



VOTING RIGHTS TO OPERATIONAL CREDITORS UNDER INSOLVENCY AND BANKRUPTCY CODE, 2016

INTRODUCTION:

In the recent weeks it is observed by the Hon'ble Supreme Court of India that the "operational creditors" should also be given right to be part of Committee of Creditors (the "CoC") of the Corporate Debtor undergoing Insolvency Resolution Process under The Insolvency and Bankruptcy Code, 2016 (the "IBC"). Currently, the Operational Creditors are kept away from being part of CoC which takes the decision on whether resolution plan has to be adopted for revival or whether the Corporate Debtor is to be liquidated.

Currently, a constituted CoC, comprise only of financial creditors. Operational creditors don't have a place in the CoC and they don't have voting rights, irrespective of the quantum of debts due to operational creditors. Justice RF Nariman pointed out that even in cases where the operational creditors' debt is huge, they currently don't have a say in the insolvency process.

ROLE OF OPERATIONAL CREDITORS IN CoC:

Currently under the IBC, the role of the Operational Creditors as to the CoC is restricted as under:

- Where a Corporate Debtor does not have any financial creditor, the CoC shall be constituted with 18 biggest Operational Creditors, 1 Representative of Employee and 1 from Workmen, who can exercise such functions that of CoC (including Voting Rights)
- Notice of each CoC meeting to be given to operational creditors if the amount of their aggregate dues in not less than 10% of the debt. (There is no voting right provided to Operational Creditor)

Balancing act: While keeping Operational Creditors away from the decision-making position (as elucidated above), the IBC under Section 30 provides that each resolution plan submitted shall provide for the payment of debts of the operational creditor which shall not be less than the amount to be paid to the operational creditors, in the event of liquidation (under Waterfall mechanism).

Though such a balancing act is provided under the IBC, the Operational Creditors of Corporate Debtor under Insolvency Resolution Process have often knocked the doors of Supreme Court of India.

CASE LAWS PERTAINING TO RIGHTS OF OPERATIONAL CREDITORS:

Important case laws pertaining to the Operational Creditors are discussed hereunder:

➤ **Bhushan Steel Case:**

The Engineering and Construction major L&T, an operational creditor of Bhushan Steel Ltd, had to move multiple courts in an attempt to recover its dues of Rs 900 crore, however, its petition is dismissed by the National Company Law Appellate Tribunal (NCLAT) in August 2018.

➤ **Essar Steel Case:**

Around 30 operational creditors of Essar Steel have jointly moved the National Company Law Tribunal (NCLT), Ahmedabad bench, seeking payment of dues worth over Rs 600 crore under IBC. While the total admitted claims of operational creditors amount to Rs.4,995 crore, the successful resolution applicant, ArcelorMittal, has offered to settle only Rs.214 crore, mainly pertaining to medium and small enterprises, according to a source close to an operational creditor.

RECENT DEVELOPMENTS:

The Hon'ble Supreme Court Justice RF Nariman during the proceedings of a hearing, suggested that Operational Creditors of the bankrupt companies be given a voice in the resolution proceedings in proportion to their debt, including voting rights. Hon'ble Supreme Court Justice RF Nariman also pointed out that in some cases, even the Operational Creditors' debt is huge but at present they don't have a say in the resolution process.

The two-judge Bench is hearing petitions filed by nearly 40 companies and individuals challenging the validity of the IBC.

The petitioners argue that the IBC is arbitrary and discretionary as it was protecting the rights of only Financial Creditors. However, Attorney General K.K. Venugopal, defended the IBC stating that it is a key piece of economic legislation that has aided recovery of loans for banks and is aimed at timely resolution. The bench is expected to resume hearing of the case in January 2019.

CONCLUSION:

Based on the existing judgements, it is evident that doors are not open in case of recovering the debts of operational creditors under IBC. Also, the interest of the Operational Creditors is not fully protected under IBC as they cannot raise their voice in the CoC formed with the Financial Creditors as per the existing provisions under IBC. But this not end of the tunnel.

It shall be noted that, Home Buyers who were not been given any Voting rights in CoC earlier under IBC, were subsequently given the said Voting Rights. Comparatively, operational creditors being business groups are regarded to have better financial and business acumen compared to that of an individual home buyer.

We should also note that the “Operational Creditors” includes not only the suppliers of goods and services but also includes employees, workmen, government and local authorities to whom the Corporate Debtor owes debt. When an observation is made to give operational creditor voting rights in CoC, the workmen group and government authorities would also get the voting rights.

As IBC is evolving into a stable piece of legislation, many more amendments are expected to come and the time will stand to test for the Operational Creditors if they can get voting Rights in COC. IBC had till date proved to be effective in terms of adopting many resolution plans for revival of sick Corporate Debtors and also recovering bad debts to a huge extent. It is definitely heading towards being a more balanced legislation.

Author : Sathya Prasad T
Director, (Corp. Compliance)
sathya.prasad@foxmandal.in

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