The Restructuring Review

Sixth Edition

Editor
Christopher Mallon

Law Business Research

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THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

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EDITOR'S PREFACE

I am very pleased to present this sixth edition of *The Restructuring Review*. As with the previous editions, our intention is to help general counsel, government agencies and private practice lawyers understand the conditions prevailing in the global restructuring market in 2012 and 2013 and to highlight some of the more significant legal and commercial developments and trends that have been evident in recent years, and that are expected to be significant in the future.

Recent trends in the world economy have presented a mixed picture. Positive economic developments in the United States, such as the robust growth in job creation, have been offset by a situation of stasis in the EU, which remains troubled by concerns about the ongoing eurozone debt crisis and political uncertainty. There have also been some indications that emerging markets, which have done much to underpin global growth in the recent past, are set to experience more challenging conditions in the coming years.

Another cause for concern is that the positive economic developments of recent years appear to have been largely predicated on the extraordinary measures taken by central banks in response to the global financial crisis; it is not clear how economies will respond when historically low interest rates and loose monetary policy eventually revert to the mean. It is to be expected that central banks will be reluctant to endanger a fragile recovery through a premature return to orthodox policy, but it is inevitable that a return will have to be made in due course. The markets' negative reaction to the signals given in June 2013 by the US Federal Reserve that it was considering an earlier end to quantitative easing than previously anticipated indicates the stress that may be placed on large parts of the global economy as current policies are reversed.

While the picture is continually changing, and the only accurate economic prediction that can be made is for more uncertainty in the months ahead, most commentators agree that a significant deleveraging at the individual, corporate and governmental levels is likely to be seen in the coming years and may be an essential prerequisite for a return to stability.

This deleveraging and the difficult global economic conditions are widely expected to contribute to a significant increase in restructuring activity in the coming years. As such, this work is becoming ever more relevant and important, in particular because of the international nature of many corporate restructurings.

I would like to extend my gratitude to all the contributors for the support and cooperation they have provided in the preparation of this work, and to our publishers, without whom the completion of this work would not have been possible.

Christopher Mallon
Skadden, Arps, Slate, Meagher & Flom (UK) LLP
London
August 2013

Chapter 13

INDIA

Nilesh Sharma and Sandeep Kumar Gupta[1]

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

i Liquidity and the financial markets

Towards the end of FY2012/13,[2] the Indian economy witnessed strong foreign institutional investment (FII) inflows, which had a positive effect on the Indian equity market and the rupee, although market movements were also affected by domestic slowdown and governance concerns. The primary equity market, however, remained subdued. The easing of the financial market conditions due to policy actions began in the third quarter and continued until the end of FY2012/13. The IMF's Global Financial Stability Report of April 2013 noted that global financial and market conditions have improved appreciably in the past six months due to monetary stimulus and liquidity support.

Various reform measures, including postponement of GAAR (general anti-avoidance rules) by two years and partial deregulation of diesel prices, have boosted the confidence of global investors in the Indian economy. Reflecting these developments, the rupee showed a modest appreciation in January 2013, which, however, came under pressure thereafter partly due to dollar demand from oil-importing companies. Recently, however, there has been a depreciation of approximately 17 per cent in the value of the rupee against the dollar.

1 Nilesh Sharma is a partner and Sandeep Kumar Gupta is an associate partner at Dhir & Dhir Associates, Advocates & Solicitors.

2 In FY 2012/13 (i.e., from 1 April 2012 to 31 March 2013), Report on Macro Economic and Monetary Developments: 2012–2013 published by the Reserve Bank of India.

The annual growth in the Reserve Bank's quarterly House Price Index at all-India level has hovered around 20 per cent for the past eight quarters. Transaction volumes also picked up, registering an annual growth of over 14 per cent in the third quarter.

ii Impact of specific regional or global events

The present economic crisis being faced has been the most serious the world has experienced since the Great Depression of 1930. It has affected almost the entire world, except for a few economies that are not fully globalised and have remained more or less closed.

