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# India Update

## Part 1 | 2020

Quarterly newsletter highlighting and analyzing strategic legal, business and industry complexities in Indian Jurisdiction

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# INDIA AND CORONAVIRUS – LATEST UPDATES

- The cases of COVID-19 (**Coronavirus**) are increasing rapidly across the world with the count crossing 245,749 globally and 195 in India. Global death toll rose to 10,048 on Friday, with India reporting four deaths due to Covid-19.
- Amid calls for social distancing to stop the pandemic's spread, Prime Minister has called for a self-imposed '*Janta Curfew*' to be observed by Indians on March 22, 2020 and has urged Indians to stay at home from 7 a.m. to 9 p.m. on Sunday. A task force is being constituted under the Finance Ministry to look ensure all steps are taken to reduce economic difficulties and take timely interventions for all economic sections of the society.
- The virus outbreak comes at a time when India's economy was already ailing under one of the worst slowdown. Measures such offering easier loan repayment terms, tax breaks for small-and-medium-sized companies, extension of loan tenors, relaxing bad-debt norms are being considered by the Finance Ministry. Other measures may include removing the goods and services tax for tourism and hospitality industry and giving loan repayment relief to commercial vehicle aggregators.

## Travel advisory and restrictions

- As things stand, Government on Thursday, March 19, 2020 banned commercial international airlines to operate to India for a week from March 22, 2020 a bid to contain the spread of coronavirus.
- Ministry of Health and Family Welfare, Government of India issued a revised travel advisory on the same day effective 1200 GMT on March 13, 2020 at the port of departure. The key points of the same are as follows:
  - All existing visas, except diplomatic, official, UN/International Organizations, employment, project visas, stand suspended till April 15, 2020
  - Visa free travel facility granted to OCI card holders is kept in abeyance till April 15, 2020
  - Any foreign national who intends to travel to India for compelling reasons may contact the nearest Indian Mission
  - All incoming travelers, including Indian nationals, arriving from or having visited China, Italy, Iran, Republic of Korea, France, Spain and Germany after February 15, 2020 shall be quarantined for a minimum period of 14 days
  - Incoming travelers, including Indian nationals, are advised to avoid non-essential travel and they can be quarantined for a minimum of 14 days on their arrival in India
  - Indian nationals are strongly advised to avoid all non-essential travel abroad. On their return, they can be subjected to quarantine for a minimum of 14 days
  - International traffic through land borders will be restricted to Designated check posts with robust screening facilities which will be notified separately by Ministry of Home Affairs
  - Provision for testing primarily for students/compassionate cases in Italy will be made and collection for samples to be organized accordingly. Those tested negative will be allowed to travel and will be quarantined on arrival in India for 14 days
- In another measure, the Indian government has decided to invoke provisions of Section 2 of Epidemic Disease Act, 1897 which was enacted in the British era to enforce all advisories. The section gives the power to take special measures and prescribe regulations as to dangerous epidemic disease.

## Restrictions on functioning of Indian courts

- The Supreme Court of India has decided to take up only urgent matters for hearing. The Court will fast track the adoption of virtual court rooms and e-filings and has restricted the entry of persons other than parties and their lawyers from the courtrooms.
- Most of the High Courts have also restricted their functioning to hear only urgent matters. In case of other matters, the ad-interim reliefs granted will continue to be in operation. High Courts have also appealed to all advocates and Bar Associations to ensure the entry of litigants in the court is also restricted and litigants are present in the court only when necessary.
- Similar steps have been taken by other judicial and quasi-judicial fora such as NCLT, NCLAT, DRT, Consumer Courts, etc., in a bid to control the Coronavirus outbreak.

## Businesses exploring Force Majeure as a risk mitigation tool

- The virus which has rapidly spread to around 160 countries, hurting economic activity, global markets and forcing countries to go for lockdowns. Stocks are suffering badly across the board as investors fear magnitude of damage which will be caused in travel, shopping and other consumer spending.
- The new norms for travel too will have serious repercussions for the economy and have a significant disruption in the upcoming AGM season as the financial year 2019-20 comes to an end. Businesses affected by the cascading effect of COVID-19 are actively considering the possibility of invoking force majeure provisions in their underlying contracts and claim some measure of relief.
- However, it is not clear that WHO declaration of March 11, 2020, (declaring the Coronavirus outbreak as a 'Pandemic') may be a proof that an event of force majeure has occurred under a relevant contract. In response to industry concerns, on February 19, 2020, the Department of Expenditure, Ministry of Finance, Government of India issued a cryptic Office Memorandum stating that the outbreak of COVID-19 that has caused disruptions in the supply chain should be considered as a "natural calamity" and force majeure provisions may be invoked "wherever considered appropriate".
- This notification may have persuasive value in the eyes of pliant counterparties, but it is debatable whether such certificates have force of law. Ultimately, the question of whether relief will be afforded can be settled only by construing the terms of the contract and assessing each case on its merits. Even if force majeure relief is granted, producers may need financial support to deal with working capital costs and interest payments due to delays in commissioning and other ancillary factors.

