

Report of the Insolvency Law Committee

The Insolvency Law Committee (“**ILC**”) presented its 5th report dated May 20, 2022 (“**Report**”) to the Government of India. The Report was released to the public on June 15, 2022. Pursuant to the Report, the ILC made several recommendations with regard to the Insolvency and Bankruptcy Code, 2016 (“**IBC**”) and regulations made thereunder to improve the efficacy of the corporate insolvency resolution process and the liquidation process under the IBC. The recommendations were made by the ILC in order to achieve the main objectives of the IBC being time bound reorganisation and insolvency resolution and maximisation of value of assets. We have summarised the key recommendations made by the ILC in its Report.

Key recommendations relating to the Corporate Insolvency Resolution Process

1. Mandating reliance on the records of the Information Utility (“**IU**”) for establishing default

One of the grievances in the functioning of the IBC has been the delays in the admission process for an application for a corporate insolvency resolution process (“**CIRP**”). While the IBC prescribes a fourteen-day timeline, the same has not been held to be mandatory and the admission process takes many months.

Under the IBC, an IU has been set up as a repository for information about debts. Financial creditors such as banks and financial institutions regularly submit information regarding their financial debts with the IU, whereas operational creditors do it on a selective basis. In order to reduce the time period taken for admission of an application for a CIRP, the ILC has recommended that financial creditors that are financial institutions and any other financial creditors as may be prescribed by the Central Government should submit only IU authenticated records to establish a default. All other financial creditors may rely on any other document for establishing a default in a situation where such IU authenticated records are unavailable. The ILC believes that placing reliance on records authenticated by IU which indicates undisputed information of default will enable the adjudicating authority to spend less of its time on verification of default and lead to quicker disposal of applications filed by financial creditors.

2. Independence of avoidance proceedings from the CIRP proceedings

Any proceedings in relation to avoidance transactions or improper trading (such as preferential transactions, extortionate transactions and fraudulent transactions) (collectively, “**Avoidance Proceedings**”) take a substantial amount of time to be concluded and invariably, are undetermined at the time the CIRP process concludes. The ILC noted the ambiguity amongst the stakeholders on whether Avoidance Proceedings can continue after approval of a resolution plan in the CIRP. It therefore recommended that a clarificatory amendment should be made to Section 26 (*Application for avoidance of transaction not to affect CIRP proceedings*) of the IBC that the completion of the CIRP does not affect the continuation of Avoidance Proceedings.

Further, the ILC also suggested that the manner of conducting Avoidance Proceedings after approval of the resolution plan should be clearly specified in the resolution plan. The IBC and attendant regulations should be amended to provide that the resolution plan must specify: (i) the details of the person who will continue to pursue such Avoidance Proceedings; (ii) the manner of payment of the costs of such Avoidance Proceedings; and (iii) the manner of distribution of expected recoveries and the preservation of claims of expected beneficiaries, if such preservation is required. When approving a resolution plan, the adjudicating authority should be satisfied that the resolution plan provides sufficient details of the manner of continuation of Avoidance Proceedings after its approval.

3. Linking the look back period under the IBC to the date of application and not admission

The ILC proposed that the IBC should be modified to provide that the threshold date for the look back period for avoidable transactions under the IBC should be the date of the filing of an application for initiation of CIRP, i.e., the initiation date, rather than the date of admission of such application. Further, the ILC recommended that transactions from the initiation date until the insolvency commencement date should also be included in the look-back period. Where multiple CIRP applications have been filed, the initiation date may be clarified to mean the date of filing of the first CIRP application.

The proposal aims to widen the existing net for capturing avoidable transactions by bringing within its ambit a significant portion of transactions that occurred before the filing of a CIRP application, and also hopes to disincentivise corporate debtors from delaying the CIRP.

4. Mechanism to deal with unsolicited resolution plans and revisions of resolution plans

The ILC observed that there are anomalous practices being followed in the market with regards to receiving resolution plans by the resolution professional after the expiration of timelines stipulated in the expression of interests and the request for resolution plans. Divergent judicial approaches regarding the submission or revision of plans after the expiry of stipulated timelines have resulted in uncertainty in the process, inconsistencies, delays, and lack of procedural sanctity.

The ILC recommended that a crystallised mechanism for reviewing late submissions of plans or revisions to plans, and unsolicited revisions to plans should be laid down in the regulations. This would lead to creation of balance between the two principles of the IBC being value maximisation and sanctity of the CIRP procedure.

5. Timeline for approval of resolution plans by the adjudicating authority

The ILC observed that significant delays at the time of approval or rejection of resolution plans by the adjudicating authority was one of the main reasons for delays in the insolvency resolution process. Such delays at the stage of disposal of the resolution plan can be value destructive and may discourage prospective resolution applicants from submitting plans. The Supreme Court has also not permitted resolution applicants to modify the plan or withdraw from the plan where the approval of the plan was delayed by the adjudicating authority.

