

An Alternative Approach to a Code of Conduct for the Committee of Creditors in an IBC Process

Recently the Standing Committee on Finance in a [report](#) placed before the Parliament on 3 August 2021 stated that “*there is an urgent need to have a professional code of conduct for the Committee of Creditors (CoC) which will define and circumscribe their decisions, as these will have larger implications for the efficacy of the Code*”.

Following such report, the Insolvency and Bankruptcy Board of India (the IBBI) published a [discussion paper](#) on 27 August 2021 (the IBBI Discussion Paper) in which, among other things, it proposed to “*put in place a code of conduct for CoC that shall elevate accountability and responsibility of CoC to ensure transparency in the functioning of a CoC.*” The IBBI Discussion Paper notes that the Insolvency and Bankruptcy Code (the IBC) has empowered the CoC to choose the best possible resolution plan for the sustained life of a company, however such responsibility must come with accountability. The CoC needs to be fair and transparent in its decisions.

The draft Code of Conduct proposed by the IBBI requires, among other things, that a member of the committee shall maintain integrity in performing its roles and functions under the the IBC, not misrepresent any facts or situations and refrain from being involved in any action that is detrimental to the objectives of the Code, maintain objectivity in exercising decisions, disclose details of any conflict of interest, not adopt any illegal or improper means, cooperate with the resolution professional, not acquire any assets of the corporate debtor without disclosure to stakeholders, and so on.

Notably, the IBBI discussion paper does not state how such a Code of Conduct will be given a legal basis. For example, is it proposed that such Code of Conduct will be included in the IBC itself or the IBBI (Resolution Process for Corporate Persons) Regulations, 2016 (the CIRP Regulations)? Such an inclusion could have unintended consequences.

Will a Code of Conduct included in the IBC or the CIRP Regulations lead to the introduction of a new ground of judicial review in relation to approval of resolution plans?

The Supreme Court in several decisions, including *K. Sashidhar vs. Indian Overseas Bank & Others* and *Committee of Creditors of Essar Steel vs. Satish Kumar Gupta*, has clearly enunciated a principle that judicial review in relation to decisions of the CoC approving a resolution plan shall be limited to the grounds stated in the IBC itself in Sections 30(2) (in case of the NCLT) and 61(3) (in case of the NCLAT). These include (a) whether the resolution plan provides for payment of costs in a specified manner, (b) whether the resolution plan provides for payment of a specified minimum amount to dissenting financial creditors and operational creditors in a specified manner, (c) whether the resolution plan provides for management of the affairs of the corporate debtor after approval of the resolution plan, (d) whether the resolution plan provides for its implementation and supervision, (e) whether the resolution plan contravenes any provisions of law, and (f) whether there has been any material irregularity in the exercise of powers by the resolution professional.

The Supreme Court has consistently held that subject to limited judicial review on the grounds stated above, courts will defer to the “commercial wisdom” of the CoC and not interfere with the decision of the CoC. This has played a very significant role in making the IBC a viable mechanism for insolvency resolution.

If the Code of Conduct is included in the IBC or in the CIRP Regulations, the effect could well be to provide an additional ground for judicial review whether or not it is explicitly stated as such in Sections 30(2) and 61(3). This is because the Code of Conduct could then be read as “law” and any perceived non-compliance with the Code of Conduct could be a ground for assailing the approval of a resolution plan on the basis that it contravenes provisions of law.

Introduction of an additional (process related) ground of judicial review based on violations of the Code of Conduct (whether expressly or by implication) will have downsides that are rather obvious. It could potentially lead to a quagmire of litigation on process related issues and further slowdown the corporate insolvency resolution process (CIRP) when the pace of such CIRPs already leaves much to be desired for multiple reasons which incidentally are also highlighted as key concerns by the Standing Committee on Finance and the IBBI Discussion Paper.

An alternative approach

The stated intention of the Standing Committee on Finance and the IBBI Discussion Paper in seeking to regulate the functioning of a Committee of Creditors is that it will

strengthen collective action. In turn, this will lead to greater efficiency in achieving insolvency resolution and value maximization in a time bound manner. Such an intention is laudable. However, at the same time a cautious approach is needed to avoid a situation where the IBC goes down the path of the pre-IBC legal regimes.

The members of a CoC are typically well-regulated entities. In most cases, they are regulated by the Reserve Bank of India or the Securities and Exchange Board of India. The IBBI is not their regulator. Perhaps the existing regulatory frameworks applicable to CoC members could be extended and adapted to IBC situations – such extension could be in a form that is not considered “law” for the purposes of Sections 30(2) and 61(3) of the IBC and yet disincentivizes non-compliance with the Code of Conduct. This approach will be consistent with the contents of the proposed Code of Conduct which are more in the nature of broad principles rather than prescriptive rules.

Such an approach, apart from addressing the valid concerns raised by the Standing Committee on Finance and the IBBI Discussion Paper, will have twin benefits. It will avoid the pitfalls of providing additional grounds of litigation to those who may not necessarily be aligned with a timely IBC resolution process, and at the same time make CoC members accountable to their own regulators in relation to discharge of their roles and responsibilities under the IBC.

*This insight has been authored by **Rajat Sethi** (Partner), he can be reached at rsethi@snrlaw.in for any questions. It was first published by [NLS Business Law Review](#). 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.*

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