# DECODING THE UNION BUDGET 2020

- India's latest Budget is structured around three prominent themes – Aspirational India, Economic Development and Caring India – with the core objective of boosting income and enhancing purchasing power through increased expenditure on rural economy.
- The Budget has tried to address many of the issues confronting India's economy. Against the backdrop of India's stated goal of becoming a USD 5 trillion economy by 2024, there is a distinct focus on stimulating growth, simplifying the tax structure, better governance and reducing litigation.
- The Budget attempts to activate multiple levers like rural, infrastructure, entrepreneurship and financial sectors to stimulate growth. There has been a clear effort to rationalize personal income-tax, with the hope that it would push consumption. The many references of the role of entrepreneurs and wealth creators in the budget speech will go a long way towards bridging the perceived trust deficit between the tax authorities, the government and the business community.

## Stimulating growth

- Dividend Distribution Tax (**DDT**) will be abolished and replaced with classical system of taxation i.e. instead of levying DDT on companies, the tax will be levied in hands of shareholders. Coupled with other measures – beneficial tax treaty rates and foreign tax credit that foreign investors can avail in their home countries, low corporate tax rates and move to decriminalize civil offences under Companies Act, 2013 – this should boost market sentiment and make Indian equities more attractive. However, a disparity still remains for domestic companies earning foreign dividends, which needs to be addressed.
- Period of tax holiday for startups has been increased from 7 years to 10 years, which underlined the government's focus on encouraging entrepreneurship initiatives. Furthermore, startup employees/promoters will not pay tax on stock plan benefits until the earlier of five years from exercise, exit or disposal of shares.
- Clearly choosing asset creation as the preferred path for stimulating growth, the government has launched INR 103 lakh crore infrastructure projects. In a major development, Sovereign Wealth Funds (**SWFs**) can now avail 100% tax exemption for investment in Indian infrastructure projects. Combined with increase in the FPI limit for corporate bonds from 9% to 15%, Indian infrastructure projects can now access long term capital, both equity and debt, from global financial markets.
- A host of sector-specific initiatives have been launched, such as extension of 15% corporate tax rate to new domestic companies engaged in electricity generation, allowing merged banks will now be allowed to carry forward the unabsorbed tax loss of merging bank, extending tax holiday for affordable housing developers to projects approved up to March 31, 2021, trebling the target for disinvestment proceeds to INR 2 lakh crore (the Government will offload a part of its stake in Life Insurance Corporation and the entire stake in IDBI Bank), among others.
- The budget has given a massive thrust to skill development and education by allocating INR 99,300 crore for education sector and INR 3000 crore for skill development. The government will allow use of ECBs to fund education infrastructure (while 100% FDI in education sector was allowed a few years ago, ECB route will potentially lower the cost of capital for this sector) and start degree level full-fledged online education programme by top 100 institutions.

## Simplifying tax structure

- An elective provision is introduced with beneficial tax rates for lower-income individuals and Hindu Undivided Familied (**HUFs**) who opt for simpler tax compliance. Such persons cannot avail of deductions and/or exemptions but will pay tax at lower slab rates. The option is to be exercised before filing the tax return, and is yearly for non-business cases while permanent (except for opt-out once) for business persons. Taxpayers can also continue under the older regime of higher tax and more deductions.
- Elective tax provisions are now becoming a trend in India. This proposal would not only make tax compliance simpler but also leave additional funds with the taxpayer, which will largely be expended in consumption. This may discourage small investments but should help the economy through growth in demand. Being elective, taxpayers have the option to choose between savings and consumption.
- In respect of Transfer pricing, the 30% ceiling on interest deduction on loans from related parties will not apply for loans from the Indian branch of a foreign bank.

