THE DRAFT INSOLVENCY AND BANKRUPTCY BILL, 2015 – *KEY ISSUES AND SUGGESTIONS*

The Insolvency and Bankruptcy Bill, 2015

Key Issues and suggestions

For ease of reference, the comments / suggestions have been split in two parts:

(i) Part A which deals with substantive aspects of our comments; and

(ii) Part B, which deals with drafting suggestions on the Bill.

PART A

Relevant Section	Proposed Position in the Bill	Comments / Suggestion
5 (4)	See definition	(i) It will be very difficult to establish a dispute proceeding as "bona fide" without some guidance on how this is to be determined. (ii) Consider removing sub-sections (b) and (c) – any dispute which leads to a debt claim should be included regardless of the underlying cause of action. Sub-section (a) should be sufficient, and the existence of sub-sections (b) and (c) may give grounds to argue that other causes of action do not form a part of the definition.
Section 6 *read with* amendment to sub-section 94(2) and Section 271 of the Companies Act, 2013	Initiation of corporate insolvency resolution process under the Bill and winding up under the Companies Act, 2013	Given that a dual regime of insolvency under the Bill and also under the Companies Act, 2013 is being contemplated, it should be clarified that insolvency proceedings under the Bill and under Section 271 (e) (*Tribunal is of the opinion that it is just and equitable that the Company should be wound* up) of the Companies Act, 2013 do not overlap.

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7(1)	Application is to be filed by the financial creditors themselves.	The trustees/agents of such financial creditors should be included as under a consortium financing arrangement or in bond issuances, the investors/lenders act through the security trustee / agent with respect to the debt. This would be particularly important to achieve the Bill's stated aim of encouraging finance through corporate bond funding.
Explanation to Section 7(1)	A financial creditor may file an application to initiate the insolvency resolution process if default for any financial debt has occurred.	Bilateral waivers by relevant lenders, if any, should restrict other financial creditors from filing an application. Therefore, waivers should be made part of information to be submitted to the information utility.
7 (4) and 9 (4)	The Adjudicating Authority has to admit or reject an application within 2 days after reviewing only the petition of the creditor.	It would be against the principles of natural justice to deny the corporate debtor the opportunity to be heard and may lead to frivolous petitions being admitted. This should be allowed but within a strict timeline as well so that the need for urgency is not compromised. Furthermore, the petition should not be automatically admitted upon furnishing of the requisite documents. It would be fairer to introduce standards of proof instead. Thus, if the debt/default is captured in the records of the information utility, the burden of proof would lie on the corporate debtor to disprove the debt. If not captured in the records of the information utility, the burden of proof would lie on the applicant. Appropriate changes can be made to the Evidence Act to capture this.
9 (1)	This section provides that the operational creditor may file an application for initiating insolvency resolution process if the demand has not been disputed by the corporate debtor or the	It has not been provided as to how the dispute in relation to the claim for the operational creditors will be settled.

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	operational creditor does not receive payment against its demand.	
9 (5)	See Section	After the word 'shall', following may be added – "within 2 days of receipt of the application under Sub-section (2) hereinabove". This is to be in line with Section 9 (4). Also, the proviso as mentioned in Section 7 (5) should be included.
11(a)	See Section	This sub-section disqualifies a corporate debtor who is undergoing a corporate insolvency resolution process (CIRP) to file an application to initiate a CIRP. This should be done away with as a corporate debtor in CIRP should be allowed to make claims for debts it has provided to any other person.
14	See section	a) The proviso should provide that with the approval of the committee of creditors, such actions may be taken during the moratorium period. b) Also, we suggest Section 14 to be expanded to restrict the corporate debtor's contractual counterparties (including Government entities) from terminating their contracts with the corporate debtor solely on the grounds that an insolvency resolution process has been commenced. Many commercial contracts (like Concession Agreements, Direct Agreements, various tripartite agreements etc.) have commencement of any insolvency proceeding as a terminable event. Termination of such contracts on which the corporate debtor is dependant for its revenue cashflow would reduce the asset value of the corporate debtor and defeat the purposes of the

