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The New Discipline of Insolvency Practitioners in India

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Opportunities & Challenges

It is now well recognized that engagement of insolvency practitioners in the insolvency process enhances the efficiency of the otherwise complex insolvency system. The absence of participation of insolvency professionals possessing appropriate knowledge and skills can impact the quality and efficiency of the entire process. Presently, the Indian law does not support effective participation of professionals. While government officials are appointed as liquidators, banks and financial institutions are appointed to prepare rehabilitation plans. This has impacted the efficiency of the rehabilitation and liquidation process. Some progress was made with the passing of the Companies (Second Amendment) Act, 2002 (Second Amendment) which provided for appointment of liquidators from a panel of firms of chartered accountants, cost & work accountants, advocates, company secretaries or others, as may be prescribed. The Second Amendment remains unimplemented due to a court challenge.

The constitution of Dr. J.J. Irani Expert Committee in 2006 offered a valuable opportunity to re-visit this subject. The committee examined the work of UNCITRAL, World Bank and INSOL International in this area and made significant recommendations for improving the insolvency law.

The government recently introduced Companies Bill in Parliament. The Bill inter alia proposes a new insolvency regime including the provisions for appointment of company liquidator in the winding up proceedings who shall be an independent person appointed out of the panel of professionals maintained by the central government. The Bill provides that such professionals must be having at least 10 years of experience in the company matters. Although the Bill seeks to introduce the concept, it falls short of providing a suitable framework for insolvency professionals.

There are no provisions in the Bill for their licensing, education and experience in insolvency or related areas. This poses the risk of easy empanelment of such professionals who may otherwise not be suitably qualified or suitable for appointment to provide the highly specialized services of insolvency. As they would be expected to discharge important functions, adequate accountability provisions are required. The proposed appointment process of insolvency practitioners as an administrator or company liquidators by court is defective.

Building framework of insolvency professionals

Building suitable framework of insolvency practitioners offers a number of challenges for the law makers. Insolvency affects the interests and rights of broad groups- creditors, employees, shareholders and debtors themselves. There is also a wider public interest in seeing that the damage is limited and resources efficiently re-allocated to productive use, risk of systemic failure is contained; misconduct is unconsidered and pursued; confidence in market is maintained; and honest debtors get a fresh start. In the centre of this stands the practitioner who has wide powers, duties, responsibilities and functions. He acts for others – creditors and debtors in particular making him a trustee. This creates the need for their regulation; provide appropriate qualifications and experience; update knowledge and experience; prescribe a code of professional conduct and ethics covering integrity, impartiality, independence and objectivity; and introduce mechanism for overseeing their performance and conduct and for dealing with those who abuse the process. Most jurisdictions including UK and Australia have adopted a licensing regime. It is inevitable in India and the professionals should be ready for licensing.

Qualifications: Education, Knowledge & Experience

The complexity of many insolvency proceedings makes it highly desirable that the insolvency practitioners be appropriately qualified with knowledge of the law. The knowledge should not only be of insolvency law, but also relevant commercial, finance and business law. The UNCITRAL Guide notes that the qualifications required of a person who can be appointed as an insolvency practitioners may vary depending upon the design of the insolvency regime with regard to the role of the insolvency practitioners (including whether the proceedings are liquidation or reorganization) and the level of supervision of the insolvency practitioners (and of the insolvency proceedings generally) by the court.

Different systems adopt different approaches to ensure the appropriate qualification of the insolvency practitioners, including a requirement for certain professional qualifications and examinations; licensing where the licensing system is administered by a government authority or professional body; specialised training courses and certification examinations; requirements for certain levels of experience (generally specified in numbers of years) in relevant areas, for example, finance, commerce, accounting and law, as well as in the conduct of insolvency proceedings. There may also be requirements for ongoing professional education to ensure familiarity with current developments in relevant areas of law and practice. Those systems which require some form of licensing or professional qualification and membership of professional associations often also address issues of supervision and discipline, and an insolvency practitioner may be subject to regulation by the court, a professional association, a corporate regulator or other body, under legislation other than the insolvency law. In addition to having the requisite knowledge and experience, it may also be desirable that the insolvency practitioner possesses certain personal qualities, such as integrity, impartiality and good management. Integrity may require that the insolvency practitioners have a sound reputation and no criminal record or record of financial wrongdoing or in some countries, no previous insolvency or removal from a position of public administration.

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Selection and appointment of the Insolvency Practitioners

Creditors should have a role to play a role in recommending and selecting the insolvency practitioners to be appointed, provided that that person meets the qualifications for serving in the specific case. The approaches that rely upon the independent appointing authority and the creditor committee may serve to avoid perceptions of bias and assist in reducing the supervisory burden placed upon the courts. A different approach permits the debtor to appoint the insolvency practitioners in those cases where reorganization proceedings are commenced by the debtor. This approach allows discussions to take place between the debtor and other parties, such as secured creditors, before commencement of the proceedings to familiarise the prospective representative with the business and allows the debtor to select an insolvency practitioners that it considers will be best able to conduct the reorganization. Concerns may be raised, however, as to the independence of the insolvency practitioners. These may be addressed by permitting creditors, in appropriate circumstances, to replace an insolvency practitioners appointed by the

It is also necessary to ensure that the remuneration of practitioners is commensurate with their qualifications, the tasks required to perform, and achieve a balance between risk and reward in order to attract appropriately qualified professionals. Establishing a measure for the care, diligence and skill with which the insolvency practitioners is to carry out its duties and functions requires that the difficult circumstances in which they finds itself when fulfilling its duties are taken into account and balanced against payment of an appropriate level of remuneration and the need to attract qualified persons to act as insolvency practitioner. A balance is also desirable between a standard that will ensure competent performance of the duties of the insolvency practitioner and one that is so stringent it invites law suits against the insolvency practitioners and raises the costs of its services.

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