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SNAPSHOT OF KEY CHANGES PROPOSED TO THE INDIAN INSOLVENCY & BANKRUPTCY CODE, 2016

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The Indian Insolvency & Bankruptcy Code, 2016 (*IBC*) has seen several challenges in recent times. The Indian Government has been proactive in responding to these. In response to the recent set of challenges, the Government intends to implement another round of amendments to the IBC. The key takeaways from this proposed amendment are discussed below. Although the draft text may change, the first impressions of the bill are positive, and an effort has been made to address a number of difficult issues that various stakeholders have been dealing with in the recent past. The amendment is also expected to be followed by changes in allied regulations.

Key takeaways

Opening the door for priority cash flow funding? The definition of interim finance will change to include other forms of funding that may be notified in future. This can be used to treat pre-IBC priority cash flow funding as interim finance. Text of rules will throw more light. If so, this could be a game changer for pre-IBC funding deals and bring much needed relief to players in financially distressed sectors in obtaining last mile funding from otherwise reluctant lenders/ investors at the right pricing.

Much needed relief for the real estate sector: A minimum threshold has been prescribed for initiation of IBC against real estate developers by allottees. This is to reduce the large number of real estate cases in insolvency courts today. The amendment is prospective and only applies to future cases and cases presently in NCLT but where IBC has not yet been admitted. The threshold is that at least 100 or 10% of the creditors (by number) under the same real estate project, whichever is lower, must jointly file an insolvency application.

> ***Comment***: Note that the threshold is by reference to the same project rather than more broadly in relation to the developer in various projects. This ensures that home owners across multiple projects cannot come together to initiate insolvency proceedings against a single developer.

Corporate debtors permitted to file insolvency petition against others: This has been permitted to allow resolution professionals to recover dues from other debtors.

Licenses and government concessions cannot be terminated during insolvency: The proposed amendment "*clarifies*" that licenses and government concessions cannot be terminated during the moratorium period. But this is only where there is no default of current dues arising during insolvency. Given that this is a "clarification" it will apply to all cases, past, present and future. Of course, current dues will have to be cleared rather than added to insolvency resolution process costs.

Supply of critical goods and services cannot be suspended, terminated or interrupted: This is similar to government concessions (above). The resolution professional determines which goods and services are critical and required to maintain the debtor as "*going concern*". Importantly, unlike government concessions, these goods and services cannot even be "interrupted".

> ***Comment***: Although the breadth of this will be useful to corporate debtors during the pendency of the insolvency process, it does leave some discretion in the hands of the resolution professional. Will this lead to counterparties drafting tighter terms and the "*early warning*" termination rights (e.g. upon the filing of an insolvency petition rather than admission of the corporate debtor to the corporate insolvency resolution process)? It remains to be seen how market practice evolves in this regard.

Whitewash of offences: New section 32A is a response to the Bhushan Power & Steel "*proceeds of crime*" issue. It whitewashes the liability of the debtor for any offence committed prior to insolvency so long as there is a change of control under the resolution, the resolution applicant is not the promoter or in control or management of the corporate debtor, and the resolution applicant is not someone who the investigating authority has reason to believe abetted such offence. Furthermore, the assets of the corporate debtor are protected from consequences of any such offence so long as these assets are part of the resolution plan or a sale of "*liquidation assets*". Interestingly, the protection under liquidation appears only to be available under an asset sale. Our IBC has a novel concept of sale of the debtor as a company itself under liquidation. The language under 32A does not appear to cover this scenario, but courts will perhaps read it to include a debtor sale as well.

Comment: Because of the "override" language at the start of this provision, the amendments address the concerns in recent case law as to the primacy of anti-money laundering regulations over the insolvency process. Although the changes are helpful, pre-insolvency restructurings and so "*one-time settlement*" transactions remain outside this protection. An alternative approach providing protection for a "*buyer in good faith for value*" (not the approach adopted) might have had wider application in this regard. Also, since the protection is not provided to anyone in management or "control" of the corporate debtor prior to insolvency or liquidation, where does this leave investors who provide capital to companies prior to insolvency and then want to bid in the insolvency process? In order to receive the benefit of the protection introduced, international investors making such pre-insolvency investments will need to careful structure their exposure so as to not to be seen as being in management or control of the corporate debtor prior to the onset of insolvency.

Blessing the new regime which permits insolvency of financial service providers: The Government recently under Section 227 notified rules for resolving certain classes of financial service providers under the aegis of the IBC. These rules quite significantly modified the provisions of the IBC itself, which, of course, a rule (being lower in standing that the IBC itself) cannot do. To try avoiding any challenge on this ground, Section 227 has been amended to "clarify" that the Central Government can "*modify*" the IBC itself when applying it to financial service providers.

Comment: This follows on from the earlier changes introduced to address the previous gap in relation to financial services and to that extent is a sensible defensive move. In the longer term, it may be the case that separate legislation is introduced to deal with insolvencies of financial service entities.

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