## Better governance and ease of compliance

- The Central Board of Direct Taxes will come out with a Taxpayer's Charter which will govern the functioning of the tax administration. This is intended to deliver a better experience for taxpayers in their interactions with the tax department. Since this will be legally mandated, the tax administration can be held responsible for the Charter's application.
- Indian citizens who are not liable to tax in India on global income and also not liable to tax in any other country due to domicile, residence, etc., will be deemed to be Indian tax residents and subject to tax in India for income earned outside India but derived from an Indian business or profession. Similarly, NRIs visiting India for more than 120 days (earlier 182 days) in a year will be treated as resident. While this will prevent tax avoidance by people managing their affairs in such a way as to avoid tax residence in any country, genuine NRIs living/working overseas will not be affected.
- Foreign businesses without a physical presence in India will be deemed to have a taxable business presence in India if they have income from advertisements targeting Indian customers, sale of data collected from India using an Indian IP address and sale of goods/services using such data. Similarly, income of foreign businesses from the sale, distribution or exhibition of cinematographic films will be taxable as royalty. This provision may not be implementable until the tax treaties are renegotiated, except where covered under multilateral instruments.
- To reduce taxpayer-administrator interface, electronic facilities will be introduced for penalty and appeal proceedings and for registration of charitable/religious trusts. Expansion of faceless assessments, which have just been introduced, could be deferred to enable proper addressal of initial challenges in e-assessment process.

## Reduce litigation

- A one-time scheme 'Vivad se Vishwas' has been announced to resolve pending disputes. The framework will be open up to June 30, 2020 and applicants opting before March 31, 2020 will have to settle only tax demanded; after March 31, 2020, they will have to pay an additional amount.
- Non-corporate foreign assessees will also be eligible to approach the Dispute Resolution Panel, which will fast-track their litigation.
- The scope of Safe Harbour and Advance Pricing Agreement (**APA**) will now cover attribution of profits to a Permanent Establishment. This will provide certainty to business transactions for cross-border related parties. Given the expertise in APA administration, the results are expected to be much more scientific than arrived through litigation.

# TAKEOVER OF UNLISTED COMPANIES

- The following provisions have been brought into effect with effect from February 3, 2020 (collectively, **Takeover Amendments**):
  - Section 230 (11) and 230 (12) of Companies Act, 2013 (**Act**)
  - Rule 3(5) of Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2020
  - National Company Law Tribunal (Amendment) Rules, 2020

## Key aspects of the Takeover Amendments

- Any shareholder (along with others) holding at least three-fourths of value of the shares in the company shall initiate a compromise or arrangement for acquiring the shares of the remaining shareholders by making an application to the tribunal.
- Such application must contain a report by a registered valuer disclosing details of the valuation of shares after considering (a) the highest price at which any person or group of persons has paid for acquisition of shares in the previous 12 months and (b) the fair value of the shares determined considering valuation parameters including return on net worth, book value of shares, earning per share, price earning multiple *vis-à-vis* the industry average, and such other parameters as are customary for valuation of shares of such companies.

- The acquirer must deposit into a bank account at least half of the total consideration for the takeover.
- With regards to the 'Power to Compromise or Make Arrangements with Creditors and Members' as mentioned in Section 230 of Act, the Takeover Amendments provide for
  - Change in application fees for the purposes of Section 230 (1) to INR 5,000
  - Fees of INR 5,000 under Section 230 (12) (for application by a person aggrieved by acquisition of shares under Section 230 (11))
  - List of documents to be attached along with the application under Section 230 (12)

## Our viewpoint

- It may be pertinent to note that the Takeover Amendments nowhere stipulate an obligation on the part of the offeree shareholders to mandatorily sell their shares.
- Furthermore, the amendments also do not stipulate that acquisition of shares under Section 230 (11) shall be exempt from any direction of the tribunal for calling a meeting of a class of members (which class may constitute of the offeree minority shareholders) under Section 230 (1) of the Act.
- In this scenario, while the Takeover Amendments are being hailed as provisions for a compulsory minority squeeze out, companies may still prefer taking recourse to a selective reduction of capital under Section 66, which requires only a special resolution and has been in the past used for minority squeeze out.
- Thus, further clarity and development of the law through amendments and/ or judicial decisions may be required for the purpose of fortifying the Takeover Amendments as a compulsory minority squeeze out.

