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India

RESTRUCTURING & INSOLVENCY

Contributor

Shardul Amarchand Mangaldas & Co

Misha

Partner- Insolvency & Bankruptcy | misha@amsshardul.com

Mahima Sareen

Principal Associate | mahima.sareen@amsshardul.com

Abhilash Chaudhary

Senior Associate | abhilash.chaudhary@amsshardul.com

Satyajit Bose

Associate | satyajit.bose@amsshardul.com

This country-specific Q&A provides an overview of restructuring & insolvency laws and regulations applicable in India.

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INDIA
RESTRUCTURING & INSOLVENCY

1. What forms of security can be granted over immovable and movable property? What formalities are required and what is the impact if such formalities are not complied with?

Under Indian law, security can be created over most kinds of assets to lenders. Assets over which security can be created fall under the following broad categories:

- immovable property (both freehold as well as leasehold);
- movable property (including plant and machinery, current assets, cash deposits, receivables, shares and intangible property such as goodwill); and
- intellectual property.

Creation of security in favour of foreign creditors typically requires clearance from an Indian 'authorised dealer bank' or the Reserve Bank of India ("RBI") under existing foreign exchange regulations and is subject to conditions stipulated by the regulatory framework for external commercial borrowings.

Security Interest over immoveable property

Security over immovable property is typically created through:

- execution of a mortgage deed; or
- a deposit of title deeds (i.e. an equitable mortgage).

Security Interest over moveable property

Security over movable property is typically created by way of pledge (in the case of shares or other securities) or hypothecation. However, security may also be created by way of lien or charge. Creditors may also opt for creating charge over third-party assets in case of the inability of the debtor entity to offer valuable security from amongst its own asset pool.

Registration of security interest and stamp duty

A security interest created by a company is required to be perfected by making filings with the Registrar of Companies within the prescribed time period in order for the security interest to be effective against a Liquidator and other creditors. This requirement does not apply to creation of security interest in favour of statutory authorities such as income tax or customs tax authorities etc., as such charge is created pursuant to provision of a statute.

In addition, security interest over immovable property by way of an indenture or deed of mortgage is also required to be registered (along with a payment of registration fees) with the sub-registrar of assurances under whose jurisdiction the immovable property is situated. Further, in addition to the above, in some states, a security over immovable property by way of deposit of title deeds is also required to be registered with the relevant sub-registrar of assurances.

Further, security created over assets in favour of certain Indian banks and certain financial institutions notified under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act") is also required to be registered with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India. Failure to make this registration would disentitle a creditor from enforcing its security interest under the SARFAESI Act.

Details of the security interest created, together with details of the underlying debt are also required to be filed with an information utility (which is a repository of financial information regarding debtors) in the format prescribed under the Insolvency and Bankruptcy Code, 2016 ("Code"). The failure to make the filing with the information utility will not impact the creation or perfection of the security interest.

Stamp duty – a fee payable to the revenue authorities, is required to be paid on security documentation at the prescribed rates under local State laws.

2. What practical issues do secured creditors face in enforcing their security package (e.g. timing issues, requirement for court involvement) in out-of-court and/or insolvency proceedings?

The modes of enforcement of security depend on both the nature of security and the nature of lenders. Lenders may seek recourse to:

