rankings,² as it rose thirty ranks, and has proceeded to further improve by twenty three ranks and jumped to number 77 in the recently published Ease of Doing Business 2019 Rankings.³

LEGAL CHANGES

Committee of Creditors

The IBC has undergone a substantial amount of changes from its inception, evolving gradually based on the needs of all the stakeholders involved. The commercial wisdom of the committee of creditors ("CoC") comprising of financial creditors has been given utmost weightage, which can be deduced in a number of cases. The voting threshold for major decisions to be undertaken by the CoC has been reduced from 75 % to 66 %, whilst routine decisions can now be taken with the approval of 51 % of the CoC, which was 75 % prior to the latest amendment. Further, withdrawal of an application is now only permitted if 90 % of the CoC approve the same.

Section 29A of the IBC

Section 29A of the IBC, which pertains to the eligibility criteria of resolution applicants, has inspired intense debate from its inception. The section has now been substantially amended in order to widen the scope of ineligible resolution applicants, so as to protect the interests of the company as a going concern and ensuring maximisation of the value of

the assets. The most notable case in this regard has been the ongoing resolution process of Essar Steel Limited, wherein ArcelorMittal and Numetal Limited have been engaged in a competitive bid process in order to acquire Essar Steel Limited. This case has been instrumental in setting out the eligibility criteria applicable to resolution applicants under the IBC.

Subsequent amendments have resulted in increasingly stringent conditions being applied to defaulting promoters and their connected parties in order to prevent them from finding loopholes to regain their companies after leading them to financial distress. The exception to this rule is the MSME industry, whose promoters are currently exempt from the restrictions applicable u/s. 29A of the IBC.

Cross-Border Insolvency Laws

With a number of creditors and assets located across the globe, regulating the recovery and involvement of foreign assets and creditors has gained an increasing urgency in order to address the interests of all stakeholders. This has led to lawmakers initiating the process of aligning domestic cross-border insolvency laws with existing international laws under UNCITRAL. While the draft chapter, which is currently undergoing an extensive review, deals with the laws pertaining to corporate debtors only, eventually the focus will also include personal cross-border insolvency laws.

Impact of IBC across all spheres of law

In order to facilitate the smooth implementation of the IBC, a number of significant changes have been introduced across several spheres of law, in the form of amendments to the Income Tax Act, 1961, the Companies Act, 2013, multiple Securities and Exchange Board of India ("SEBI") regulations and the Real Estate Regulations and Developments Act, 2016 ("RERA").

a) Relaxations under Income Tax Act

With regard to income tax, there have been two relevant changes in the form of amendments to the Finance Act, 2018. Section 79 of the Finance Act, 2018 has been amended to provide that business losses shall not lapse in respect of a company, whose resolution plan has already been approved by the National Company Law Tribunal ("NCLT"). However, the amendment has a caveat in the form of an opportunity to appeal to higher authorities.

1 *Ease of Doing Business 2017, World Bank* <http://www.doingbusiness.org/en/rankings>

2 <https://www.worldbank.org/en/news/press-release/2017/10/31/india-jumps-doing-business-rankings-with-sustained-reform-focus>

3 *Ease of Doing Business 2019, World Bank* <http://www.doingbusiness.org/en/rankings>

Moreover, section 115JB has been amended to provide that in the case of companies whose application is admitted by the NCLT under the IBC, the amount of total loss brought forward (which is inclusive of unabsorbed depreciation) would be allowed to be reduced from the book profit for the purpose of levying minimum alternate tax.

