



CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER IBC, 2016: A PARADIGM SHIFT

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ABSTRACT:

KEYWORDS:

INTRODUCTION

Corporate insolvency resolution process (CIRP) is the process for resolution of insolvency of a corporate debtor (other than a financial service provider) under the Code. But the word "insolvency" is nowhere defined. However, under section 433 (e) covers a company, which is "unable to pay its debts", and thus constitutes a ground for winding up of the company. Inability to pay its debts would be a case where, a company's entire capital is lost in heavy losses and no accounts are prepared and filed and no business is done for one year. Therefore Insolvency is when an individual or organization is unable to meet its outstanding financial debt towards its lender as it become due. By the way of changing the repayment plan of the loans or writing off a part thereof insolvency can be resolved. If it cannot be resolved, then a legal action may lie against the insolvent and its assets will be sold to pay off the outstanding debts. For this purpose, an official assignee/liquidator appointed by the Government of India, realizes the assets and allocates it among the creditors of the insolvent. But the term insolvency and bankruptcy is not same. "Bankruptcy" is when a court has determined insolvency, and has given legal orders for resolution. On declaring the person as bankrupt, the court is responsible to liquidate the personal property of the insolvent and distribute the property amongst the creditors of the insolvent debtors.

The code has shifted the responsibility on the creditor to initiate the insolvency resolution process against the corporate debtor from the existing resolution regime. The IRP provides a collective mechanism to lenders to deal with the overall distressed position of a corporate debtor. This is a significant departure from the existing legal framework under which the primary onus to initiate a reorganisation process lies with the debtor, and lenders may pursue distinct actions for recovery, security enforcement and debt restructuring.

CORPORATE INSOLVENCY RESOLUTION PROCESS

Chapter II of Insolvency and bankruptcy code, 2016 states that "Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter."

BY FINANCIAL CREDITOR:

A financial creditor either himself or jointly with other financial creditors may initiate the Corporate Insolvency Resolution process (CIRP) by filing an Application to Initiate Corporate Insolvency Resolution Process (without having issued any notice for default of repayment to the corporate debtor because Financial Debt is Time Value for Money) to the Adjudication Authority. NCLT is the adjudicating authority under whose jurisdiction the registered office of the Corporate Debtor is situated along with the prescribed filing fees.

The financial creditor shall along with the application furnish to the Adjudication Authority:

- i. Record of the default recorded with the information utility or such other record or evidence of default as may be specified;
- ii. The name of the resolution professional proposed to act as an interim resolution professional (with his consent in specified form).

The Adjudication Authority shall within a period of 14 days of the receipt of the application ascertain the existence of the default from the records or on the basis of the evidence furnished by the Creditor and:

- i. If it is satisfied that the default has occurred and application is complete and there is no disciplinary proceedings are pending against the proposed resolution professional, it may, by order, admit such application; or

- ii. If it is satisfied that the default has not occurred or the application is incomplete or any disciplinary proceedings are pending against the proposed resolution professional, it may, by order, reject such application or give a notice to the applicant to rectify the defects in his application within 7 days of receipt of such notice from the Adjudication Authority.

2. BY OPERATIONAL CREDITOR:

An operational creditor has to issue a demand notice to the Operational Debtor with the copy of invoice demanding payment of the amount involved in the default in the specified form.

The Corporate debtor shall within a period of 10 days of the receipt of the demand notice bring to the notice of the operational creditor:

- i. Existence of a dispute, if any, and record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;
- ii. the payment of unpaid operational debt to the corporate creditor by sending the adequate proof.

After expiry of the period of ten days from the date of delivery of the notice, if the operational creditor does not received payment or proof of payment from the corporate debtor or any notice of the existence of dispute, the Operational Creditor may file an application to the Adjudication Authority.