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		insolvency resolution process. Alternatively, it should be provided that the rights and benefits, as may be available under these commercial contracts, in favor of the secured creditors, such as substitution rights etc., will not be affected or taken away by such termination by the counterparties. c) Considering that the moratorium period of 6 months (which may be further extended by another 90 days on an application made for such extension) will restrict the secured creditors to exercise their debt recovery rights provided under various special legislations (such as the SRFAESI Act, 2002) against the corporate debtor, limitation period for exercising such rights as may be provided under the Limitation Act, 1963, or such special legislations, should be extended.
17 (1) (d)	Management of affairs of the corporate debtor by interim resolution professional	Many lending transactions provide for detailed trust and retention account mechanism/ escrow account mechanism which are important for the lenders to realize their security. Such provisions should not be overruled by the provisions of the Code. Therefore, any existing arrangement with any lenders for existing accounts should be excluded from this. Nonetheless, the words 'instructions of the corporate debtor' words may be replaced with 'instructions of the interim resolution professional'. Also, such take-over of management by the interim resolution professional should be made public by the order of the

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		Adjudicating Authority.
18(3)	Interim Resolution Professional to take possession of all assets of the corporate debtor.	Assets that are secured to secured creditors should be excluded from this. This exclusion should also be provided in Section 36(4).
19 (1)	Cooperation by management of corporate debtor	The words 'and promoters or any person connected with the management of the corporate debtor' should be added after the word 'personnel'. This is to ensure that promoters also cooperate with the interim resolution professional considering their control over the affairs of the corporate debtor.
21	Composition of Committee of Creditors	Please consider if the secured creditors of the corporate debtor should be given a greater say in the committee of creditors than the unsecured creditors.
27 (1)	Creditors or the Corporate debtor may initiate application to replace Insolvency Professional and are only required to build a *prima facie* case.	The integrity and impartiality of the insolvency professional may be compromised if only a *prima facie* case is required to remove him/her. We suggest that substantive grounds for removal be required to be established before the Adjudicating Authority and not simply on the strength of a *prima facie* case. This becomes particularly important when the applicant is the corporate debtor, who may be able to frustrate the IPR process by seeking removal of the insolvency professional.
28 (1) (i)	See Section	We suggest the words "pursuant to enforcement of a security interest" be added at the end of this sub-section to preclude any argument that the insolvency professional is otherwise permitted

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		to dispose of the shareholders' shareholding.
29 (1)	Resolution applicant to make a resolution plan	Resolution applicant has been defined to include 'any person who may file a resolution plan'. It is not clear from the definition as to who this person will be, therefore (a) considering that only financial creditors and insolvency professional are involved in the resolution process, it is recommended that the creditors' committee along with the insolvency professional (and any outside agency on contract basis) formulate the plan; and (b) in the event 'any person' also includes a corporate debtor, such debtor should be allowed to file for an insolvency application if it has demonstrated unconditional equity commitments from acceptable credit providers However, certain debtors should not be allowed to present a resolution plan. *For instance,* corporate debtors who have (i) made investments for fraudulent purposes, (ii) failed to contribute equity as required under relevant financing documents, (iii) diverted funds, and/or (iv) been declared a willful defaulter by the banks.
31	Approval of resolution plan by Adjudicating Authority	There are no specific requirements as to the financial creditors. Secondly, Section 31(1) provides that repayment of an operational creditor cannot be less than the amount the operational creditor would have gotten as part of the proceeds from the liquidation trust. This reduces the ability of the committee of creditors to restructure the debt of the company as part of the resolution plan.
33(5)	Initiation of liquidation on account of contravention of the provisions of the resolution	This should not be a trigger for liquidation as it will defeat the entire regime of revival of the corporate debtor. In the event the

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	plan	corporate debtor does not adhere to the resolution plan, the same should be referred to the Adjudicating Authority for further action.
43 (1) (a)	See Section	A period of one year preceding the insolvency commencement date should be for *unrelated* parties. This appears to be a drafting error.
50	Extortionate credit transactions	The Bill should define "extortionate credit transactions" and provide standards for the same.
54 (2)	Contractual arrangements among recipients of the proceeds from sale of assets to be disregarded by the liquidator	In cases of consortium financing, some creditors (eg. Hedge providers) generally have second ranking charge over the assets of the corporate debtor subservient to the senior creditors and such arrangement is also acknowledged under the intercreditor arrangements entered among such creditors. Therefore, an exception will be required for recognizing such arrangements.
56(1)	Eligibility for a fast track corporate insolvency resolution	This should also include *a corporate debtor whose assets have become unviable or non-operational.*
59(3)(a)	A corporate debtor can liquidate itself on certain grounds including a declaration from the majority of directors of the company stating that there is no debt or it will be able to pay its debts in full from the proceeds of assets sold in the voluntary liquidation	The requirement that the company will be able to pay its debts in full from the proceeds of sale of assets should be subject to lenders being satisfied with the assessment that the debt can be paid off by way of sale of assets.
59 (3) (a) (i)	Voluntary liquidation – Declaration of directors that the corporate debtor will be able to settle its	To be considered if such confirmation can be given as the sale price will depend upon what is agreed upon by the purchaser

