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The International Comparative Legal Guide to:

Corporate Recovery & Insolvency 2017

11th Edition

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

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1 Overview

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

Until the recent past, the Indian legal framework, to deal with restructuring and insolvency was fragmented across multiple legislations *viz*. the Companies Act, 1956, the Sick Industrial Companies (Special Provisions) Act, 1985, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), the Recovery of Debts due to Banks and Financial Institutions Act (RDDBFI Act), 1993, etc.

All the above legislations were largely skewed towards the debtor in possession regime, i.e. the debtors remained in possession and control of the assets and were solely responsible for these or otherwise, albeit with restrictions on their disposal in accordance with the provisions of the respective legislations

However, the legal framework in India to deal with the Insolvency and Bankruptcy situation, has undergone a paradigm shift with the enactment and coming into force of the Insolvency and Bankruptcy Code, 2016 (IBC, 2016 or the Code), with effect from 1.12.2016.

The provisions of the Code are focused on a 'Creditor in Possession' regime concept wherein right from the admission of the application by the Adjudicating Authority (AA) until the time the resolution plan is sanctioned by the AA, the creditors of the Corporate Debtor, through their appointed Resolution Professional (RP), remain in possession and control of the assets of the Corporate Debtor. The company continues to be run and controlled by the Resolution Professional until a resolution plan is sanctioned by the AA or a liquidation order is made to that effect by the AA. For making any decision during the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor, the consent of 75% or more of the members of Committee of Creditors (COC) having a voting right is mandated under the Code. The Code further provides that, upon the liquidation order being made, the Resolution Professional continues to perform the duties of that of a liquidator for sale of liquidation estate of the Corporate Debtor and distribution proceeds thereof amongst the creditors in the manner as provided in the Code.

As such, it can be safely concluded that the present legislation in our country, to deal with the insolvency and bankruptcy of corporate/non-corporate entities, is creditor friendly.

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 insolvency and bankruptcy proceedings provides for only formal processes and is presently being largely governed by the Code which covers a wide range of restructuring, *viz*. re-organisation through a scheme for compromise, arrangements and reconstruction or financial, capital and business restructuring. Failure to reach an understanding/resolution with the creditors under the Code shall lead to liquidation of the Corporate Debtor.

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 (RBI), the banking regulator which lays down the modalities and requisites to carry out the restructuring of debts, *viz*.: Bilateral Restructuring; Corporate Debt Restructuring (CDR); Joint Lenders' Forum (JLF); Flexi Restructuring Scheme; Change of Management through a Strategic Debt Restructuring (SDR); Change of Management outside of SDR and Scheme for Sustainable Structuring of Stressed Assets (S4A).

Each of the formal processes of insolvency and bankruptcy and the informal processes of restructuring are widely prevalent in India and, usually, corporate initially resort to the informal modes of restructuring and move towards the formal modes upon failure of restructuring under the former. However, the system is likely to undergo a change because unlike the previous regime, the present legislative mechanism operates in a Creditor Friendly regime as such it will be dependent upon the commercial wisdom of both the debtor and creditor as to which mechanism is to be resorted to address the financial distress situation.

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, managers and all the key managerial personnel of the Corporate Debtor are required to act honestly, without negligence and in the *bona fide* best interest of the company. Directors are further expected to make proper use of their powers, not to fetter

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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 companies, except with the informed consent of the company.

In terms of the Companies Act, 2013, there is no restraint on the directors in continuing to trade, albeit with *bona fide* intentions, whilst a company is in financial difficulties.

However, in terms of the provisions of the Code, upon admission of the application of the Corporate Debtor by the AA, the management of the affairs of the Corporate Debtor vests with the Interim Resolution Professional (IRP), the powers of the Board of Directors or the partners of the Corporate Debtor, as the case may be, are suspended and the same vest with the IRP and all the officers and managers of the Corporate Debtor are obligated to report to the IRP.

Filing of an application for initiation of the CIRP against a Corporate Debtor, under the code, is not mandatory. Instead it is discretionary and upon the occurrence of a default of an amount of or in excess of Rs. 1.00 Lakh, any Financial Creditor/Operational Creditor or the Corporate Debtor itself may file an application before the AA for initiation of CIRP against the Corporate Debtor.

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?

