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RESOLVE and HOW – All about Resolution Plan(s) under Insolvency and Bankruptcy Code, 2016

In this article, the author critically examines diverse issues relating to Resolution Plan which is most important component in the Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016. He is of the view that resolution mechanism should opt for an open auction mechanism to ensure transparency and best price discovery.

Insolvency Code, One Step Forward and Two Backwards

As I sit to write on this topic, what comes to my mind is the 'real' action on the ground, *i.e.*, the **BIG** 12 cases. Nothing better than to see what is happening, before we dwell on what should happen or what should have happened. They were supposed to be the real 'torchbearers' for the Insolvency and Bankruptcy Code, 2016 ('Code') and were expected to set the 'benchmark' with respect to the process and the outcome. The reality seems to be giving a different message to what theory expected. May be the 'cart has been put before the horse' by starting the experiment of the Code / Recovery / NPA Resolution with these big cases. May be, a better strategy (though in hind sight) could have been a soft launch with the 'lesser mortals', getting started, seeing it evolve and then going with a Bang on the Big Ones. The law would have evolved in the process and a clear list of 'dos' and 'don'ts' would have been there for all, avoiding some knee jerk reactions, that we all have been seeing ever since the law has been around. It also becomes a case of one step forward and two, backwards.

Practically all these cases have taken more time than what was prescribed initially in law (*i.e.* maximum of 270 days) and still most of them are no-where near resolution, atleast in the way it was intended. But, for likes of Bhushan Steel, Electrosteel Steels, Amtek Auto and Monnet Ispat, who (almost) passed through the bumpy ride, (though at various stages of appeals / challenges at NCLAT/Supreme Court), the others have got stuck in the 'legal tangle'. One of them, Era-Infra was delayed for admission (delays being another challenge at hand) but for the rest like Alok Industries, Lanco Infra and Jyoti Structures, Liquidation might be the only answer. Was this the intended outcome? Also, the twists in the tale in likes of Binani Cement and Bhushan Power & Steel (which refuses to throw up surprises), says something altogether different about 'Resolution' and the 'Resolution Process'.

Dealing with Resolution Plan (Code v. NCLT)

The concept of resolution plan has been dealt in (more than required) detail in the Code and Regulations. The discussions and debates at the NCLT/ NCLAT levels go beyond all that is written/ prescribed and specified, for two simple reasons:

- The feedback from the ground about real/practical problems comes after Resolution Professional/CoC/Resolution Applicant and respective teams put their heads together for six/ nine long months and find that there cannot be a fix or rigid solution for challenging and unexpected situations. Rather, flexibility be the name of the game, suiting the specific situations and the context.
- All said and done this is one such solution we all look at eagerly, which can never have a fixed shape, size, format, scale, timeline of repayments, design, pattern or sequence. No “one size fits all” in this scenario. Every case will have its nuances and requirements and challenges and accordingly would require a ‘tailored solution’. Hence, without looking at the patient, no Doctor can prescribe the ‘Right Medicine’. Even for the similar patient, the medicine might be different, and every other Doctor would diagnose the way he deems fit.

Who is willing to offer what and how, what and why, some CoC members like and some don’t, there are lot of variables involved and to reduce everything in writing as expected at times (CoC to give reasons for rejection) may just not be feasible, when there is lot of Grey and less Black & White.

Finally, comes the ‘Perception’ which may be just another, but a big determinant in acceptance or rejection of a Plan. Perception cannot always be justified, and one can find ‘rationale’ and ‘perception’ to be mutually exclusive at times. Paper assessment (Quantitative) might suggest a different reaction response versus perception (Qualitative). The good story on paper, where everything would turn out well in ‘future’, is pitched against, the ‘past’ experience of the CoC members with the Resolution Applicant.

Let us take a small step back and understand the genesis of the Code, again

The Code had to be a real game changer and it is turning out to be one. There has been a lot of emphasis on ‘GST’ and ‘RERA’ as a game changing legislations, but what IBC has already done on the ground is ‘unthinkable’ and ‘unimaginable’. Some of the erstwhile business tycoons have lost their companies and many more are about to. The Code is sounding a death knell for many, for defaults which

were the order of the day. But the Code was meant to achieve a ‘time bound’ resolution process to enable all stakeholders sit across and agree to a plan which is a win-win for all, in a ‘creditors in control’ regime. But the looming danger of more rejections and eventual liquidations was probably not the intent. Anything around or above liquidation value is the minimum what anyone expected from the Resolution Plans, but how come there are none of those in few cases. Is it an issue with the liquidation value, the process or there is something more than meets the eye?)

