



COVID-19 OUTBREAK: CHALLENGES IN IMPLEMENTING THE RESOLUTION PLAN

*By Gauri Suri and Dyuti Pandya
From Army Institute of Law and University
of Mumbai; respectively*

Abstract

The corporate insolvency resolution process (CIRP) in India is a disparate process of recovery of outstanding debts. It formulates a resolution plan via which debt restructuring and satisfaction of liabilities in an expedited manner is possible. The resolution plan also ensures the revival of the corporate debtor.

As India starts recovering from the debilitating impact of the COVID-19 pandemic, it is pertinent to re-examine already approved resolution plans prior to the lockdown. The scenario revolving around resolution plan formulated an important means on how a business needs to continue its existence in such events. In the post-COVID lockdown India, the timeline for the previously approved resolution plan will no longer be practicable due to the changing set-up revolving around the bankruptcy and insolvency regime. The commercial viability under the existing economic circumstances has also changed and will continue to change. Consequently, this calls for a modification in the current schema where the approved resolution plans become incapable of implementation.

This paper throws light on relevant provisions of the Insolvency and Bankruptcy Code, 2016 to discern whether such resolution plans can be amended. Secondly,

this paper counsels various suggestions and recommendations that may be incorporated into the existing framework by drawing a comparative analysis with other leading countries.

Keywords: Corporate Insolvency Resolution Process, COVID-19 pandemic, Approved resolution plans, Commercial Viability.

Introduction:

The Insolvency and Bankruptcy Code provides for a disparate resolution process to recover the outstanding debts. Under the Code, a resolution plan has been defined in Section 2(e) as the insolvency resolution process for corporate persons under Chapter II of Part II of the Code.¹ In other words, the resolution plan envisages debt restructuring and reviving the company from its insolvent position in an expedited manner.

The economic impact of the nationwide lockdown is starting to pour in slowly. As India starts recovering from the debilitating impact of the COVID-19 pandemic, it is pertinent to re-examine already approved resolution plans prior to the lockdown. In the post-COVID lockdown India, the timelines for the previously approved resolution plan will no longer be practicable, and the commercial viability under the existing economic circumstances has also changed. Henceforth, multiple approved resolution plans may become incapable of implementation.

I. Insolvency Resolution Process

¹ Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).



An eligible resolution applicant presents the resolution plan to the resolution professional. A resolution applicant, as defined under section 5(25) of the Code, denotes any person who submits a resolution plan to the resolution professional and is not disqualified under Section 29A². The Plan comprises the terms for the restructuring of business operations, keeping the company as a going concern, financing findings and decisions, conditions regarding repayment of debts, along with fixing timelines for the implementation of the Plan and the reimbursement of creditors. The resolution professional ensures the prerequisite specifications of a resolution plan as specified under section 30(2) of the Code is complied with, further presents the Plan to the Committee of Creditors (COC) for their approval. If the COC favors the resolution plan by the necessary majority vote of 66%³, the plan is forwarded for approval to the adjudicating authority. It is important to note that when the adjudicating authority, i.e. NCLT sanctions the resolution plan, it becomes final and binding.⁴

II. Legal Recourse

Resolution Plan once approved cannot be modified

IBC does not comprise of any provisions for the re-initiation or resumption of the CIRP upon default of implementation of the resolution plan and accordingly intends to give supremacy to the binding nature of the resolution plan.

In *Rahul Jain v. Rave Scans Ltd*⁵ NCLAT held that once a resolution plan has attained finality, it cannot be modified by order of the tribunal.

In another case *RGV Vyapar Pvt Ltd v. Arun Kumar Gupta*⁶, the court opined that the Adjudicating Authority has no jurisdiction to reopen a resolution process under section 31.

Inherent Powers of the NCLT

Inherent powers of NCLT are stipulated under section 60(5)(c) of the IBC according to which NCLT has the jurisdiction to entertain/dispose of any question of law or facts in relation to insolvency resolution or liquidation proceedings. Furthermore, Rule 11 of the NCLT Rules, 2016 elicits the inherent powers of the tribunal. The NCLAT held that Rule 11 could not operate to reopen or modify an approved resolution plan by the NCLT under the guise of inherent powers of tribunal. After finality of the plan, the powers of the NCLT are confined to Section 60.⁷

In the case of *QVC Exports Private Limited vs RP Deloitte Touche Tohmatsu India LLP*⁸, NCLAT held that NCLT could not be authorized to modify a resolution plan where the modification does not involve “any question of law, priorities or facts.”