The ILC proposed that suitable amendments should be made to Section 31 of the IBC to provide that the adjudicating authority has to approve or reject a resolution plan within 30 days of receiving it. If the adjudicating authority has not passed an order approving or rejecting the resolution plan within such 30-day time-period, it may be required to record reasons in writing for the same.

6. Prescribe a standard of conduct for the committee of creditors (“CoC”)

The CoC is tasked with taking key decisions during the CIRP, including approval of the resolution plan and is also given wide powers to utilise its commercial wisdom. However, insolvency tribunals have from time to time noted certain missteps of CoCs, such as inadequately empowered representatives attending CoC meetings, CoCs undertaking adjudication beyond their powers and violating legal procedural requirements. Any improper conduct by members of the CoC impacts the life of the corporate debtor, and consequently its stakeholders.

The ILC has proposed that it would be suitable for the Insolvency and Bankruptcy Board of India (“IBBI”) to issue guidelines providing the standard of conduct of the CoC while acting under the provisions of the IBC. This may be

in the form of guidance that provides a normative framework for the CoC to conduct itself under the provisions of the IBC. In order to empower the IBBI to issue such guidelines, the ILC has recommended that appropriate amendments may be made to Section 196 of the IBC.

Key recommendations relating to the Liquidation Process

1. Mandatory stakeholder consultation by the liquidator

The IBC currently empowers the liquidator to consult with the stakeholders consultation committee (“SCC”). This provision is however discretionary in nature. The ILC noted that the requirement for a liquidator to consult or seek sanction from committees of stakeholders constituted during the liquidation process prior to performing certain functions was common in several jurisdictions around the world.

The ILC proposed that the IBC may be suitably amended to provide that the liquidator must mandatorily consult with the SCC so as to ensure that the SCC is able to provide commercial inputs on the functions of the liquidator as well as conduct an oversight over the liquidator. This will enable the liquidator to take better guided decisions after receiving the valuable expert advice or information from the SCC and also provide the SCC a comprehensive oversight over the liquidator.

2. Secured creditors to contribute towards workmen’s dues and for preservation of their security

The IBC provides that secured creditors opting to realise their security interest outside the liquidation process are liable to contribute towards CIRP costs.

The ILC recommended that suitable amendments may be made to the IBC to provide that:

- (a) secured creditors opting to realise their security interest outside the liquidation process should also be required to contribute towards workmen’s dues in the same manner as they would have if they had relinquished their security interest;
- (b) when a secured creditor steps outside the liquidation process, he should also be liable to pay the liquidator for any expenses incurred by the liquidator for the preservation and protection of its security interest; and
- (c) if a secured creditor fails to make the required contributions, its security interest should be deemed to have been relinquished and become part of the liquidation estate.

The proposed suggestion recognises that workmen are key stakeholders of the corporate debtor and form the backbone of efforts to preserve the business of the corporate debtor, not just prior to insolvency commencement, but also during insolvency proceedings. Additionally, the rationale behind requiring a secured creditor who decides to step outside the liquidation process, to be liable to pay the liquidator any expenses incurred by the liquidator for the preservation and protection of its security interest is that such amounts for preservation or protection of the security interest would have been borne by the secured creditor if no liquidation process were ongoing.

3. Mechanism for terminating a voluntary liquidation process (“VLP”)

VLP is meant for solvent corporate persons who choose to liquidate themselves. The ILC recognises that in a dynamic market economy, the financial and economic circumstances of a corporate person may change after the initiation of a VLP. Currently, there are varying practices on whether, and on what basis, a VLP can be terminated before the passing of a dissolution order.

The ILC recommended that in order to ensure that there is consistent practice for termination of a VLP, a simple mechanism for terminating a VLP which is akin to the mechanism for commencement of the process should be laid down in the IBC. The proposed amendment is aimed to ensure that termination of VLP is not undertaken on an *ad hoc* basis and procedural requirements for termination are statutorily encoded.

Conclusion

The IBC has gone through significant changes over the past five and half years to cater to the needs of various stakeholders. The Report sets out crucial amendments that are required to the current insolvency and liquidation framework to make it more effective. One of the key concerns raised by several stakeholders is the delay in the process: delays at the time of admission, delays on decision making by the CoC during the CIRP process and delays by the adjudicating authorities in approving resolution plans or ordering liquidation of corporate debtors. The amendments proposed by the ILC, if implemented, will certainly help in reducing the delays. However, there is also a clamouring need to increase the bench strength of the adjudicating authorities and the appellate tribunals at a lightning speed so that the changes that are being brought about in the law can be enforced and upheld in a timely manner.

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This Prism has been prepared by:



Aashit Shah
Partner



Janhavi Bhanushali
Associate



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