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The International Comparative Legal Guide to:

Corporate Recovery & Insolvency 2016

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A practical cross-border insight into corporate recovery and insolvency work

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Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
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India

Nilesh Sharma

Dhir & Dhir Associates

Sandeep Kumar Gupta

1 Overview

1.1 Where would you place your jurisdiction on the spectrum of debtor to creditor-friendly jurisdictions?

The prevailing legislation dealing with the revival and rehabilitation of distressed entities is debtor-friendly as it entails a 'Debtor in Possession' regime. From the initiation until the completion of the restructuring proceedings under the provisions of the Sick Industrial Companies Act 1985 (SICA), the debtor remains in possession and control of the assets and is solely responsible for their operations or otherwise, albeit with restrictions on their disposal. The company continues to be controlled by its existing Board of Directors until either liquidator is appointed by the courts in winding up proceedings or an order for change of management is passed in case of proceedings pending under SICA.

However, any restructuring or scheme of revival must necessarily be consented to by at least 75% of the secured creditors, in value, of the debtor company, before the same can be approved by the adjudicating authority. The balance in favour of the creditors is maintained as the secured creditors are permitted to initiate recovery in terms of the provisions of the Recovery of Debts by Banks/FIs Act (RDDB) or enforce their security under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (SARFAESI), as the case may be. Further, under the proposed Insolvency and Bankruptcy Code (new law under discussion) it would be more of a creditor-friendly regime as the collective wisdom of the creditors would dictate the entire insolvency resolution process, including the management control of the debtor company.

1.2 Does the legislative framework in your jurisdiction allow for informal work-outs, as well as formal restructuring and insolvency proceedings, and are each of these used in practice?

The legislative framework in India for restructuring and insolvency proceedings provides for only formal processes and is presently governed by multiple old laws along with some bits and pieces of recent legislation, *viz*.: reorganisation through a scheme for compromise, arrangements and reconstruction under the Companies Act, 1956/2013; financial, capital and business restructuring under the Sick Industrial Companies Act 1985 (SICA); restructuring through an Asset Reconstruction Company (ARC) established under the provisions of SARFAESI; or winding up in terms of the Companies Act 1956/2013.

Under the legislative framework in terms of the provisions of SICA, if the Board for Industrial & Financial Reconstruction (BIFR) is of the opinion that the sick company, on its own, can make its net worth positive within a reasonable time, then it shall take note of the same and by an order grant such time to the company.

In addition to the above, there are several non-statutory, informal mechanisms based on the various circulars and guidelines issued by the Reserve Bank of India, the banking regulator which deals with the restructuring of debts, *viz*.: Bilateral Restructuring (BR); Corporate Debt Restructuring (CDR); Joint Lenders' Forum (JLF); Flexi Restructuring Scheme; and Strategic Debt Restructuring (SDR).

Each of the formal processes of restructuring and insolvency and the informal processes of restructuring are widely prevalent in India; however, corporations usually initially choose informal methods of restructuring and only then move towards formal methods upon failure of restructuring under the informal methods.

2 Key Issues to Consider When the Company is in Financial Difficulties

2.1 What duties and potential liabilities should the directors/managers have regard to when managing a company in financial difficulties? Is there a specific point at which a company must enter a restructuring or insolvency process?

The directors are required to act honestly, without 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 must not place themselves in a position in which their personal interest or duties to other persons may conflict with their duties to the company, except with the informed consent of the company.

In terms of the Companies Act or SICA, there is no restraint on the directors for continuing to trade, albeit with *bona fide* intentions, whilst a company is in financial difficulties. Further, the directors of manufacturing companies engaged in scheduled industries are obligated to notify the BIFR in case of potential/actual sickness, and non-compliance with the same has penal consequences.

The directors are further obligated to give notice of appointment of a liquidator of the company at its general meeting to the Registrar of Companies, and upon such appointment they cease to exercise their powers, including continuance of trading as the Official Liquidator takes charge of the company. In the case of a creditors' voluntary winding up, the directors must convene a meeting of the creditors of the company, and must present therein a statement of the position of the company's affairs together with a list of creditors of the company along with their estimated claims. The directors must file notice of any resolution passed at the creditors' meeting with the Registrar of Companies.

