

## Dewan Housing: Why insolvency resolution processes need a greater degree of certainty

In November 2019, after reports of a large-scale financial scam, Dewan Housing Finance Corporation Ltd (DHFL) became the first non-banking financial company to be referred to the National Company Law Tribunal (NCLT) for insolvency proceedings.

In February 2020, 24 applicants submitted expressions of interest for DHFL. Applicants were allowed to bid for either the entire company or parts of the business. The last date for submission of a resolution plan was April 16. The deadline was extended multiple times, including on account of the COVID-19 pandemic, until November 9.

While the Adani group was reportedly among the initial 24 applicants, it eventually submitted an unsolicited bid after the November 9 deadline, offering the highest recovery to the lenders at the time. The other bidders, Oaktree Capital, Piramal Enterprises and SC Lowy, requested DHFL's Committee of Creditors (CoC) to reject the Adani group's bid since it had been made after expiry of the bidding period for the entire company (instead of only a part of the business as per the Adani group's original proposal).

Piramal Enterprises, in particular, is reported to have written that "the manner and timing of submission of such a resolution plan is intended to disrupt and vitiate the process being followed..." and that they had reasons to believe that details of their resolution plan "may have been leaked and have been considered for the purpose of making such an unsolicited offer".

The Adani group defended its late-stage bid on the basis that the bids submitted within the deadline did not reflect the value of the company and that rival bidders were preventing value maximization and forming a cartel to restrict full and fair competition.

The CoC directed prospective bidders to submit resolution plans by November 17 and then, after the NCLT stayed the proceedings on a petition filed by the National Housing Bank, by December 14. The CoC specified that existing bidders could submit revised bids

---

with their best offer (failing which their previous resolution plans would be considered as final).

While SC Lowy withdrew from the process on grounds of unfair treatment, both Oaktree Capital and Piramal Enterprises have presented higher bids than the Adani group in this fourth and ostensibly final round.

A resolution plan under the Insolvency and Bankruptcy Code, 2016 (IBC) is not a sale or an auction or a recovery – it is a plan for insolvency resolution of the borrower as a going concern while maximizing the value of its assets and promoting entrepreneurship, availability of credit, and balancing of interests of all stakeholders.

The objectives of the United Nations Commission on International Trade Law for an insolvency resolution regime, cited by the Bankruptcy Law Reforms Committee in its November 2015 report, included certainty in the market, provision of timely, efficient and impartial resolution, ensuring a transparent and predictable insolvency law and maximization of value of assets.

The principles relied on by the Bankruptcy Law Review Committee included symmetry of information between creditors and debtors and time-bound process to better preserve economic value. While late-stage bids may be acceptable in exceptional circumstances, this cannot be allowed to become a regular feature of the CIRP.

In the Binani Cement insolvency process, the resolution plan submitted by Dalmia Bharat was initially approved by the creditors. However, the NCLT observed that such plan was discriminatory and contrary to the IBC, and directed the creditors to consider other plans, including UltraTech's revised resolution plan.

Eventually, UltraTech's revised resolution plan was approved by the creditors and subsequently, by the National Company Law Appellate Tribunal (NCLAT) on the basis that the principle of value maximization was paramount and that UltraTech's attempt to take over Binani Cement outside of the corporate insolvency resolution process (CIRP) did not make it an ineligible applicant. This was also upheld by the Supreme Court. The NCLAT also relied on a conclusion that Dalmia Bharat's resolution plan was discriminatory among the creditors.

However, the principle of value maximization is not intended to be, and indeed cannot be, the paramount principle for consideration and approval of resolution plans under the IBC. It is also noteworthy that the NCLT and NCLAT judgments in the Binani Cement matter were rendered prior to the judgment of the Supreme Court in the ArcelorMittal matter in November 2019.

In the DHFL case, the COVID-19 pandemic could arguably qualify as an exceptional circumstance. However, given the level of interest in DHFL as per the original bids, it is

---

difficult to view the pandemic as justification for acceptance of a bid after the deadline and subsequent re-opening of the bidding process.

The IBC sets out a time-bound process, which allows for information symmetry, transparency and adequate time to all bidders to submit resolution plans on a level playing field. Allowing parties to put forth bids after a publicly announced deadline, which are inconsistent with their original proposals, provides an unfair advantage to such parties and creates information asymmetry.

A letter written by a bidder to the CoC and the Reserve Bank of India, as reported in the media, summed it up well by stating: “Bidders need to be comfortable that bidding is being conducted within the context of a fair, transparent and reliable process, both in perception and fact.”

The letter continued: “Processes run in reliable and developed markets define clear parameters for a transparent structured process which are strictly adhered to, creating certainty for bidders and thus maximising value. Breaches in confidentiality and opaqueness undermine this certainty, discouraging good faith bidders from participating and encouraging tactical bidding which does not lead to value maximization.”

While creditors may be tempted to prolong the CIRP in anticipation of a better return or there may be other extraneous forces at play, the IBC-mandated process and timeline must be respected absent compelling circumstances.

Otherwise, serious bidders will be deterred from participating and any litigation on account of alleged procedural lapses will prolong the process, waste public funds and ultimately harm the corporate debtor and the public.

Meanwhile, more than a year after initiation of the CIRP, DHFL’s CoC is evaluating the latest bids received and the possibility of legal action against the CoC in respect of the bidding process remains open.

---

*This note has been authored by **Rajat Sethi** (Partner) and **Tanya Aggarwal** (Partner). They can be reached on [rsethi@snrlaw.in](mailto:rsethi@snrlaw.in) and [taggarwal@snrlaw.in](mailto:taggarwal@snrlaw.in) for any questions. It was first published by [VCCircle](#). This insight is intended only as a general discussion of issues and is not intended for any solicitation of work. It should not be regarded as legal advice and no legal or business decision should be based on its content.*

**S&R**  
**ASSOCIATES**  
**ADVOCATES**



**NEW DELHI**  
64 Okhla Industrial Estate  
Phase III  
New Delhi 110 020  
Tel: +91 11 4069 8000

**MUMBAI**  
One Indiabulls Centre, 1403 Tower 2 B  
841 Senapati Bapat Marg, Lower Parel  
Mumbai 400 013  
Tel: +91 22 4302 8000