# GOVERNMENT'S EFFORT TO FINETUNE IBC

- Continuing with its efforts to finetune the Insolvency and Bankruptcy Code and address emerging grey areas, Government has introduced several amendments. In furtherance of the same, the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 was promulgated by the Union Cabinet and got the approval of president on December 28, 2019.
- The salient features brought about by this Amendment are as under:
  - An application for initiation of insolvency proceedings in relation to a real estate project can only be filled by a minimum of 100 allottees or not less than 10% of the total number of allottees of the same real estate project, whichever is lesser.
  - The scope of moratorium has been enlarged to prohibit suspension or termination of arrangements that involve conferment of rights by any government authority on the grounds of insolvency, as long as there is no default in the payment of current dues arising out of use of such benefits during the period of moratorium; and termination of arrangements relating to supply of essential goods and services during the moratorium period.
  - The liability of a corporate debtor for an offence committed prior to the commencement of the CIRP shall cease if the resolution plan results in change in the management or control of the corporate debtor to a person who was not either a promoter or in the management or control of the corporate debtor or a related party of such a person, or a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or court.
  - A corporate debtor can file an application for initiation of CIRP against any other corporate debtor.
- This Amendment was necessitated on account of a peculiar situation which arose after the takeover of Bhushan Power and Steel by JSW Steel. After the Resolution Plan was approved and after JSW took over the assets of Bhushan Power and Steel, the Enforcement Directorate attached the properties of Bhushan Power and Steel as part of an ongoing investigation. This amendment will certainly help in ironing out such an anomalous situation in future.
- Supreme Court vide Order dated January 13, 2020 in *Manish Kumar v. Union of India & Anr.*[3] has issued notice on a batch of writ petitions challenging the constitutional validity of certain provisions of this Ordinance. The Court has directed for maintaining status quo on the pending petitions filed by the homebuyers. While the order does not clarify whether applications which would be filed henceforth would have to comply with the thresholds provided under the impugned Ordinance, we believe that any new petition will have to be compliant with the threshold provided in the Ordinance, since the Ordinance itself has not been stayed.

## Our viewpoint

- Amendment attempts to fine tune each step of the insolvency process ranging from filing of the application to the resolution of the corporate debtor to make the process more efficient and effective. Introduction of additional thresholds for financial creditors represented by an authorized representative will prevent malicious and unthought after triggering of CIRPs. The bar on termination, suspension or non-renewal of licenses, permits etc. of the corporate debtor during the moratorium period will help ensure that the corporate debtor continues to function as a going concern but would also ensure maximization of the value of the assets of the corporate debtor at the stage of resolution. The instant Amendment provides much needed protection to the successful resolution applicant from criminal proceedings arising out offences committed by previous management.

# NEW WINDING-UP RULES

- On January 24, 2020, the Ministry of Corporate Affairs, Government of India (**MCA**) has notified the rules for winding-up of companies (**Winding up Rules**), making it easier for small firms to close their businesses without going to the NCLT. The Winding up Rules have been notified under the provisions of Section 469 of the Companies Act, 2013 and would be effective from April 1, 2020.
- The Winding up Rules would be applicable to companies that fulfil the following criterion as per the last audited balance sheet of the company:
  - Having assets of book value less than INR 10 lakh; or having deposits less than INR 25 lakh; or having total outstanding including secured loans less than INR 50 lakh or turnover less than INR 50 crore or paid up capital less than INR 1 crore
- The provisions of the rules related to filing and audit of the Company Liquidator's accounts and its procedure (Rule 91 to 99 of the Rules) and disposing of assets (Rule 165 to 167 of the Rules) shall be applicable to above class of companies with modification that the word "Tribunal" shall be considered as "Central Government". In essence, the Winding up Rules state that the Central Government will provide requisite approvals to all such companies for winding up instead of NCLT.
- Currently, the procedure of winding up by a company is primarily governed by the IBC which deals with scenarios such as 'voluntary winding up' and 'liquidation on account of inability to pay debts' and other cases of insolvency are being dealt under Companies Act, 2013. Under both the statues the companies undergo the dilatory process of the approval of NCLT for the purposes of liquidation. The promulgation of the Winding up Rules is widely considered in furtherance of 'Ease of Doing Business in India' and have also provided an easy way out for many conglomerates, both Indian and international, to liquidate their non- functional/ unused companies in India.
- Having said that, under the Winding up Rules a large part of the procedure applicable to regular companies continue to be applicable to the companies that can opt for the summary procedure. It is therefore unclear and something to 'wait and watch' if the process will be fast tracked merely by shifting the jurisdiction to the Central Government from NCLT.
- Some of the other key procedural aspects of the Winding up Rules are:
  - It lays down the process for meeting of creditors and contributories of the Company, and specify the scenarios in which creditors can and cannot vote and also mandates that all the money lying in the bank account of company liquidator which is not immediately required for the purposes of winding up, to be invested in government securities or in interest bearing deposits in any scheduled bank
  - Lays down the procedure for maintenance of registers and books of accounts by the company liquidator; the rules outline the procedure for creditors to prove their debts and claims against the company and also provides for provision and process to make an appeal to tribunal if such proof gets rejected by the company liquidator.

