WHETHER IT IS A CREDITOR OR INVESTOR REGIME

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In 2016, the Government enacted the Insolvency & Bankruptcy Code, 2016 (IBC), which came as a rescue for the snail-paced debt recovery regime and provided a consolidated legal framework in place of the highly fragmented Insolvency and Bankruptcy regime in India. The IBC has been subject to extensive discussion and debate. Certain discrepancies have been noticed in the corporate insolvency resolution regime. However, the Government is implementing changes in alternating phases and recently, the Ministry of Corporate Affairs issued a circular that shareholders' approval need not be sought separately for approving the resolution plan.

Section 30(2) of the Insolvency and Bankruptcy Code states that the resolution plan approved by the committee of creditors of the adjudicating authority with the provisions of the applicable laws makes it legally implementable.

According to the IBC, once the resolution professional places the approved plan before the NCLT, a decision is made whether it is to be implemented or not. Once approved, the company focuses on clearing its dues. If the resolution plan is rejected by the Tribunal, the company goes in for liquidation, unless the matter is challenged at the National Company Law Appellate Tribunal (NCLAT). The ambiguity arose under the Companies Act 2013, wherein it is given that transactions pertaining to transfer of assets or shares usually require shareholders' approval.

First, it is sought to counter or rather, reason with a seemingly valid loophole in the CIRP which states that, as per Section 30(2)(e) of the IBC, any Resolution Plan must be in compliance with the provisions of any law in force - thus shareholder' approvals as required under the Companies law cannot be dispensed with. While at first look, one might say that the IBC under Section 238 has overriding effect over any other law, the need to comply with applicable provisions of the law under Section 30(2)(e) is a specific requirement of the IBC itself, which cannot be overlooked. After all, the National Company Law Tribunal (NCLT) can reject a Resolution Plan, if the same does not comply with provisions of any law in force. To cast further doubt onto the actual intention of the IBC in accommodating shareholder approvals, Regulation 39(6) of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, specifically dispenses with the approval of members, partners or shareholders of the corporate debtor as is required *only* as per the constitutional documents of a company, the shareholder agreements, joint venture agreements, and such other documents. However, Regulation 39(6) does not in any way oust the requirements of shareholder approvals as per the Companies Act, 2013.

As stated earlier, a legal ambiguity is visible in the provisions of the IBC and its Regulations. While one might simply argue that the IBC envisages shift of control of the corporate debtor over to the Resolution Professional and the Committee of Creditors, it must be pointed out that this control pertains to the management of affairs of the Corporate Debtor. Thus, there is cause to debate as to what extent shareholders' approval is necessary to effect a Resolution Plan that complies with the applicable provision of law as per Section 30(2)(e) of the IBC. For example, in order to effect a valid resolution plan, does the IBC mandate shareholders' approval for sale and disposal of substantially the whole of a public companies undertaking as per Section 180(1) of the Companies Act, 2013?

The explanations that could help iron out the above described legal ambiguity are admittedly based on statutory interpretation, more so than any explicit provisions of the IBC itself. To explain the same, the Corporate Insolvency Resolution Process (CIRP) of a Corporate Debtor can be seen as divided into two main stages: Stage 1 being 'Before the Resolution Plan', i.e., during the corporate insolvency process and Stage 2 being 'After the Resolution Plan', i.e. during the stage of its approval and implementation.

During Stage 1, the management of the Corporate Debtor vests in the Resolution Professional by virtue of two main provisions of the IBC: Section 17 read with Section 23. As per these Sections, the entire management of the affairs of the Corporate Debtor vests with the interim resolution professional, and then the resolution professional who is confirmed by the Committee of Creditors for the entire duration of the CIRP. It is explicitly laid down in Section 25(1) that the Resolution Professional shall "preserve and protect" the continued business operations of the Corporate Debtor, i.e. run the defaulting corporate entity as a going concern. Also, Section 28 explicitly mandates the approval of the Committee of Creditors, in order for the Resolution Professional to carry out any action that might affect the capital structure, ownership or management of the Corporate Debtor, or the rights of the creditors.