The operational creditor shall along with the application furnish to the Adjudication Authority:

- i. copy of the demand notice or invoice delivered to the operational creditor;
- ii. an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;
- iii. a copy of the certificate from the financial institution maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor;
- iv. Record of the default recorded with the information utility or such other record or evidence of default as may be specified;
- v. The operational creditor may also propose the name of the resolution professional to act as an interim resolution professional (with his consent in specified form);

The Adjudication Authority shall within a period of 14 days of the receipt of the application ascertain the existence of the default from the records or on the basis of the evidence furnished by the Creditor and:

- i. If it is satisfied that the default has occurred and application is complete, there is no repayment of the unpaid debt, demand notice was delivered to the debtor, there is no dispute in existence and

there is no disciplinary proceedings are pending against the proposed resolution professional, it may, by order, admit such application; or

- ii. If it is satisfied that the default has not occurred or the application is incomplete or there has been payment of unpaid debt or the creditor has not delivered the demand notice or invoice to the debtor for payment or notice of dispute has been received by the operational creditor or there is record of dispute in the information utility or any disciplinary proceedings are pending against the proposed resolution professional, it may, by order, reject such application or give a notice to the applicant to rectify the defects in his application within 7 days of receipt of such notice from the Adjudication Authority.

3. BY CORPORATE APPLICANT

Wherein a Corporate Debtor has committed a default, a Corporate Applicant thereof may file an application for initiating Corporate Insolvency Resolution Process (CIRP) to the Adjudication Authority i.e. NCLT at the bench within whose jurisdiction the registered office of the Corporate Debtor is situated along with a filing fee as specified. The Corporate Applicant of the Corporate Debtor shall along with the application furnish to the Adjudication Authority:

- i. Its books of accounts and such other documents relating to such period;
- ii. The name of the resolution professional proposed to act as an interim resolution professional (with his consent in specified form).

The Adjudication Authority shall within a period of 14 days of the receipt of the application ascertain the existence of the default from the records or on the basis of the evidence furnished by the Corporate Applicant and:

- iii. If it is satisfied that the default has occurred and application is complete and there is no disciplinary proceedings are pending against the proposed resolution professional, it may, by order, admit such application; or
- iv. If it is satisfied that the default has not occurred or the application is incomplete or any disciplinary proceedings are pending against the proposed resolution professional, it may, by order, reject such application or give a notice to the applicant to rectify the defects in his application within 7 days of receipt of such notice from the Adjudication Authority.

The Corporate Insolvency Resolution Process (CIRP) shall commence from the date of admission of the application.

- The following persons are not eligible to initiate CIRP
 - i. a corporate debtor who is undergoing CIRP;
 - ii. a corporate debtor who has completed CIRP in the last twelve months;
 - iii. a corporate debtor or a financial creditor who has

violated any of the terms of resolution plan approved in the last twelve months; and d. a corporate debtor in respect of whom a liquidation order has been made.

- Corporate insolvency process shall be completed within 180 days of admission of application by NCLT. Upon admission of application by NCLT, Creditors' claims will be frozen for 180 days, during which time NCLT will hear proposals for revival and decide on the future course of action. And thereupon, no coercive proceedings can be launched against the corporate debtor in any other forum or under any other law, until approval of resolution plan or until initiation of liquidation process.
- NCLT appoints an interim Insolvency Professional (IP) upon confirmation by the Insolvency and Bankruptcy Board (hereinafter, "the Board") within 14 days of acceptance of application. Interim IP holds office for 30 days only. Interim IP takes control of the debtor's assets and company's operations, collect financial information of the debtor from information utilities. The insolvency professional has the power regarding the management and affairs of corporate debtor and all the powers of board of directors shall vest under him during the period of resolution. Apart from power of management it has certain duties prescribed under the act. NCLT causes public announcement to be made of the initiation of corporate insolvency process and calls for submission of claims by any other creditors.
- After receiving claims pursuant to public announcement, interim IP constitutes the creditors' committee. All financial creditors shall be part of creditors' committee and if any financial creditor is related party of corporate debtor, then such financial creditor will not have any right of representation, participation or voting. Operational creditors should be part of Creditors' Committee (without voting right) if their aggregate dues are not less than 10% of the debt.
- Creditors' committee shall meet first within seven days of its constitution and decide by 75% of votes either to replace or confirm interim IP as Resolution Professional. Thereupon, Resolution Professional is appointed by the NCLT upon confirmation by the Board. The creditors' committee, with a majority of 75% votes, can change Resolution Professional any time.
- The creditors' committee has to then take decisions regarding insolvency resolution by a 75% majority voting. If three-fourths of the financial creditors consider the case complex and require extension of time beyond 180 days, the NCLT can grant a one-time extension of up to 90 days.