## Our viewpoint

- While the actual shortening of the timeline for the liquidation process is an outcome which only would be evident after sometime, the Winding up Rules are surely expected to curb the burden from the NCLT and positively effect the timelines of the other matters pending before the NCLT.

# ATTRIBUTES OF A 'REASONED ARBITRAL AWARD'

- The Supreme Court of India (**SC**) vide its judgement in the matter of *M/s Dyna Technologies Pvt Ltd v. Crompton Greaves Ltd*[2] dated December 18, 2019 highlighted the difference between inadequacy of reasons in an arbitral award and unintelligible arbitral awards passed under the Arbitration Act.
- At the outset, the SC made observations on the aspects of jurisdictions of courts under Section 34 of the Arbitration Act and held that the section limits challenge to an award only on the grounds provided under the section or as per interpretation by various courts. Hence, an arbitral award should not be interfered with in an informal and cavalier manner unless perversity of award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain arbitral award. SC also noted that it was pertinent that the mandate under Section 34 of the Arbitration Act to respect the finality of an award and the party autonomy to get their dispute adjudicated as an alternative forum under the law should be respected by the courts and Section 34 cannot be equated to a normal appellate jurisdiction.
- The SC also made a note of Section 31 of the Arbitration Act which elucidated the necessity of providing reasons for an arbitral award and observed that Indian law recognized enforcement of a reasonless arbitral award if it had been so agreed by the parties.
- SC delved into the scope of Section 30 of the Arbitration Act which provides for grounds for setting aside the award and observed that Section 31(3) mandated an arbitral award which is intelligible and adequate in its reasoning and could be implied by the courts by a fair reading thereof. However, the aforesaid section does not require an elaborate judgement to be passed by the arbitral tribunal having regard to the speedy resolution of dispute.
- The Apex court laid down three characteristics for a reasoned award, namely proper, intelligible and adequate. With reference to section 34(4) of the Arbitration Act, the SC noted that the legislative intent of the section was to make an arbitral award enforceable, after giving an opportunity to arbitral tribunal to undo curable defects attributable to absence of reasoning, or gap in reasoning or otherwise. This could assist in avoidance of a challenge under section 34 (4) of the Act.
- On the aspect of challenge relating to adequacy of reasons, the SC held that a court while exercising jurisdiction under section 34 of the Arbitration Act should adjudicate the validity of such an arbitral award based on the degree of particularity of reasoning required; have regards towards the nature of issues falling for consideration and the documents submitted by the parties to that arbitral awards with inadequate reasons are not set aside in a casual and cavalier manner. However, the degree of particularity could not be stated in a precise manner as the same would depend on the complexity of the issue.

## Our viewpoint

- Supreme Court has made a remarkable effort in distinguishing the basis of challenge to an arbitral award by laying down the foundation of preliminary evaluation of an award in its form and content on the basis of being proper, intelligible and adequate, which parameters are often confused or sometimes not considered in the ordinary course resulting in unwarranted form of judicial intervention by the courts resulting in varying consequences.
- This Order is essentially a cautionary tale for the parties and arbitrators to have a clear award, instead to have an award which is obfuscated in structure and implied in its content.

# Amendments to Indian Stamp Act, 1899

- The Finance Act, 2019 (**Finance Act**) proposed noteworthy amendments to the Indian Stamp Act, 1899 (**Act**). The proposed changes were notified by the Ministry of Finance (**MoF**) on December 10, 2019 and were proposed to come into force from January 9, 2020. However, the MoF vide notification dated January 8, 2020 extended the effective date to April 1, 2020.