In *Rahul Jain v. Rave Scans Private Ltd*⁹, the Supreme Court reiterated the same viewpoint that once an order that has attained finality it cannot be reviewed under the inherent powers of the Court except to correct arithmetical or clerical errors.

² Supra

³ Section 27, Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

⁴ Section 31, Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).

⁵ (2019) 10 SCC 548

⁶ Company Appeal No.509 of 2018

⁷ *RGV Vyapar Pvt Ltd v. Arun Kumar Gupta* (2018) 40(IBC)40/2020

⁹ (2019) 10 SCC 548



On account of the above, it can be asserted that the Adjudicating Authority does not have the power to alter an approved resolution plan.

Under the Insolvency and Bankruptcy Code, the following are the potential consequences wherein there is a failure to yield an approved resolution plan:

1. Liquidation

Wherein the successful bidder defaults to honour its obligations under the approved resolution plan, liquidation of the company is one of the recourse available. Section 33 stipulates various grounds for the liquidation of the corporate debtor, and Section 33(3) enumerates liquidation in case of a failure to implement the resolution plan.

This provision is restricted to occurrences wherein the corporate debtor contravenes the terms of the resolution plan. Moreover, this prospect is only available to persons other than the corporate debtor whose interest is prejudicially affected. The COVID 19 crisis) has aggregated the financial stress across the spectrum, that will directly impact the feasibility and viability of the resolution plan; this will result in the liquidation of the company, which will jeopardize the interests of all the stakeholders.

The authors would like to point out that liquidation stands in sharp contradiction to the objective of IBC, which is to encourage resolution rather than liquidation. The courts have held innumerable times that liquidation should be the last resort¹⁰, and all attempts should be made to keep the company as a going concern.¹¹ In the present

circumstances, liquidation should not be an option as the intention behind the provision is manifest as being a resort against the malfeasance of the corporate debtor.

2. Penal and criminal liability for contravention of the resolution plan

Section 74 prescribes a punitive measure for the contravention of the terms of an approved resolution plan. This provision endeavours to punish the corporate debtor, the creditors or any person on whom the resolution plan is binding, for deliberate and intentional violating the terms of an approved resolution plan. The specified penalty is imprisonment between 1 to 5 years or a fine between Rs. 1 lakh to Rs. 1 crore or both imprisonment and fine. Currently the regulations by the government only serve the time period till the approval of the plan. The bidder will be exposed to Penal actions for not adhering to timelines provided in the said plan. The authors contend that it's extremely unjust for the bidders to face criminal action for the default caused due to the COVID 19 crisis. Therefore, the authors suggest there should be a provision for a concession or moratorium for implementation of the approved resolution plan.

Lessons from cross country comparisons:

Amidst the COVID-19, plans pertaining to the restructuring, recovery and resolution of the companies have been majorly affected. In order to protect the commercial viability and the feasibility of the financial system, measures have been taken to ensure that the insolvency regime is prepared for any potential failures. As we have witnessed, companies in India whose resolution plans

¹⁰ Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors 71(IBC)02/2019

¹¹ Arcelor Mittal India Private Limited Vs. Satish Kumar Gupta & Ors (2019) 2 SCC 1



were already approved prior to the pandemic are currently in a state of uncertainty and there is no concrete solution provided by the IBC or the government on how to mitigate ramifications under such circumstances. Whilst India has not focused on its banking and insolvency regime in the current state, business communities around the globe have made governments adopt several measures to ensure the continuity and sustainability of their ventures post-crisis. Following this, the governments have amended their insolvency legislation to prevent viable business entities from collapsing.¹²

