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Single Transferable Voting in IBC: A way out from the Procedural Quagmire

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ABSTRACT

The Insolvency and Bankruptcy Board of India (IBBI) has come up with a proposal for introduction of system of “Single Transferable Vote” (hereinafter, “STV”), also referred to as “preferential voting”, for arriving at speedier resolution process by the Committee of Creditors (“COC”) under the Insolvency and Bankruptcy Code, 2016 (hereinafter, “Code”). IBBI has published a paper titled “Discussion Paper on measures for increasing the possibility of resolution, value of resolution plan and enabling timely resolution” on 7th June 2023 soliciting public comments on this subject matter. The said proposal is being viewed as an innovation solution to fast track the insolvency resolution process which has been bogged down with delays due to lack of acceptance of insolvency plans by the CoC. Recent analysis shows that large haircuts that are being take by the creditors in arriving at a resolution in CIRP are directly attributable to such procedural delays. This paper attempts to analyze the concept of “STV” and its potential implication in the commercial arena.

Keywords: *Single Transferable Vote, Committee of Creditors, Insolvency.*

I. INTRODUCTION

The Insolvency and Bankruptcy Board of India (IBBI) has come up with a proposal for introduction of system of “Single Transferable Vote” (hereinafter, “STV”), also referred to as “preferential voting”, for arriving at speedier resolution process by the Committee of Creditors (“COC”) under the Insolvency and Bankruptcy Code, 2016 (hereinafter, “Code”). IBBI has published a paper titled “*Discussion Paper on measures for increasing the possibility of resolution, value of resolution plan and enabling timely resolution*” on 7th June 2023 soliciting public comments on this subject matter.

At the outset, it is relevant to understand the concept of STV. In the constitutional framework, the system of STV has been explicitly mentioned for the election of President and Vice-President of India. Under Article 55 of the Constitution, the President of India has to be elected by the elected members of both the Houses of Parliament as well as Legislative Assemblies of

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States and Union Territories by proportionate system through single transferrable vote. Similar provision is provided under Article 66 for the election of Vice- President of India by members of both the Houses of Parliament. Article 80 and 171 of the Constitution gives a similar mandate for election of members of upper house of the Parliament as well as the State Legislature respectively. The reason for opting for this method of election for the aforesaid positions was to prevent wastage of time and avoiding huge expenditure since the Lower Houses in the Parliament as well as the State Legislatures were to be elected by way of direct elections².

Thus, the scope of system of 'Single Transferable Vote' has been unique to elections of certain positions of political nature in India's statutory framework, with no mention of such a system in commercial parlance.

Before analyzing the effect of introduction of STV in insolvency proceedings under the Code, it is germane to examine the reasons due to which the IBBI came up with this proposal. The basic objective of enacting the Code was to provide a time-bound and efficient process for resolving insolvency and bankruptcy proceedings in a transparent manner so as to ensure optimum realization of value of assets of debtor. The Code under Section 12 provides for completion of Corporate Insolvency Resolution Process ("CIRP") within a period of 180 days from the insolvency commencement date, provided an extension of 90 days can be given if a resolution to that effect is passed by the CoC by a vote of 66% and the consequent application filed by the Resolution Professional is allowed by NCLT. Furthermore, the Code has also provided an outer limit of 330 days within which the insolvency proceedings have to be "mandatorily" completed from the insolvency commencement date. It is relevant to mention that the aforesaid threshold of "66%" was brought down from the earlier threshold of "75%" for extension of time period as well as for acceptance of resolution plan with the aim of encouraging quicker resolution.

Despite the above- mentioned mandate of completing the resolution process within a period of 180 days, the NCLT has been struggling to complete the proceedings under the said time- frame. As per the data provided in the report titled "*Implementation of Insolvency and Bankruptcy Code- Pitfalls and Solutions*" published by the Standing Committee on Finance in August 2021³, out of the total 9,851 insolvency cases pending before the NCLT under the Code, 7027 cases (i.e., more than 70%) were those that had remained pending for more than 180 days from their respective insolvency commencement date, thus indicating a deviation from the intended

² P.K. Majumdar and R.P. Kataria, *Commentary on the Constitution of India*, 10th Edition Pg 1520.

³ 32nd Report of the Standing Committee on Finance, Seventeenth Lok Sabha

objective of the Code. The Report cited two major reasons for delay in resolution of insolvency proceedings- delay in deciding the insolvency applications by NCLT and delay in acceptance of resolution plans by the CoC. The first reason can be directly attributed to infrastructural issues and backlog in vacancies in the Tribunal. To address the same, the Government has already taken steps to fill the vacancies and to augment the capacity of all the 15 Benches⁴. However, it is the delay by CoCs in accepting a resolution process which has been fundamental in deviation from the objective of time-bound completion of insolvency resolutions.

