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IBC: Committee of Creditors should include Operational Creditors

■ Sharad Tyagi




The Insolvency and Bankruptcy Code, 2016 ("IBC") is considered as an important legislation for early detection of financial

sickness of any corporate debtor and to deal with such sickness in a time bound manner by allowing the implementation of the effective resolution plan, if the same is viable. After the detection of such sickness, all decisions pertaining to revival and implementation of the effective resolution plan are required to be taken by the committee of creditors (comprising of only financial creditors) ("CoC") by majority vote of not less than 66% of the voting share of the financial creditors. The operational creditors are not allowed to be a part of CoC and to vote in favour or against such resolution plan except when there is no financial creditor pertaining to the corporate debtor and such operational creditors meet the prescribed criteria under IBC. Such operational creditors have limited rights to receive notice of CoC meeting and to attend such meeting provided their aggregate dues are at least equivalent to 10% of the total debt.

The Bankruptcy Law Review Committee ("Committee") in its report dated November 4, 2015, has expressed its apprehension that the operational creditors would not be willing to take the risk of postponing their payments for better future prospects of the corporate debtor and concluded that

the constitution of CoC should be restricted only to the financial creditors for rapid and efficient resolution process. The aforesaid rationale seems to be against the interest of the operational creditors as no business can sustain without incurring operational debt and there is a possibility that such operational creditors will start demanding upfront payment or security to protect their interest which may badly affect the business of the operational creditors.

In the matter of Binani Industries Limited Vs Bank of Baroda & Anr. [Company Appeal (AT) (Insolvency) No. 82 of 2018], it is inter alia mentioned that "...if one type of credit is given preferential treatment, the other type of credit will disappear from market. This will be against the objective of promoting availability of credit".

The rationale given by the aforesaid Committee regarding exclusion of operational creditors in CoC seems logical, but such scenario will not fit in all the cases of corporate bankruptcy. For example, if few operational creditors hold 75% of the total debt, still they will not be having any decision-making power in CoC which seems to be unfair to such operational creditors. Thus, there must be some criteria under IBC based on which such operational creditors may also be included in CoC or else it should be left to the discretion of National Company Law Tribunal to include them in CoC with voting rights. 



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