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Insolvency Reforms on Anvil in India

Enactment of the Insolvency and Bankruptcy Code, 2016 (“Code”) is one of the key gem in the Indian rule book and one of the greatest economic legislative reform. Considered as a progressive and dynamic economic enactment, the Code is a true epitome of proactive methodology towards ensuring revival and resolution of companies in a time bound and justified manner. There is no pessimism in saying that in a time span of mere three years, Code has breezed through numerous litmus assessments and endured numerous tempests on various platforms by justifying its very purpose of enactment and paving a way from hopeless end to endless hope for the plethora of stakeholders.

At present the Code accommodates the arrangements relating to the corporate insolvency resolution process, fast track insolvency resolution process, corporate liquidation & voluntary liquidation, personal guarantor’s insolvency and bankruptcy process all under one umbrella. However after such huge numbers of accomplishments and intersection different achievement, Code is akin to a half-baked cake as it is yet to bring on board the provisions pertaining to the pre-pack sales, group insolvency and cross border insolvency.

The challenges that pandemic has posed on restructuring and turnaround sector in India and amendments that the Code is undergoing pursuant to the present day scenario has resulted in brainstorming by the professionals and insolvency practitioners to think out of box ideas while being in the periphery of law. Such options may include enforcement of the security interest by the creditors under Section 13 of SARFAESI Act 2002, enforcement of Inter Creditor Agreement, exercising compromise and arrangement under the provisions of Companies Act 2013 etc.

To make Indian insolvency framework robust with passing time and to provide reasonable solutions for every emerging issue in the distress market, following reforms are quintessential and may land up anytime soon in Indian’s insolvency ecosystem:

1. Pre-Pack Sales : Considering USA and UK model, Pre-Pack Sale whenever introduced in India will be subset of pre insolvency resolution instrument thereby providing financial creditors and corporate debtor a superior platform to work in advance on the resolution strategy of the corporate debtor with the advise of an Insolvency Professional, before the filing of an insolvency petition under the provisions of the Code. Pre-Pack Sale is a corporate rescue tool that can result in change in the

ownership of the business of the company along with continuity in the trade of the company and preservation of the employment of the company without compromising on the value of the business, relationship with stakeholders and goodwill of the company that has been built over the years. To make pre-Pack Sales a big hit, their acknowledgment under the Code with a characterized set of guidelines will be fundamental to insightfully handle the situations such as sale of business of the company to the connected party or where nepotism towards secured financial creditors is more.

2. Group Insolvency: With group structures holding prominence in the business landscape of India, there is a need to outline a comprehensive framework on the subject of group insolvency. There are situations where the directors and promoters may boost their inclinations and the chance of restoration of organizations when companies which are part of vast group undergoes restructuring jointly. As of late, the need of such framework was acknowledged in the iconic cases where famous groups such as Videocon, Amtek, Educomp, Era Infrastructure, Adel, Lanco, Jaypee and Aircel landed into insolvency and consequently extraordinary issues emerged from their interconnection with the group companies and when their exist no set of law, rules and regulations under the Code to deal with such situation. Though Hon'ble Supreme Court of India and Adjudicating Authority on their wisdom have passed few orders to partially redress the emerging issues yet numerous challenges are still being faced in the absence of clearly laid law and rules on the subject.

Insolvency and Bankruptcy Board of India constituted a specialised Working Group to outline the framework on the subject in early 2019 and Working Group has submitted its report on group insolvency framework in India in late 2019. The framework on the subject is expected to come in two phases i.e one dealing with the group insolvency of the entities having assets, liabilities, debtors and creditors in domestic territory whereas other part of the framework dealing with the amalgamation of the provisions of group insolvency with the provisions of cross border insolvency.

3. Cross Border Insolvency: Hailing back from the year 2000 different committees in India have advanced their report before the government accentuating the need to bring in place a robust framework to deal with the issues of cross border insolvencies in line with UNCITRAL Model Law on Cross Border Insolvencies. With globalization, the investment of different countries in India has also multiplied. With increment in global ventures in India, foreign nations should be given a protection, a sense of security and comfort that their investments are safe in India. Formal cross border insolvency laws is quintessential need of an hour to protect the rights of domestic as well as foreign investors.

Insolvency and Bankruptcy Board of India constituted an exclusive Working Group to come out with a proposal on the framework of cross border insolvency in India in March 2019 and Working Group has submitted its report on the same in May 2019. The upcoming model is expected to cover mechanism to ensure judicial cooperation between bankruptcy courts of different jurisdictions, developed theory of Centre of Main Interest, alignment with best international practices and reciprocal arrangements.

Apart from the key emerging areas expecting sooner entry in the Indian insolvency law as highlighted above, Sectoral Resolution Schemes is also a topic in great consideration. In India, maximum stressed assets lies in the power and real estate sector followed by steel, telecom and textile sector. Each sector requires explicit parameters to be catered to come out with a meaningful resolution. Such a scenario calls for sector specific relief package with the cooperation of regulators operating in different sectors and financial creditors to quickly work out on resolving the industry

specific distress. Also, provisions relating to the Individual Insolvency and Fresh Start Process which are already covered under the Code can also be enforced in coming times.

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