

HSA Advocates – few suggestions on the draft Insolvency and Bankruptcy Bill, 2015

1. Clean slate

We understand that the intention of the Bankruptcy Law Reform Committee (“BLRC”) was to scrap the existing laws on bankruptcy and insolvency and introduce a new law covering all aspects of bankruptcy and insolvency. Though the draft bill sets out in certain sections its overriding effect vis-à-vis other existing laws and amends certain provisions of such existing laws, it is our suggestion that, to avoid unnecessary litigation at a later stage, a clear provision needs to be introduced to explicitly state the existing laws which are being repealed and replaced by this new legislation. This provision should also include clear transitioning provisions to provide greater clarity on ongoing matters of bankruptcy and insolvency which are pending in the courts of law.

2. Default trigger

The default trigger under the draft bill has to be carefully analyzed and deliberated upon from a practical practice perspective. It is our view that the default definition seems to be very widely drafted and as a result, the substantive provisions of the draft bill could be arbitrarily used. The default definition in the interim report of the BLRC would have been more suitable and should be reconsidered with appropriate modifications.

3. Cross border insolvency and bankruptcy

As this draft bill is intended to be a comprehensive law on insolvency and bankruptcy in India, it is our view that a separate chapter be included in this draft bill to deal with cross border insolvency and bankruptcy. Given India’s foreign investment requirements it is important that a chapter to deal with cross border issues is incorporated to instill investor confidence.

4. Insolvency and bankruptcy of municipalities

This draft bill on insolvency and bankruptcy in India also becomes very pertinent from the perspective of infrastructure projects such as those like Smart Cities wherein the government is relying on municipal bonds, pooled financing mechanics and bond banks for its financing needs. In this light, it is our recommendation that a separate chapter be added in this draft bill to deal with bankruptcy and insolvency of municipalities. There are several international examples such as Detroit wherein lack of proper bankruptcy mechanisms for

municipal bonds led to a complete collapse of municipal structures. Thus a separate chapter added to this effect, will in turn benefit the municipal bond market by instilling investor confidence.

5. PPP infrastructure projects

As most infrastructure development in India is currently envisaged to be implemented through the PPP model, it is our recommendation that the draft bill (including the waterfall mechanics, the rights of secured and unsecured creditors) is reviewed from the perspective of the rights of the concession granting authorities (i.e. instrumentalities of the state) and the security and other rights which are accorded to senior lenders of such projects. Issues relating to priority of payment of instrumentalities of the state also have to be thoroughly analysed as such instrumentalities should not be accorded statutory priority of payments for commercial transactions.

6. Statutory claims

Statutory claims (such as taxes and labour dues) made by authorities have to be carefully reviewed so that any insolvency resolution process is protected from claims made by the statutory authorities after implementation of such resolution process. It is our submission that the interest of the statutory authorities and the commercial parties are protected under the draft bill in a balanced manner so that no claims are brought after the insolvency resolution process is implemented and the spirit of the legislation which is to expedite the process of insolvency resolution, is upheld.