- Resolution Professional to conduct entire corporate insolvency resolution process and manage the corporate debtor during the period.
- Resolution Professional shall prepare information memorandum for the purpose of enabling resolution applicant to prepare resolution plan. A resolution applicant means any person who submits resolution plan to the resolution professional. And upon receipt of resolution plans, Resolution Professional shall place it before the creditors' committee for its approval.
- Once a resolution is passed, the creditors' committee has to decide on the restructuring process that could either be a revised repayment plan for the company, or liquidation of the assets of the company. If no decision is made during the resolution process, the debtor's assets will be liquidated to repay the debt.
- The resolution plan will be sent to NCLT for final approval, and implemented once approved.

VOLUNTARY LIQUIDATION OF CORPORATE PERSONS

The Code provides for voluntary liquidation proceedings by corporate person who intends to liquidate itself and has not committed any default and can pay off its debts fully from proceeds of liquidation of its assets. The law requires a declaration to that effect from majority of directors of the company also stating that the company is not being liquidated to defraud any person. A resolution passed to this effect shall be approved by creditors representing two-thirds value of the company's debts. Voluntary liquidation commences when such resolution is passed by the creditors as above. Provisions of liquidation process apply to voluntary liquidation. Once the debtor is completely wound up and assets liquidated, the NCLT passes an order for its dissolution.

FAST TRACK CORPORATE INSOLVENCY RESOLUTION PROCESS

Small corporates generally have simple operating models and clear capital structures. Insolvency of such firms can be potentially addressed more expeditiously compared to normal period of 180 days. The Code provides for fast track resolution of such corporates in 90 days, extendable by 45 days. The Code read with the Insolvency and Bankruptcy (Adjudicating Authority) Rules, 2016 and the IBBI (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017 govern the Fast Track CIRP. Apart from the compressed timelines and appointment of only one valuer instead of two, the Fast Track Process is broadly similar to the CIRP.

The aim of the Insolvency and Bankruptcy code is to conclude the procedure within half of the default time period specified under the Code. The person or entity seeking the fast relief will have onus on the process at set-off and that person or entity that sets-off the Fast-track

process must support that the case is fit for the Fast-track. Therefore, whosoever fills the application for fast track process under Chapter IV (Section 55) of the Insolvency and Bankruptcy Code will have to file the application along with the proof of the existence of default as evidenced by records available with an information utility or such other means as may be specified by the Board to establish that the corporate debtor is eligible for fast track corporate insolvency resolution process.

The following corporate debtors are eligible for resolution under the Fast Track Process:

- i. a small company, as defined under clause (85) of section 2 of Companies Act, 2013 (where paid up capital is less than Rs.50 lakh and turnover is less than Rs.2 crore); or
- ii. an unlisted company with total assets, as reported in the financial statement of the immediately preceding financial year, not exceeding rupees one crore.
- iii. a start-up as defined in the notification dated 23rd May, 2017 of the Government of India in the Ministry of Commerce and Industry.

The Code has provided for a fast track insolvency resolution process in respect of corporate debtors, qualification to be notified by the Government. The process shall be completed in 90 days (extendable by maximum 45 days). Provisions of insolvency process apply to fast track insolvency. This will be an enabler for start-ups and small and medium enterprises to complete the resolution process quickly and move on.