- The SARFAESI Act: The SARFAESI Act is a special legislation meant for enforcement of security interests. While it covers security interests such as mortgage, charge, hypothecation, or assignments, some rights such as the pledge of shares are excluded from its ambit. Under the SARFAESI Act, a creditor may take possession over such a secured asset, take over the management of the business of the debtor to recover dues, or appoint a manager for the secured assets under its possession, amongst other such remedies. No order from the court is required for any such actions if due process is followed, however, typically, there is some level of court involvement on account of challenges by the borrowers etc.
- The Recovery of Debts and Bankruptcy Act, 1993 ("RDB Act"): Under the RDB Act, a summary procedure is conducted before a special tribunal to adjudicate upon the claim of creditors, and a hearing is given to the debtor. If the court is convinced of the existence of a debt and a default on its payment, it issues a certificate for recovery. This may lead to sale or attachment, taking over possession of a property, or the appointment of a receiver to manage the property through an officer of the tribunal called the recovery officer, amongst others. Most foreign creditors would not be able to pursue actions under the SARFAESI Act or the RDB Act as these remedies are typically available to Indian banks and financial institutions, and certain other specified financial institutions such as the International Finance Corporation.
- Civil suit, in accordance with the provisions of the Civil Procedure Code, 1908 and the Commercial Courts Act, 2015;
- Private sale of assets: A mortgagee may exercise its right to private sale of immovable properties, without intervention of court. The right of private sale can be exercised by the mortgagee on default of the debtor in certain circumstances, such as where the mortgage is an English Mortgage and the parties do not belong to specified religions/ communities; where a power of sale without the intervention of the court is expressly provided for in the mortgage deed and the mortgagee is the Government; or where a power of sale without court intervention is expressly provided as part of the mortgage deed and the mortgaged property is situated within select areas of specified Indian cities. Prior to exercising the power of private sale, the mortgagee must give the mortgagor at least 3 months' prior notice regarding the default on repayment of principal or interest on the secured debt. In case of movable properties, the pledged goods can be sold by way of a private sale by the pledgee for recovery of outstanding debt after providing a reasonable prior notice to the pledgor calling upon repayment of the secured debt.

Practical Issues while enforcing the security interest

While enforcing their security interest, secured creditors often face issues of delays and litigation by the debtors. Delays may be on account of slow processes of courts (where court-involvement is required), long notice periods for private sale and delaying tactics by recalcitrant debtors including litigation. Foreign lenders must also be conscious of restrictions on whom their security can be sold to, and there may be some regulations regarding repatriating proceeds as well. For foreign creditors, it should be noted that as per the guidelines issued by the RBI on External Commercial Borrowing, in the event that the security over immovable property is enforced, the property must be sold to a resident of India and proceeds have to be repatriated towards liquidation of the borrowing.

It is to be noted that the insolvency resolution proceedings under the Code are not meant for recovery of debt or enforcement of security interest and are aimed at resolution of insolvency of the debtor.

3. What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how is a restructuring plan approved and implemented? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play?

There are multiple frameworks available under the Indian legal regime for restructuring of debt. First and foremost are the remedies under the Code. The Code consolidates reorganization and insolvency laws applicable to businesses as well as individuals. The following reorganization and insolvency procedures are available to incorporated businesses:

The Corporate Insolvency Resolution Process ("CIRP")

The debtor, as well as domestic and foreign 'financial creditors' (whose debt is disbursed against the time value of money, such as banks), and 'operational creditors' (persons to whom debt is owed in respect of provision of goods and services, including workmen and employees, as well as statutory creditors) may apply for the initiation of the CIRP to rescue the debtor as a going concern. The essential requirement to be satisfied for initiation of CIRP is existence of debt and default, (with certain additional requirements such as issuance of statutory notice, and absence of pre-existing dispute in case of operational creditors). Once the Adjudicating Authority (the National Company Law Tribunal constituted under the Companies Act, 2013) is satisfied of the pre-requisites for admitting an application for CIRP, it admits the same and a moratorium or "calm period" is declared. Thereafter, a public announcement is made for creditors to submit their proof of claims.

The CIRP causes a change in control of the management of the debtor and a registered insolvency professional called the Resolution Professional manages the affairs of the corporate debtor with powers of the board of directors remaining suspended. The Resolution Professional also runs the CIRP, invites claims, constitutes a committee of creditors constituted of unrelated financial creditors ("CoC") with voting rights assigned as per value of debt owed and in consultation with the CoC, invites resolution plan from all eligible persons. Additionally, the Resolution Professional is required to carry out certain actions, such as making a change in the management of the debtor or its subsidiary, raising interim finance, etc., only with prior approval of the CoC.

The CoC evaluates all resolution plans received and approves a resolution plan by a vote of more than 66% of the committee (by percentage of debt owed). The resolution plan so approved is then placed for the approval of the Adjudicating Authority, which must approve the resolution plan if it meets the minimum requirements of law. In some cases, a Monitoring Committee – comprising the Resolution Professional, representatives from the CoC and representatives of the Resolution Applicant – is constituted to oversee the implementation of the resolution plan.

The Code provides that a CIRP should conclude within 330 days. In practice, the actual time taken for conclusion of CIRP may take more time depending upon the scale, nature and complexities of the debtors and disputes that may arise in specific cases.

