[2019] 2 IBJ (Art.) 23

Voting and E-Voting – Interesting Evolution under Insolvency and Bankruptcy Code, 2016

This article is intended to understand voting and e-voting in the Committee of Creditors and to know how these have been evolved under the Insolvency and Bankruptcy code, 2016 and the Regulations made thereunder.

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Preamble

As all of us are now aware that the **Insolvency & Bankruptcy Code, 2016** (**IBC**) is the self-containing bankruptcy law of India which seeks to consolidate the existing framework by creating a single law for insolvency and bankruptcy for both corporate persons and individuals. IBC has been making waves in the last two years of its implementation. Notwithstanding several challenges faced in the implementation process, the authorities concerned – be they at Ministry of Corporate Affairs (MCA) or Insolvency and Bankruptcy Board of India (IBBI) or the judiciary – have risen up to the challenges, have looked at the problems straight at their face, have never hesitated to amend the law or the regulations as the situation demanded. Amendments seemed to be never ending but the end result was amazing to see. In short, the new law has broken quite a few shackles and made the bankers a happy lot if the recent decisions of National Company Law Tribunals were to be taken into account.

Context

The Committee of Creditors ('CoC') is the most important cog in the wheel of IBC. The CoC, consisting of financial creditors in general, call the shots in relation to a company undergoing corporate insolvency resolution process (CIRP). The CoC takes several decisions during the CIRP period.

The IBC provided for initially 75% of the voting share of the CoC as decisive for the purpose of deciding whether a resolution plan should be approved or not. This was more or less on the lines of the Corporate Debt Restructuring (CDR) mechanism wherein the 75% of the bankers approve a restructuring plan, then, it would be binding upon the remaining 25% of the lenders as well. (75% in value and 60% in number was also the requisite majority to approve a restructuring plan under CDR mechanism.)

A little later, with effect from 6th June 2018, the threshold voting share was reduced to 66%, bowing to the response from various quarters that a two-third majority should also be having a say in matters of importance rather than the conventional three-fourth majority.

In certain other matters of IBC, the voting threshold was specified as 51%, 66%, 90%, etc. For quick reference, these instances are given below:

Event requiring approval by the Committee of Creditors	Re-quired voting share	Remarks /relevant Section
Appointment of RP replacing an existing IRP or replacing an existing RP with another RP	66%	Sec.22
One-time extension for CIRP period beyond 180 days	66%	Sec.12
Approval or rejection of a resolution plan	66%	Sec.30(4)
Transactions listed under Sec.28 of IBC	66%	Sec.28
Withdrawal of application under Sec.12A	90%	Reg. 30A(4)
Sale of the assets by RP outside the ordinary course of business	66%	Reg.29(2)
Aany other transaction for which specific voting share is not provided under IBC	51%	Sec.21 (8)

It may be relevant to state here that the voting by the CoC members can happen with their physical presence or by means of electronic voting (e-voting).

E-Voting

Electronic voting (also known as **e-voting**) is voting that uses electronic means to either aid or take care of casting and counting votes, with a view to facilitate larger participation by the stakeholders without their being physically present at the venue of the meeting.

E-Voting under Companies Act, 2013

Companies Act, 2013 has introduced a new provision of voting through electronic means under Section 108 read with Rule 20 of Companies (Management and Administration) Rules, 2014. As per the provisions of that Rules, every listed company or a company having not less than one thousand shareholders, shall provide to its members facility to exercise their right to vote at general meetings by electronic means. A shareholder may exercise his right to vote at any general meeting by electronic means and company may pass any resolution by electronic voting system in accordance with the provisions of this rule.

It is laudable that the legislators of IBC have also thought about e-voting for the CoC members in view of the cruciality of the decisions taken by them for the revival or liquidation of the corporate debtor.

In the above context, it is very important as to how the CoC members take their decisions in the CoC meetings. Whether the CoC members present should take decisions in the meeting itself or they can go back, relax and then register their decision by means of e-voting is a question debated in many forums. The directions given by Tribunals / Courts in this regard also merit our attention inasmuch as the IBC itself is a time-bound legalised process of resolution and the CoC members cannot take their own sweet time by sending officers just to attend the meeting and take decisions later on by higher officials.