The provisions of the IBC, 2016, empower any creditor of a Corporate Debtor, irrespective of it being a Financial or Operational Creditor or secured or unsecured creditor, to make an application before the Adjudicating Authority to initiate the Corporate Insolvency and Resolution Process against the Corporate Debtor in the event of there being a default by the Corporate Debtor in making payment of their dues for an amount of Rs. 1.00 Lakh or more. Under the provisions of the SARFAESI Act, the secured Financial Creditors may take measures to enforce their security interest without the intervention of the court. Under the provisions of the RDDBFI Act, banks and financial institutions are eligible to make an application before the Debt Recovery Tribunal (DRT) (the concerned Adjudicating Authority) for recovery of their dues from the Corporate Debtor. However, under the provisions of the IBC, 2016, immediately upon admission of the application by the Adjudicating Authority, a moratorium is declared under Section 13 of the Code with regard to matters contained under Section 14 of the Code; i.e. there is a restraint on continuation of any coercive recovery proceedings, including: suits; execution of any judgments, decrees or orders in any court of law, tribunal or other authority; restriction or transfer, encumbrance, alienation or disposal by the Corporate Debtor of any of its assets or any legal right or beneficial interest therein; and a prohibition on any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the SARFAESI Act.

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

Under the IBC 2016, the Resolution Professional appointed by the Adjudicating Authority at the time of admission of the application filed by the Financial Creditor or Operational Creditor or the Corporate Debtor for initiation of the Corporate Insolvency and Resolution Process against the Corporate Debtor is, *inter alia*, obligated to manage the affairs of the Corporate Debtor and to collect all information relating to the assets, finance and operations of the Corporate Debtor and the financial and operational payments for the previous two years. If during the course of verification of the transaction, it comes to the knowledge of the Resolution Professional or if he is of the opinion that Corporate Debtor has undertaken certain preferential transactions or entered into an undervalued transaction or extortionate credit transaction or any other transaction which may have the effect of defrauding the creditors, during the relevant time (a period of two years in case of transaction with related parties and a period of one year in other cases), the Resolution Professional may approach the Adjudicating Authority with an application seeking appropriate orders, including reversal of such transactions.

'Transactions' as defined in the Code include: transfer of property or an interest thereof of the Corporate Debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the Corporate Debtor which has the impact of putting such creditor or a surety or a guarantor in a more beneficial position than it would have been in the event of a distribution of assets; gifts to a person; undervalued transactions and extortionate credit transactions.

In addition, once a secured creditor issues a notice under Section 13(2) of the SARFAESI Act, 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 limitation in the absence of any restraining order.

3 Restructuring Options

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

The informal mechanism for restructuring is possible under the aegis of the various circulars and guidelines promulgated by the RBI. 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 INR. 100 million to restructure its debts with the super-majority consent (value wise) and by 60% consent in numbers, of its CDR member lenders, and 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 among them to agree to abide by the policies and systems of the CDR mechanism along with a 'stand still' clause for a period ranging from 90 to 180 days.

In addition to the above, the RBI has also issued guidelines for restructuring of debts through the formation of a Joint Lenders Forum (JLF) and formulation of a Corrective Action Plan (CAP) with the consent of the majority of the JLF members. The RBI has also promulgated the Flexi Restructuring Plan, which enables 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 '*the shareholders should bear the first loss as compared to lenders*', the RBI issued guidelines for effecting 'change of management' by the lenders under the aegis of 'Strategic Debt Restructuring', which enables the lenders to convert

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the entire or a portion of their debt into equity of the borrower and thereafter transfer the same in favour of 'new promoter' within a specified window and also consider refinancing debt to the 'new promoter'. To tackle the growing challenge of stressed assets emanating from loans given to large corporates turning bad, the RBI brought out the Scheme for Sustainable Structuring of Stressed Assets (S4A), which was an improvisation over its last two tools to help banks limit fresh slippages to non-performing assets from large corporate exposures. Recently, pursuant to the amendments to the Banking Regulation Act, 1949, introduced through the ordinance and notification issued by the Central Government, the RBI has been empowered to issue directions with regard to stressed assets and specify one or more authorities or committees to advise banking companies on the resolution of stressed assets.

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 of reconstruction, takeovers, mergers, demergers, transfer of undertakings and restructuring of debts as provided in Section 230–240 of the Companies Act, 2013 by way of which the liabilities of the distressed companies can be restructured. Further, in the event of initiation of a Corporate Insolvency Resolution Process against the Corporate Debtor under IBC 2016, the Resolution Professional shall invite resolution plans from the prospective Resolution Applicants; such plans may also be based on one or more mechanisms as discussed above, subject to the compliance of the conditions as laid down under Section 30(2) of the IBC, 2016.