It can be argued from the above provisions that in respect of Stage 1, the Code vests the entire management of the Corporate Debtor in the hands of the Resolution Professional, and subjects all substantial actions to approval of *only the Committee of Creditors*. It may be argued that due to the unsuccessful management of the corporate entity by those earlier in charge, i.e. the promoters, directors and majority shareholders, the IBC has intentionally transferred all decision making power to the Committee of Creditors, which the IBC recognizes as best suited to assess the business viability of the defaulting corporate entity. This is even truer for a private and closely held company, where the promoters are the main majority shareholders - it makes no sense to allow the decision making power to vest with the shareholders once the corporate entity has defaulted in loan repayment and a CIRP has been initiated. As it is, the shareholders and promoters are responsible for business failure of the defaulting corporate entity - vesting any decision making power under the IBC will mean that they will never allow any Resolution Plan to go through.

In any case, it would be consistent with provisions of the IBC that during the CIRP, the Resolution Professional merely looks over the assets of the company and manages its business *as a going concern*. Such routine administration of the company should ideally not involve taking any major decisions that would require shareholders' approval.

Coming to Stage 2, once a Resolution Plan is decided, any strategies for restructuring of the defaulting company's debts, or selling its assets, etc. could require shareholders' approval. In response to this, it can be argued that the National Company Law Tribunal's (NCLT) approval of a Resolution Plan *impliedly dispenses* with the requirement of shareholder approval. Once the Resolution Plan is placed before the NCLT, the NCLT must, *inter alia*, satisfy itself that the Resolution Plan is in compliance with all laws in force. Once the Resolution Plan is approved, it is binding on the corporate debtor and its employees, members, creditors, guarantors and all other stakeholders involved in the resolution plan. Thus, the NCLT's approval is presumed to have looked into the satisfaction of all interests, on account of which, shareholder approvals is dispensed with. A comprehensive reading of the provisions of the IBC seems to show that only two entities, namely, the Committee of Creditors and the NCLT are involved in approving the Resolution Plan. Further, it may also be argued that any Resolution Plan, as approved by the Committee of Creditors and the NCLT, must show awareness and adherence to the applicable *regulatory compliances.* For example, a Resolution Plan approved by the Committee of Creditors must still comply with the notification requirements as per Section 5 and 6 of the Competition Act, 2002.

Thus, the arguments above rely on the law of interpretation to respond to the legal ambiguity raised. It is assumed that during the CIRP, the Resolution Professional will not be taking any drastic decisions that require shareholder approval, and that after the Resolution Plan is placed before the NCLT, the NCLT will assess whether the Resolution Plan accommodates all interests at stake, and only then gives its stamp of approval.

Having addressed the valid concerns, the incorrect claims are briefly clarified. It is stated that promoters could oppose key resolutions to frustrate creditors/lenders, and could try to derail the whole insolvency process. The management or creditors with at least 75% of the outstanding loans could turn down the revival package, resulting in the Corporate Debtor's liquidation. This cannot be the case. Promoters and all other members involved earlier in the management of a Corporate Debtor have no say whatsoever in the insolvency process envisaged by the IBC. Once an insolvency application is admitted by NCLT, the entire management/board of the Corporate Debtor is suspended and vests with the Resolution Professional. Thus, the Code brings forth a shift towards a ***"creditor-in-control regime"***, with the promoters/board of directors and members no longer having a say as well as any voting rights in the running of the defaulting corporate entity.

As questions regarding the valid and lawful application of the IBC keep coming up, it is hoped that our Tribunals and Courts keep in mind the very basic intent for which a new Insolvency regime was brought in place. Whether shareholders' approval is accommodated under the IBC, or not, it is hoped that the provisions of the IBC are implemented keeping in mind the goals of efficiency and value enhancement that will bring in additional gains to both the economy and the exchequer.