## Amendments in the Act

### New rates and the Burden of duty

<table>
<tr><th>STAMP DUTY ON INSTRUMENTS</th><th>NEW RATES</th><th>BURDEN OF PAYMENT</th></tr>
<tr><td>Issue of debentures</td><td>0.005%</td><td rowspan="12">▪ Issue of security whether through a stock exchange or depository or otherwise – Issuer<br>▪ Sale of security through stock exchange – Buyer<br>▪ Sale of security otherwise than through a stock exchange – Seller<br>▪ Transfer of security through a stock exchange or depository or any other means – Transferor<br>▪ In any other case – Payable by person making, drawing or executing such instrument</td></tr>
<tr><td>Transfer and re-issue of debentures</td><td>0.0001%</td></tr>
<tr><td>Stamp Duty on security Other than debentures</td><td>0.005%</td></tr>
<tr><td>Transfer of security on delivery basis</td><td>0.015%</td></tr>
<tr><td>Transfer of security on non-delivery basis</td><td>0.003%</td></tr>
<tr><td>Government securities</td><td>0%</td></tr>
<tr><td>Repo on corporate bonds</td><td>0.00001%</td></tr>
<tr><td colspan="2">DERIVATIVES</td></tr>
<tr><td>Futures - equity and commodity</td><td>0.002%</td></tr>
<tr><td>Options - equity and commodity</td><td>0.003%</td></tr>
<tr><td>Currency and interest rate derivatives</td><td>0.0001%</td></tr>
<tr><td>Other derivatives</td><td>0.002%</td></tr>
</table>

### Creation of Centralized Collection Mechanism (CCM):

- It is meant to streamline collection of stamp duty (through stock exchanges, clearing corporation or depositories) and disbursal of collected revenues to State governments where buyer resides. Stamp duty on issue of securities which are not routed through stock exchange or depository needs to be paid by the issuer of securities at the place where the registered office of the issuer is located.
- Exemptions for instruments from stock exchanges and depositories established in any International Financial Services Centre defined under Section 18 of the Special Economic Zones Act, 2005.

### Amendments in definitions

- The broadened definition of 'Securities' includes securities as defined under the Securities Contract (Regulation) Act, 1956; derivatives as defined under the Reserve Bank of India Act, 1934; certificates of deposit, commercial usance bills, commercial papers, repos on corporate bonds and other instruments of original or initial maturity up to one year; or other instruments declared by the Government.
- The term 'Debenture' now includes debenture stock, bonds or any other instrument that evidences debt; bonds in the nature of debentures issued by companies and body corporates; certificates of deposit, commercial usance bill, commercial paper and other debt instruments of original or initial maturity up to one year; securitized debt instruments and any other instruments specified by the SEBI.

## Our viewpoint

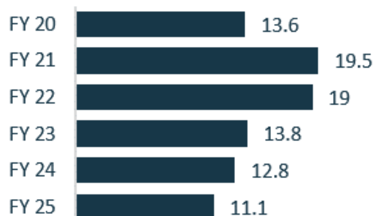
- The amendment serves a multitude of goals meant to improve Stamp Duty collection and disbursal to States, reduce cases of avoidance or evasion of stamp duty and plug the leakage of revenues for the Government. The amendment will lead to reduction in the cost of collection and will boost the revenue productivity for the respective states. However, only the time will tell how well the CCM is implemented by the agencies for collection of the stamp duty specially in cases where securities transaction are not routed through a stock exchange.