An adverse effect of the insolvency resolution proceedings remaining pending beyond the statutory mandate has been seen on the percentage of 'haircut' that the creditors have been taking. The more time a firm spends in the insolvency process, the more value it loses⁵. Therefore, to ensure maximum realization of the asset value of the debtor, it is imperative for the insolvency process to be completed without any undue delay. The proposal of IBBI for introduction of STV in the insolvency process is an attempt in this direction.

As per Section 30(4) of the Code, the Committee of Creditors may accept a resolution plan by a vote of not less than 66% of voting share of the financial creditors, after considering its workability, feasibility as well as the manner of distribution proposed, which may take into consideration the order of priority amongst creditors as provided under sub-section (1) of Section 53 of the Code, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board. Further, Regulation 39(3) of the CIRP Regulations provides that where more than one compliant resolution plans are available, all the plans are put to vote simultaneously. Further Regulation 39(3B) provides that the plan that receives the highest affirmative votes, subject to receiving the requisite 66%, is regarded as approved by the CoC. In an unlikely event of two or more resolution plans securing equal number of votes, the committee approves any one of them, as per the tie-breaker formula announced before voting. Where none of the resolution plans receives requisite votes, the CoC again votes on the resolution plan that received the highest votes, subject to the timelines under the Code. Hence, it is observed that the creditors vote in favour of all available compliant resolution plans to avoid being a dissenting creditor. The situation commonly occurs in several real estate cases where the real estate allottees vote in favour of all available plans in order to ensure that they are not dissenting creditor and the CD does not end in liquidation, as

⁴ *Taking all necessary steps to augment capacity of NCLT: Govt (2022) Business Today*. Available at: <https://www.businesstoday.in/latest/economy/story/taking-all-necessary-steps-to-augment-capacity-of-nclt-govt-326689-2022-03-21> (Accessed: 20 July 2023).

⁵ *Low IBC recoveries are a worry. but solutions lie in cutting court ...* (no date) *The Print*. Available at: <https://theprint.in/opinion/low-ibc-recoveries-are-a-worry-but-solutions-lie-in-cutting-court-delays-not-blaming-coc/1251201/> (Accessed: 20 July 2023).

liquidation leaves the real estate allottees with no relief. Hence, it is seen that the current voting framework does not offer a system for creditors to elicit their preferences on these plans.

All plans are considered based on first preference accorded to them. If no plan achieves the 66% required votes, the plan with least first preference votes is eliminated and its first preference is allotted to the second preference. It proceeds on the basis of a process of elimination and exclusion, whereby the plans with lowest number of preference votes are excluded. In case no plan is able to secure the requisite 66% votes, then it may be taken that the committee of creditors has not approved any resolution plan. Similar preference voting may be adopted to elicit the preference of class of creditors with 51% threshold of voting. The explanation of the draft amendment to Regulation 39(3B) of the CIRP Regulations mentioned in the discussion paper released by IBBI explains the term ‘Single Transferable Vote’ as *“a voting system in which voters cast a single vote in the form of a ranked-choice ballot. Voters have the option to rank plans, and their vote may be transferred according to marked back-up preferences if their preferred plan is eliminated, so that their vote is used to select a plan they prefer over others.”*

Nevertheless, the Board has a reason to come up with the said proposal of introducing preferential voting i.e., the requirement to increase the chances of more resolution plans getting accepted by the Committee of Creditors. The Board by way of this proposal is aiming to expedite the process of seizing the potentially valuable assets for efficient redeployment before they start to lose their value. It is expected of the Board, which is the regulating body under the Code, to have a bias for the seemingly better of the two possible outcomes of corporate insolvency resolution process, “resolution” and “liquidation” and the latter of the two is to be treated as the last resort. Resolution would warrant restructuring and, in most cases, involve a change in ownership. The expectation is that, such resuscitation, which takes into consideration commercial realities, will best serve the interest of debtors, other stakeholders, as well as the larger economy, by maximizing the value of assets rescued.

However, any possible introduction of preferential system of voting to minimize the chances of liquidation is expected to hit legal hurdles. The Code with its introduction had envisaged a shift from “debtor-in-possession” to ‘creditor-in-control” regime. The aforesaid proposal will amount to undoing this shift, and undermining the creditors’ prerogative to be a dissenter. Under the new system, the CoC is expected to give its affirmation to one of the plans provided it satisfies the prescribed threshold of at least 51% vote share of CoC as its first preference. The proposal may seem to be one which is imposed upon the CoC. However, keeping the larger picture in mind i.e., the objection of resolution of insolvency proceedings in a time bound manner, the proposal of introducing a system of preferential voting is an innovation solution

which must be tried and tested.
