

GNLU Centre for Law and Economics

A GLANCE OF THE THIRD ROUND OF THE PANEL DISCUSSION ON THE IMPACT ASSESSMENT OF THE CORPORATE INSOLVENCY RESOLUTION PROCESS: FUTURE PROSPECTS AND PRACTICAL CHALLENGES

The GNLU Centre for Law and Economics, supported by the GNLU Faculty Seed Grant Programme since June 2022 is undertaking a research project headed by Dr. Hiteshkumar Thakkar (Asst. Professor Economics, GNLU) titled *Impact assessment of Corporate Insolvency Resolution Process (CIRP) in the State of Gujarat*. On 21st January, 2023, the Third Round of the Panel Discussion was held virtually, wherein there was congruence among the various panellists that while the IBC has several positives that presents a case of improvement as compared to the previous legislations, it is not flawless.

Below are some of the highlights of the distinguished Panellists' comments:

Mr. G. P. Madaan

“Resolution plans amount should never be considered with haircut suffered, it needs to be taken into consideration with its liquidation value and fair value.”

- Made a reference to the discussion paper dated 18th of January 2023, published by the IBBI Ministry and has invited comments and suggestions from the public for changes to the Insolvency and Bankruptcy code.
- Highlighted that the efficacy of the IBC has been questioned in *Vidarbha Industries v. Axis Bank* and *State Tax Officer v. Rainbow Papers Limited*. In *Vidarbha* case it was held that under Section 7(5), the word ‘may’ indicate that that the Adjudicating Authority can exercise its discretion while admitting the application. However, under Section 9(5), the word shall indicate that no discretion could be exercised.
- Agrees with the discussion paper as well as the *Vidarbha* judgement that there should be discretion in the admission of application.
- Emphasizes that the spirit of the code is not to recover government dues. In cases where charges or a charge has been created towards the government, for example- outstanding dues to provident fund department and other such charges to the government, such a plan will attract reluctance on behalf of the CoC to follow the plan

- Highlights that for successful resolution applications, there is a need to make the process more creditor specific.
- Suggests that more changes need to be made on an urgent basis, in order to save the law, while incorporating the changes. This could be done on an urgent basis through an ordinance

Mr. Suharsh Sinha, Partner, AZB nad Partners

“Another success of the IBC has been in the amount of recovery that banks have made in the past 5 years. I think this is important because since the time IBC came, the NPA ratio of the banks was bad, today it is low.”

- Highlights the success of the IBC-
 - First success- New institutions have been set up in record time and have been functioning well relatively
 - Second success- the amount of recoveries that banks have made has increased compared to that under previous legislations. While not all can be attributed to IBC (due to bank recapitalization), IBC establishes a control system, where recoveries are made with a haircut
 - Third success: IBC has developed the Secondary market; we now have ARC, Hedge Funds, Foreign Investors
- Proceeds to underscore the issues with the IBC
 - Believes that the biggest stumbling block of the IBC is the NCLT
 - There is need for adequate training of judges as judges do not have experience in commercial dispute. They possess an Administrative or Criminal law background. This causes them into issues of look fair play and equality, which should not be the case in Commercial disputes
 - Disagrees with the Vidarbha judgement. Believes that the interpretation Shall (compulsory admission), provides an objective criterion to the judge.
 - Believes that if discretion is vested there would be no consistency in how cases are decided
 - Is of the opinion that there is no rational for differential treatment of financial creditors from operational creditors
 - Registers his disagreement with the decision India Resurgence ARC Private Limited v. M/s. Amit Metaliks Limited & Anr.
- Highlights the need for the ILFS Resolution under the Companies Act, to be considered

Mr. Anil Goel, CA, Insolvency Professional

“One important issue is right of specific performance. Is advance for purchase of property a financial or operational debt? I am getting a custom ship made, and I paid advance money, if I do not get delivery, I should get a seat on the table (as financial creditors).”

- Highlights the two primary issues discussed in the colloquium
 - Delay in admission of section 7, 9, 10 applications. This gives an opportunity to the promoters to take away whatever is possible. This has resulted in a lack of trust in IBC
 - Settlement should not be considered at an admission stage. The process of recovery is outside jurisdiction of NCLT
 - Delay in approval of resolution plan. By the delay, there may be a change in project value, etc.
- Highlights that large banks are reverting to Debt recovery and SARFESI Act, (especially after the Rainbow papers judgement) which is far clearer cut
- Money realized in liquidation is much more than what is offered under resolution plan. Thus, Liquidation and SARFESI are better options
- Registers that it is not the case that not much has been done; many issues have been resolved such as limitation period, bankers power to remove the liquidator, etc.
- Registers that fear of IBC being there is working well in favor of the lenders
- Registers the issue on need for more flow of information flow from promoters and KMPs

Mr. Charan Rawat, Banker

“Banks suffer the most. What is my status if I have an exclusive charge? The exclusivity extinguishes once the CIRP commences.”

- Highlights that Bankers are one of the parties that suffer the most
- Highlights the issue of the taking away of exclusive charge or guarantee from banks on commencement of CIRP. While this does not affect the financial position of CD, But, bankers cannot understand why they cannot enforce the guarantee.
- Proposes that once resolution plan has been approved, nclt’s decision should be final and there should be no other intervention

- Highlights the debate: whether the IBC is resolution law or recovery law. If a resolution law, why is there so much weightage attached to liquidation value. Is a Resolution with an 85 to 90% haircut a resolution or closer to liquidation

Mr. Nageswaran Swamy, Insolvency Professional

“It is a nascent law. Particularly this is one law which is now trying to post itself against all colonial laws, most others laws are there since colonial times.”

- The IBC effectiveness is talked about in terms of recovery percentage.
- Suggests on the basis of the 18th January report, that bankers have their own resolution plan-
- Highlights the pressing issue, whether there is a need to make a course correction from creditor in control to debtor in control model