For some time after the beginning of the crisis in the United States, it was thought that the economies of India and China would remain insulated from the crisis, and also that these two economies would play a major role in moderating the crisis and paving the way towards a worldwide recovery. These views have now been proved seriously wrong and these two economies have also come under extreme pressure. The then-governor of the Reserve Bank of India (RBI), Duvvuri Subbarao, pointed out in 2009 that the impact of world crisis has touched India in three ways: in trade, in finance and in confidence.

Although the Indian banking sector is comparatively in much better shape than its counterparts in the advanced countries, but is also facing the secondary effects of the global downturn. As a result of these secondary effects, the banking sector in India has begun to see an increasing number of proposals for debt restructuring as borrowers are finding themselves unable to service the interest on their debts as well as repaying the principal.

iii Market trends in restructuring procedures and techniques employed during this period (formal or informal)

Between March 2009 and March 2012 gross advances in the Indian banking system have grown by a compounded annual growth rate (CAGR) of approximately 20 per cent, and restructured standard advances have grown at a CAGR of more than 40 per cent. The number of restructured standard advances as a percentage of total gross advances increased from 3.5 per cent in March 2011 to 4.7 per cent in March 2012 and to 5.9 per cent by the end of September 2012. The reasons for this surge include the global recession, domestic slowdown, reckless lending by some banks in the past and improper monitoring of borrowers' accounts. The increased numbers have stressed the Indian banking system and, in the event that the economic situation does not improve, may well cause serious harm to the Indian banking sector.

iv Number of formal procedures entered into or exited during this period

The financial difficulties being faced by the industry have resulted in a hike in the number of non-performing asset (NPAs) of banks. The growth rate of NPAs of 45.7 per cent (year on year), at the end of September 2012, outpaced that of gross advances during same period, which is a matter of great concern as regards asset quality.

Owing to increased deterioration in asset quality, the restructuring of corporate loans is on the rise in India, and the rising trend for debt restructuring is a cause for concern not only for the banking sector but also the economy as a whole.

As per the latest performance report of the CDR Cell on 31 December 2012, the number and value of restructuring cases referred to the CDR Cell shows the surge in the number of cases of deteriorated debts. This rise does not augur well for the banking sector or for the corporate sector.

Total references received		*Cases rejected/closed*		*Cases under finalisation of restructuring packages*		*Total cases approved (including cases withdrawn/exited)*	
No. of cases	*Aggregate debt (rupees)*	*No. of cases*	*Aggregate debt (rupees)*	*No. of cases*	*Aggregate debt (rupees)*	*No. of cases*	*Aggregate debt (rupees)*
491	2,668,850,000	79	318,420,000	50	230,650,000	362	2,119,780,000

Source: CDR Cell – Progress Report at 31 December 2012.

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

i Insolvency laws and security enforcement law in India

There is no single comprehensive and integrated corporate insolvency law in India that would address the needs of an entity in distress. The insolvency and restructuring framework is guided by the following four major legislative acts:

a the Companies Act 1956;
b the Sick Industrial Companies (Special Provisions) Act 1985 (SICA);
c the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (the SARFAESI Act); and,
d the Recovery of Debts due to Banks and Financial Institutions Act 1993 (the RDDBFI Act).

Companies Act 1956

Chapter V of the Companies Act 1956, lays down the law relating to 'Arbitration, Compromises, Arrangements and Reconstructions' of companies in India. The said chapter contains the provisions for the possible compromises, arrangements and reconstructions between the company and its creditors and shareholders. The main provisions of the said chapter relating to compromises and arrangements are summarised below:

a Where a compromise or arrangement is proposed, between a company and its creditors or between a company and its members, the company court with jurisdiction[3] may, on the application of the company or of any creditor or member of the company (or in the case of a company that is being wound up, of the liquidator) call a meeting of the creditors or members, to be held and conducted in such manner as the court directs. If a majority in number representing three-quarters of the value of the creditors or members agree to any compromise or arrangement, the compromise or arrangement will, if sanctioned by the court, be

