

# POSITION OF OPERATIONAL CREDITORS UNDER IBC

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Insolvency and Bankruptcy Code, 2016 defines two types of creditors, financial creditors (FCs) and operational creditors (OCs). FC refers to a person to whom the corporate debtor owes a sum of money under any form of credit facility like, cheque, bonds, debentures, lease, guarantee etc. whereas, an OC means a person who has provided the corporate debtor with any sort of goods or services for which the payment is outstanding. The primary procedure under the code is initiated by appointment of a RP who works according to Committee of Creditors' and NCLT's instruction, and CoC is formed only by FCs.

OC's rights are limited in the code, first to initiate a corporate insolvency process against the corporate debtor, and to notification and attendance of each CoC meeting if the aggregate dues of OCs is ten per cent or more of the debt. And the last right is to appeal against an order approving a resolution plan under section 31 on the grounds that, the debts owed to OCs of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board.

The difference in their rights is justified by Banking Law Reforms Committee in its report as, the drafters aim was to protect all stakeholders interest through a process which focuses on restructuring of the debt and revival of the company first and only when it fails that the seek to liquidate all its assets. And OCs are generally uninterested in revival of the company but keen on liquidation.<sup>1</sup>

This presumed generalisation of OCs intention by the drafters of the code seems prima facie discriminatory, all creditors irrespective of the nature of their debt are initiating the process of insolvency to lawfully recover their respective debts, hence on failure of the revival, all the creditors FCs and OCs will be keen for liquidation process. On the other hand if a revival plan proposes to pay the creditors more than what will be recoverable on the event of liquidation, OCs and FCs alike will be in the favour of opting for revival rather than liquidation.

This approach of the legislature has led to huge losses to OCs in the country, according to data compiled in a joint report of the Confederation of Indian Industry and consultancy firm Sumedha Fiscal Services<sup>2</sup> a wide variance in the total claim of the OCs and the actual admitted claim is observed. In 10 of the 12 accounts in the first list of the Reserve Bank of India referred for insolvency under the IBC, the cumulative claim of 6,692 OCs is worth Rs 39,000 crore. But the admitted claim is only Rs 9,550 crore, representing acceptance of only 24 per cent. In case of Binani Cement, the association of the operational creditors appealed to the Supreme Court, to consider their interest before accepting any resolution plans and alleged discrimination between different types of creditors under IBC however, SC dismissed the appeal without providing any relief to the OCs.

Only in the much celebrated case of SBI v Bhushan Steel<sup>3</sup>, OCs interests were protected very well. Tata Steel has offered to pay Rs. 1200 crores against operational creditors' admitted claim of Rs. 1212 crores, which implies almost 100% recovery (based on January 10, 2018 claim report). The financial creditors have taken approximately 37% haircut on their exposure.

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<sup>1</sup> [http://ibbi.gov.in/BLRCReportVol1\\_04112015.pdf](http://ibbi.gov.in/BLRCReportVol1_04112015.pdf)

<sup>2</sup> <http://sumedhamanagement.com/reports/IBC%20-%20EVOLVING%20DYNAMICS.pdf>

<sup>3</sup> C.P. NP. (IB) 201 (PB)/2017

But as a general rule the OCs do not form a part of CoC unless they represent 10% or more of the aggregated debt, therefore the haircut on their debts is much more than FCs as they are ones voting for the acceptance of the resolution plan. This is turning into a cyclic process which if not rectified immediately will end up damaging the economy of the country as operational creditors are usually SMEs which provide a huge employment to the society. The first step can be mandatorily involving atleast one member in CoC representing OCs interest.

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