DICTATED DECISION-MAKING

IBBI Expects To Usher Effective Decision-Making in Creditors' Committee Meetings

- ***Vinod Kothari***

Editor's Note: *The one who has been created and exists "to decide" cannot "not decide" or remain indecisive. CoC, being now in charge of steering wheel, has to decide on several matters pertaining to the corporate debtor under corporate insolvency resolution process. And given the strict timelines, there cannot be any scope for procrastination or delaying/deferring the decision-making process.*

The CoC mostly consists of banks and financial institutions, which send their representatives to attend the meetings held by the RP. The objectives of constitution of CoC being very clear, one cannot afford the representatives to be merely note-makers or listeners – for effective deliberations in the meetings, the representatives ought to have full authority to deliberate as well as decide and vote on the concerned matters. Or else, the entire objective of calling a meeting stands defeated.

There is no specific stipulation under the Code as to the above; however, IBBI, in view of practical experiences faced by RPs and stringent observations made by NCLTs in certain rulings, came up with a Circular requiring that CoC members shall be represented by such persons who are competent and are authorised to take decisions on the spot and without deferring decisions for want of internal approvals.

This piece is a quick observation on why this Circular was badly needed.

The recent IBBI circular dated 10-08-2018 makes an interesting reading. While it is lamenting the fact that the hard timeline-bound regime of the insolvency process will lead to unintended corporate mortality if the bank representatives attending the CoC meetings are not empowered to decide, the amusing undertone is that it has directed the resolution professionals to ensure the attendees in CoC meetings are decision-makers themselves.

The IBBI circular comes in the wake of order by NCLT, Principal Bench dated 7.6.2018, in the matter of *SBJ Exports & Mfg. Pvt. Ltd. v. BCC Fuba India Ltd* and order dated 4.7.2018 in the matter of *Jindal Saxena Financial Services Pvt. Ltd. v. Mayfair Capital Private Limited*(C.P. No. (IB)-84(PB)/2017). Earlier, the Hyderabad Bench had, vide order dated 27-11-2017, in the matter of *Kamineni Steel & Power India Private Limited* criticized the members of CoC meeting on making attendance without full mandate from their competent authorities to take final call at the meeting itself instead of falling back on their seniors' approval and delaying the time-bound procedure.

It is a matter of common knowledge that India is one of the few insolvency frameworks in the world which comes with hard timelines. If insolvency is not resolved within 180 (or, on extension, 270) days, the company will be mandatorily moved to liquidation path. Since the resolution process is entirely based on decisions at the CoCs, the CoC may arrive at some conclusive resolution only if the CoC members are empowered to decide and vote at the meetings. The ironic reality is that the attendees at the CoC meetings are rarely decision-makers themselves. They come to discuss the matter at the

meeting, but would mostly take the matter to their respective offices to get the view of their seniors, very often, committee in their respective offices too. The indecision of the CoC itself may be the reason for corporate mortality.

As a resolution professional, one would very often experience this situation: there is a patient on the operation table, and a panel of doctors would decide how to treat andoperate upon the patient. Assume the doctors have to decide by a certain majority, and they themselves in turn have to depend on their seniors to give their views. The patient will be surely killed by indecision.

No matter what the IBBI has to say or what NCLT/NCLAT might have ruled, the irony is that the CoC attendees barely are able to decide. There are several reasons for their indecisiveness. The reasons may include mundane, such as the seniority of the person attending, the recent transfer of the attendee into the resolution matters, or the internal hierarchy of the bank itself. However, the most important issue that affects decision-making is the fear of persecution that the banker carries if he has hard decisions to make. And surely, the most important decision in insolvency process is the decision about the haircut. Bankers have a natural fear, born out of years of experience, that if the one who decides has to face the so-called 3 Cs – CBI, CAG and CVC. There is no pursuit against indecision. No one is punished for not deciding. However, decision-making invites internal and external action. Therefore, banks just don't decide on matters like haircuts. Practically, one would have seen several situations where the attendee at CoC would have confessed that he knows that the value he will get in liquidation will be far lower than the haircut put for approval, but he would rather let the haircut be faced as a *fait accompli* in liquidation rather than decide upon much lower haircut in resolution.