Additionally, a reference could also be made to the Monnet Ispat & Energy Limited judgment, which has rendered further clarity on the priority of the ranking provided to the Income Tax Department under the waterfall mechanism provided u/s. 53 of the IBC.

b) Exemptions under Companies Act, 2013

Under the Companies Act, 2013, if a resolution plan has already been approved by the NCLT, then the consent of shareholders of the corporate debtor (which is generally required for significant corporate actions such as reduction of capital, disposal of material assets and preferential allotment of shares), is not necessary for the resolution plan to take effect.

c) SEBI (Delisting of Equity Shares) Regulations, 2009

Delisting of securities from stock exchanges generally requires compliance with stringent pricing norms and appropriate shareholder consent. However, if delisting is proposed under a resolution plan under the IBC, then exemptions from the elaborate delisting requirements are available, provided, the resolution plan under the IBC grants an exit option to the existing public shareholders at a price not less than their liquidation value and the price provided to promoters and/or other shareholders. Further, an application for listing of shares delisted pursuant to a resolution plan under the IBC can now be made without adhering to the cooling-off period prescribed under the delisting regulations.

d) Exemptions under SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

Shareholder consent is no longer required if certain actions are undertaken pursuant to an approved resolution plan under the IBC. These include undertaking material related party transactions, divesting control in a material subsidiary and selling more than 20 % of the assets of a material subsidiary. Relaxations have also been provided for undertaking the actions listed herewith pursuant to an approved resolution plan under the IBC such as change of promoter, a company procuring professional management, and a reclassification of promoter(s) or promoter group as public shareholder.

e) Exemptions under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

Companies which have an approved plan under the

IBC have also been exempted from the requirement of making an open offer. Further, successful acquirers under a resolution plan are now permitted to hold more than 75 % of the shares in a listed company, which would have otherwise breached the requirement for a minimum public shareholding of 25 %.

f) Exemptions under SEBI (Issue of Capital and Disclosure Requirement) Regulations, 2011

Preferential allotment of shares can be made by companies if the preferential allotment takes place as the result of a resolution plan under the IBC. Further exemptions include relaxation from the multiple pricing requirements and requirement of shareholder consents for allotment of equity shares and convertible securities.

g) Real Estate Regulations and Developments Act, 2016

With the *Jaiprakash Associates Limited – Jaypee Infratech Limited* case gaining an exceptional amount of traction, it became essential to address the concerns of home buyers as significant financial creditors. With the ordinance on 6th June, 2018 and subsequently the amendment of 17th August, 2018 coming into effect, allottees under the Real Estate Regulations and Developments Act, 2016 are now included as financial creditor(s) in keeping with the amendment to the definition of financial debt.

The amendment and the outcome of the *Jaypee Infratech Limited* matter has shown the efforts made by lawmakers to secure and protect the interests of homebuyers who did not have any representation in the CoC despite their substantial investment.

STRUCTURAL AND CULTURAL CHANGES

The architects of the IBC drafted the law with an endeavour to ensure that the company remains a going concern. The IBC has provided the economy a medium to ensure commercial stability. The IBC has now gained traction as a means of ensuring the maximisation of the value of assets in a time-bound manner and preventing the obliteration of the value of the assets of the company on account of corporate distress.

In the course of the last two years, a system comprising of experienced professionals and organisations such as Insolvency Professionals (“IP”), Information Utility (“IU”), Insolvency Professional Entities (“IPE”), Insolvency and Bankruptcy Board of India (“IBBI”) in collation with the adjudicatory authorities has managed to create an efficient ecosystem. The combined efforts and experience of the aforementioned parties in dealing with stressed assets can be credited for the significant turnaround the market has undergone.

The IBBI has taken up the mantle of regulating the aforementioned parties with multiple regulations, guidelines and circulars, in order to help these parties to smoothly navigate through these problematic situations. The adjudicatory authorities have provided further clarity with regard to the laws applicable and have adopted alternate approaches occasionally to ensure that the interests of all stakeholders are not compromised.

The culture of creditors consistently having to pursue debtors to ensure recovery has gradually evolved into a culture wherein the promoters are viewing debt repayment as an obligation, and not as an option, leading to speedier resolution and recovery for the creditors. With promoters being held accountable under the IBC, promoters have begun to take proactive steps to ensure that defaults do not occur or are engaged in offering out-of-court settlements for existing debts to their creditors.

