

Discussion on 'Bankruptcy on the side'

An Indian perspective

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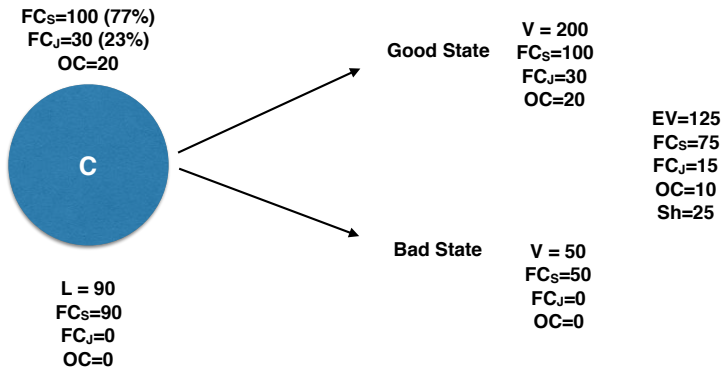
Key Takeaways

- Inter-creditor agreements (ICAs) do not necessarily reduce transaction costs
- Enforcement may lead to value destruction for a non-party stakeholder
- When should courts enforce ICA and when they shouldn't?
- Fully enforced expectation damages (ED) is value maximising
- ED better than Specific Performance (SP) and Stipulated Damages (SD)

Part I

Indian context

An example



Expected value

	L	G	B	E(v)
FCs	90	100	50	75
FCj	0	30	0	15
OC	0	20	0	10

Side Agreements in India

- Liquidation bias in IBC
- No platform for bargaining between FCs and OCs
- Could be resolved by side agreements?
- Agreement requiring FC to vote in a certain way

Issues with side agreements

- Enforceability
 - Subordination agreements - ILC says enforceable
 - Disregarded that fact that Senior FC may prefer liquidation
 - Enforceability of side agreements b/w secured and unsecured creditors?
 - NCLT recommended SoP for CoC
- *Sirpur Mill* case (NCLAT)
 - Plan can't discriminate dissenting FCs
 - Valuation comparator - struck down

Conclusion

- Side agreements could be an alternative to lack of negotiating platform
- Could help in addressing liquidation bias in IBC
- Enforceability is unclear