



Dealing with Insolvency

IBC's impact and role in the resolution process

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Prior to the enactment of the Insolvency and Bankruptcy Code, 2016 (IBC), the issues surrounding insolvency and debt resolution were governed by several laws and adjudicatory fora. This multitude of statutes and authorities was perceived to have rendered the insolvency and debt recovery process inadequate, ineffective and protracted, leading to the enactment of the IBC. The IBC has now become an effective tool for facilitating the exit of distressed firms, thereby allocating scarce economic resources towards more productive uses and aiding in the recovery of amounts from non-performing assets (NPAs).

The Economic Survey 2016-17 stated that the origin of the NPA problem plaguing Indian lenders can be traced to decisions taken by firms in the mid-2000s to launch new projects worth billions of rupees, particularly in infrastructure-related areas such as power generation, steel and telecom, setting off the biggest investment boom in India's history. The survey further stated that higher-than-expected costs, lower revenues, and greater financing costs all squeezed corporate cash flow, quickly leading to debt servicing problems.

Since then, the IBC has ushered in significant changes. The Economic Survey 2022-23 stated that since its inception in December 2016, 5,893 corporate insolvency resolution processes (CIRPs) had commenced by end September 2022, of which 67 per cent have been closed. Of these cases, around 21 per cent were closed on appeal, review, or settlement, 19 per cent were withdrawn, 46 per cent ended in orders for liquidation, and 14 per cent culminated in the approval of resolution plans. The survey also records that in 2021-22, the total amount

recovered by banks through the IBC exceeded that recovered through other means, including Lok Adalats, debt recovery tribunals or under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

Insolvency in the power sector

The 37th report of the Parliamentary Standing Committee on Energy, submitted on March 7, 2018, on "Stressed/Non-Performing Assets in Electricity Sector", examined 34 coal-based thermal power plants (TPPs) under financial stress. The report highlighted several reasons for the financial stress, including non-availability of fuel (coal), insufficient PPAs by states, inability of the promoters to infuse equity and working capital, tariff-related disputes, issues related to banks, and delays in project implementation, leading to cost overruns. Some of these issues can be resolved through the IBC process. Analysis by the Institute for Energy Economics and Financial Analysis shows that as of April 2023, 26 TPP stressed assets had been fully or partially resolved, with strategic buyers acquiring 11 of these plants through CIRPs.

The Ministry of Power, recognising the efficacy of the IBC and the need for power generation, issued an advisory on November 1, 2023, encouraging state generating companies to participate in the CIRP by acquiring strategically and commercially significant stressed power assets. The advisory identified four plants across the country that were ready for takeover.

According to the Insolvency and Bankruptcy Board of India website, the electricity sector currently constitutes 3 per cent of the 7,058 cases that have been admitted into the CIRP under the IBC,

the majority of which are hydroelectric plants and TPPs.

Some successful takeovers of power assets under the IBC include:

- Acquisition of Lanco Mandakini Hydro Energy Private Limited by Statkraft Ih Holding AS.
- Acquisition of South East Uttar Pradesh Power Transmission Company Limited by Resurgent Power Ventures Pte. Limited.
- Acquisition of Jal Power Corporation Limited by NHPC Limited.

This offers hope to power companies that have been struggling due to unfavourable circumstances and also gives a fillip to the power sector in India.

IBC and PPAs

A challenge that deters resolution applicants from submitting resolution plans is the continuity of the corporate debtor's existing PPAs. Their subsistence, along with projected revenues, is often a factor making an acquisition under the CIRP attractive. However, most PPAs contain an ipso facto clause, which states that a counterparty undergoing CIRP amounts to an event of default, thus giving the right of termination to the other party.

The validity of such a clause in light of the provisions of the IBC was considered by the Supreme Court in the *Gujarat Urja Vikas Nigam Limited (GUVNL) versus Mr Amit Gupta and Ors case [(2021) 7 SCC 209]*.

In this case, GUVNL and Astonfield Solar (Gujarat) Private Limited had entered into a PPA. During the term of the PPA, due to heavy rainfall and floods in Gujarat, Astonfield's solar power plant became severely damaged. Astonfield



wrote a letter to GUVNL, invoking the force majeure clause in the PPA.

Due to the financial stress caused by the disruptions and damage, Astonfield was unable to fully service the debt and was thus declared an NPA by the financing parties. Subsequently, the National Company Law Tribunal (NCLT) commenced CIRP proceedings against the corporate debtor and issued an order of moratorium.

After the commencement of the CIRP proceedings, GUVNL issued a notice of default to Astonfield, invoking an ipso facto clause in the PPA which permitted GUVNL to terminate the PPA on the grounds of insolvency. In the notice of default, the appellant called upon the corporate debtor to remedy this default within 30 days from the date of receipt of the said notice, failing which the appellant stated that it would terminate the PPA by issuing a termination notice.

Astonfield filed an application under Section 60(5) of the IBC, seeking an injunction to restrain GUVNL from terminating the PPA. Section 60(5)(c) of the IBC states that the NCLT has the jurisdiction to entertain or dispose of any question of law or facts arising out of or in relation to the CIRP of the corporate

person under the IBC.

In this case, the NCLT restrained GUVNL from terminating the PPA on the grounds that "The clauses of the PPA cannot be placed on a higher pedestal than the provisions of the IBC, in the context of drawing a timeline for completion of the CIRP. The fact that the CIRP has not concluded within 30 days from the receipt of the notice of default cannot be construed as an event of default since the time limit for the CIRP under the IBC is 330 days."

The National Company Law Appellate Tribunal (NCLAT) dismissed GUVNL's appeal against the NCLT order, holding that during the CIRP, the first resolution professional has to maintain Astonfield as a "going concern". The termination of its sole PPA, under which it supplied electricity only to GUVNL, would render Astonfield defunct. Hence, the NCLAT held that GUVNL could not terminate the PPA solely on the grounds of the initiation of the CIRP of the corporate debtor, which was supplying power to Astonfield during the period of the CIRP.

Subsequently, GUVNL approached the Supreme Court against the NCLAT order. The Supreme Court ruled that the NCLT/NCLAT can exercise jurisdiction under Section 60(5)(c) of the IBC over disputes

arising from contracts such as the PPA.

With regard to GUVNL's right to terminate the PPA, the Supreme Court stated: "The termination of the PPA will have the consequence of cutting the legs out from under the CIRP." The Supreme Court further stated that "In this case, the PPA has been terminated solely on the grounds of insolvency, which gives the NCLT jurisdiction under Section 60(5)(c) to adjudicate this matter and invalidate the termination of the PPA as it is the forum vested with the responsibility of ensuring the continuation of the insolvency resolution process, which requires preservation of the corporate debtor as a going concern."

This case effectively addressed the concerns of acquirers, and the clarity provided by this decision will make the CIRP more robust and encourage the turnaround of stressed assets with value.

Conclusion

The impact of the IBC on the power sector has led to the phase-out of old activities, making room for new ones and preserving assets and projects. While this has been encouraging, the extent to which the IBC can ensure the reallocation of economic resources from unprofitable activities remains to be seen. ■