A company can choose a pre-packaged sale with the consent of the majority of its secured creditors and the manner in which repayments are to be made to them and, accordingly, place a scheme of arrangement as provided under section 230–231 of the Companies Act, 2013, 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 230–231 of the Companies Act, 2013 as well as the resolution plans that may be submitted by the Resolution Applicants to the Resolution professional for onward consent of the Committee of Creditors and thereafter the approval of the Adjudicating Authority. 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.

Apart from the above, the Asset Reconstruction Companies (ARCs) set up under the statutory provisions of SARFAESI Act, may also acquire the debts of the Corporate Debtor from the lending Banks/ Financial Institutions (FIs) and subsequently restructure the same in post discussions and arrangement with the debtor. The provisions of SARFAESI Act also empower the lenders/ARCs to effect a change in management as a restructuring mechanism.

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

Under the provisions of the Code, any of the Financial/Operational Creditor or the Corporate Debtor itself may initiate the filing of an application before the Adjudicating Authority for initiation of the Corporate Insolvency and Resolution Process in the event of default by the Corporate Debtor in payment to its Financial or Operational Creditors for a sum of Rs. 1.00 Lakh or more. Unlike the previous legislation, the filing of an application under the provisions of the IBC, 2016 is not mandatory, and instead depends on the discretion of the Financial/Operational Creditors whose debts remain unpaid or the Corporate Debtor.

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

In terms of the provisions of SARFAESI Act, the ARCs may acquire the debts of the Corporate Debtor or the lenders may decide to assign their debt in favour of one or more ARCs post classification/ identification of the borrowers account as a Non Performing Asset (NPA) i.e. in default for payment of due interest/instalment for a period of 90 days.

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

The Code provides for an Interim Resolution Professional/ Resolution Professional (IRP/RP) who shall, immediately upon admission of the application by the Adjudicating Authority, take charge of the management of affairs of the Corporate Debtor. It is the IRP/RP who takes control and custody of the assets of the Corporate Debtor during the continuation of the CIRP. The IRP/ RP, being an appointed officer on behalf of the creditors, runs the complete process of the CIRP of a Corporate Debtor and in case there is any discrepancy/difficulty being countered by him due to any action/inaction of the Corporate Debtor or any Key personnel of the Corporate Debtor, he may approach the Adjudicating Authority with an application seeking appropriate directions. Hence, there is not much intervention by the court and its role is only to expedite the entire process as the CIRP is based on a resolution plan duly approved by the Committee of Creditors (COC) with super majority vote i.e. by 75% or more of the voting rights.

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 Companies Act, 2013, 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 under the IBC, 2016, a resolution plan can only be sanctioned by an Adjudicating Authority if such plan is approved by 75% or more of the COC comprising Financial Creditors of a Corporate Debtor, and it provides for payments to Operational Creditor of at least such amount which they shall receive in the event of a liquidation of the Corporate Debtor. As such, the Financial Creditors are able to influence the restructuring under the IBC, 2016, thereby forcing the minority creditors to accept the settlement terms as consented to by the majority creditors.

However, under the provisions of the IBC, 2016, immediately upon admission of the application by the Adjudicating Authority, a moratorium is declared under Section 13 of the Code with regard to matters contained under Section 14 of the IBC, 2016, i.e. there is a restraint on the continuation of any coercive recovery proceedings including: suits; execution of any judgment, decree or order in any court of law, tribunal or other authority; restriction or transfer, encumbrance, alienation or disposal by the Corporate Debtor of any of its assets or any legal right or beneficial interest therein; and a prohibition on or any action to foreclose, recover or enforce any

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security interest created by the Corporate Debtor in respect of its property, including any action under the SARFAESI Act.

In an informal mechanism of restructuring, the decisions have to be taken collectively by all the secured lenders of the company in the Joint Lenders Forum (JLF) meeting. As per the recent notification issued by the RBI, dated 05.05.2017, the decisions taken in the JLF meeting shall be based on the consent of secured lenders representing at least 60% of the total debt and at least 50% of the creditors in number, which shall be binding on all other secured creditors of the Corporate Debtor forming part of the JLF.

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

The initiation of the restructuring process does not result in *ipso facto* termination of all pending contracts, and the company is free to perform its obligations under the existing 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 discretion of the other party.