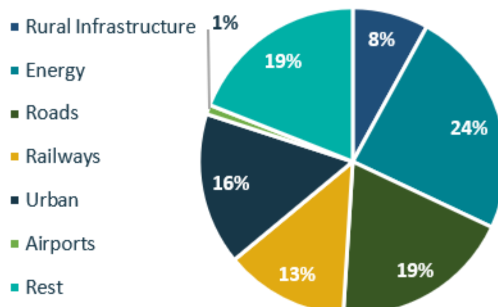
## REDEFINING BANKRUPTCY: THE ESSAR STEEL STORY

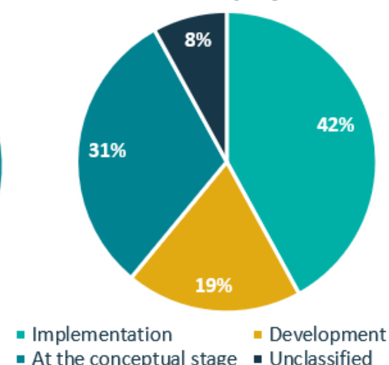
- On December 16, 2019, a consortium of Luxembourg based ArcelorMittal and Japan's Nippon Steel & Sumitomo Metal Corporation Ltd. completed the acquisition of Essar Steel India Ltd. and brought closure to one of the largest insolvencies under India's new bankruptcy law. With the torturous case coming to an end, there was a palpable sense of relief across corporate India and a big victory for the three-year-old legislation as the Supreme Court upheld the principle of financial creditors having primacy over operational creditors.
- When Standard Chartered Bank and State Bank of India filed insolvency proceedings against Essar Steel in August, 2017, the company had an outstanding debt of INR 54,550 crore and was the biggest defaulter on RBIs original 'dirty dozen' list of bad loans. Banks were going to test the new IBC passed in Parliament the previous year. The law was clear in what it wanted to achieve – quick resolution and maximum recovery.
- While the Indian economy may be in the midst of a slowdown, much hope rides on its long-term prospects. And India currently has per capita steel consumption of only 70 kg a year, less than half the average of many other developing nations. Due to a confluence of such factors, steel emerged as the unlikely test bed for India's new bankruptcy law.
- With Essar being an eye-catching weighty deal and bidders competing for it, a number of legal precedents have been set. Through the case, courts gave several key rulings which cleared the grey areas at the edge of IBC while on the other side several amendments were brought from the cabinet to help resolve the issues. Section 29A was included in the code to prevent defaulting promoters from buying back their assets for cheap and also barred the bidders with links to other defaulting assets. Amongst many other, one of the outstanding things was the promptness with which Supreme Court settled legal questions showing commercial awareness – something which commercial courts in India need to display.
- While a lot has been achieved through the Essar Steel case, there are still big questions within IBC that need clarity. The question whether the new owner of an asset gets immunity from Prevention of Money Laundering Act is already being tested in the court in JSW Steel's resolution plan to take over bankrupt Bhushan Power and Steel Ltd (**BSPL**) where some of BPSL's assets have been attached by the Enforcement Directorate as a part of fraud investigations into its erstwhile promoter Sanjay Singhal. Government through The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2019 tried to resolve the issue, however the question with regards to its applicability still remains to be answered by the courts.
- IBC safeguards and maximizes the value of the company, and, consequently, value for all its stakeholders. The government is planning to introduce e-bidding to reduce the timeline and improve transparency. If implemented properly, IBC can help in setting up new standards of corporate governance, radically change how business exits unfold as a result of distress sale, add more certainty for creditors and thereby lead to more money getting pumped into Indian businesses.

# NIP – A MEGA PUSH TO REVIVE THE INDIAN ECONOMY

- Given the critical role of infrastructure in initiating and sustaining national economic development, as per Economic Survey, 2019 it is projected that India would need to spend USD 4.5 trillion on infrastructure by 2030 to sustain its growth rate.
- With the above objective in mind, the Finance Minister unveiled INR 102 trillion of infrastructure projects under National Infrastructure Pipeline (**NIP**). This includes more than 6,500 greenfield and brownfield projects costing above INR 100 crore each across sectors such as power, renewable energy, railways, urban development, irrigation, mobility, education, health and water. The projects will be spread across 21 Ministries and 18 States and Union Territories. While the Centre and States will contribute 39% each of the project cost, 22% will be contributed by the private sector (this is likely to go up to 30% by 2025).
- At a macro level, focusing on infrastructure development is a sound strategy for stimulating economic growth, given the attendant asset creation which leads to increased jobs and spending power amongst the workforce. For developers specifically, NIP will provide a significant impetus given its focus on PPP-based contracts as well as result in better visibility of upcoming projects, which will help ensure proper planning and preparedness for project bidding, capital raising and similar activities, all of which are a key factor in increasing investor confidence.
- The Budget also contained information on the government's plans on raising resources beyond the traditional budgetary sources, including monetization of operational infrastructure assets. Tax exemption to attract investment by SWFs into infrastructure, increasing the FPI limits for investment in corporate bonds, withholding tax relief for ECB investors are steps in the right direction.
- The budget announcement on the creation of a Project Preparation Facility is indeed important in this context. Projects would need to be planned, prepared and structured – in due consultation with the private sector – so as to ensure that there is a credible framework under which the private sector can evaluate potential participation and returns.
- Through Infrastructure Vision 2025, the government has envisaged enhanced road connectivity to remotest areas and trunk connectivity through expressways to major economic corridors, strategic areas and tourist destinations.
- Effective involvement of the private sector is instrumental for mobilizing additional capital and resources, which are critical for achievement of the overall NIP target. Administrative ministries and departments can enable this ecosystem through a sustained focus on project budgets and time-bound implementation of the projects envisaged under the NIP.