In the case of a winding up by court, the directors have the duty to defend the company in the winding up petition filed by the creditor. Each director must file a statement of the state of affairs of the company upon appointment of an Official Liquidator by the court. The directors also have the 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.

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

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

Under the provisions of SICA, a 50% or more erosion of peak net worth in the immediately preceding four financial years according to the Accumulated Losses as at the end of the relevant financial year in which the company's potential sickness was reported (Section 23) and complete erosion of net worth according to Accumulated Losses (Section 15) are the benchmarks for filing a reference for company sickness with the BIFR.

A petition for winding up can be filed before the High Court on grounds as stated under Section 433 of the Companies Act 1956 (Section 271 of the 2013 Act).

A scheme of arrangement can be filed under Section 391 (Section 230 of the 2013 Act), by a company, its creditors or shareholders in the event of the said entity facing financial difficulties.

2.2 Which other stakeholders may influence the company's situation? Are there any restrictions on the action that they can take against the company?

Under the Companies Act 1956, the petition for winding up by the court may also be made by 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 the debtor company for the latter's inability to pay its debts.

Under SICA, the Reserve Bank of India (RBI), a State government, public financial institution, State-level institution or scheduled bank are also eligible to make a referral to the BIFR if they have reasons to believe that the company has become sick.

SICA envisages a stay of coercive recovery proceedings, including suits, without the express approval of the BIFR or the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) in terms of Section 22(1) of SICA. The protection is automatically available to a sick company from the date of registration of its reference with the BIFR and continues until the continuation of implementation of the sanctioned scheme.

SARFAESI and the RDDB empower the secured creditors to enforce their security interest in each process. However, in case of proceedings pending under SICA, coercive recovery proceedings – except through the mechanism of SARFAESI – are not permitted without the express approval of the BIFR/AAIFR as per Section 22(1) of SICA.

In cases where winding up proceedings have been initiated, the pending suits, if any, are stayed under the terms of Section 446 of the 1956 Act (Section 279 of 2013 Act) and the only option available to the unsecured creditors is to file their claim before the liquidator.

2.3 In what circumstances are transactions entered into by a company in financial difficulties at risk of challenge? What remedies are available?

If the outcome of a company is pending before the BIFR under the provisions of SICA, the BIFR can appropriately interfere with, and can restrain, transactions in terms of Section 22(3) or 22A of SICA. Further, the Hon'ble Supreme Court in the landmark judgment of *Raheja Universals v NRC Ltd*. also recognised the power of the BIFR to even annul or regulate transactions entered into prior to filing a reference with the BIFR for the purpose of overall rehabilitation of the company under the aegis of SICA.

In addition, once a secured creditor issues a notice under Section 13(2) of SARFAESI, there is a *suo moto* restraint on transfer of the secured assets by sale, lease or otherwise and any attempt to enter into transactions in respect of the secured assets of the company can be annulled by the appropriate court of law.

Any other transaction entered into by a company in financial difficulty to carry out its normal course of business or activities is otherwise not susceptible to any attack in the absence of any restraining order.

Elaborate procedures dealing with the effects of winding up on antecedent and current contracts are set out under Chapter V of the 1956 Act (Chapter XX of the 2013 Act).

3 Restructuring Options

3.1 Is it possible to implement an informal work-out in your jurisdiction?

An informal mechanism for restructuring is possible under the aegis of the various circulars and guidelines promulgated by the Reserve Bank of India. The distressed entity may enter into Bilateral Restructuring with its lenders or it may resort to Corporate Debt Restructuring (CDR), a voluntary, non-statutory 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 the super-majority consent of its CDR member lenders; the decisions thereof shall be binding on all member lenders. The CDR mechanism is based on debtor-creditor agreements (DCAs) and inter-creditor agreements (ICAs), which provide the legal basis for the whole mechanism. Debtors are required to execute a DCA and abide by the terms therein, and the lenders execute an ICA which is a legally binding agreement to abide by the policies and systems of the CDR mechanism along with a "stand still" clause for a period ranging from 90–180 days.

