28 August 2024

Introduction of Guidelines for the Committee of Creditors – A Step in the Right Direction

BACKGROUND

The Insolvency and Bankruptcy Code, 2016 (Code) is an ever-evolving legislation aligned with the economic needs of the country. While frequent revisions have been carried out in the Code and Insolvency and Bankruptcy Board of India (Insolvency Resolution for Corporate Persons) Regulations, 2016 (CIRP Regulations) to bring forth onus and responsibility in the roles of the resolution professional and allied professionals, the role of the creditors comprising the committee of creditors (CoC) has long remained vague and undefined. In order to bridge this gap, the Insolvency and Bankruptcy Board of India (IBBI) has on 06 August 2024 introduced the 'Guidelines for Committee of Creditors' (Guidelines) with the ultimate aim to ensure time bound resolution of the corporate debtor in the interest of value maximization.

These Guidelines assume more importance since it is the CoC and its commercial wisdom which drive a corporate insolvency resolution process (CIRP). It has also been established via various judgements that such commercial judgement is non-justiciable. However, there have been some instances wherein the commercial wisdom of the CoC has prevailed over tenets of the Code prioritizing recovery over value maximization and also contributing to delayed resolution. Accordingly, the Guidelines which have come into immediate effect aim to curtail the procedural delays and value erosion while also enhancing transparency and coordinated decision making by the CoC.

GUIDELINES TO BE FOLLOWED BY THE COC:

1. **Objectivity and Integrity**: The members of the CoC shall (i) follow the provisions of the Code and adjoining regulations in letter and spirit, while performing their roles and functions; (ii) maintain integrity in discharging their roles and functions; (iii) maintain objectivity in decision making; and (iv) facilitate informed decision making and share with the CoC and the resolution professional information in relation to transactions, guarantees, recoveries, claims etc relating to the corporate debtor.

   The inclusion of the phrase 'letter and spirit' shall ensure that the CoC takes purposive interpretation of the Code and base its decision to further the objectives of value maximization and time bound resolution.

2. **Independence and impartiality**: The members of the CoC on becoming aware of any existing or potential conflict of interest arising due to pecuniary, personal or professional relationship with any stakeholder shall immediately disclose it to the other members of the CoC / resolution professional.

3. **Professional competence and participation**: The member of the CoC shall (i) keep themselves updated on the latest provisions of the Code and aligned rules and regulations along with the duty assigned under the same; (ii) nominate sufficiently authorized representatives to participate in meetings of the CoC. The nominated representative shall endeavour to obtain the approval of any competent authority, if necessary; and (iii) participate actively and constructively in the deliberations and decision making of CoC.

   The introduction of the above is essential to ensure that representative attending the CoC meetings are appropriately authorized and aware of the Code. This shall address the delay in resolution to a large extent.

4. **Co-operation, supervision and timelines**: The members of the CoC shall (i) supervise and facilitate the resolution professional in discharging his duties under the Code; (ii) facilitate expeditious appointment of various professionals within statutory timelines; and (iii) endeavour to resolve *inter-se* disputes between CoC members especially in relation to claim, through non-adversarial means with a view to avoid prolonged litigation.

   The appointment of professionals including statutory auditors, valuers etc is essential for furthering the CIRP of the corporate debtor and require CoC approval. The facilitation of the same by the CoC members shall greatly aid in fast tracking the steps involved. The suggestion to explore *inter-se* disputes via non-adversarial methods is aimed to prevent multiple litigations stemming from dissatisfied lenders in the matter of claim admission.

5. **Confidentiality**: The member of the CoC shall at all times adhere to the confidentiality undertaking as required under the CIRP Regulations.

6. **Costs**: The member of the CoC shall (i) take necessary steps to ensure that the CIRP cost is reasonable; (ii) expeditiously decide on the expenses to be incurred by the resolution professional including his fees and expenses involved in maintaining the corporate debtor as a going concern; and (iii) fix the fees of the liquidator in a prudent manner.

   The inclusion of the above guidelines shall ensure that the CoC only undertakes activities strictly mandated under the Code or incur the expenses associated with them on its own accord.

7. **Meeting of the CoC**: The member of the CoC shall (i) regularly monitor the activities of the resolution professional and seek rationale behind the decisions taken; (ii) recommend for inclusion of delayed claims under Regulation 13 of CIRP Regulations; (iii) participate in the presentation of valuation methodologies made by the registered valuers; and (iv) ensure conduct of meetings of the CoC at regular intervals.
   The same shall ensure that the members are involved in the running of the corporate debtor and updated on its functioning. Since the CoC functions in a fiduciary capacity, the specification of proactive recommendations on delayed claims, majority of which are of 'operational creditors', 'other creditors' or 'homebuyers' is noteworthy.

8. **Sharing of information**: The member of the CoC shall (i) proactively share the latest financial statements, relevant extract from audits of the corporate debtor conducted by the CoC members and other relevant information with the resolution professional to enable efficient running of CIRP process; and (ii) seek details of all litigation filed against or by the corporate debtor from the resolution professional and recommend necessary actions to safeguard the interest of the corporate debtor.

9. **Feasibility and viability of the corporate debtor**: The member of the CoC shall (i) review the information memorandum and offer additional comments / insights; (ii) contribute towards preparation of marketing strategy for the assets of the corporate debtor and may also undertake for such marketing; (iii) ensure all resolution plans received by the resolution professional are placed for CoC consideration; and (iv) consider requirement of monitoring committee for resolution plan implementation.

COMMENTS

The introduction of the Guidelines follow the directions of the Hon'ble High Court of Delhi in Mr. Kunwer Sachdev *v* IDBI Bank & Ors *(2024 SCC OnLine Del 908)* wherein vide order dated 12 February 2024, the High Court had directed the IBBI to frame a code of conduct or guidelines for the CoC. The High Court had aptly observed that CoC takes the driver's seat in the CIRP of the corporate debtor and its decision is accorded the highest pedestal in a sense that even the adjudicating authority is not empowered to lift the veil on the merits of the decision. Accordingly, absence of such guidelines have many a times led to focus being on recovery rather than resolution. While the commercial wisdom of the CoC still stands supreme, with the introduction of the Guidelines it will now be tested on the scale of reasonableness, fair-play, proportionality and adherence to the principles of natural justice.

The Guidelines, by specifying that the CoC should undertake its decisioning making process in a time bound manner within the timelines prescribed under the Code, shall also push timely resolution of the corporate debtors. The Guidelines shall also contribute towards conduct of the CIRP in a more transparent manner with realization of value being maximized for all stakeholders.

However, on the side of caution it may be noted that while these Guidelines are definitely a step in the right direction, in its current form the Guidelines are very broad and subjective which runs the risk of increased litigation *qua* its interpretation. Further, in the absence of any provisions which provide for consequences *qua* non adherence to these Guidelines, it is likely that these Guidelines will be seen as directory and not mandatory. To conclude, the Guidelines are definitely a step in the right direction, however they need much more detailing to be effective.

- Dr. Siddharth Srivastava (Partner), Mohit Kishore (Counsel) and Shikha Mohini (Associate)

For any queries please contact: editors@khaitanco.com

AMBITION STATEMENT

"Our ambition is to be a respectable law firm providing efficient and courteous service, to act with fairness, integrity and diligence, to be socially responsible and to enjoy life. We should put greater emphasis on working in consonance with our aforesaid values than on maximizing earnings. Earn we should but with dignity and pleasure."