1. **USA:** The Small Business Reorganization Act (SBRA) came into existence in February 2020 and effectively brought a relief to the United States Bankruptcy Code. This particular Act has brought about an efficient, economical solution for reorganizing the businesses that are currently in debt (secured and unsecured debts). The Coronavirus Aid, Relief and Economic Security Act (CARES) came into existence in March 2020 and provided a way for debtors to have control over their businesses during the pandemic and post crisis as well. Furthermore, this Act allows debtors to modify their already confirmed resolution plans depending upon the financial trouble they face during the crisis. This includes extending payments for seven years after the initial payment plan was already due.
2. **Singapore:** The Ministry of Law introduced the COVID-19 (Temporary Measures) Act 2020 to provide relief to businesses and

individuals that will not be able to fulfil their contractual obligations due to the pandemic. This Act has provided relief in the form of a moratorium to fulfil the obligations that were to take place on or after February 2020. This has relieved the small-scale retailers and SMEs to preserve the cash flow and keep the commercial viability intact. The insolvency and bankruptcy proceedings have been limited to only specific cases; this has been intended to last for 6 months and maybe extended till 12 months.¹³

3. **UK:** Under the UK Government, a package of insolvency has been introduced that will prove to clarify the restructuring tools to be used amid the pandemic. The new restructuring tools would include a moratorium for companies to find rescue/restructuring options. It would further provide a new restructuring plan that will bind the creditors to it. This is a form of a fast track implementation of reforms implemented in the insolvency framework to protect businesses.¹⁴

4. **Australia:** The government has announced the Coronavirus Economic Response Package Omnibus Bill 2020 (Economic Response Bill) whose objectives involve certain provisions under the Bankruptcy Act 1966. The time frame in which a debtor is protected from enforcement action by a creditor is temporarily increased to six months from 21 days. In order to keep businesses as a going concern amid the crisis, the companies have been provided with temporary relief from personal liability for insolvent trading.

¹² Khan, M. and Shah, U., 2020. *Impact Of Covid-19 On Insolvency Global Regimes*.

¹³ Ong, Y., 2020. [online] Norton Rose Fulbright. Available at: <<https://www.nortonrosefulbright.com/en/knowledge>

/publications/782929df/singapore-introduces-covid-19-temporary-measures-act-2020>

¹⁴ Shearman & Sterling. 2020. [online] Available at: <<https://www.shearman.com/perspectives/2020/03/covid-19-changes-announced-to-uk-insolvency-law-and-on-agms>>



If we are to focus on India, the insertion of Regulation 40C in the CIRP regulations has laid down the provision in pursuance of CIRP. This provision states that the period of lockdown will not be counted for the purpose of calculating the timeline for any activity in reliance on the resolution process. India has not taken adequate measures to endow the insolvency regime amidst the pandemic. The nationwide lockdown has accelerated the concern revolving around the survival of business entities and made the resolution plans no longer commercially viable due to the extenuating state of affairs. The mechanism needed for the implementation of the approved resolution plan which is the desired culmination of every positive step taken under the Insolvency framework has been neglected. Whereas the foreign governments have already addressed the issues pertaining to approved resolution plans, India has failed to address the key problematic aspects, amongst others, primarily concerning commercial viability of already approved resolution plan and secondly, penalizing the defaulters for not adhering to the implementing timelines due to the COVID-19 pandemic. The authors believe that this would result in a floodgate of cases contending the impossibility of implementation of the plan as result of the lockdown and its aftermath on the equity market amongst other sectors of the spectrum. IMF's predicted a recovery in the year 2021 for countries who have taken measures in curtailing the virus spread and preventing the bankruptcy and layoffs

simultaneously.¹⁵ India's future here somewhat lies bleak after the government has decided to suspend provisions of IBC that would trigger the fresh insolvency proceedings. But the question here is whether this suspension will prove to be in parlance with the approved plans? The survival of already approved plans is in deep waters and the initiation of new proceedings after a year will likely result both the proceeding in coherence with the new measures taken by the government thereon,

One can argue on many factors as to how the measures need to be implemented but looking at the UNCITRAL model of insolvency, India needs to abide by the provisions and come up with a concrete solution on how to go about.¹⁶

1. **Provision of certainty in the market to promote economic stability and growth:** India as a nation needed to bring about temporary legislations that would have promoted the restructuring of businesses and acted soon upon the closure and asset transfer of the failed ones in the wake of the pandemic. Since the measures to bring about any changes were administered later has proliferated an uncertainty in the market, the laws and institutions in the markets. This is due to the sudden halt brought to the supply chains around which have brought a sudden change in the economic stability and growth.
2. **Maximization of value of assets:** The entire objective of the insolvency framework is brought down to effectuate a manner in which avoidance provisions create requirements for treating prior transactions.