So, we see that the most important term everyone looks for, at all stages during a CIRP process is ‘**Resolution Plan**’. Whether Resolution Plan has been received, whether Resolution Plan is compliant, whether Resolution Plan is/would be acceptable, whether Resolution Plan is/would be shortlisted, whether it would be accepted by CoC and finally if it would be approved by NCLT. (*in any case, the chances of it getting challenged at NCLAT remain high, as seen in almost all the cases, a cause of worry though*)

Resolution Plan and its process cannot and should not (as a concept) be regulated (beyond a point). It should have, what has been mandated in the law (at a broader level and no more), compliance with Section 30(2) of the Code and the Regulation 38, stating conditions to be met (including payment of CIRP cost on priority, identification of specific sources of funds, payment of minimum liquidation value to operational creditors, priority payment to dissenting creditors, adequate supervision, implementation and monitoring mechanism in place etc.). But more and more amendments targeting the shape, size and contents of the Resolution Plan or specifying do’s and don’ts for Resolution Applicants may not be a good idea.

The reasons for these amendments have often been stated as requirement of ‘consistency’ and avoiding of ‘preferential treatments’ or anything else, but fact remains, if the intent of Resolution Applicant (and/or other Stakeholders) is not bonafide, ways will be found to circumvent the law. The markets are not yet fully developed and too many changes, that too very frequently is not helping the cause. The signal going in the market is confusing and shows the lack of understanding (and pre-emption) by law makers on the outcome. Nothing is perfect, but we should always strive for perfection. But in the process, the changes and tweaks cannot and should not be based on

aberrations and exceptions. There are always smart and creative people around to find out loop holes and closing one, (to avoid getting exploited), should not lead to opening of others. The tweaks should also be mindful of the ‘genuine’ players, hence the concept of ‘retrospective application’ of any changes, for one should be thought about twice over.

We know, and we see that the most important ‘component’ in CIR Process is Resolution Plan and the most important ‘stakeholder’ is Resolution Applicant, (the bidder, the rescuer)

Already an action in haste in almost a blanket ban through insertion of Section 29A by Ordinance led to reducing the potential Resolution Applicants and that led to enough backtracking eventually. There were umpteen judgments from across NCLT’s treating and interpreting this development their own way which were very different from each other. The debate around this amendment really opened a Pandora’s box where practically every other promoter seemed to have got affected by the new law throwing up rumors of ‘corporate rivalry’ being one of the reasons behind this development. Eventually the dilution happened and not once but twice, second time specifically for MSME Sector. So, an attempt to control and regulate the ‘Resolution Applicant’ and the ‘Resolution Plan’ kind of backfired.

In any case, with all the clarifications and amendments and circulars, we saw the creative and not so creative ways (as reported) of Resolution Applicants including Liberty house, Ultratech, Vedanta, JSW, etc., at times intentionally or unintentionally, finding ways and means to be in the race without maintaining the sanctity of timelines or the procedures, all in the name of the larger cause / objective of the Code i.e. “Maximization for all the stakeholders” and Adjudicating Authority/ Courts happily coming forward to support this cause/ objective. But did they become unfair to the other aspect of this law, i.e. “the timelines”. Like any other proceedings, in IBC also, justice delayed will be justice denied. How much delay is justified in the garb of ensuring ‘principles of natural justice’ are adhered to are met? There would always be that ‘unhappy’ and ‘unsatisfied’ stakeholder who may not have the wherewithal to challenge the way others did.

When we have other Bodies/ Authorities/Stakeholders like RBI/ Banks trying to come out and devise with their own ways and means to tackle the NPA crisis

and concepts like ICA (Inter Creditor Agreement), is it not the feeling of ‘dépà vu’ of ‘old wine in a new bottle’? Were these not the stakeholders earlier in CDR, SDR and other such regimes when much could not happen to address the NPA mystery. Then why a similar attempt again when something like IBC can be effective. Anyways, with some awkward conditions inbuilt, it is already been reported as ‘dead on arrival’ case. (dissenting creditor to either sell his stake at 15% discount to liquidation value or buy others at 25% premium is surely a non-starter, where the liquidation value itself an issue in IBC, was made responsible for the low bids).

So, then what is the solution? What can be a win-win Resolution Plan?

We all understand, these are, still early days. A lot is being told, written, seen, tried and experienced. There are people and then there are people, both positive and negative. But as of now the Code is being defined by various stakeholders exactly the way people in a dark room would define an elephant. Some say the law only takes care of creditors and some say, it really gives a good opportunity to genuine promoters to exit. *I would say, it depends.* The only similarity in cases in the Code is that they all are stressed assets, (may be with issues of default, siphoning and diversions, which is nothing but a situation which arises mostly in cases of continuing defaults, where the intent of the defaulting promoters then is only to run the show to avoid getting exposed). Else, every case would have its own nuances, own complications and own potential solution options. If that be the case, then how prudent it would be to define what Resolution Plan would be and should be, and how that Resolution Plan be designed, defined and drafted. What can be the part of such a plan and what not is kind of prescribed in Regulation 37 which serves as a guiding light. We all are privy to creativity going beyond all that to put Resolution Plans to the CoC for consideration, trying to shortchange one or the other stakeholder, (either the minority or the dissenting or the ones who are not a party to the CoC and the decision making).

