



■ A fixed line telephone and a calculator sit next to a pair of spectacles. (Photographer: Chris Ratcliffe/Bloomberg)

## **Insolvency Law: Fair Value Made Mandatory To Get Fairer Bids**

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In a move that may impact the valuation of stressed assets and bring in transparency in the bidding process, the Insolvency and Bankruptcy Board of India (IBBI) amended its regulations on Tuesday.

The changes will be effective as of Feb. 6 and pertain to the fair value of the stressed assets, evaluation matrix for potential investors, and timelines for the submission of the resolution plan to the committee of creditors. The insolvency regulations were introduced in November 2016 and have been amended five times since, including as recently as Dec. 31 last year.

## Hello, Fair Value

So far, the insolvency regulations required determination of only the liquidation value of the insolvent company by two registered valuers. Now, these valuers will also have to determine the fair value of the company. Fair value, along with the liquidation value, will have to be provided to the committee of creditors on a confidential basis.

The amendment defines 'fair value' to mean the realisable value of assets of the insolvent company, if they were to be sold between a willing buyer and seller as on the date on which insolvency application has been admitted, on an arm's length basis, after proper marketing.

Earlier there was a concern that wide dissemination of liquidation value to applicants caused bids of lower value since bids tend to hover near the liquidation value mark which is significantly less than market value of the asset, Suharsh Sinha, an insolvency lawyer at AZB & Partners told BloombergQuint. He pointed out that an earlier amendment to the regulations had addressed this issue by saying that the liquidation value be kept confidential. The recent amendment seeks to address the value of the asset being pegged to the low liquidation value, he added.

“ *The valuers now need to provide both the 'fair value' as well as 'liquidation value'. In companies facing severe distress, the fair value and liquidation value may converge. But in many cases where the companies have capabilities of generating positive cash flows, a 'fire-sale' liquidation value is an inaccurate reflection of intrinsic value - to that extent, the amendment is a very welcome move.*

**Suharsh Sinha, Lawyer, AZB & Partners**

But some experts are skeptical regarding the implication of this change.

It is not clear as to what the implication of undertaking two valuations would be, since these valuations are only shared with the committee of creditors and not disclosed to prospective bidders; possibly for a better price discovery for the lenders, Zubin Mehta partner at law firm Veritas Legal told BloombergQuint.

It will be difficult to ascertain the effect this change has on a proposed resolution plan, he added.

## Evaluation Matrix: Ensuring Fairness

The second change relates to an 'evaluation matrix' that will have to be included in the invitation offered to prospective resolution applicants. The amendment states that the evaluation matrix refers to a set of parameters and the manner in which these parameters are to be applied while considering a resolution plan.

While the regulations do not indicate what these parameters could be, they have to be approved by the committee of creditors and may be amended and communicated within prescribed timelines. The evaluation matrix will have to be provided to resolution applicants before they submit their bids.

The committee of creditors evaluates various resolution plans submitted for an insolvent company and, based on their evaluation, determine the appropriate resolution plan, Arjun Gupta, an insolvency lawyer at Nishith Desai Associates explained. The applicants must also be made aware of why the committee decided to go with plan X over plan Y and it appears that this is the rationale for bringing in the concept of an evaluation matrix, he added.

“ *This was already being done by resolution professionals in ongoing cases to ensure there are no allegations of bias or favouritism by the committee of creditors or resolution professional. The amendment codifies the prevalent market practice.*

**Arjun Gupta, Lawyer, Nishith Desai Associates**

More importantly, it will ensure that the bid evaluation process is more transparent and provides a layer of procedural fairness to any challenge to the process by unsuccessful bidders, Sinha added.

## **New Timelines**

The recent amendments have now also laid down timelines within which resolution plans must be submitted to the committee of creditors and the National Company Law Tribunal.

If the invitation to resolution applicants includes an evaluation matrix, the applicants will have to submit their resolution plans at least 30 days before the last date of submission. Where an evaluation matrix is not included in the invitation itself and is provided subsequently, the applicants will have to submit resolution plans at least 15 days before the last date of submission.

These timelines will not apply for ongoing insolvency processes if less than 37 days are left for submission in the former case, and less than 18 days in the latter.

Further, the resolution professional will have to submit the plan, approved by the committee of creditors, to the NCLT at least 15 days before the expiry of the maximum period permitted for completion of the resolution process.

The final change is on the contents of a resolution plan, which must now compulsorily provide for necessary measures to maximise value of assets. An inclusive list of such measures is provided in the amendments which includes a merger or consolidation of the insolvent company, reducing the dues owed to creditors, change in terms and conditions of loan, including reduction of interest rate etc.

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