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INSOLVENCY AND BANKRUPTCY CODE

A code of balances

The Committee of Creditors needs to act in the best interest of all the stakeholders of the corporate debtor

A CORPORATE IS AN amalgam of stakeholders. It is expected to maximise the value of its assets and consequently the interests of all its stakeholders. However, it may not always have the motivation to maximise the value of a corporate and/or promote the interests of all the stakeholders simultaneously or equitably. Therefore, the law prescribes governance norms to ensure that a corporate maximises the value of its assets, today and tomorrow, and balances the interests of all the stakeholders, and assigns the responsibility

for compliance with those norms primarily to a professional, the company secretary, and a custodian, the board of directors.

A corporate (other than a financial services provider) has broadly two sources of funds, namely 'equity' and 'debt'. Usually, the equity owners control and run the corporate. The Insolvency and Bankruptcy Code (IBC), 2016, however, envisages that if they fail to service the debt, the corporate in default undergoes the corporate insolvency resolution process (CIRP). An insolvency professional (IP) carries on business operations of the corporate as a going concern

until the Committee of Creditors (CoC) draws up a resolution plan that would keep the business of the corporate going on forever. The IBC, as stated in the long title, requires a CIRP to (1) maximise value of assets of the corporate, and (2) while doing so, balance the interests of all the stakeholders, and assigns the responsibility primarily to the IP, and the CoC comprising non-related financial creditors.

The IBC maximises the value by striking a balance between resolution and liquidation. It encourages and facilitates resolution in most cases where creditors would receive at least as much as they would in liquidation. This would happen where the enterprise value is sufficiently higher than the liquidation value. In such cases, resolution preserves and maximises the enterprise value as a going concern. In the remaining cases, the IBC facilitates liquidation as that maximises the value for the stakeholders.

The IBC enables initiation of a CIRP at the earliest, even at the very first default, when the enterprise value is usually higher than the liquidation value and hence the CoC has the motivation to resolve insolvency of the corporate rather than liquidate it. It mandates resolution in a time-bound manner to prevent decline in the enterprise value with time, reducing motivation of the CoC to opt for liquidation. It facilitates resolution—makes a cadre of professionals available to run the corporate as a going concern, prohibits suspension or termination of supply of essential services, enables raising interim finances required for run-

ning the corporate, etc.

In contrast, the IBC prohibits any action to foreclose, recover or enforce any security interest during a CIRP and thereby prevents creditor(s) from maximising his interests. It expects creditors to recover their default amounts collectively from future earnings of the corporate rather than from the sale of its assets. In the matter of *Prowess International Pvt Ltd vs Parker Hannifin India Pvt Ltd*, the National Company Law Appellate Tribunal (NCLAT) reiterated: "It is made clear that Insolvency Resolution Process is not a recovery proceeding to recover the dues of the creditors." Further, the IBC enables a financial creditor to trigger a CIRP even when the corporate has defaulted to another creditor and thereby prevents any preferential treatment to a creditor over others. In the matter of *Prowess International Pvt Ltd vs Parker Hannifin India Pvt Ltd*, the National Company Law Tribunal (NCLT) observed: "The nature of insolvency petition changes to representative suit and the *lis* does not remain only between a creditor and the corporate debtor."

Resolution maximises the value of assets of the corporate and enables every stakeholder to continue with the corporate to share its fate. All stand to gain or lose from resolution, though one may gain or lose relatively more than another. In contrast, liquidation allows satisfaction of their claims one after another. If there is any surplus after satisfying the claims of one set of stakeholders fully, the claim of the next set is considered. On both counts, maximisation of value of assets and balancing the interests, resolution triumphs over recovery as well as liquidation in most cases.

Balancing interests under CIRP assumes significance as every corporate may not have enough resources at the commencement of a CIRP to satisfy the claims of all the stakeholders fully, while resolution provides an opportunity to the CoC to consider and balance their interests. In fact, the IBC prescribes several balances in a resolution process—repayment of at least liquidation value to operational creditors, repayment of interim finance in priority, approval of resolution plan by 75% voting power, etc.

The CIRP regulations also provide for several balances. They allow a dissenting financial creditor to exit at the liquidation value and thereby protect its interests. Many creditors, however, may not like to exit at the liquidation value. And those who exit leave the enterprise value behind. This balances the interests of financial creditors *inter se*, while tilting the balance in favour of resolution. The regulations also require a resolution plan to include a statement as to how it has dealt with the interests of all the stakeholders, including financial creditors and operational creditors, of the corporate debtor.

When the main aim of the IBC is to facilitate recasting a corporate faltering in its debt obligations, it needs to take care of the interests of all the stakeholders with equity

The judicial pronouncements require consideration of the interests of all the stakeholders in a resolution. Again, in the matter of *Prowess International Pvt Ltd vs Parker Hannifin India Pvt Ltd*, the NCLAT held: "In the circumstances, instead of interfering with the impugned order, we remit the case to the Adjudicating Authority for its satisfaction whether the interest of all stakeholders have been satisfied..." And in the matter of *Prabodh Kumar Gupta vs Jaypee Infratech Ltd and Others*, the NCLT observed: "...the position of present petitioner is undisputedly of stakeholders. Therefore, the IRP appointed by this Court in respect of the corporate debtor company is equally expected to consider and take care of the interests of the petitioner..."

When the fundamental aim of the IBC is to facilitate recasting a corporate faltering in its debt obligations, it needs to take care of the interests of all the stakeholders with equity. The CoC, which is placed in a unique position of the custodian of a corporate under a CIRP, has the duty to strive for resolution, and through resolution maximise the value of assets of the corporate and balance the interests of all the stakeholders.