In addition to the above, the RBI has also issued guidelines for the restructuring of debts through the formation of a Joint Lenders Forum (JLF) and formulation of a Corrective Action Plan (CAP) with the consent of a majority of the JLF members. The RBI has also promulgated the Flexi Restructuring Plan, which enables the banks to lend and restructure the infrastructure debt for a longer period of 20–25 years with an option of refinancing the same every five years. Recently, with the objective of ensuring "the shareholders should bear the first loss as compared to lenders", the RBI issued guidelines for effecting a "change of management" by the lenders under the aegis of a "Strategic Debt Restructuring", which enables the lenders to convert their entire or a portion of their debt into equity of the borrower and thereafter transfer the same in favour of a "new promoter" within a specified window, and also consider the refinancing of debt to the "new promoter".

3.2 What formal rescue procedures are available in your jurisdiction to restructure the liabilities of distressed companies? Are debt-for-equity swaps and pre-packaged sales possible?

The formal procedure for restructuring encompasses, within its ambit, schemes for reconstruction, takeovers, mergers, demergers, transfer of undertakings and restructuring of debts as provided in Sections 391 and 392 of the 1956 Act (Sections 230–231 of the 2013 Act). In addition, a scheme for revival and restructuring of a sick industrial company can also be duly sanctioned by the BIFR under the provisions of SICA.

There are no specific provisions under Indian law which provide for a "pre-packaged sale". However, similar meaning can be construed under the provisions of Section 17(2) of SICA, wherein if the BIFR is of the opinion that the sick company can make its net worth positive on its own within a reasonable period of time, then it will give such time to the sick company. Under such a circumstance, the sick company can formulate a scheme, which may, *inter alia*, envisage a sale of assets, and such a scheme must be presented before the BIFR for taking it on record.

A company can choose a pre-packaged sale with the consent of a majority of its secured creditors and the manner in which repayments are to be made to them, and accordingly, organise a scheme of arrangement under Section 391–394 of the Companies Act 1956 for the approval of the court.

Debt-for-equity swaps can be used as a tool for restructuring as duly recognised/provided for in restructurings undertaken under Sections 391–394 of the 1956 Act (Section 230–231 of the 2013 Act) as well as the rehabilitation scheme sanctioned by the BIFR under SICA. The same is done to bring the debt to a sustainable level either by waiver of excess debt or conversion into equity, or a combination of both.

3.3 What are the criteria for entry into each restructuring procedure?

Under the provisions of SICA, complete erosion of net worth through Accumulated Losses (Section 15) is the benchmark for filing a reference for sickness with the BIFR.

A scheme of arrangement can be filed under Section 391 (Section 230 of the 2013 Act), by a company, its creditors or shareholders in the event of the said entity facing financial difficulties.

Under the informal mechanism, as per the RBI guidelines, if the principal or interest payment remains overdue for 61–90 days, the banks must mandatorily form a committee of lenders called the Joint Lenders' Forum (JLF) and explore the options to resolve the stress in the borrower's account. Detailed mechanisms and criteria for entering into other informal procedures are dealt with in terms of RBI circulars and guidelines.

3.4 Who manages each process? Is there any court involvement?

The formal restructuring processes under the provisions of the Companies Act 1956 and SICA are consensual in nature. There is no direct intervention of the court and its role is only to expedite the process, push the concerned stakeholders to make a decision about the proposed restructuring and to put its stamp of approval on the restructuring agreed upon by the required majority. In case no form of restructuring can be agreed upon and the company is otherwise non-viable, the other option with the court is to order the winding up of the company.

3.5 How are creditors and/or shareholders able to influence each restructuring process? Are there any restrictions on the action that they can take (including the enforcement of security)? Can they be crammed down?

In case of a scheme of arrangement as per the 1956 Act, the consent of three-quarters of the members and/or creditors (in value) of each class is necessary and the minority creditors who have less than 25% exposure in the dues of the company can be crammed down and directed to fall in line with the majority of creditors.

In case of a restructuring scheme sanctioned by the BIFR under SICA, the minority secured lenders (banks and financial institutions) can be crammed down to accept the terms of restructuring agreed to by ¾ or more of secured lenders (banks and FIs) in terms of value, as minority creditors cannot scuttle the revival process. However, the consent of statutory authorities is required.