But the point which I would emphasize here is that in spite of instructions, guidelines and prescriptions, does it make sense to ‘regulate’ (beyond a point) the process or the structure of the Resolution Plan and lay down a prescription for the potential Resolution Applicant on timelines and requirements. Whatever has been there in

law already, how much of those in terms of timelines or otherwise (treatment) has been agreed, adopted and accepted by the Resolution Applicants, especially in the big cases. Forget about the shape and size and content of the Resolution Plan. Liberty House's bid came well beyond the deadline and they are still in fray as far as CIRP of Bhushan Power & Steel is concerned, UltraTech's offer came late in the day after Dalmia Bharat's bid was finalized in CIRP of Binani Cement, JSW raised their bid value much later in the day in CIRP of Bhushan Power & Steel, L&T has challenged the payout to Operational Creditor in CIRP of Bhushan Steel when CoC approved the plan of Tata Steel, Liberty House's eligibility under Section 29A was evaluated differently in different cases they had bid for and so on and so forth. These are/were the cases where everyone was looking forward to for setting up of benchmarks and evolution of best practices but the inconsistent stories coming out, is not something any one had imagined.

Resolution Professional

At this stage, I would require the focus to shift to the Resolution Professional, who did or is supposed to do whatever was/is prescribed in law regarding the Information Memorandum, Expression of Interest, Evaluation Matrix, Assessment and Analysis of Resolution Plans from the eligible Resolution Applicants and presenting the worthy ones (all of those) to CoC for their perusal and shortlisting. And then is where he practically loses control on the process as it becomes pure legal and less commercial. I have personally seen beyond this, its Advocates and Tribunal which have taken the onus to drive the process thereafter. I have been a witness to debates only hovering around the legal aspects and the processes and the procedures which are 'important' but not 'critical' in comparison to the 'commercial sanctity' and the 'timelines' which has been the essence of the Code. Somehow it appears, due to absence of adequate commercial understanding at various levels in our system, this law has become more 'legal' and less 'commercial', though it deals only with the resolution of a commercial entity. It has been seen that the requirement of extra time due to prolonged litigation (at times unwarranted as I mentioned) has been allowed / granted easily and then that extra time excluded, to remain within mandated 270 days (conveniently losing out on the perspective of the time value of money concept). Here, sorry to state, this has become a norm rather than an exception.

With this background, it is seen that there is less merit in controlling or over regulating the process of submission of Resolution Plans or putting strict procedures for Resolution Applicants.

The first and foremost requirement of law and the basic intent of the Legislature is not liquidation and 'only' resolution. Resolution in most cases is happening through a change in the management. Its important to have trust in the new player. *Give him a framework, develop a MIS, ensure a consistent implementation and supervision mechanism (which is also transparent to other stakeholders) to see that the plan is being implemented in the right spirit.* That would be an area to focus on rather than create any kind of hurdles in the process of finding Resolution Applicants or getting their Resolution Plans.

The team of lenders (read CoC) expects a 'Resolution first' for the Corporate Debtor in distress and only thinks of choosing the 'type of Resolution' when it has a choice to make with more plans than one. In this scenario, where beggars can't be choosers, we need a red-carpet welcome for Resolution Applicants. A stringent procedure might put off a class of Resolution Applicant to come forward and submit Expression of Interest or Resolution Plan due to anything that is perceived complicated or uncertain.

Conclusion

Why the Private Equity Funds have not yet stepped in this space? World over the Distressed Asset Sale is a big attraction for Venture Funds, Hedge Funds and even other types of PE Funds who might look at Strategic Acquisitions also for the purposes of aggregation? World is watching and the Big Asset Sale (Big 12 cases) ideally could have set a different benchmark as opposed to what it is turning out to be. There is still time for course correction and change the perception. 'Ease of Doing Business' is a concept which is also applicable here.

In such a situation, just a simple **value maximization objective**, is the objective to be followed and achieved, with given broader guidelines on the process of Resolution mechanism and opting for an 'open auction' mechanism to the extent possible to ensure 'full transparency' and the 'best price discovery'. Beyond that, the wish list of trying to be a perfectionist or trying to ensure that no one walks out unhappy from this party (distress sale party) is too wishful.