IBC revisit needed, in law and practice

ABIZER DIWANJI

Founder, NeoStrat Advisors

Apart from fixing procedural and mindset issues, new legislation is required around pre-pack laws for all companies

THE PROPOSED AMENDMENTS to the Insolvency and Bankruptcy Code (IBC) are welcome as they deal with delays in resolution by National Company Law Tribunal (NCLT), government agencies, and promoters. The changes also plan to augment implementation and improve the creditors' voices in the liquidation process. All of these are welcome as the IBC's track record glaringly tells that we need change.

Without doubt, IBC is one of the best legislations in India's recent history. The law was drafted maturely to cover every aspect, but the rules in certain instances went contrary. The behaviour of its various pillars, the courts, creditors, resolution professionals, and corporate debtors also leaves a lot to be desired. The regulator, which paid attention to only one of the pillars, was left with no choice but to be hard on the regulated and was unable to regulate the other pillars, all of which together drive the success of this legislation. A glance at some statistic confirms this.

IBC has admitted a total of around 8,150 companies, of which 2,000-odd are pending, 2,700 were liquidated, 1,100 had successful resolution plans, 1,250 were appealed and settled, and 1,100 were withdrawn under Section 12A. On performance, whilst most measure recoveries as a percentage of claims, one needs to measure IBC performance on recoveries as a percentage of liquidation value (as rules do not allow anyone to resurrect a company during a Corporate Insolvency Resolution Process (CIRP), though the law imbibes that. As a percentage of liquidation value, CIRPs recovered 163% and liquidation recovered 89% of value. This is quite strong, given that no other means in the past has offered this return. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act is near it, given that statistic is based on hard assets as collateral. On average, a CIRP has taken 701 days, but today it takes around 820 days. Liquidation has taken another 510 days on average, and today it takes around 650. We have 4,520 insolvency professionals and 5,750 valuers, but only 60 judges when we need 360. Non-judicial members are mainly bureaucrats and not commercially-minded turnaround professionals. Given the optimism of Indian promoters, admission of stress takes five years, admission to CIRP takes two years, CIRP itself takes two years, and liquidation takes another two years, making it a total of nine-11 years after stress identification. This destroys the corporate debtor's enterprise value and available collateral, leading to credit losses across the board.

Turnaround and crisis management skills rather than just the knowledge of law is a pre-requisite

Moving to the proposed IBC amendments, courts have been asked to ascertain default and admit within 14 days. This was part of the original law, but the courts thought they could decide on the commercial wisdom of an admission, the onus of which lies with the creditors. However, courts have been granted the ability to go beyond the timelines if written requests are given, leaving a judge and a bureaucrat to decide on commercial wisdom. Courts need to be commercially-minded and admit or resolve basis creditor judgment.

The issues around not allowing agencies and other non-contractual claims to slow the process is welcome. This would avoid situations like the JSW/BPSL delays. Agencies can go after any other asset of the corporate debtor not within CIRP or guarantees. The defined timelines on 12A, supervision of creditors in liquidation, and ability to alienate plans from distribution are welcome moves that would hasten resolution.

However, what we really need to address is institutional maturity to manage a law as sophisticated as IBC. The Insolvency and Bankruptcy Board of India (IBBI) should become a mature regulator which facilities the spirit of the law. For this, it may need oversight of all pillars of the law under various degrees. Today, there is over-supervision of the insolvency professional. The amendments do talk about not considering disciplinary actions when appointing, which seems an acknowledgement of the ease with which such action is initiated. Creditors, on their part, need to act as trustees of an enterprise. When they admit a company in CIRP, their wisdom should indicate a recovery and hence, interim finance for turnaround should be made available in the natural course. The Reserve Bank of India should not classify such interim finance as a non-performing asset until the CIRP is ongoing. Specialist skills among creditors are critical. A culture of passing on stressed assets to professionals on a timely basis may help. The insolvency profession needs to make itself more credible. We have far too many of them too, which was required when the need existed. Now, early detection and resolution would be the norm. Turnaround and crisis management skills rather than just the knowledge of law is a pre-requisite. IBBI may consider a re-qualification of insolvency professionals.

Apart from fixing procedural and mindset issues, new legislation is required around pre-pack laws for all companies, along with cross-border and group insolvency being introduced to encourage voluntary filings under IBC proactively. The aim should be to resolve, rather than disrupt, ownerships. A big concern is timely identification of debts. Data tells that it takes five years for a promoter or creditor to acknowledge the need to restructure. Making the resolution process more appropriate, a promoter should be given a chance to resurrect themselves. Though there is a Section 10 provision for self-filing, debtors are unwilling as CIRP mandates an auction. Pre-packs, if all creditors are paid, albeit delayed, should not involve an auction. This can only come through oversight, and we now have the legal framework to offer these without the risk of delayed recognition, as in the past. Further, the regulator needs to ask financial institutions about strategies for special mention accounts. Transfer of these exposures to specialists (special situations funds or asset reconstruction companies) should be encouraged with due supervision.

Legal provisions backed by structural changes are the need of the hour.