As per the provisions of the Code, the Resolution Professional in the exercise of his powers with regard to management of the operations of the Corporate Debtor as a going concern, has the authority to amend or modify the contracts or transactions which were entered into before the commencement of the CIRP, if he deems it fit in order to protect and preserve the value of the property of the Corporate Debtor and maintain continuity of operations of the Corporate Debtor as a going concern.

The set-off provisions contained in terms of the contract if the same, in the opinion of the Resolution Professional, are not prejudicial to the interest of the Corporate Debtor, shall be upheld.

If the IRP/RP, upon examination, determines that there is a transfer of property or an interest thereof of the Corporate Debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the Corporate Debtor, and: the transfer has the effect of putting such creditor or a surety or a guarantor in a more beneficial position than it would have been in the event of a distribution of assets; certain transactions were made during the relevant period which were undervalued; and the Corporate Debtor is a party to an extortionate credit transaction involving the receipt of financial or operational debt during the period of two years preceding the insolvency commencement date, then upon an application by the IRP/RP to that effect, the Adjudicating Authority may pass orders for reversal of such transactions entered into by the Corporate Debtor.

3.7 How is each restructuring process funded? Is any protection given to rescue financing?

In case an application for the initiation of the CIRP is made by the Corporate Debtor, the cost of the restructuring process is to be funded by the Corporate Debtor itself either through loans, internal accruals or infusion of funds by promoter/management/strategic investors. In case an application is made by a person other than the Corporate Debtor, then the cost of public announcement shall be borne by the applicant, which may be reimbursed by the COC to the extent that it ratifies the same. Further, all insolvency resolution process costs, as defined under section 5(13) of the IBC, 2016 read with Regulation 31 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, which *inter alia* includes interim finance raised and the expenses incurred for raising such interim finance shall have the first priority in payments under a resolution plan or from the sale proceeds of the liquidation of assets of the Corporate Debtor, in case of liquidation.

4 Insolvency Procedures

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

Under the provisions of the IBC, 2016, the overall CIRP period has been fixed at 180 days from the insolvency commencement date (extendable by another 90 days upon an application being made at the behest of the COC). In case no resolution plan is received by the Adjudicating Authority within the maximum period permitted for completion of the CIRP or if the Adjudicating Authority rejects the resolution plan on grounds of its non-compliance with the requisites of the Code, then it shall, *inter alia*, pass an order for liquidation of the Corporate Debtor.

Further, even before the expiry of the maximum period permitted for completion of the CIRP, if the Resolution Professional prompts the Adjudicating Authority regarding the decision of the COC to liquidate the Corporate Debtor, then the Adjudicating Authority shall pass an order for liquidation of the Corporate Debtor. Further in terms of Section 59 of the IBC, 2016, a corporate person who intends to liquate itself voluntarily may initiate voluntary liquidation proceedings under the Code, provided it has not committed any default and subject to compliance with such condition and procedural requirements as may be specified by the Insolvency and Bankruptcy Board of India ('Board').

There are provisions under the Companies Act, 2013 relating to compulsory winding up by the courts upon the occurrence or non-occurrence of events as prescribed under the said act.

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

As discussed in question 4.1 above, in case no resolution plan is received by the Adjudicating Authority within the maximum period permitted for completion of the CIRP or if the Adjudicating Authority rejects the resolution plan on grounds of its non-compliance with the requisites of the Code, then it shall, *inter alia*, pass an order for the liquidation of the Corporate Debtor.

Further, even before expiry of the maximum period permitted for completion of the CIRP, if the Resolution Professional prompts the Adjudicating Authority regarding the decision of the COC to liquidate the Corporate Debtor, then the Adjudicating Authority shall pass an order for liquidation of the Corporate Debtor.

Voluntary liquation can be initiated only by a solvent corporate debtor who has not committed any default and subject to making a declaration under an affidavit from a majority of the directors stating that either the company has no debt or it will be able to pay its debt in full from the proceeds of the assets to be sold and that the liquidation process is not being initiated with the intent to defraud any person. Further, within four weeks of the declaration, a special resolution of the members of the company shall be passed, requiring the company to be liquidated voluntarily and appointing an insolvency professional to act as a liquidator.

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The circumstances under which a company can be wound up by the tribunal, on grounds other than an inability to pay debts, have been clearly stated under Section 271 of Companies Act, 2013, being:

(i) passing of a special resolution to that effect;

(ii) acting against the sovereignty and integrity of India, security of state, public relations with a foreign state, public order, decency or morality;

(iii) conducting its affairs in a fraudulent manner;

(iv) default in filing the financial annual returns with the Registrar of Companies for the immediately preceding five financial years; and

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

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

In the event of an order for liquidation in respect of a Corporate Debtor, the Adjudicating Authority appoints the RP as the liquidator for the purposes of liquidation unless he is replaced by the Adjudicating Authority.