Although there is no specific provision dealing with unsecured creditors in a scheme under SICA, in the interest of the revival of a sick company, the BIFR may reduce the interests of unsecured creditors. However, as per a judgment of the Hon'ble Delhi High Court, such unsecured creditors may not be forced to accept a reduction in their dues through a scheme sanctioned by the BIFR, and may opt to stand outside of the scheme and seek recovery of their entire dues after the expiry of the scheme period.

During the restructuring process under Section 391–394 of the Companies Act 1956, moratorium is normally available; however, the same is pursuant to an order passed by the High Court upon application. Under SICA, the moratorium is automatic from the date of registration of the sick company by the BIFR. The said moratorium is available during the pendency of the restructuring proceeding by the BIFR. During the moratorium period, a creditor cannot file any suit or winding up petition or initiate any other recovery action against the sick company without obtaining the prior permission of the BIFR, except actions under Section 13(4) of SARFAESI with the consent of 60% (in value) of the creditors having jointly financed a financial asset. If such action under SARFAESI is taken by secured creditors representing 75% or more of the total secured debt of the company, such creditors may get the pending reference before the the BIFR abated.

3.6 What impact does each restructuring procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

The initiation of a restructuring process does not result in *ipso facto* termination of all pending contracts, and the company is free to perform its obligations under the contract if the situation so permits. However, if the contractual terms amongst the parties provide for termination of the contract upon commencement of any of the stated procedures, then the contractual obligation may be terminated at the preference of the other party. In case of proceedings pending under SICA, the BIFR can issue either restraint or suspension modification orders on the contracts, under Section 22(3), if the same is required in the interest of the revival of the company, but the contractual terms cannot be quashed.

3.7 How is each restructuring process funded?

The cost is to be met by the company itself either through loans, internal accruals, infusion of funds by promoter/management/strategic investors (whether in the nature of equity or debt), sale of surplus assets, etc.

4 Insolvency Procedures

4.1 What is/are the key insolvency procedure(s) available to wind up a company?

The winding up procedures are governed in accordance with the provisions of the Companies Act 1956 and 2013, which contain the law relating to winding up through the High Courts, and prescribes two methods of winding up a registered company, *viz*.: winding up by the court upon the occurrence or otherwise of events as prescribed under the Act; or a voluntary winding up by the members or the creditors without the intervention of a court.

Under the Companies Act 1956 and 2013, any winding up procedure can be initiated by the creditors/court only in case of insolvent companies, except in cases where the winding up has been voluntarily initiated by the company by passing a special resolution of the shareholders to wind up voluntarily for any reason whatsoever, or if the court has initiated a compulsory winding up of the company for certain reasons. Voluntary winding up is possible in the case of solvent companies which are capable of paying their liabilities in full.

Under SICA (Section 20), if the BIFR, after having exhausted all available options for revival of the sick company, forms an opinion that it is not possible to revive the company and the company may not become viable and it is just and equitable that it should be wound up, then it may record and forward its opinion to the High Court.

4.2 On what grounds can a company be placed into each winding up procedure?

In terms of the provisions of Section 433 of the 1956 Act (Section 271 of the 2013 Act), a company can be wound up under the following circumstances:

(a) if the company has, by special resolution, resolved that the company be wound up by the court;

(b) if there is a failure to deliver the statutory report to the Registrar or hold the statutory meeting;

(c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

(d) if the number of members is reduced, in case of a public company, below seven, and in case of a private company, below two;

(e) if the company is unable to pay its debts; and

(f) if the court is of the opinion that it is just and equitable that the company should be wound up.

If the court is of the opinion that a compromise or an arrangement previously sanctioned in terms of Section 391–394 of the Act cannot be worked satisfactorily with or without modifications, it may pass an order for the winding up of a company.

Under SICA's provisions, if the BIFR, after having exhausted all available options, forms an opinion that the revival of the sick company is not likely to happen in the future, then it may record and forward its opinion for the winding up of the company to the High Court of the respective State in which the registered office of the company is located, and the winding up proceedings will commence in accordance with the law.

4.3 Who manages each winding up process? Is there any court involvement?

In case of a winding up petition filed by a creditor of a company, the court may appoint the Official Liquidator of the court as a Provisional Liquidator of the company until the final winding up order is passed. The Provisional Liquidator so appointed shall have the same powers as the Official Liquidator, subject to restrictions as may be imposed by the tribunal. When a liquidator is appointed, he takes over the Board of the company until the company is finally dissolved, thus the Board of the company is effectively dissolved at this point.

