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● **COMMITTEE OF CREDITORS**

An institution of public faith

The Committee of Creditors must build its capacity to distinguish a viable firm from an unviable one, and ensure rescue of only viable firms and closure of only unviable ones, in the interest of the economy

IN ITS LONG TITLE, the Insolvency and Bankruptcy Code, 2016, specifies its objectives. It is reorganisation and insolvency resolution (reorganisation) of certain persons. The purpose of such reorganisation is maximisation of value of assets of the person concerned to promote entrepreneurship and availability of credit and balance the interests of all its stakeholders.

The IBC provides for corporate insolvency resolution process (CIRP) for reorganisation of corporate firms. It sepa-

rates commercial aspects from judicial aspects, and empowers and facilitates the Committee of Creditors (CoC) to take commercial decisions in a CIRP. The commercial decisions of the CoC are not ordinarily open to any analysis, evaluation or judicial review by the adjudicating authority or the appellate authority, and hence not justiciable.

The IBC envisages a resolution plan for reorganisation of a defaulting firm. The selection and approval of the best resolution plan requires two abilities: namely, the ability to restructure the lia-

bilities and the ability to take commercial decisions. In contrast with operational creditors (OCs) who may pursue immediate realisation of their dues, financial creditors (FCs) generally have the resilience to wait for realisation of their dues post-reorganisation. They have also the ability to determine if a resolution plan will achieve the objectives of the IBC. In view of their abilities, the CoC comprises FCs. The CoC, therefore, has a duty to take commercial decisions that further the objectives of the IBC and do not allow the interests of FCs overshadow the interests of the firm.

A CIRP entails a large variety of commercial decisions by OCs, FCs, insolvency professionals (IPs), the CoC and resolution applicants. This article, however, enumerates four key commercial decisions that a CoC is required to take in a CIRP, to reorganise the firm as a going concern to maximise the value of its assets.

1. A firm in a market economy fails to deliver on account of two broad reasons. First, it carries on a business that is no more viable for exogenous reasons such as innovation. Most such firms have economic distress and are unviable. However, a few of them may have resources to change the business line and become viable. Second, the firm is not doing well for endogenous reasons such as its inability to compete in the market place, while other firms in the same business are doing well. Most such firms have financial distress and are viable. However, a few of them may have significantly depleted their resources and become unviable. The CoC must correctly identify if the firm under a CIRP is viable or not and must rescue a failing, viable firm, and close a failing, unviable one.

2. If the firm is viable, the CoC must visualise the resolution plan required for the reorganisation of the firm. The resolution plan may entail a change of management, technology or product portfolio; acquisition or disposal of assets, businesses or undertakings; restructuring of ownership, balance sheet or organisation, etc. Much in the same way a promoter invites subscription for shares in an IPO, the CoC must create visibility of the underlying value of the firm and invite and encourage appropriate resolution plans for the reorganisation of the firm. It must express its mind as to what kind of resolution applicant can reorganise the firm, keeping in view its complexity and scale of business; what can possibly address the failure by a firm; what are the parameters to assess the viability and feasibility of resolution plans, etc, to enable prospective resolution applicants design and submit competing resolution plans for the reorganisation of the firm.

3. The CoC must ensure that the firm continues as a going concern and its value does not deteriorate during a CIRP. For this purpose, it must appoint a competent IP who can run the business of the firm as a going concern at its optimum potential, provide complete, correct and timely information about the firm to resolution applicants for the design of resolution plans, and safeguard the assets of the firm. It must facilitate interim finance, and cooperate in detection of avoidance transactions, wherever required. It must expedite various tasks for the closure of the CIRP at the earliest.

4. The IBC envisages the CoC to consider only those resolution plans that (i) have been received from credible and capable resolution applicants; (ii) comply with the applicable laws; (iii) are feasible and viable; (iv) have the potential to address the default; and (v) have the provision for effective implementation of the plan. These considerations ensure that the resolution plan achieves reorganisation of the firm as a going concern, on a sustained basis. Of the plans that meet these requirements, the CoC must approve that resolution plan that maximises the value of the assets of the firm, irrespective of realisation for creditors under the plan.

The CoC also takes a few other decisions along with approval of a resolution plan. It may approve restructuring of realisations for FCs to enhance maximisation of value under the resolution plan. It may also approve sharing the realisations under the plan between FCs and OCs or between classes of FCs or

OCs, or exemptions from taxes and duties sought for implementation of the plan, etc. It is doubtful if these are strictly commercial decisions and, therefore, beyond scrutiny. In any case, the IBC does not mandate consideration of these aspects while approving a resolution plan, as these may not have a bearing on the viability and feasibility of the plan. Therefore, the CoC must not discard a resolution plan that maximises the value of the assets of the firm just because it yields realisations in the future for FCs or yields relatively

lower realisation for them. It is important to note that commercial decisions are not amenable to a precise mathematical formula. It is not that a firm is viable, or a resolution plan is viable and feasible, where the realisations for FCs under the plan exceeds liquidation value of the firm. In fact, it requires considerable commercial dexterity and acumen. The CoC must build its capacity to distinguish a viable firm from an unviable one, and ensure rescue of only viable firms and closure of only unviable ones, in the interest of the economy.

The CoC must ensure the firm continues as a going concern and its value does not deteriorate during a CIRP. It must appoint a competent IP who can run the business of the firm as a going concern

