Recasting insolvency resolution

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The Insolvency and Bankruptcy Code, 2016 (IBC) is one of India's most significant economic reforms, introduced to address the challenges of insolvency resolution in a structured and time-bound manner.

At the time of its introduction, the IBC was seen as an important tool that would help India's standing in the business world and bring bad borrowers and big defaulters to book. Yet, as the law matured, certain issues have cropped up that demand attention, particularly regarding institutional capacity and procedural efficiency. The recent Supreme Court of India judgment in Jet Airways (*State Bank of India & Ors. vs The Consortium of Mr. Murari Lal Jalan and Mr. Florian Fritsch & Anr.*) has laid bare the many structural infirmities that are plaguing India's insolvency regime.

A double burden

The effective implementation of the Insolvency and Bankruptcy Code (IBC) hinges on the performance of the National Company Law Tribunal (NCLT) and its appellate body, the National Company Law Appellate Tribunal (NCLAT). These tribunals face the dual burden of handling corporate insolvencies under the IBC and cases under the Companies Act. This institutional architecture, however, suffers from what might be termed "temporal disjunction".

Conceived in 1999 based on the Eradi Committee's recommendations and operationalised in 2016, the NCLT's structure reflects the economic realities of a bygone era, leaving it ill-equipped to meet contemporary demands. With a sanctioned strength of 63 members – many of whom divide their time across multiple benches – the NCLT has become a bottleneck for insolvency resolutions and corporate transactions such as mergers and amalgamations.

The Jet Airways case is one example of the many structural infirmities affecting India's insolvency regime

Compounding the issue, several NCLT benches do not operate for the full working day, even when not tasked with handling cases from other benches.

As a result, delays have worsened. According to the Insolvency and Bankruptcy Board of India (IBBI), the average time for insolvency resolutions increased to 716 days in FY2023-24, up from 654 days in FY2022-23. This is despite the Supreme Court's repeated calls for adherence to the specific timelines provided in IBC, including in the Jet Airways case, where the Court has stated that the "NCLTs/NCLATs need to be sensitised of not exercising their judicial discretion in extending the timelines...in such a way that it may make the Code lose its effectiveness thereby rendering it obsolete".

The need for domain expertise

The current framework's deficiencies are manifest across other dimensions. What stands out the most is the qualitative dimension of institutional capacity. The current method of appointment ignores the need for domain experience. As the Court noted in the Jet Airways case, "Members often lack the domain knowledge required to appreciate the nuanced complexities involved in high-stakes insolvency matters...". This creates a paradox where an institution tasked with resolving complex cases is hindered by a lack of specialised knowledge.

However, the problems run deeper than capacity limitations. There is also the bureaucratic labyrinth. There is no effective system in place before the NCLTs for urgent listings. And as noted by the Supreme Court, the staff of the Registry is given wide powers to list or not to list a particular matter. Perhaps most troubling is what the Court has termed a "growing tendency" among NCLT and NCLAT members to ignore or defy its orders, which threatens the very foundation of India's judicial hierarchy.

This is not merely about institutional efficiency. It is about institutional integrity.

Sparse use of alternatives

The procedural framework further exacerbates these constraints. The requirement for a mandatory hearing for all applications including for progress reports, which is not in any way necessary from the standpoint of natural justice, results in considerable delays. The limited use of alternative dispute settlement methods adds to the problems of an already overworked system.

Various jurisdictions across the globe contend with similar challenges pertaining to institutional capacity and procedural efficiency. Nevertheless, the magnitude of India's scale, its endemic corruption and its economic ambitions necessitate solutions that transcend mere incremental enhancements. The recent reform proposals, including the initiative for mandatory mediation prior to the submission of insolvency applications, present a degree of optimism.

Further, there needs to be a hybrid model that values judicial experience and domain expertise. Also, the time is ripe for procedural innovations that go beyond piecemeal changes. The creation of specialised benches for different categories of cases could enhance both efficiency and expertise and ensure that mergers and amalgamations are cleared in time.

Pertinently, infrastructure must not remain an afterthought. Adequate courtrooms and a qualified, permanent support staff are critical to sustaining these institutions within the broader economic framework. Above all, India's insolvency regime must evolve beyond mere debt resolution to serve as a proactive driver of economic rejuvenation, especially as the country aims to attract greater foreign investment. At this very important point in time, the choice is clear. The time for a bold reimagining is now.