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	debts in full from the sale proceeds	irrespective of the valuation undertaken in this regard.
60 (3) (a) and (b)	See Section	Following words may be added at the end of these two sub-sections: "*in relation to its insolvency under this Act*".
79(14)	Definition of 'excluded debt'	Excluded debt should include liabilities in relation to personal guarantees for corporate debt. This is to exclude any liabilities incurred by promoters/guarantors in relation to a corporate debt and restrict it to debt only for individual purposes.

Other Comments:

1. Given that the committee of creditors has wide-ranging powers including modification of contracts of the corporate debtor, protection from liability as has been provided to the interim resolution professionals should also be provided to the committee of creditors.

2. It should be clarified in the Bill that no appeal should lie from a decision of the committee of creditors. An appeal should lie only if process or procedure under the Bill is not followed.

PART B

Relevant Section	Proposed Position in the Bill	Comments / Suggestion
4 (14)	Definition of "insolvency debt"	This has not been used anywhere in the Bill.
5(3)(a)	Shareholders *who are authorized under the constitutional documents* are authorized to file an application to initiate an insolvency resolution process.	It is unusual to see provisions in the constitutional documents of a company that specific or a threshold of shareholders are permitted to apply for winding up of the company. This provision should provide for a specific threshold of shareholders who may make such an application.
5(29)	Definition of "Resolution Professional"	Should include Interim Resolution Professional as well.
7(7)	See Section	It is not clear why there is a difference in a notification for rejection of an application by a financial creditor. This should be in line with the other provisions where both corporate debtor and the applicant are notified.
8(2)	A corporate debtor may reply to a demand notice by providing evidence of the dispute pending in relation to the demand made.	This sub-section requires that a dispute should have been initiated at least 60 days prior to the demand notice/invoice which may not be possible if the default has occurred say only 10 days back. It should be clarified that the corporate debtor may reply to the demand notice with a request for dispute resolution.
9 (5)	See Section	After the word 'shall', following may be added – "within 2 days of receipt of the application under Sub-section (2) hereinabove". This is to be in line with Section 9 (4). Also, the proviso as mentioned in Section 7 (5) should be included.

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20(2)(c)	See Section	"to raise interim fresh" should be replaced with "to raise interim finance".
33(2)	See Section	Cross-reference to Section 30(7) seems to be incorrect.
60 (3) (a) and (b)	See Section	Following words may be added at the end of these two sub-sections: "*in relation to its insolvency under this Act*".
65 (1)	See Section	Following words may be added after the word 'insolvency professional' in (i) the third line – "*or any other person*"; and (ii) the third last line – "*or such other person*".
65 (2)	See Section	Following words may be added after the word 'liquidator' in (i) the second line – "*or any other person*"; and (ii) the third last line – "*or such other person*". Also, following words may be added after the word 'any person' in the third last line – "*or for the purpose of evading repayment of its debt*".
65 (3)	See Section	Following words may be added after (i) the word 'liquidator' in the third line – "*or any other person*"; (ii) the words 'three lakh rupees' – "*and further pass an order to stop the insolvency resolution process or the liquidation process, as the case may be"*.
68 (i) (a)	See Section	Following words may be added after the word 'concealed' in the first line – "*or caused to conceal*".

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68 (i) (b)	See Section	Following words may be added after the word 'removed' in the first line – "*or transfer or causes to be removed or transferred*".
68 (i) (a)	See Section	Following words may be added after the word 'falsified' in the second line – "*or caused to be concealed, destroyed, mutilate or falsify*".
68 (i) (d)	See Section	Following words may be added after the word 'made' in the first line – "*or caused to be made*".
68 (i) (f)	See Section	Following words may be added at the end of this clause – "*and was not for the purposes of evading any liability of the corporate debtor*".