Upon his appointment, all the powers of the board of directors, key managerial personnel or the partners of the Corporate Debtor cease to have effect and vests with the liquidator.

Throughout the liquidation process until such time as the assets are realised and the sale proceeds are distributed, in the manner as envisaged in the Code, the liquidator may approach the Adjudicating Authority for such orders or directions as may be necessary for the liquidation of the Corporate Debtor.

In addition to the above, the liquidator is obligated to furnish a progress report periodically to the Adjudicating Authority in the manner as prescribed under the provisions of the IBC, 2016, read with the relevant regulations.

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)?

Under the provisions of the IBC 2016, there is no term such as "winding up", and instead it talks about "liquidation". All the provisions contained in the erstwhile laws with respect to initiation of liquidation proceedings against the Corporate Debtor by its creditors on account of its inability to pay its debts or its shareholders in case of a voluntary winding up are now being dealt with in accordance with the relevant provisions of IBC, 2016. The manner in which the creditors may initiate CIRP or the Corporate Debtor may initiate a voluntary liquidation have already been discussed in questions 4.1 and 4.2 above.

With respect to compulsory winding up by the court, this shall be only in the circumstances mentioned under section 271(a) to (e) of the Companies Act, 2013. Upon initiation of the liquidation process, no suit or other legal proceeding may be instituted by or against the Corporate Debtor; however, the liquidator may initiate a suit or other legal proceedings on behalf of the Corporate Debtor subject to prior approval of the Adjudicating Authority, but there shall be no restriction on any legal proceeding in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

Upon commencement of the liquidation process, the secured creditors have two options for the recovery of their dues i.e. either to relinquish their security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator or to stay outside the liquidation process and recover their dues by enforcement of their security interest.

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?

Subject to the directions of the Adjudicating Authority, the liquidator shall, *inter alia*, have the power to carry on the business of the Corporate Debtor for its beneficial liquidation as he considers necessary. The liquidation process does not result in *ipso facto* termination of all pending contracts. 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 discretion of the other party.

If the liquidator upon examination, determines that there is a transfer of property or an interest thereof of the Corporate Debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the Corporate Debtor, and: the transfer has the effect of putting such creditor or a surety or a guarantor in a more beneficial position than it would have been in the event of a distribution of assets; certain transactions were made during the relevant period which were undervalued; and the Corporate Debtor is a party to an extortionate credit transaction involving the receipt of financial or operational debt during the period of two years preceding the insolvency commencement date, then upon an application by the liquidator to that effect, the Adjudicating Authority may pass orders for reversal of the transactions entered into by the Corporate Debtor.

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

Upon a liquidation order being made in respect of a Corporate Debtor, the proceeds from the sale of the assets comprised in the liquidation estate of the Corporate Debtor shall be distributed in the following order of priority:

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) equal ranking between workmen's dues for a period of 24 months preceding the liquidation commencement date and the debts owed to a secured creditor in the event such secured creditor has relinquished security;

(c) wages and any unpaid dues owed to employees other than workmen for a period of 12 months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) equal ranking between any amount due to the Central Government and the State Government in respect of whole or any part of the period of two years preceding the liquidation commencement date and debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

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

Once a liquidation order is passed by the Adjudicating Authority and a liquidator is appointed, there is no provision under the IBC, 2016 for submission of any resolution plan before the Adjudicating Authority for the revival of the Corporate Debtor. The liquidator is obligated to take charge over the assets (liquidation estate) of the Corporate Debtor as a fiduciary for the benefit of all the creditors. The liquidator is obligated to follow the procedure of law and realise the liquidation estate and utilise the proceeds from the sale of the liquidation estate of the Corporate Debtor for distribution in the order of priority as prescribed under Section 53 of the Code.

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 Adjudicating Authority from the applicability of tax on waivers of principal/interest, 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 at the material time when the resolution plan is approved by the Adjudicating Authority.

The company is legally duty bound to pay all applicable taxes such as Excise Duty, Customs Duty, Sales Tax, Income Tax, Capital Gain Tax, etc., arising even during the pendency of any of the procedures. The entire restructuring procedure and the resolution plan must be in compliance with all applicable laws in force at the time of sanction of the plan.