E-voting under IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and Insolvency and Bankruptcy Code, 2016

The provisions in relation to e-voting are governed by regulation 25 and regulation 26 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

It may be noteworthy that the provision relating to e-voting has undergone several changes. It will be interesting to see how the provisions have been evolved over a short period.

Regulation 25

Voting by the Committee of Creditors.

Regulation 25 as on 28-05-2016	As per Amendment made on 04-07-2018	As per Amendment made on 05-10-2018
(1) The actions listed in section 28(1) shall be considered in meetings of the committee.	No change	No change
(2) Any action other than those listed in section 28(1) requiring approval of the committee may be considered in meetings of the committee.	No change	No change
(3) Where all members are present in a meeting, the resolution professional shall take a vote of the members of the committee on any item listed for voting after discussion on the same.	(1) The resolution professional shall take a vote of the members of the committee present in the meeting, on any item listed for voting after discussion on the same.	No change
(2) At the conclusion of a vote at the meeting, the resolution professional shall announce the decision taken on items along with the names of the members of the committee who voted for or against the decision, or abstained from voting	No change	No change
(3) If all members are not present at a meeting, a vote shall not be taken at such meeting and the resolution professional shall- (a) circulate the minutes of the meeting by electronic means to all members of the committee within forty eight hours of the conclusion of the meeting; and (b) seek a vote on the matters listed for voting in the meeting, by electronic voting system where the voting shall be kept open for twenty four hours from the circulation of the minutes.	(5) The resolution professional shall- (a) circulate the minutes of the meeting by electronic means to all members of the committee within forty-eight hours of the conclusion of the meeting; and (b) seek a vote of the members who did not vote at the meeting on the matters listed for voting, by electronic voting system in accordance with regulation 26 where the voting shall be kept open for twenty-four hours from the circulation of the minutes.	(5) The resolution professional shall- (a) circulate the minutes of the meeting by electronic means to all members of the committee and the authorized representative, if any, within forty-eight hours of the conclusion of the meeting; and (b) seek a vote of the members who did not vote at the meeting on the matters listed for voting, by electronic voting system in accordance with regulation 26 where the voting shall be kept open for at least twenty-four hours from the circulation of the minutes.

		(6) The authorized representative shall circulate the minutes of the meeting received under sub-regulation (5) to creditors in a class and announce the voting window at least twenty four hours before the window opens for voting instructions and keep the voting window open for at least twelve hours.

It would be very relevant to see the amendment on 4th July, 2018 in regulation 25(5)*(b)* wherein it is stated that the RP shall seek a vote, of the members who **"did not vote"** at the meeting on the matters listed for voting, by electronic voting system in accordance with Reg.26.

Prior to this amendment, the regulation 25(5), if all the members are not present at a meeting, a vote shall not be taken at such meeting and the RP shall circulate the minutes of the meeting within 48 hours and seek a vote on the matters listed for voting in the meeting, by electronic voting system.

From the reading of the above provisions, it appears that the IBBI has applied its mind to a situation where for instance only one or two members of the CoC were not present at the meeting but the remaining members present constituted more than 66 per cent. In such a case, going for e-voting did not make any sense. The author himself has faced similar situations in many CoC meetings when a prudent decision was recorded in the Minutes that the CoC members present constituted so much per centage and therefore, there is no requirement to go for e-voting as going for such e-voting entailed only additional cost and did not make any effect on the decision already taken at the CoC meeting by the members present. The author went to the extent of highlighting this situation to the authorities in one of the seminars that the CoC members present felt belittled when their decision did not matter and the RP would proceed to go for e-voting requiring the time and efforts of all the CoC members once again to register their vote in the e-voting process. Probably, the e-voting companies went merry with such decisions!!!