4.4 How are the creditors and/or shareholders able to influence each winding up process? Are there any restrictions on the action that they can take (including the enforcement of security)?

A creditor of a company can file an application for the winding up of the debtor company for the latter's inability to pay its debts.

A creditor's voluntary winding up requires the holding of meetings of creditors besides that of the members, and it is the creditors who get the right to appoint the liquidator and, hence, the winding up proceedings are dominated by them.

In cases where winding up proceedings have been initiated, the pending suits, if any, are stayed under the terms of Section 446 of the 1956 Act (**Section 279 of the 2013 Act**) and the only option available to the unsecured creditors is to file their claim before the liquidator. However, the secured creditors can choose to stand out of the winding up proceedings and the amount realised through the sale of the secured assets will be appropriated in accordance with the provisions of the Companies Act.

4.5 What impact does each winding up procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

Elaborate procedures dealing with the effects of winding up on antecedent and current contracts as set out under Chapter V of the 1956 Act (Chapter XX of the 2013 Act) stipulate that any transaction relating to any transfer of property, movable or immovable, delivery of goods, payment, execution or other act relating to the property made, taken or done by or against a company, within six months before the commencement of its winding up if considered as fraudulent in nature and entered into with an intent to defeat the legitimate rights of the creditors shall be considered as Fraudulent Preferences, and the court has the power to declare the same as void (Section 531–537 of the Companies Act 1956 (Sections 328–355 of the 2013 Act)).

Further, as per Section 531A of the Companies Act 1956, any transaction relating to the transfer of property or any delivery of goods which is not in the ordinary course of a business or for valuable consideration, if made within a period of one year before the presentation of a petition for winding up or the passing of a resolution for voluntary winding up of the company shall be void against the company, and the person preferred shall be subject to the same liability and shall have the same right as if he 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 his interest, whichever is less.

Any creation of a floating charge over the properties of the company (under a winding up procedure) within the 12 months immediately preceding the commencement of the winding up shall be invalid unless it is proved that the company, immediately after the creation of the charge, was solvent. (Section 534 of the Companies Act 1956.)

The law further provides that, in the case of winding up, either voluntary or through the court, any transfer of shares in the company or any alteration of status of the member of the company made after the commencement of the winding up shall be void unless so permitted by the liquidator/court. (Section 536 of the Companies Act 1956.)

The company is free to perform its pending obligations under the contract if the situation so permits. However, if the contractual terms amongst the parties provide for termination of the contract upon commencement of any of the stated procedures, then the contractual obligation may be terminated at the preference of the other party. Further, any amount that is legally due and payable by the creditors can be appropriately set off against the sum owed by the company in each of the procedures

4.6 What is the ranking of claims in each procedure, including the costs of the procedure?

In case of winding up, the ranking of claims is specifically provided in Sections 529A and 530 of the 1956 Act (Sections 326 and 327 of the 2013 Act). As per the said provisions, the secured creditors and workers dues have first priority on a *pari passu* basis, followed by sovereign debts and other dues. The costs of the proceedings are met out of the sale proceeds of the assets of the company or, in case the company is running its operations or is otherwise generating some income, out of the said income. The said costs or expenses have first claim over all the sale proceeds of the assets and over the income generation.

4.7 Is it possible for the company to be revived in the future?

Yes, it is possible to revive the company in future as even post appointment of a liquidator, the then existing Board/management of the company, in the exercise of their residual powers, is empowered to take steps for the revival of the company including filing a reference for the revival of the company under SICA or a scheme for reorganisation under Section 391–394 of the Companies Act 1956.

5 Tax

5.1 Does a restructuring or insolvency procedure give rise to tax liabilities?

There is no exemption from applicability of any tax liabilities either directly or indirectly during any of the procedures. However, upon the consent of the respective tax authority, relief may be granted by the BIFR from the applicability of tax on waivers of principle/interest on loans, etc., and if the restructuring envisages any merger/de-merger as a revival mechanism, the tax liability thereof shall be dealt with in accordance with the applicable tax laws in force.