# Inclusion of UAE as a 'Reciprocating Territory'

- The Ministry of Law and Justice, Government of India, vide its notification dated January 17, 2020 (**Notification**) declared United Arab Emirates (**UAE**) a 'reciprocating territory' for the purposes of enforcing foreign civil decrees in India. Pursuant to the Notification, UAE mainland, DIFC and ADGM decrees will be expressly recognized and shall be deemed enforceable under the Indian Civil Procedure Code (**CPC**) and will now be executed in India as if it has been passed by the District court.
- In India, the law governing recognition and enforcement of foreign decrees is provided in Section 44A of the CPC and provides that any decree passed by superior courts of any reciprocating territory may be executed in India, as if it has been passed by Indian courts. The decrees passed by foreign courts of reciprocating territories can be put into execution straightaway and may operate as res judicata subject to satisfaction of the conditions of its conclusiveness as mentioned in Section 13 of the CPC.
- UAE joins the likes of UK, Singapore, Bangladesh, Malaysia, New Zealand, Hong Kong, Trinidad & Tobago, Papua New Guinea, Fiji and Aden, which enjoy reciprocating territory status in India. This development opens up additional avenues for realizing debt, recoveries and claims, and is particularly significant given the substantial number of Indian-owned companies in the UAE. We expect the Notification to have a significant impact on litigation strategies of financial institutions and corporates in the UAE.

## Key considerations

### Foreign Decree vis-à-vis Insolvency and Bankruptcy Code, 2016:

- NCLT and NCLAT – the tribunals empowered for discharging powers and functions conferred upon them under the IBC – may take cognizance of a foreign decree and treat it as a debt for the purposes of the code. However, these tribunals don't have jurisdiction to enforce the foreign decree. The position emerges from a judgement passed in matter of *M/s Stanic Bank Ghana Ltd v. Rajkumar Impex Pvt Ltd*.[1] The tribunal took note of Section 44A and Section 13 of CPC, observing that prima-facie case made out under the code and a debt is payable. The said decision was also upheld by NCLAT. Reciprocity between India and UAE for execution of decrees under Section 44A of the CPC could give credence to foreign decree holders to invoke the mechanism under the IBC as a measure for debt realization.
- **Our viewpoint:** Under the IBC, there is a distinction between decrees from non-reciprocating and reciprocating territories from the standpoint of debt. Enforcement of decree passed in non-reciprocating territory will entail filing a suit, which may be construed as a cause of action for the said suit. This could provide an opportunity to the Corporate Debtor to wriggle out of IBC's purview on the ground of a disputed debt, as the decree will be treated as additional evidence against the defendant.

### Enforcement of arbitral awards seated in UAE

- The Notification is restricted to enforcement mechanism under Section 44A of CPC and does not change the position on enforcement of arbitral awards passed by Arbitral Tribunals seated in UAE. As per Part II of the Indian Arbitration and Conciliation Act, 1996 (**Act**), a foreign award may be executed in India if it is a New York Convention Award and fulfils the conditions mentioned under Section 44 of the Act, which requires the award to be in pursuance of a written agreement to which the convention is applicable or has been passed in territories where the convention is applicable and notified.
- **Our viewpoint:** Where a UAE seated award is passed in favor of an award holder, they can now apply to court of relevant jurisdiction for getting the award declared as a Rule of Court. However, ambiguities with respect to application of Notification (whether it is applicable retrospectively or prospectively?) and enforcement of arbitral awards by getting the award declared as a Rule of Court for subsequent enforcement in India will have to be clarified.

## List of references

[1] *M/s Stanic Bank Ghana Ltd v. Rajkumar Impex Pvt Ltd*, NCLT Division Bench, Chennai, CP/670/IB/2017

[2] *M/s Dyna Technologies Pvt Ltd v. Crompton Greaves Ltd*, Supreme Court, Civil Appeal No. 2153 of 2010

[3] *Manish Kumar v. Union of India and Anr*, Supreme Court, Writ Petition (C) No. 183 of 2013

## Glossary

| | | | |
|---|---|---|---|
| **ADGM** | Abu Dhabi Global Market | **CoC** | Committee of Creditors |
| **CIRP** | Corporate Insolvency Resolution Process | **DIFC** | Dubai International Finance Centre |
| **ECB** | External Commercial Borrowing | **FDI** | Foreign Direct Investment |
| **FPI** | Foreign Portfolio Investor | **IBC** | Insolvency and Bankruptcy Code, 2016 |
| **NCLAT** | National Company Law Appellate Tribunal | **NCLT** | National Company Law Tribunal |
| **NRI** | Non-Resident India | **SEBI** | Securities Exchange Board of India |
| **SWF** | Sovereign Wealth Fund | | |

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