However, even after the said amendment in regulation 25(5), there is still a situation happening wherein the members present in the CoC meeting but not taking part in the voting process will still have an opportunity to vote by e-voting process thanks to the words "**who did not vote at the meeting"** in the amended Reg.25(5). Financial creditors, particularly bankers, have a hierarchy in their management and therefore they seek their higher authority's approval before taking a decision by themselves. They now have a handy tool to say that we did not vote in the CoC meeting and therefore we have the right to vote in the e-voting process.

As per the Circular No.IBBI/CIRP/016/2018 dated 10th August 2018 issued by the Insolvency and Bankruptcy Board of India, it was observed in the matter of *Jindal Saxena Financial Services Pvt. Ltd. v. Mayfair Capital Pvt. Ltd.*, the Adjudicating Authority noted that there were four financial creditors who attended the first meeting of the CoC. In the said meeting, the CoC did not approve appointment of interim Resolution Professional (IRP) as Resolution Professional(RP) since two of the four Financial creditors, having aggregate voting rights of 77.97% required internal approvals from that competent authorities. It observed:

> "*We deprecate this practice. The Financial Creditors/Banks must send only those representatives who are competent to take*

decisions on the spot. The wastage of time causes delay and allows depletion of value which is sought to be contained. The IRP/RP must in the communication addressed to the Banks/Financial Creditors require that only competent members are authorized to take decisions should be nominated on the CoC. Likewise, Insolvency and Bankruptcy Board of India shall take a call on this issue and frame appropriate Regulations."

IBBI went to the extent of directing the IRP / RPs that they shall in every notice of the meeting of the CoC and any other communication addressed to the financial creditors other than creditors under section 21(6A)*(b)* require that they must be represented in the CoC or in any meeting of the CoC by such persons who are competent and are authorized to take decisions on the spot and without deferring decisions for want of any internal approval from the financial creditor.

Conclusion

CoC is a very important institution in the IBC scheme of things. The CoC members, though generally financial creditors, wear several hats when they sit in the CoC meetings as they decide the fate of the corporate debtor. IBC has bestowed upon their shoulders a very significant responsibility to weigh various things in right perspective and take appropriate decisions and in this context, their voting is extremely important. Therefore, the voting should take place in the meeting itself if the decisions were to be taken quickly as per the requirement of the IBC for a time-bound insolvency resolution. The e-voting should be resorted to only when the required percentage of voting threshold could not be achieved with the voting of the members present in the meeting and the voting share of persons who were not present in the meeting would be critical to reach the threshold and pass the resolution.

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Critical Areas of Concern in the Process of Insolvency and Bankruptcy Code, 2016

In this article, the author points out the day-to-day challenges faced during Corporate Insolvency Resolution Process (CIRP) as observed and confronted on the job. These consist of specific unanswered questions which require clarity and solutions as the Code evolves, for smoother functioning of the time-bound mechanism.

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Introduction

In the two years since its inception, the Insolvency and Bankruptcy Code has emerged as one of the legislations which prescribes fastest processes to tackle the problem of India's growing non-performing/ distressed assets. The Insolvency and Bankruptcy Code, 2016 ('Code') has been enacted to consolidate all existing related laws in India such as the SARFAESI Act, 2002, the DRT Act, the SICA, 1985, etc. and bring them under one umbrella to shorten the time for resolution of debts which used to be four to five years, with additional outcome *i.e.,* revival of debt-ridden companies. There are four pillars of the Code : the creditors, the Insolvency Professional, the Tribunals, *i.e.,* the NCLT and its Appellate Authority and the Resolution Applicants. A lot has been written about the challenges of the Code and the debates on whether the implementation of the Code is a bane or a boon.

