Suggestions for Strengthening Insolvency & Bankruptcy Code

1. Non cooperation by the Corporate Debtor

Background: Research indicates that, as part of the Corporate Insolvency Resolution Process (CIRP) conducted under the Insolvency & Bankruptcy Code, 2016 ("**the Code**"), the corporate debtor does not fully cooperate with the Resolution Professional (RP) and that is one of the major reasons for delay in the entire CIRP. However, it is also noted that, even though RPs have a recourse under Section 19(2) of the Code to approach the courts to compel the cooperation by the corporate debtor, only 3% of the RPs have filed such an application and approached the courts on grounds of Non-Cooperation by the corporate debtor.

Issue: Section 19(2) of the Code is not being fully utilized by RPs to take recourse to the courts, on grounds of non-cooperation by the corporate debtor.

Suggestion: Section 19(2) is a section with wide import that does not provide what types of orders can be passed by the courts or the Adjudicating Authority under the Code, except for effectively compelling the corporate debtor to cooperate with the RP. However, recently, the Adjudicating Authority in the matter of M/s Educomp Infrastructure & School Management Limited (Petitioner - Corporate Detor) and Mr. Ashwini Mehra, Resolution Professional vs. Mr. Vinod Kumar Dandona, Suspended Director & Ors.,[1] held that the corporate debtor shall be held responsible for non- submission of the information as well as for non- cooperation with the RP and be liable for punishment under Section 70 of the Code. Section 70 is a general provision penalising any parties who are liable for misconduct in the CIRP.

Jurisdictions such as Singapore, United Kingdom, Hong Kong and others, in their respective insolvency laws severely penalise any form of non-cooperation, on part of the corporate debtor, with the RP.

However, noting the surprisingly low number of Section 19 applications in India, we believe that the language of Section 19 of the Code be accordingly amended to *explicitly* provide that non-cooperation on part of the corporate debtor with the RP will attract penalty.

Further, there is ambiguity regarding powers of RPs whether they can conduct private investigation in cases where there is avoidance transaction. Considering the fact that, in most of the contentious insolvency cases, fraud may be suspected, therefore, courts may be allowed to permit the RPs to carry out private investigation to investigate such transactions. Currently, a few such orders have been passed but given that law has not defined the periphery of courts power, much is being left to courts and judges' own pragmatism. Law should be certain and clear in this regard.

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[1] CA No.335/ 2018 in CP (IB) No.10/ Chd/ Hry/ 2018

Private examinations is a powerful investigatory tool because they would enable the RP to question not only the ex-personnel of the corporate debtor but also the third parties, pertaining to their dealings with the corporate debtor.

2. Facilitating the accessibility of financial documents for RPs

Background: Our research indicates that 80% of the corporate debtors lack documentation models and do not properly maintain books of accounts. In our survey with RPs, 83% of respondents had stated that the companies are devoid of proper documentation models for both statutory and non-statutory records. 60% respondents said that it is tough for RPs to get information pertaining to financial and operational aspects of the corporate debtor. It is worthwhile to note that record keeping is quintessential for the smooth organisation of the CIRP.

Issue: Facilitating the accessibility of financial documents for RPs.

Suggestions: As per the scheme of the Code, once the application is admitted under either of the provisions of Section 7 or 9 or 10 of the Code, the Adjudicating Authority, under Section 13 of the Code appoints the Interim RP for conducting the CIRP. It is significant to note that if Section 13 is amended to reflect that the Adjudicating Authority passes an order against the corporate debtor to provide all forms of financial information to the IRP (and RP, later on), then the corporate debtor would be compelled to cooperate and provide such information to the IRP/RP. Further, this must also be supplemented with the fact that any form of non-compliance by the corporate debtor with such a court order will hold them liable for contempt of court offense.

The Hong Kong insolvency law also states that any form of non-cooperation by the corporate debtor with the insolvency professional will make it liable for contempt of court offense. Hence, such a transformation in the language of Section 13 of the Code will go a long way in facilitating the provision of financial information by the corporate debtor to the IRP/RP.

Next Gen Insolvency Regime: Focus on Multi-Track Approach towards Insolvency

Insolvency and Bankruptcy Code has been successful in changing the credit culture in India. It has provided a strong regime for insolvency resolution.

However, to stay useful for changing times, the Code needs to revamp certain areas of the regulation. The recommendations below are not limited to modifications that need to be done in IBC but also includes some recommendations that are required for any good insolvency jurisdiction.

A well-functioning corporate insolvency system can serve as a valuable tool to promote entrepreneurship, innovation, access to finance and economic growth. Before a company enters insolvency, a well-functioning insolvency framework can facilitate entrepreneurship, innovation and access to finance. Post entering into insolvency, laws can perform several functions, including the reorganization of viable companies in financial distress, the liquidation

of non-viable businesses in a fair and efficient manner, and the maximization of the returns to creditors.

Therefore, having an efficient insolvency framework robust pre insolvency resolution tools both in form of formal as well informal debt structuring. It also requires a sector specific solution for insolvency. At the heart of this, there is a need to strengthen banks and lending institutions and provide. Also, emerging issues such as cloud computing insolvencies, consumer bankruptcy, cross border insolvency etc.

It is suggested that a multi-track approach be adopted for insolvency resolution.

Given that not all insolvency matters take 270 days as some cases are of smaller nature, It will be useful to look at insolvency cases through the prism of a multi-track approach. In 1998, the Woolf Committee in England adopted a similar approach. The multi-track approach provides a flexible regime for handling cases and does not provide any standard procedure such as those in the small claims or claims in the fast track. Instead, it offers a range of case management tools such as standard directions, case management conferences and pre-trial reviews. These can be used in a 'mix and match' way to suit the needs of individual cases. Thus, following three tracks could be suggested based on default threshold :-

- the fast track
- the small claims track.
- the multi-track

This will help in quick resolution of insolvency and also avoid one size fit all approach towards resolution of stressed assets. Further, case management will be easier and will help attain more certainty in outcome.