

Govt plans pre-packaged IBC deals to ease caseload

The pause in bankruptcy resolutions because of the covid-19 pandemic has prompted the government to legislate changes to the insolvency code to fast-track processing of cases where a restructuring plan has been agreed in advance between the company and its creditors, two people aware of the development said.

The so-called pre-packaged insolvency procedure, or pre-pack, will also help ease the burden on bankruptcy courts, once the changes to the Insolvency and Bankruptcy Code are approved by Parliament.

“Pre-packs are probably intended to lower the burden of courts and effectively come out with an alternative solution,” said Shardul Shroff, executive chairman at law firm Shardul Amarchand Mangaldas and Co.

A huge backlog of cases at National Company Law Tribunal (NCLT) benches have stretched resources and led to delays in resolution of cases. The current covid-19 crisis has only added to the delays. A pre-pack resolution, experts say, will help shorten the long-winded court process.

It will also help reduce uncertainty on whether the stressed assets will draw interest from bidders and even if they do so, whether lenders will accept their bids.

Till December, bankruptcy courts in India admitted 3,254 companies for resolution. Of this, resolution plans have been approved for 190 cases; 246 cases have been closed on appeal or review and liquidation proceedings have begun in 780 cases. “Pre-packs appear to be an attempt to see whether these cases can be settled and subjected to an order of NCLT as binding on parties,” said Shroff.

The plan to bring pre-packaged IBC has been in the works for some time and experts said the current crisis may be a good time to implement it. The ministry of corporate affairs had in April last year sought comments on pre-packaged resolutions from interested parties.

An 11-member panel, headed by former Securities and Exchange Board of India (Sebi) chairman U.K. Sinha, is examining the issue to suggest a suitable framework. It is examining three modes—pre-packaged insolvency resolution, pre-arranged insolvency resolution and pre-arranged sale.

To be sure, not everyone is convinced pre-packaged resolutions are the way to ease the burden on bankruptcy tribunals. “What would really help is if the government increases the strength of NCLT benches to tackle the growing number of cases, and that would be more effective than bringing new legislation,” said Karan Kalra, founder of Bombay Law Chambers.

Kalra said there are provisions in the IBC that allow for quicker resolution of cases.

“Take Section 12A for instance, which allows the case to be withdrawn by consent of lenders. One can use this if there are quicker solutions or deals available outside the IBC process after it has been admitted,” he said, adding that while a pre-packaged deal increases certainty, it does not necessarily lead to value maximization, the core principle of the bankruptcy code.

The practice of pre-packs was first developed in the US, following the enactment of the Bankruptcy Reform Act of 1978. Soon after its introduction, it became so popular that in 1993, nearly one-fifth of all public bankruptcies were pre-packaged. Much like in the US, the practice of pre-packs is widespread in the UK, Netherlands, France and Germany.

Sitesh Mukherjee, partner at law firm Trilegal, believes a pre-pack may not work in the Indian context as firms are largely promoter-driven. "Only those bidders who are able to view the company from the promoters' eyes will have an advantage. There is a huge amount of asymmetry in terms of transparency and disclosures," said Mukherjee.

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