6 Employees

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

A liquidation order passed under Section 33(7) of the IBC, 2016 shall be considered to be a notice of discharge to the officers, employees and workers of the Corporate Debtor except when the liquidator continues to carry on the business of the Corporate Debtor during the liquidation process. In such circumstances, the workmen shall file their claims with the liquidator and in accordance with the provisions of the Code, the workmen's dues for a period of 24 months preceding the liquidation commencement date shall be paid on a *pari passu* basis along with the dues of the secured creditors. Similarly, employees may also file their claims with the liquidator and their dues for a period of 12 months preceding the liquidation commencement date shall be paid in priority over any payments to be made to unsecured creditors in accordance with the waterfall mechanism as prescribed under the Code.

However, in case of a Corporate Debtor undergoing CIRP where a resolution plan is prepared and approved, the workmen and employees may be retained, rationalised or they may opt for an amicable settlement or voluntary retirement, etc.

7 Cross-Border Issues

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

The provisions of the IBC, 2016 do not have any extraterritorial jurisdiction and as such they are not applicable for companies incorporated outside India.

However, a company incorporated in a foreign country may be wound up as an unregistered company as per the provisions of Sections 375–376 of the Companies Act, 2013, if it has its office and assets in India, and the pendency of a foreign liquidation does not affect the jurisdiction to make winding up orders.

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

As per the provisions of Section 234 of the IBC, 2016, the Central Government may enter into an agreement with the government of any country outside India for enforcing the provisions of this Code. Further, the Code also provides that the Central Government may by notification in the official gazette direct the application of provisions of the IBC, 2016 in relation to assets or property of the Corporate Debtor, including the personal guarantor of a Corporate Debtor, situated at any place in a country outside India with which reciprocal arrangements have been made, subject to such conditions as may be specified. Accordingly, the Adjudicating Authority may issue a letter of request to a court or an authority of such country competent to deal with such request.

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 restructuring of their foreign debts with foreign lenders on a bilateral basis, subject to compliance with the provisions of Foreign Exchange Management Act, 1999 and the regulations made thereunder and RBI procedures. Further, the proceedings from sale of assets of Indian companies in other jurisdictions will be subject to the law of the respective land.

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 entity in the group company is a separate legal entity and initiation of the insolvency proceedings in one of the group of 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 the insolvency proceedings, the same shall have to be discharged and if there is an amount recoverable from the entity undergoing the insolvency proceedings then the necessary claim for the same shall be required to be filed before the RP / liquidator, as the case may be, and the amount shall be distributed as per the waterfall mechanism.

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9 Reform

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

It is also noteworthy to mention the recent developments, amendments and measures that have been initiated by the Central Government and the RBI to address the mammoth growth of stressed assets in the banking system. Recently the Government notified the amendments in the Banking Regulation Act, 1949, which were introduced through an ordinance. The amendments *inter alia*, empower the RBI to issue directions with regard to stressed assets and specify one or more authorities or committees to advise banking companies on the resolution of stressed assets. In exercise of the above power, the RBI has outlined an action plan to implement the Banking Regulation (Amendment) Ordinance, 2017 and has accordingly issued a directive bringing the following changes to the existing regulations on dealing with stressed assets:

(i) Clarified that a corrective action plan could include flexible restructuring, SDR and S4A.

(ii) To facilitate decision-making in the JLF, the requisite percentage for approval of a proposal has been reduced from 75% to 60% (value-wise) and to 50% in number.

(iii) Banks which are at a minority on the proposal approved by the JLF are required to either exit within the stipulated time or adhere to the decision of the JLF.

(iv) Participating banks have been mandated to implement the decision of the JLF without any additional conditionality.

(v) The Boards of banks were advised to empower their executives to implement the JLF's decision without further reference to them.

It was made clear to banks that non-adherence would invite enforcement action, i.e. monetary penalties on the concerned bank under the provisions of the Banking Regulations Act, 1949.

From the above, it is well demonstrated that the Government and the RBI are also pushing lenders to be more proactive towards the restructuring of stressed assets, wherever possible, and has accordingly issued directions to banks for empowering their executives and facilitating decision-making in JLFs by reducing the requisite voting percentage.

The above amendments coupled with the implementation of the provisions of the IBC, 2016 are likely to be a mile stone in the Indian legislation framework to deal with the insolvency and bankruptcy of a Corporate Debtor, Partnership Firm and individual. Although the law is at a very nascent stage of its implementation, the results are highly encouraging.

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