The change has percolated beyond debtors and creditors, and has led to a significant and expedited improvement in the overall economic culture prevalent in the market, with corporates opting to take quicker action with regard to deployment of resources and smoother functioning in terms of timely payments in order to reduce any possibilities of being involved in insolvency proceedings.

RBI Circular dated 12th February, 2018 on Stressed Assets

Reporting requirements have become increasingly stringent especially on account of the RBI 12th February, 2018 circular ("Circular"), which in addition to the multiple amendments to the law, has led to significant improvements in the prevalent debt culture, with lenders exercising more caution by using feasibility and viability as the determinants for future projects.

The IBC has increasingly become more inclusive and creditor-friendly by providing for mitigation of risk not only for financial creditors but also for operational creditors. With regard to financial creditors, home buyers are also considered as a class of financial creditors, a step which has provided substantial relief to the common population in addition to corporate organisations.

The circular has also led to an improvement in ensuring post-credit disbursement discipline, in addition to future lenders increasing their diligence and prudence while determining the viability of a project which they intend to fund.

It must be noted, however, that the ensuing litigation filed by a number of power companies has led to a halt to the ongoing process of bringing to task a number of defaulting companies as banks refrain from reporting them as non-performing assets.

Project Sashakt

In addition to the Circular, Project Sashakt has also been largely responsible for introducing a structural change in the business environment by increasing transparency and investor confidence with regard to the financials of a bank. Early resolution is key to the preservation of organisational capital and to ensuring a quicker turnaround with regard to the resolution process.

The committee headed by Mr. Sunil Mehta suggested a five-pronged approach, which would result in bad loans amounting to up to Rs. 50 crore being managed at the bank level, within a stipulated deadline of 90 days, whilst bad loans between Rs. 50 crore to Rs. 500 crore would require banks to enter into an intercreditor agreement, which would authorise the elected lead bank to implement a resolution plan in 180 days or make reference of the asset to the NCLT. As a part of Project Sashakt, the government is currently looking into instituting an Asset Reconstruction Company ("ARC") and an Asset Management Company ("AMC") and is on the lookout for possible investors who would be willing to fund the AMC.

A collation of the ideas and implementation respectively for Project Sashakt and the Circular is expected to bring in substantial improvement with regard to debt recovery in compliance with expedited timelines.

CASES WHICH HAVE MADE AN IMPACT

a) Bhushan Steel Limited

Bhushan Steel Limited (the company has been renamed as Tata Steel BSL Limited) and Bhushan Power and Steel Limited have been a significant part of the resolution process under the IBC. Bhushan Steel Limited was one of the first major companies to achieve resolution and was acquired by Tata Steel Limited. Bhushan Power and Steel Limited is currently undergoing the resolution process, with its three bidders – Tata Steel Limited, JSW Steel Limited and Liberty House. Bhushan Power and Steel Limited has undergone two rounds of bidding. In the first round of bidding, Liberty House submitted its bid after the proposed deadline, and filed before NCLT an application seeking consideration of its bid. The NCLT subsequently directed the CoC to consider Liberty House's bid, resulting in Tata Steel Limited appealing before the NCLAT to discount Liberty House's bid from being considered on account of non-adherence to the procedure.

The NCLAT, however, asked the CoC to reconsider Liberty House's bid. With a number of appeals filed by both Liberty House and Tata Steel Limited based on several issues, eventually the NCLAT asked lenders to consider the three bids submitted by Tata Steel Limited,

Liberty House and JSW Steel Limited in a second round of bidding. Reports state that currently JSW Steel Limited is the H1 bidder for Bhushan Power and Steel Limited after Tata Steel Limited refrained from revising its bid.

b) Essar Steel Limited

The ongoing resolution process of Essar Steel Limited has significantly led to the developments which have taken place in section 29A which sets out the ineligibility criteria of resolution applicants. ArcelorMittal and Numetal Limited have been engaged in a competitive bidding process for more than a year in order to procure one of the largest steel companies in India.