CHALLENGES IN INSOLVENCY RESOLUTION PROCESS

1. Stringent timelines – In some cases, it is practically impossible to complete the whole procedure within the given timeline of 180/270 days, considering the practical difficulties of getting necessary information as well as dealing with multiple stakeholders.
2. Non availability of interim finance – As most of the companies against whom insolvency are bought are already in high debt and financially stressed, getting interim financeduring the corporate insolvency resolution process (CIRP) is a challenge.
3. Late starting of IU-Without having adequate number of IUs and its infrastructure in place, it is hard for IRP/IPs to gather required information under the Code within the defined timelines.
4. Dealing with the existing management and promoters-As the powers of the Board is suspended during the CIRP and the effective power is transferred to the IP/IRP, the promoters and the existing management see it as a threat to their company and sometimes try to impede the IP/IRPs from working in the most efficient manner.

5. Lack of support from operational creditors and regulators-Once a company is into CIRP, existing vendors do not want to continue business and want their dues to be cleared, while new vendors request for advance payment. Without cooperation from vendors, it might be challenging for the IP/IRP to sustain business operations.
6. Ineffective decision making by CoC – Without standard protocols and guidelines to deal with decision making by the Committee of Creditors (CoC), there are often indifferences within the creditors which are leading to delays and resulting in non-compliance with the given timelines and in some cases such decisions might not be commercially sound.
7. Cross-border insolvency-Thereis lack of or limited provision to cover cross-border insolvency.The Code has granted the power to the Central government to enter intobilateral treaties with other countries to apply the Code in relation to assets of the corporate debtor situated outside India.

SanjeevShriya v. State Bank of India & others .

The Hon'ble Allahabad High Court observed that, wherein a corporate debtor is undergoing corporate insolvency resolution process (hereafter, the "CIRP") under the Code, parallel proceedings against the personal guarantors of such corporate debtor is undergoing corporate insolvency resolution process (hereafter, the "CIRP") under the Code, parallel proceedings against the personal guarantors of such corporate debtor should not be initiated since the liability of the corporate debtor shall onlyonly be crystallized once the NCLT approves the resolution plan under section 31 of the Code or passes an order of liquidation of the corporate debtor under section 33 of the Code. The Hon'ble High Court at para 29 of the SanjeevShriya judgement mentions, "..... The argument advanced by ShriNavinSinah is also fortified on the ground that once the liability is still in a fluid situation and the same has not been crystallized, then in such situation, two parallel/split proceedings in a different jurisdiction should be avoided, if possible. In the aforementioned circumstances, the objection so raised by learned counsel for the respondent bank regarding alternative remedy cannot sustain and is rejected." Primarily, in this case the Hon'ble Court was dealing with the issue under section 14 of the Code, however, the observation that a creditor can initiate action against the guarantor only after crystallization of debt of the principal debtor needs serious deliberation.

CONCLUSION

In a situation of corporate insolvency, if the stakeholders can make rational and quick decisions to deal with the said situation i.e. the decision about continuation of business, its reorganization or its closure, a law to deal with the insolvency situation and the intervention of the courts may

not be required. However, it has been observed that the stakeholders fail to take such decisions to deal with the situation of insolvency and, therefore, is the need for a corporate insolvency law. It is often said that “ in the absence of a bankruptcy law a firm’s assets would be sold as scrap and value would be lost”. As such, the law to deal with corporate insolvency / bankruptcy enables an economy to rescue the viable businesses and to pull out the valuable economic resources out of the unviable businesses through the liquidation process at the earliest without further depletion in the value of the assets so that the same can be deployed in other profitable economic activity.

The Code aspires to expand the capital avenues for business finance, where various classes of capital providers can distinguish and price credit risks across risk categories and offer differentiated and customized credit products for businesses at different stages of maturity and financial strength. It further encourages entrepreneurs to take informed risk and pursue their ideas with the confidence that in case the idea needs a fresh lease of life at a later stage or does not fructify into a viable venture, there is an orderly and predictable mechanism that provides for insolvency resolution, wherever possible and ease of exit, wherever required.

REFERENCES