

IBC: Battle royale between value maximisation & sanctity of insolvency process

The orders of the NCLT benches to reconsider bids in the Binani Cements and Bhushan Power & Steel cases sent a wave of despair down to industry watchers who have been arguing for an effective insolvency regime for India.

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It is now a battle between the rights of the creditors to maximise value from the [insolvency](#) process against the sanctity of the insolvency process. Two orders from the National Company Law Tribunals in the last fortnight entertaining revised bids tip the scales towards value maximisation and against timely resolution.

Facts of the two cases:

<p>NCLT Kolkata in Binani Cements case on May 2</p>	<ul style="list-style-type: none"> -Asked lenders to consider UltraTech's revised bid; -Gave RP three days' time from the date of order to place the fresh bids by UltraTech before CoC -Allowed Dalmia Bharat to match UltraTech's Rs. 8,000 offer; Dalmia Bharat has offered Rs 6,750 crore -Asked RP to file progress report in the case by June 4 -Extended resolution deadline to June 23 on account of litigation time 	<ul style="list-style-type: none"> -Dalmia Bharat challenges NCLT order -Lenders to evaluate UltraTech's fresh bids
<p>NCLT Ahmedabad in Bhushan Power & Steel case on April 23</p>	<ul style="list-style-type: none"> -Asked lenders to either consider Liberty House's delayed bids or to consider fresh round of bidding, right from the start -Extended the resolution deadline to June 24 on account of litigation time 	<ul style="list-style-type: none"> -Lenders decide against conducting fresh bids. -They met last week to open Liberty's bid -Liberty House offered Rs. 18,500 crores, Tata Steel Rs. 17,000 crores, JSW Steel Rs. 11,000 crores -Lenders to evaluate all three bids

Source: An ETCFO Compilation

At the heart of the two orders is the belief that the principle of value maximisation should supercede the requirement of timely resolution.

Sumant Batra, Managing Partner at Kesar Dass, a law firm specialising in bankruptcies says "the view that has emerged from the NCLT orders is that they prefer to maximization of value can take place without the process serving as a constraint to achieve that objective and therefore they seem to have given that goal a preference over nuances of the process."

"The only concern is that if you don't have certainty of the process it poses the process to certain risk," he adds.

For someone who has been a close observer of the process of setting up of the Insolvency and Bankruptcy Code, NIPFP economist, Ajay Shah is aghast at that prospect. "Tomorrow, insolvency proceedings can finish in 180-270 days, and then somebody can come and then say I have a better bid, and this can go on for years and years. There is no finality," he says while reiterating that the point of the IBC is that the process is short.

The NCLT Kolkata verdict in the Binani Cements, where the losing bidder UltraTech is back in contention with its revised bid, Shah says it will become a precedent for all the cases, as he fears no buyer will then "seriously" take the whole process.

The legal fraternity, however, takes a slightly different view of the orders. SK Singhi, Managing Partner at SK Singhi & Co, also an advocate for operational creditors in the Binani Cements' case believes that the order is a one-off case and does not mean that rebids will be allowed on a regular basis. "This order is based on the facts and circumstances of the present case."

According to Goda Raghavan, partner at AK Law Chambers, the Binani case verdict is like a "double-edged sword."

On one hand, she says it is a "good precedent" because it talks about maximization of the value of the distressed assets and gives a broader signal that the tribunal will not blindly accept the lenders' proposal, especially given the ongoing parallel agreement between the group companies. However, she adds the order maybe deemed to be interfering in a legally concluded bidding process.

"This judgement opens up a fair ground on the intention of the IBC itself, which is in the interest of the both lenders and debtors. In the resolution process, if a better price can be ascertained then why the revised bids should not be allowed, especially in the present circumstances of the case?" she asks even as she strikes a note of caution.

"Here, you have to be careful. Rebidding should only be allowed in the genuine cases where there is legitimate reason. NCLT will therefore have to act on a case-to-case basis," she says.

Arjun Gupta, insolvency lawyer at Nishith Desai Associates while concurring with this viewpoint believes an open or phased round of bidding could lead to litigation. "The amended Regulation 39 of CIRP doesn't allow for competitive bidding as per the earlier timeline which was till 30 days of completion of the insolvency process. However the wording as it stands today still can be interpreted to mean that it is up to the discretion of the RP," he says.

Discretion, unless it is defined properly rarely helps in legal resolution processes such as those associated with insolvency and bankruptcy. It seems that there needs to be a rethink on the permissibility and process of bid revision. Ultimately, there needs to be a balance between value maximisation for the creditors and the signalling value of the legal precedents for the economy.