3 The High Court of the state in which the registered office of the company is situated.

binding on all creditors, all members, and also on the company (or, in the case of a company that is being wound up, on the liquidator and contributories of the company).

b The court may not sanction any compromise or arrangement unless it is satisfied that the company or any other person by whom an application for winding up has been made has disclosed all material facts relating to the company to the court, such as the latest financial position of the company, the latest auditor's report on the accounts of the company or whether any investigation proceedings are pending in relation to the company.

c When an application is pending, until its final conclusion, the court is empowered to stay the commencement or continuation of any claims or proceedings against the company on such terms as the court thinks fit. It also has the power to supervise and monitor the implementation of the sanctioned compromise or arrangement, and may also modify it, if necessary. If the court is of the opinion that an earlier sanctioned compromise or arrangement cannot be worked satisfactorily, with or without modifications, it may pass an order to wind up a company.

d Under this chapter, the court has the power to issue directions for transfer of the whole or any part of the undertaking, property or liabilities of any company to the transferee company, where the compromise or arrangement is for the amalgamation of any two or more companies.

Winding up of a company

As per the Companies Act 1956, there are two ways of winding up a registered company.

The company court can order the winding up of a company if (1) the company has, by a special resolution, resolved that the company be wound up by the court, (2) if the company commits a default in delivering the statutory report to the Registrar of Companies or in holding the statutory meeting, (3) if the company fails to commence its business within one year of its incorporation or suspends its business for a whole year and the court is convinced that there is no intent to carry on the business, or if the number of members is reduced below the statutory minimum (i.e., below seven in case of a public company and two in the case of a private company), (4) if the company is unable to pay its debts, or (5) if the court is of the opinion that it is just and equitable that the company should be wound up.

The petition for winding up to the court may be made by the company itself, a creditor of the company, a contributory or contributories, the Registrar of Companies, or the central or any state government. A creditor of a company can file an application for the winding up of a debtor company for latter's inability to pay its debts.

Alternatively, when a company is wound up by the members or the creditors without the court intervention, this is called a voluntary winding up. It may take place on the passing of an ordinary resolution in the general meeting of its shareholders under certain circumstances and on the passing of a special resolution of the shareholders to wind up voluntarily for any reason whatsoever. Voluntary winding up is possible in the case of solvent companies that are capable of paying their liabilities in full.

Creditor's voluntary winding up

A creditor's voluntary winding up is possible in the case of insolvent companies. It requires the holding of meetings of creditors besides that of the members, right from the beginning of the process of voluntary winding up. The creditors get the right to appoint liquidator and hence, the winding-up proceedings are dictated by the creditors.

SICA

SICA was enacted in 1985 in the public interest with a view to securing the timely detection of 'sick' and 'potentially sick' companies owning industrial undertakings so that a speedy determination could be made by a board of experts of the preventive, ameliorative, remedial or other measures that could be taken with respect to such companies, and the expeditious enforcement of these measures. Insolvency legislation in India currently focuses on reorganisation of the financial and business structure of potentially viable entities facing financial distress so as to allow them to rescue and continue their businesses, and the liquidation of unviable insolvent entities.

Under the provisions of SICA, only medium and large industrial companies in distress can approach the bankruptcy tribunal[4] for formulation of a rescue plan. A company entitled to refer its matter for rescue to BIFR is termed a 'sick industrial company' and the test to its being under distress is balance-sheet based and not default-based.[5] Small and ancillary industrial undertakings are specifically excluded from the jurisdiction of SICA so that the focus can remain on rescuing companies in the industries in which the largest resources in terms of capital, human resources, etc. have been deployed.

A company that becomes an SIC as at the end of a financial year is required to file a mandatory reference before BIFR within 60 days of the finalisation of its accounts for the said financial year at the annual general meeting of its shareholders.[6]

The Act further provides that no reference can be made to BIFR where the financial assets belonging to a company have been acquired by a securitisation or reconstruction compan; the courts have put the figure that prevents the reference to BIFR at 75 per cent or more of the financial assets of a sick company being acquired by any such company.[7]

After receipt of the reference of a company, BIFR will make enquiries into the workings of the company and once it is satisfied of the fact, it will declare the company as an SIC. During the enquiries, BIFR may appoint one or more person as a special director on the board of the company to safeguard the financial and other interests of the company, or in the public interest.

If BIFR decides that it is not going to be practicable for an SIC to make its net worth exceed its accumulated losses within a reasonable period of time, and that

4 The Board for Industrial and Financial Reconstruction (BIFR).

5 An industrial company that, in addition to fulfilling other prescribed requisites, has at the end of any financial year accumulated losses equal to or exceeding its entire net worth, becomes an SIC.

6 Section 15 of SICA.

7 *Asset Reconstruction Co India P Ltd v. Shamken Spinners Ltd & Ors*, W.P.(C) No. 9557/2007, 12 November 2010.

it is necessary or expedient in the public interest to rescue the company by adoption of various measures for its revival, BIFR may appoint either the secured lender or an independent bank as the operating agency (OA) to formulate a scheme for the revival of the company.

This scheme may provide for:

a the financial reconstruction of the SIC;
b proper management of the SIC by a change in or takeover of its management;
c its amalgamation with any other company;
d sale or lease of a part or whole of any of its industrial undertakings;
e the rationalisation of managerial personnel and workers in accordance with law; and
f such other preventive, ameliorative and remedial measures as may be appropriate, which could include:
  - reduction in the interest or rights of the shareholders of the company;
  - lease of the industrial undertaking of the SIC to any person, including a cooperative society formed by the employees of such undertaking; and
  - sale of the industrial undertaking of the SIC, free from all encumbrances and all liabilities of the company or free from specified encumbrances and liabilities, to any person, including a cooperative society formed by the employees of such undertaking.

The scheme prepared by the OA is examined by BIFR and, thereafter, a draft rehabilitation scheme is formulated and published by BIFR for seeking suggestions and objections from the all concerned. Sixty days is allowed for the purpose of gaining consent, which may be further extended by BIFR by another 60 days. BIFR may, after considering the objections and suggestions of the various parties, sanction the rescue scheme for the company. The implementation of the scheme is monitored by a monitoring agency appointed by BIFR. If the need so arises, the sanctioned scheme may be modified by the BIFR.

In the event that BIFR is of the opinion that the SIC is not likely to become viable, and that it is just and equitable that the company should be wound up, BIFR forwards its opinion to the High Court under whose jurisdiction the company falls for winding up. Based on the opinion of BIFR, the competent High Court may pass the order for its winding up and proceed in accordance with the provisions of Companies Act 1956.

No recovery proceedings (including winding-up proceedings) against the company or its guarantors can be initiated or continued from the time the reference of an SIC is registered by BIFR until the BIFR-sanctioned scheme is implemented or until BIFR decides that the SIC is not viable and should be wound up, and also during the period when any appeal by the SIC or any other party is pending before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR). During this time, BIFR can issue directions to the SIC that it may not dispose of any of its assets without the permission of BIFR.

Under Section 22(3) of SICA, BIFR also has the power to issue an order declaring that operations of all or any contracts, assurances, agreements, settlements, awards, standing orders or other instruments in force to which the sick company is a party or that may be applicable will remain suspended or may be enforceable in a manner such as may be specified by BIFR. BIFR may pass this order for a period not exceeding two years at a time, but it may be extended by one year at a time up to seven years. The said declaration made by BIFR has effect, notwithstanding anything else contained in any other law, decree or order of a court, agreement, etc.

BIFR can also initiate misfeasance proceedings against any person who has taken part in the promotion, formation or management of the SIC, if it appears that such person has retained or misappropriated any of the assets of the SIC. It may direct such person to repay or restore the money or assets or any part thereof, with or without interest, to the company and report said matter to the central government for any action against such person that the government may deem fit. BIFR may also direct public financial institutions or scheduled banks and state-level institutions not to provide financial assistance to such person, or any partnership firm, company or other body corporate with which he or she is associated, for up to 10 years.

The provisions of SICA override the provisions of all other laws except the provisions of Foreign Exchange Regulation Act 1973 and the Urban Land (Ceiling and Regulation) Act 1976.

SARFAESI Act 2002

The SARFAESI Act is a foreclosure Act the aim of which is to enable secured lenders to realise long-term assets, manage problems of liquidity and asset liability mismatches, improve recovery by exercising powers to take possession of securities and sell them without the intervention of the courts, and reduce non-performing assets by adopting measures for recovery or reconstruction.

Under the SARFAESI Act, security interest created in favour of any secured creditor may be enforced without the intervention of court or tribunal by such creditor in accordance with the provision of the Act. Where any borrower, who is under a liability to a secured creditor under a security agreement, is in default in repayment of secured debt or any installment thereof, and its account is classified by the secured creditor as a non-performing asset, the secured creditor may require the borrower, by notice in writing, to discharge in full its liabilities to the secured creditor within 60 days of the date of notice, failing which the secured creditor is entitled to exercise all or any of the rights under of Section 13(4) of this Act.[8] Upon receiving a notice, no borrower can sell, transfer or lease the secured assets mentioned in the notice without the consent of the lenders. The secured creditors are empowered to act even in cases that are pending before BIFR or with the official liquidator, provided 60 per cent or more of the secured lenders are of the same mind.

8 The lenders may take possession of the secured assets and/or the management of the borrower's business and also have the right to transfer same by way of lease, assignment or sale.

RDDBFI Act 1993

In line with the international trend of helping financial institutions recover their debts quickly and efficiently, the government constituted debt recovery tribunals (DRTs) under the aegis of the RDDBFI Act in place of the civil courts in this situation.

Under Section 19 of the RDDBFI Act, banks and financial institutions can file suits for recovery of their dues, known as original applications, and after recording of evidence, final arguments are heard and, if in order, a decree is passed in favour of the banks or financial institutions.

However, due to the long drawn legal procedures and ineffectiveness of the RDDBFI Act, the SARFAESI Act 2002 was enacted. Despite the introduction of the SARFAESI Act, the RDDBFI Act continues to be constitutionally valid as the SARFAESI Act addresses only secured lenders and the determination of dues of the lenders is carried out by DRTs as per the provisions of the RDDBFI Act. The coexistence of both acts has been extensively dealt with in the judgment of the Supreme Court of India in *Transcore v. Union of India*.[9] The DRT is also the appellate authority for appeals filed against the proceedings initiated by secured creditors under the SARFAESI Act.

ii Informal procedures

In addition to the formal insolvency and restructuring procedures available to corporates in India, there are informal procedures in terms of guidelines issued by the Reserve Bank of India for restructuring of corporates facing distress. The Corporate Debt Restructuring (CDR) mechanism was introduced in 2001. It is a voluntary system that allows a financially distressed company with two or more lenders and debts of more than 100 million rupees to restructure its debts with super-majority consent of its lenders.[10] The restructuring agreed to by the lenders having the specified strength is binding on the remaining lenders provided they are member of the CDR system. The CDR mechanism is based on the Debtor-Creditor Agreement (DCA) and the Inter-Creditor Agreement (ICA), which provide the legal basis to the whole mechanism. Debtors are required to execute the DCA and abide by the terms therein. Similarly, all lenders participating in the CDR mechanism are required to execute a legally binding agreement among themselves to agree to abide by the laid-down policies and systems of the CDR mechanism. One of the most important clauses of DCA is the 'standstill clause', whereby both parties agree not to initiate any legal action against each other during the standstill period, which is normally between 90 and 180 days. Further, the borrower also undertakes that during the standstill period the loan documents executed in favour of its lenders will stand automatically extended without limitation, that the borrower will not approach any other forum for similar reliefs, and that there will be no change in the directorship of the company in as much as same relates to resignation from the board of directors.

The objective of the CDR mechanism is to ensure a timely and transparent mechanism for restructuring the corporate debts of viable entities facing problems, but

9 2008 1 SCC 125.

10 With the consent of lenders representing 75 per cent or more of its debt in value terms and by 60 per cent of the lenders by numbers.

outside the purview of BIFR, DRT and other legal proceedings, to the benefit of all concerned. This mechanism further aims at preserving viable companies that are affected by certain internal and external factors and at minimising losses to creditors and other stakeholders through an orderly and coordinated restructuring programme.

iii Duties of directors of companies in financial difficulties

SICA requires that in the event of a company becoming a potential SIC, its board of directors should bring such fact to the notice of the shareholders by convening a meeting and explaining the reasons, and to the notice of BIFR by filing a report. If the directors of the company fail to comply with the BIFR's 60-day notification deadline in the event of company becoming an SIC, they will be liable for strict penal action.

In the event of a voluntary winding up, the directors of the company are required to make a declaration verified by an affidavit to the effect that they have made full inquiry into the affairs of the company and to the solvency of the company.[11]

Directors are further required to give notice of the company's appointment of a liquidator of a company at its general meeting to the registrar of companies. The directors of the company must cease to exercise all powers of the board and, similarly, the managing directors and other full-time directors must also cease to exercise their powers on the appointment of a liquidator for winding up the company. In the event of a creditors' voluntary winding up, the directors must convene a meeting of the creditors of the company where they must present a statement of the position of the company's affairs, together with a list of creditors of the company and the estimated amount of such creditors' claims. The directors must file notice of any resolution passed at the creditors' meeting with the Registrar of Companies.

In a winding up by the court, the directors have a duty to defend the company against the winding-up petition filed by the creditor. The directors must also file a statement of the state of the affairs of the company, upon appointment of an official liquidator by courts. The directors also have a duty to assist the official liquidator from time to time by providing relevant information, records and assistance during the process of winding up by the court.

In addition to the foregoing, directors must act honestly, without any negligence and in good faith, in the *bona fide* best interests of the company. Directors are further expected to make proper use of their powers, not to fetter their discretion for any reason whatsoever, and not to place themselves, without the informed consent of the company, in a position in which their personal interests or duties to other persons are liable to conflict with their duties to the companies.

Directors are the trustees for the moneys and properties of the company handled by them, as well as exercise of the powers vested in them. If they exercise their powers and perform their duties dishonestly, they will be liable for breach of trust and will also be required to compensate the company for any loss or damages suffered as a result of their *mala fide* acts.

11 The company does not have any debts or that it will be able to pay its debts in full within a period of no more than three years from the commencement of the voluntary winding up.

As per Section 542 of the Companies Act, if, in the course of the winding up of a company, it appears that its business has been carried on with the intent to defraud creditors of the company or any other persons, or for any other fraudulent purpose, the court may direct that the person responsible will be personally liable without any limitation of liability for all or any of the debts or other liabilities of the company, as the court may direct.

iv 'Clawback' actions

As per Section 531 of the Companies Act, the court has the power to declare any property-related act concerning a company taking place in the six months before commencement of its winding up, which would have been deemed a fraudulent preference had it taken place three months before the presentation of an insolvency petition on which it is adjudged insolvent, will be deemed a fraudulent preference of its creditors in the event of the company being wound up and, as such, will be invalid.

Further, as per Section 531A, if any unusual or valuable transfer of property or any delivery of goods is made by a company in the year preceding a petition for winding up or passing of a resolution for voluntary winding up of the company, they will be void. The law further provides that in the case of a fraudulent preference as stated above, the person preferred will be subject to the same liability and have the same right as he or she had undertaken to be personally liable as surety for the debt to the extent of the mortgage or charge on the property, or the value of the interest, whichever is less.

In the event of a company being wound up, any floating charges on its property created in the 12 months immediately preceding the commencement of the winding up will be invalid unless it can be proved that the company was solvent immediately after the creation of the charge, except to the amount of any cash paid to the company at the time of the charge, together with the interest on that amount at the applicable rate.

The law further provides that in the case of voluntary winding up, any transfer of shares within the company made without the sanction of a liquidator or any alteration of status of the member of the company made after the commencement of the winding up will also be void. Similarly, in the case of a winding up by the court, any disposition of property or actionable claims of the company and any transfer of the shares in the company or alternation in the status of its members made after the commencement of its winding up will, unless the court orders otherwise, be void.

III RECENT LEGAL DEVELOPMENTS

A few companies dealing in asset reconstruction activities came into existence after promulgation of the SARFAESI Act in 2002, which has had an effect on the number of cases referred for restructuring in the past few years. These companies give an easy option to lenders to exit distressed cases by buying their stakes at discounts, and thereafter recovering the debt from the borrower, usually at a profit.

Another important change that will affect restructurings is the new Companies Bill 2011, which will replace the existing Companies Act 1956 and Sick Industrial Companies (Special Provisions) Act 1985; it is before parliament and is likely to be enacted very soon. It proposes the formation of a National Company Law Tribunal

(NCLT), which would handle all matters relating to the rescue, restructuring and winding up of companies.

There has also been another important amendment to the SARFAESI Act 2002, which was notified in January 2013, in which secured creditors of a borrower company representing at least 60 per cent of the secured debt have been empowered to enforce their security interest in the event of default by the borrower. Prior to this amendment, this figure was 75 per cent, so this should enable lenders to recover their dues more quickly.

i Recent judgments

The Supreme Court in the matter of *Raheja Universal Ltd v. NRC Ltd and Ors*[12] held that Section 22 of SICA contain the statutory powers empowering BIFR to determine a scheme, from its presentation to its complete implementation in accordance with law, free from interjection and interference from other judicial processes. It was held that under Section 22A, all assets of the company are under the exclusive jurisdiction and domain of BIFR, and BIFR has unfettered powers under Section 22A with respect to the assets of the company and all that it has to examine is the public interest, interest of the company, its shareholders and employees, etc. The Supreme Court further observed that the provisions of SICA, being special legislation, will prevail over the provisions of Transfer of Property Act 1882.

In the case of *Nouveaw Exports Private Limited v. AAIFR*,[13] the High Court of Bombay held that if secured creditors whose strength is less than three-quarters of the value of the amount outstanding against the financial assistance disbursed to the borrower intend to invoke the regime under the SARFAESI Act for enforcement of their securities, they would need to gain consent from BIFR under Section 22 of SICA.

In the matter of *Central Bank of India v. State of Kerala and Ors*,[14] the Supreme Court tagged various appeals involving the interpretation of non-*obstante* clauses contained in the SARFAESI Act and the DRT Act in light of the specific clauses contained under the state government revenue legislations, including the Bombay Sales Act 1959 and Kerala General Sales Tax Act 1963, which provide for the creation of first charge in favour of the state government over the property of an assessee who has defaulted in payment of state government dues. According to this decision, the charge thereby created in favour of the state in respect of sales tax dues takes precedence over the charge created in favour of the bank in respect of loan taken by borrower.

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

A number of companies have resorted to the CDR mechanism to seek restructuring of their debts. Of the cases approved by CDR until the end of 2012, the iron and steel

12 (2012) 4 SCC 148.

13 WP No. 2079 of 2010, date of judgment 19 May 2010.

14 Supreme Court of India, 27 February 2009.

sector has seen the most activity, with an aggregate debt of 471 billion rupees in 47 cases, followed by the infrastructure sector with an aggregate debt of 197 billion rupees in 16 cases, and the textiles sector with an aggregate debt of 164 billion rupees in 71 cases. The iron and steel sector was worst hit as a result of overcapacity and shortage of iron ore, the main raw material, pursuant to the ban on mining imposed by the government. The recession, coupled with delays in regulatory approvals, has resulted in delayed execution of infrastructure projects. The problems in the textiles sector arose due to a sharp increase in the price of cotton.

A large number of companies whose debts had been restructured earlier have been forced to make filings for a second time as they have been unable to honour their commitments under the first restructuring due to the prolonged recession. Many companies have made the filings before BIFR to seek protection against recoveries and for determination of measures for their rescue and restructuring under SICA. Some cases referred to CDR, or where restructurings have been approved under CDR, include Alps Industries Limited (debts of 12 billion rupees), Hindustan Construction Company Ltd (debts of 33 billion rupees), Gammon India Ltd (debts of 95 billion rupees), Jindal Stainless Ltd (debts of 90 billion rupees), Essar Oils Ltd (debts of 91 billion rupees) and Kingfisher Airlines Ltd (debts of 70 billion rupees).

Cases referred to BIFR or where schemes have been sanctioned by BIFR include Ramsarup Industries Ltd (debts of 21 billion rupees), Duncans Industries Ltd (debts of 7.25 billion rupees), Samtel Color Ltd. (debts of 3.3 billion rupees), Fair Deal Supplies Ltds (debts of 4.25 billion rupees). The restructuring techniques envisage either hiving off one of the business segments of the distressed entity into a separate company, sale of unproductive business segments or assets of the distressed company in order to reduce the debt burden, conversion of a portion of the debt into zero-rated non-convertible debentures in order to reduce the interest burden, or the merger of the distressed company into a healthy company to generate synergies and economies of scale.

V INTERNATIONAL

India has not adopted the UNCITRAL Model Law, neither do EC Regulations apply to it. As per the provisions of the Companies Act 1956, the Indian courts exercise jurisdiction over winding-up proceedings despite the possibility of the place of main activities of the particular companies being outside India. Foreign entities with dues recoverable from said companies may, however, approach the Indian courts conducting the winding up to lodge their claims over the estate of the company being wound up.

The law for the recognition of foreign judgments and proceedings is contained in Sections 13 and 44A of the Code of Civil Procedure, which consider foreign judgments in reciprocating countries as conclusive, barring certain exceptions such as fraud, a judgment not based on merits of the case or where no competent jurisdiction existed.

Despite the existing provisions in the Companies Act and the Code of Civil Procedure, Indian laws on cross-border insolvency are inadequate and need to be overhauled in order to provide a regime conducive to transnational activity in terms of investment and security. Both committees appointed by the government and the

Reserve Bank of India to make recommendations for changes to the bankruptcy law[15] have recommended enactment of an insolvency law based on the UNCITRAL Model Law, but no concrete steps have so far been taken by the government.

VI FUTURE DEVELOPMENTS

The Indian parliament is in the process of legislating a new law that will revamp the existing corporate insolvency system in India. After enactment of said law, the new NCLT will be formed, which will take over all the distress corporate cases, which currently fall within the jurisdiction of BIFR.

The new law will be part of the Companies Act, a bill in respect of which has been passed by one house of the parliament. It is likely that the said law will be enacted in the next few months and the NCLT will come into existence. The new insolvency law is akin to Chapter XI of the US Insolvency Law. The NCLT will have a much larger number of branches spread among various cities of India, which should help in the speedy disposal of insolvency matters. In addition to the jurisdiction for corporate rescue matters, the NCLT will also have jurisdiction over the winding up of companies and the powers to restructure the companies.

15 The Justice Eradi Committee and NL Mitra Advisory Group on Bankruptcy Laws.

Appendix 1

ABOUT THE AUTHORS

NILESH SHARMA
Dhir & Dhir Associates, Advocates & Solicitors
Nilesh Sharma is a partner in Dhir & Dhir Associates, Advocates & Solicitors. He is a law graduate and a chartered accountant and looks after the restructuring and insolvency practice of the firm. His association with the firm and his experience in this practice area has lasted more than two decades. His experience includes providing advice on restructuring and insolvency issues, negotiated settlements, cross-border insolvency issues and representation before the bankruptcy courts. He is a member of Insol India and the AAIFR BIFR Association of India.

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Sandeep Kumar Gupta is an associate partner in Dhir & Dhir Associates, Advocates & Solicitors. He is a qualified chartered accountant with extensive experience of around 20 years in banking, project finance and debt restructuring of entities in distress, both through the CDR mechanism and on a bilateral basis. He is a part of the corporate consultancy team of the firm, advising clients on matters related to settlements with lenders and other insolvency-related issues.

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