This led to the eligibility of both the companies to be re-examined in light of the amendment, with the Resolution Professional declaring both the prospective resolution applicants as ineligible. A number of applications were filed by both the companies pertaining to the ineligibility of the other company on account of their association with non-performing assets. The orders passed by the courts in this matter have dealt in detail with issues concerning management and control in addition to lifting of the corporate and several other aspects of section 29A. Subsequently, both companies were asked to clear their non-performing assets (“NPA”) within two weeks from the order passed by the Supreme Court on 4th October, 2018.

ArcelorMittal has offered to pay Rs. 42,000 crore for Essar Steel Limited. ArcelorMittal has already made a payment of Rs. 7,469 crore in order to clear the outstanding liabilities on account of NPAs, Uttam Galva Steels Limited and KSS Petron Limited in keeping with the order of the Supreme Court. However, in a last attempt to save their flagship company, the promoters of Essar have offered to pay back all dues, amounting to Rs. 54,000 crores. Even though ArcelorMittal has been declared as the H1 bidder, a number of creditors have challenged the decision before the adjudicatory authorities claiming that the plan does not address the interest of all stakeholders sufficiently. The outcome of this case will play a significant role in determining the future of a number of NPAs.

c) Jaypee Infratech Limited – Jaiprakash Associates Limited

The case concerning Jaypee Infratech Limited – Jaiprakash Associates Limited has been instrumental in helping home buyers to secure their rights as financial creditors in the CoC, and participate in the resolution process.

The courts have gone out of their way to ensure that the rights of home-buyers are not compromised as far as

possible and have accorded home-buyers the status of financial creditors in order to render them a voice with regard to major decisions to be undertaken by the CoC.

Jaypee Infratech Limited provided an upstream guarantee to its parent company, Jaiprakash Associates Limited. However, subsequently both companies have become NPAs. During the first attempt for resolution, the CoC for Jaypee Infratech Limited had decided to liquidate the asset on account of unviable proposals. However, the liquidation proceedings were stayed by the Supreme Court, whilst NCLT asked Jaiprakash Associates Limited to return 760 acres of land to Jaypee Infratech Limited on account of the transaction being deemed undervalued and fraudulent. Through subsequent court hearings, the Supreme Court asked Jaiprakash Associates Limited to pay Rs. 1,000 crore, which was subsequently reduced to Rs. 650 crore. Since liquidation would not serve the purpose of recovering the dues of the creditors, the Supreme Court opted to restart the resolution process and included home buyers as a class of financial creditors in the CoC. The insolvency process for Jaypee Infratech Limited has commenced, with the home-buyers voicing their opinions with regard to the selection of the resolution professional already.

CONCLUSION

In a short span of two years, the IBC has managed to stabilise the economy to a considerable extent. By establishing an efficient ecosystem of dedicated organisations and individuals with experience in the field of insolvency and bankruptcy, the market has witnessed a turnaround with regard to NPAs in multiple sectors. Credit must be given to the lawmakers and adjudicatory authorities for the efforts they have made to address the best interests of all stakeholders to the best of their capacities.

It must also be duly noted that with defaulters being held accountable for their financial irresponsibility under the IBC, the managements responsible for companies, such as promoters, are proactively engaged in ensuring that their companies do not convert into NPAs.

In cases where companies have defaulted, attempts are being made to convince their creditors to accept out-of-court settlements. Alternatively, by means of IBC, distressed asset fund investors are being provided with multiple opportunities for investment and to ensure the turnaround of NPAs. This is gradually reflecting positively on the fiscal health of the economy. In the course of another year, the impact that IBC has made as a path-breaking law will be clearly evident as a number of approved resolution plans will be implemented to a substantial extent. ■