The company is legally duty bound to pay all the applicable taxes such as excise, customs, sales tax, income tax, capital gains tax, etc., arising even during pendency of any of the procedures. The same is duly evident from the Company Court Rules which also provides for taxation in case of winding up proceedings. Exemptions, if any, have to be specifically sought and can be granted either through the applicable taxation legislation or through a scheme sanctioned by the BIFR under SICA.

6 Employees

6.1 What is the effect of each restructuring or insolvency procedure on employees?

In case of a winding up, the future employment prospects of the employees cease to exist, and the employees can only claim recovery towards their outstanding dues (if any) according to Section 529A of the Companies Act 1956. However, in case the company is being revived and the revival scheme is being framed, the workers can be retained, rationalised or opt out of an amicable settlement or voluntary retirement, etc. In case the promoters of a sick company are not able to revive the company under the provisions of SICA, the employees can also stake their claim for takeover of the management of the sick company by forming a workers' industrial cooperative.

7 Cross-Border Issues

7.1 Can companies incorporated elsewhere restructure or enter into insolvency proceedings in your jurisdiction?

The provisions of SICA do not have any extra-territorial jurisdiction, and as such they are not applicable to a foreign debtor. However, a company incorporated in a foreign country may be wound up as an unregistered company as per the provisions of Section 583 and 584 of the Companies Act 1956 (Sections 375–376 of the 2013 Act) if it has an office and assets in India, and the pendency of a foreign liquidation does not affect the jurisdiction to make winding up orders. The winding up procedure, as provided in Sections 426–483 and 528–559 of the Companies Act 1956 (Chapter XX & XXI of the 2013 Act) has to be followed in respect of the assets of the company.

7.2 Is there scope for a restructuring or insolvency process commenced elsewhere to be recognised in your jurisdiction?

A judgment or proceeding in a foreign court can be recognised in India in accordance with Sections 13 and 44-A of the Civil Procedure Code (CPC). India has neither adopted the UNCITRAL Model Law nor do EC Regulations apply to it. As per the provisions of the Companies Act 1956, Indian courts may exercise jurisdiction over winding up proceedings regardless of whether the place of main activities of the company is outside Indian borders. Foreign entities having dues recoverable from the said companies may, however, approach the Indian tribunal/court conducting the restructuring/winding up, for lodging their claims against the company.

7.3 Do companies incorporated in your jurisdiction restructure or enter into insolvency proceedings in other jurisdictions? Is this common practice?

Indian companies may enter into a restructuring of their foreign debts with foreign lenders on a bilateral basis, subject to compliance with FEMA regulations and RBI procedures. Further, the proceedings on assets of Indian companies outside the Indian jurisdiction will be subject to the law of the respective country.

8 Groups

8.1 How are groups of companies treated on the insolvency of one or more members? Is there scope for co-operation between officeholders?

Each company in a group is a separate legal entity, and initiation of insolvency proceedings in one of the group companies does not adversely impact the operations in the other group entities, and there is no pooling of assets of the subsidiaries or the parent company. However, if there is an established liability of a group company to the entity undergoing a winding up, the same shall have to be discharged, and if there is an amount recoverable from the entity undergoing a winding up, then the necessary claim for the same shall be required to be filed before the Official Liquidator and the amount shall be recovered as per the waterfall mechanism.

9 Reform

9.1 Are there any proposals for reform of the corporate rescue and insolvency regime in your jurisdiction?

The legislation dealing with the corporate rescue and insolvency regime is undergoing a radical change. Chapter XIX and XX of the Companies Act 2013 (which are still not in force as they have not yet been notified by the Central Government) lay down the provisions dealing with matters pertaining to insolvency and reorganisation and winding up of a corporation. Under the 2013 Act, the criteria for determination of sickness will change from "net worth erosion" to "inability to pay" and the applicability of the same shall extend to all companies not limited to "industrial" companies. After determination of sickness, an interim administrator shall be appointed, who shall convene a meeting of creditors of the company to determine whether the company can be revived and rehabilitated. Upon receipt of a favourable report from the interim administrator, the tribunal shall appoint a company administrator to prepare a revival plan for the rehabilitation of the company and present it to the tribunal for its approval. The scheme so prepared should have the consent of at least ¼ of the unsecured creditors and ¾ of the secured creditors, in terms of value. Upon sanction of the same by the tribunal, the company administrator will be authorised to monitor the progress of the implementation of the sanctioned scheme.