Added to the problem of indecision is the prevailing notion, incorrect in the view of the author, that the abstinence of a creditor from voting amounts to disapproval. That is, if a certain creditor at a CoC meeting decides not to vote at all, his vote will be counted as a negative vote, as the required decision-making should be positive votes out of total votes, and not out of those voting. The author strongly argues that this is a wrong view; however, this view is being espoused by several people. This exacerbates the issue of decision-making at CoCs.

Undoubtedly, the intent of the Code as well as the IBBI is absolutely clear. It is resolution before liquidation. In this wake, the voting percentage required for approval by CoC has also been reduced, by way of an Ordinance, from flat 75% to 66% for substantial decisions and 51% for routine matters.

So, will the scenario be better after this IBBI circular? Surely, one may ensure compliance by writing, perhaps as a part of the notice calling the CoC meetings, that only those empowered to decide should be attending, but practically, no resolution professional may reasonably expect there would be much change. Unless, of course, the RBI sends out a directive – that the member attending the CoC should be sent with a pre-approval of the relevant hierarchy so that the attendee may take a decision at the meeting or the banks become proactive enough to prepare their own evaluation matrices, approved by the senior-most personnel, which can serve as basis to take decision for the attendees at CoC.

INELIGIBILITY CRITERIA U/S 29A OF IBC: A NET TOO WIDE?

- ***Sikha Bansal & Richa Saraf***

Editor's Note: *IBC has been designed to explore revival opportunities for an ailing corporate entity. Thus, it invites potential resolution applicants to come forward and submit resolution plans. The approach, initially, was all inclusive and any person could come as resolution applicant. However, this became a second chance for defaulting promoters, who either directly or through related entities, were able to buy back their companies at hugely discounted prices. Therefore, a need arose to restrict such defaulting promoters to come back to power, and repeat the history. Section 29A, often quoted as the most controversial provision of IBC, was thus enacted by way of an amendment. Section 29A is a negatively prescribed list, and enumerates person who cannot be a resolution applicant.*

Originally drafted section 29A was rigid to the extent that it closed too many doors – thus, reducing the possibilities of receiving resolution plan with each restrictive layer it created. Also, some of the clauses of section 29A were expansive to the point of being unreasonable. This analysis goes through the section and discusses some relevant points.

The section was later fine-tuned – please refer to our next article for the amendments which were later introduced in the section.

Resolution plan is designated to be the "way-out" for insolvent entities coming under the Insolvency and Bankruptcy Code, 2016. The resolution professional appointed by the adjudicating authority constitutes a committee of creditors, invites resolution plans from prospective resolution applicants, and places the resolution plans before the committee of creditors. The resolution plan which is approved by the committee of creditors is submitted to the adjudicating authority for sanction. A resolution applicant, as defined under section 5(25) of the Code, earlier referred to mean ***any person*** who submits a resolution plan to the resolution professional. Hence, a resolution applicant might have been any person- a creditor, a promoter, a prospective investor, an employee, or any other person. The Code had not gone into the basis and criteria for selection of the resolution applicant. This became a fatal loophole in the law which allowed back-door entry to defaulting promoters at substantially discounted rates for the assets of the corporate debtor.

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To curb the illicit ways, several amendments were made in the Code, first by way of Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 dated 23rd November, 2017, then by Insolvency and Bankruptcy Code (Amendment) Act, 2018 dated 19th January, 2018 ("**Amendment Act**"). Of all the amendments, the one which has become a riddle for all is section 29A. The section specifies persons not eligible to be resolution applicant, and has ten parts (i.e. clauses), the tenth part is further