Financial Creditors – They Play Central Role in Process of the Code

Beginning with the creditors, I will concentrate my argument on the Financial Creditors, who play a central role in this process, since the key objective of the Code is to resolve the massive NPA numbers which frighten the books of India's banking sector. I have spotted a variety of complications attracted by the consortium, primarily, their Internal Approval process, the representatives sent by the banks during CoC meetings are not given adequate authority to take decisions during the meetings which are taken later by the banks' respective authorities in the organization. This undervalues the conduct of CoC meetings as the RPs really just inform the members on the progress of the CIRP and the decisions are effected later on finalization by appropriate authority which solicits a lot of time, spoiling the essence of the Code. Sometimes it hampers the entire process which includes critical decisions concerning keeping operations of Corporate Debtors as a going concern. Next, moving to the topic of securities held by the creditors, the priority of charges is mostly unclear. This is the most controversial subject since the entire decision making, *i.e.*, approval of a plan to avoid liquidation depends on it. The first charge holders do not wish to share the proceeds of the plan with second charge holders. There is even no differentiation between the secured and unsecured financial creditors for distribution of proceeds. In liquidation, the first charge holders do not relinquish their charge as there is no clarity regarding priority of charges, this further lengthens the process and complicates the matter.

Resolution Professionals – Challenges Faced by them

Moving on to most valuable section, the Resolution

Professionals (RP). The obstacles faced by this group on a daily basis are innumerable. Though the professionals have come forward to rescue the system but they are being made the victim and are the worst sufferers in the process. The challenges range from no ratification of even the payments made out of their own pocket for smooth operations of the CIRP of Corporate Debtor, leave aside their remuneration and go to the extent of threat of litigations filed against him. The CoC does not even provide the amount for insurance which is a necessity for preservation of assets. During the course of a CIRP, the RP has the responsibilities such as taking over the management of the Corporate Debtors as the representative of creditors, keeping the operations running as a going concern, identifying transactions of fraudulent nature, ensuring various compliances of several regulatory authorities, the list is endless. While performing these duties, RPs often cope with the consequences which include blackmail and fabricated complaints from various stakeholders such as factory workmen and the promoter group, prosecution threat by various authorities such as income tax for not filing returns even for earlier years, no immunity against false FIRs filed by such stakeholders and hostile behavior from existing employees while extracting information, all while he struggles to receive information and documents from earlier management to complete the compliances of the Code.

National Company Law Tribunal (NCLT) – Expansion of Infrastructure

For the NCLT, the most serious issue is the number of pending cases, an expansion of infrastructure is a must to keep the process running smoothly. The successful implementation of this dynamic, time-bound legislation requires increasing the number of Benches, or mechanisms to reduce the load on the tribunals, which currently get over-involved in various stages of the whole CIRP rather than operating to ensure timely approval of the resolutions plans.

Resolution Applicants – The Real Rescuers

Finally, I would like to speak about the Resolution Applicants (RAs), the indispensable unit of this process, the real rescuers. They bring in the money, the method to cast out the NPA accounts from the books and are the structure through which the primary objective of the Code, 'reviving sick companies' will be met. But, the RAs are not invulnerable to the many matters which test the Code currently. It begins with the presentation by the RAs, they are grilled and interrogated by CoC and not embraced like they should be. Further, any potential acquirer of a business would request that it takes over the debtor free from all encumbrances and charges and prays for waivers of past contingent liabilities and obligations as a completely reasonable necessity. But, in largely all cases, the same have been disapproved by the creditors/NCLT. They are expected to take over the assets and business on as is where is basis with all attachments and encumbrances. The law itself needs to be modified to the effect that once a Corporate Debtor is under the Code, all the attachments and contingent liabilities of past business should be cleared to seek an effective resolution. The industry needs to realize that there are opportunities on both sides of the table by the presence of this group. Not only they provide recovery for the creditors from the distressed asset, there is an indication of potential revival of a dead or dying company; and for the investors it is an easier channel of business development through expansion, growth or diversification of their existing business. There have been cases where once the earnest money deposit is collected by banks, it was unfairly refused to be refunded to the rejected applicants before a successful plan is declared, which takes months due to various litigations during approval process (or even more than a year in a few cases).

Conclusion

The regulatory authorities need to pay attention to these practical matters as well, which are causing hindrances and will substantially benefit the resolution process in the interest of all stakeholders.