During the continuance of the proceedings, the tribunal may direct the interim administrator or the company administrator, as the case may be, to take over the assets or the management of the sick company. Further, the moratorium shall, upon application, run for a maximum period of 120 days at a time.

The provisions of the Companies Act 2013 also lay down the procedure for the merger of two or more small companies or between a holding company and its wholly owned subsidiary or prescribed class or class of companies, without any requirement of convening the meetings of the creditors/class of creditors, provided it is approved by 90% of the members of both the companies and by 9/10 in value of their respective creditors. It also contains provisions relating to the merger of domestic companies with foreign companies and *vice versa*.

Pending notification of the relevant Chapters of the 2013 Act, the Insolvency and Bankruptcy Code, 2016 (IBC) has been recently passed by the Parliament, which aims to consolidate and amend the existing laws relating to reorganisation and insolvency resolution of companies, partnership firms, limited liability partnerships and individuals, and provides a "single window" to address insolvency resolution in a speedier and timely manner. As per the IBC, after application for the initiation of a Corporate Insolvency Resolution Process (CIRP), an Interim Insolvency Professional (IRP) shall be appointed by the adjudicating authority (National Company Law Tribunal in case of corporations and LLPs, and the Debts Recovery Tribunal in case of partnerships and individuals) within 14 days and from there the management shall work with the IRP to constitute a Committee of Financial Creditors of the company. The Committee shall appoint a resolution professional which shall thereafter run the CIRP. The IRP shall examine the resolution plans submitted by various parties and such plan, which is approved by a super majority of the voting share of financial creditors, shall be placed before the adjudicating authority for approval. The entire process has to be completed within a period of 180 days, extendable by 90 days, failing which the company would be placed under liquidation.

During the continuation of the insolvency resolution process, there would be a "calm period", and all creditors' claims will be frozen (including an action by lenders for security enforcement under SARFAESI).

The law gives substantial weight to operational creditors by according them a defined priority in the distribution waterfall. The law protects the interest of the workmen (24-month dues) by according them a priority in payment at par with the secured lenders.

As such, the IBC is a comprehensive attempt to try to restructure/revive a company in a timely manner, failing which liquidation is the only resort. It is likely to be brought into force very soon, and in that case the provisions of Chapter XIX and XX of the 2013 Act will cease to have any force, if they are notified at all.

Nilesh Sharma

Dhir & Dhir Associates
D-55, Defence Colony
New Delhi-110024
India

Tel: +91 11 4241 0000
Fax: +91 11 4241 0091
Email: nilesh.sharma@dhirassociates.com
URL: www.dhirassociates.com

Nilesh Sharma is a Senior Partner of Dhir & Dhir Associates, a leading full-service law firm in India. He is a qualified chartered accountant and lawyer and spearheads the restructuring & insolvency practice of the firm. He has an extensive experience of more than two decades in providing strategic advisory and consultancy to a large number of industrial groups on debt restructuring within and outside the CDR mechanism, negotiated settlements, restructuring and reorganisation under insolvency proceedings, restructuring and reorganisation under Section 391–394 of Companies Act 1956 and winding up proceedings, etc. He has been doing regular representation work before the Insolvency Court as a prominent lawyer on behalf of distressed companies, banks, public sector undertakings and other creditors, etc. He is a member of the Corporate Affairs Committee and Banking Committee of the PHD Chamber of Commerce & Industry, Delhi. He has been rated as one of the leading lawyers in the field of restructuring and insolvency by many reputed international journals like *The Legal 500* and *Chambers & Partners*, etc.

Sandeep Kumar Gupta

Dhir & Dhir Associates
D-55, Defence Colony
New Delhi-110024
India

Tel: +91 11 4241 0000
Fax: +91 11 4241 0091
Email: sandeep.gupta@dhirassociates.com
URL: www.dhirassociates.com

Sandeep Kumar Gupta is a Partner of Dhir & Dhir Associates. 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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glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk