

The evolving resolution of stressed assets

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The banking sector has been under tremendous stress in the past few years due to the increasing number of non-performing assets (NPA) caused among other things by the absence of a comprehensive bankruptcy regime. In 2016, the Insolvency and Bankruptcy Code, 2016, was enacted to provide a comprehensive framework for the resolution of NPAs. The recovery rate in 94 cases resolved through the code by fiscal year 2019 is 43%, compared to 26.5% under the previous regime. According to the World Bank, the code has helped India move up to 63rd place in its 2020 ease of doing business rankings. While the results are encouraging, unfamiliarity with the new law, slippage of timelines, frivolous litigation and a lack of infrastructure have hindered the implementation of the code.

Initially, the code provided that 270 days was the time limit for completion of the insolvency resolution process (CIRP). In 2017, the National Company Law Appellate Tribunal held in *JK Jute Mills Company Limited v Surendra Trading Company* that this limit was mandatory. However, the Supreme Court in the case of *ArcelorMittal India Private Limited v Satish Kumar Gupta & Ors* held that the period of time taken in litigation should be excluded from the time limit. The average timeline for cases resolved under the code is now 324 days. The code was therefore amended in August 2019 to provide mandatory completion of CIRP within 330 days including all legal proceedings. However, the court in November 2019, in *Committee of Creditors of Essar Steel India Limited v Satish Kumar Gupta* (the Essar case) struck down the word mandatory as arbitrary and held that in exceptional cases the timeline could be extended. For there to be timely resolution, this discretionary power must be exercised sparingly by tribunals.

Due to the infancy of the law, several conceptual issues are still evolving. This has led to litigation and inordinate delays. Issues such as the ranking of creditors, the legality of differential treatment of financial and operational creditors in a plan, the status of claims upon completion of CIRPs have frequently been the subject of challenge. These issues have now been clarified by the Supreme Court in the Essar case, which recognized the classification of creditors on the basis of security, and the differential treatment of financial and operational creditors. Further, it has been clarified that undecided claims do not survive the expiry of the CIRP. The role of the court in interpreting the code has helped create precedents in a still evolving law.

However, contradictory judgments across tribunals have affected resolution. One concern is the continuation of liabilities for offences committed under previous management after the CIRP. *Bhushan Power* is an example where the Enforcement Directorate attached the assets of the corporate debtor (CD) for past offences even after the plan of JSW Steel was approved. This concern should be addressed by the new section 32A introduced by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019, which exonerates the CD of liability for past offences.

Delay in adjudication is also caused by the lack of infrastructure. As of September 2019, there were only 16 National Company Law Tribunal panels with 53 members handling 10,860 cases. In the case of *Swiss Ribbons Private Limited & Anr v Union of India & Ors* the Supreme Court directed that circuit benches of the appellate tribunal be established within six months. However, it is almost a year since the judgment was delivered and not one circuit bench has been established. Inadequate infrastructure has led to delay in the admission of cases for as long as a year instead of the 14 days contemplated under the code. Several CIRPs have been stalled by frivolous litigation instituted by former promoters, the Essar case being one. It took more than 600 days to resolve. Lack of adequate information about

the CD, adequate information utilities and good resolution professionals are other challenges. Delay in resolution results in value destruction which has seen resolution applicants backing out.

The code has revolutionized the framework for the resolution of distressed assets. However, timely resolution continues to be a challenge. Of 12 large corporate accounts, only four have been resolved. Of 2,542 admitted cases, 1,497 CIRPs are ongoing and estimates are that it will take almost 30 months to clear current cases, exceeding the statutory timeline by over one and a half times. While the government has been proactive in implementing the code by introducing timely amendments, concerted efforts are required to improve the number and quality of judges, resolution professionals and information utilities in order to achieve the objective of timely resolution.