¹⁵ The Economic Times. 2020. *IMF Chief Kristalina Georgieva: We Have Entered Recession Read More At:*

[https://economictimes.indiatimes.com/News/International/Business/Imf-Chief-Kristalina-Georgieva-We-](https://economictimes.indiatimes.com/News/International/Business/Imf-Chief-Kristalina-Georgieva-We-Have-)

[Entered;Recession/Articleshow/74852225.Cms?Utm_Source=Contentofinterest&Utm_Medium=Text&Utm_Campaign=Cpist.](https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19) [online]

<https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19>

¹⁶ *Legislative Guide on Insolvency law*; UNCITRAL



This is usually done by treating creditors equitably and enhancing the value of debtor's assets by a recovery value for the benefit of all creditors. The balance has to be struck for not undermining the contractual obligations which are important for investment decisions in reliance with the objectives of an insolvency regime. The lookout on implementing provisions for reorganizing the businesses which may end up generating more value for creditors in the long term. The repercussions brought by events not predicted need to be considered so the proceedings can be safeguarded and the maximization of value can be ensured.

3. **Striking a balance between liquidation and reorganization:** This balance is predicted on the economic theory that a greater value is usually obtained by keeping the businesses together. In the wake of a financial difficulty, the insolvency law should be prepared to provide different types of conversions of proceedings for creditors and debtors' assets valuation.
4. **Ensuring equitable treatment of similarly situated creditors:** According to the policy of equitable treatment, it permeates many facets of an insolvency law. This includes application of the stay or suspension of provisions to set aside acts and transactions. Furthermore, to recapture the value of the entire insolvency regime. An insolvency law should be able to address problems that would prove detrimental to the very objective of the law in the wake of an economic crisis.
5. **Provision for timely, efficient and impartial resolution of insolvency:** And

lastly insolvency law should address and resolve proceedings in an orderly, fast and efficient manner, with the main objective of avoiding disruption of business activities of debtors. The entire process needs to be considered to ensure maximum efficiency without sacrificing any sort of tractability. Therefore, one can say that India needs to adopt relevant measures in order to keep the maximization of assets intact.

Conclusion: The impact of COVID-19 has been a debacle apropos of the bankruptcy regime. The Indian government before implementing the blanket suspension should have focused on the impact of the ban on the lenders who relied on the Code for debt recovery. There is no viable solution laid down for the creditors on how they will implement the plans for the resolution process for debt recoveries. The move will delay recoveries, impose an unprecedented event on how to implement plans that were approved prior in the wake of new financial unstable scenarios¹⁷. All of this will lead the corporate sector to compromise their capital adequacy and further impact the banks in context of resolution planning. The operational continuity of the insolvency framework would have been a feasible solution if these steps were taken in consideration of the debtors and the creditors and not otherwise. Multiple businesses around the world have already been witnessing the liquidity crisis and trade disruptions. Furthermore, the insolvency regimes of other countries have taken interim steps to prevent the complete shutdown of the

¹⁷ Jain, R., 2020. *Covid-19 Economic Package: No New Insolvency Proceedings Up To One Year, Says Finance Minister Read More At: <https://www.bloomberquint.com/Law-And-Policy/Covid-19-Economic-Package-No-New-Insolvency-Proceedings-Up-To-One-Year-Says->*

Finance-Minister. [online] Available at: <https://www.bloomberquint.com/law-and-policy/covid-19-economic-package-no-new-insolvency-proceedings-up-to-one-year-says-finance-minister>



insolvency system. The foremost objective of any bankruptcy and insolvency regime would be to keep the viability intact to ensure the competitions prevailing in the markets. It is an unchartered territory that we are currently witnessing; therefore, decisions taken should be in coherence with circumstances that will help in reviving the structure rather than pushing in the pitfall further. Systems around the globe that have not taken measures need to reshape the structure with the sole objective to surge the availability of credit and ensure maximization of assets. The countries whose financial sector is affected the most will need the central banks to provide them with greater liquidity so that the countries can perform basic credit evaluation (this would include India, Japan, South Africa etc.). Given the importance of a resolution plan in the insolvency regime, to keep the businesses as a going concern, it is essential to keep them interconnected by introducing temporary relief measures. Therefore, one should understand the significance of the resolution plan at such times and why we need to keep businesses running and not break the supply chain and create a hurdle in the system.