The Pre-packaged Insolvency Resolution Process ("PPIRP")

With effect from 4 April 2021, Micro, Small and Medium Enterprises (enterprises where investment and annual turnover fall within certain thresholds) that have committed default of at least INR 10 lakh (approximately US$13,403) are eligible for a PPIRP and may negotiate a "base plan" with their creditors prior to commencement of the PPIRP.

Once 75% of its members and 66% of its unrelated financial creditors by value, approve the proposal to initiate PPIRP, the corporate debtor may approach the Adjudicating Authority to initiate the process. Once a PPIRP has been initiated, a limited moratorium shall be declared and a registered insolvency professional is appointed to oversee the process.

During a PPIRP, the management of the debtor continues to stay in possession of its directors or partners, albeit with the oversight of the CoC. The CoC itself is formed on the basis of a list of claims provided to a Resolution Professional (who is a registered insolvency professional) by the corporate debtor. Additionally, the corporate debtor must provide the Resolution Professional a Preliminary Information Memorandum containing all information relevant for formulating a resolution plan, as well as the negotiated base plan. The CoC retains the decision to approve the base plan, or to invite other plans to challenge it. Any plan that receives not less than 66% approval from the CoC is considered approved and is submitted to the Adjudicating Authority.

A PPIRP must be concluded within one hundred and twenty days of commencement. As per publicly available data, only four companies have adopted this route, with one withdrawing its application. For the remaining companies, the process has crossed the 120 days timeline envisaged under the Code.

Liquidation Process

Insolvent liquidation cannot be commenced directly, and may only be a consequence of the failure of the CIRP. Under the Code, the insolvent liquidation of companies is triggered in the event that the CIRP does not culminate in approval of a resolution plan or if no resolution plan is proposed within the timelines under the CIRP. The company may also be liquidated, if the CoC resolves to liquidate the company during the CIRP before the

confirmation of the resolution plan or the debtor contravenes the terms of an approved resolution plan. It may also be initiated exceptionally on failure of the PPIRP.

The most important duties of the Liquidator are (a) to collect, consolidate and verify all the claims against the corporate debtor, (b) to formulate the liquidation estate of the corporate debtor, (c) to sell the assets of the corporate debtor and (d) to distribute proceeds of the sale or auction in accordance with the processes laid down in the Code. The Adjudicating Authority oversees this process, and the Liquidator must submit several reports apprising them about the status of the liquidation. The proceeds from the sale of the liquidation estate are distributed amongst the creditors according to a priority set forth under Section 53 of the Code. When the assets of the corporate debtor have been completely liquidated, the Liquidator makes an application to the Adjudicating Authority for dissolution. The law requires that the Liquidator attempt to achieve this within 1 year, which in practice may take longer duration in some cases depending on the facts and circumstances of each case.

Voluntary Liquidation under the Code

Even though a creditor cannot directly file for liquidation, a debtor can initiate voluntary liquidation. Chapter V of the Code prescribes a separate mechanism for commencement of voluntary liquidation, which requires a declaration from the board of directors affirming that the company has no debt or that it will be able to repay its creditors in full after liquidating its assets, along with a declaration that liquidation is not taking place to defraud any person. Thereafter, a resolution has to be passed by the members of the company in terms of the statute, along with approval of two-third of the creditors by value.

Upon passage of the resolution by members and the approval from two-third of the creditors, the liquidator proposed by the resolution gets appointed and initiates liquidation by way of selling the assets of the debtor. Once the affairs of the company are completely wound up and proceeds of the liquidation are distributed amongst the stakeholders, a final report is submitted to the Insolvency and Bankruptcy Board of India ("IBBI") and Registrar of Companies and the Adjudicating Authority. Upon being satisfied by the final report, the Adjudicating Authority passes an order for dissolution of the debtor. The liquidator is directed under the concerned regulations to complete the voluntary liquidation process within 270 days in case there are existing creditors of the debtor and within 90 days in case there are no creditors of the debtor at the time of commencement of voluntary liquidation. The aforesaid timelines are not couched in mandatory terms and it may take longer for completion of the voluntary liquidation process in some cases.

Prudential Framework of RBI:

In addition to the Code, the RBI has also in exercise of its regulatory powers laid down a framework for restructuring of debts for large credit accounts (INR 15 billion and above), namely 'Prudential Framework for Resolution of Stressed Assets' vide its circular dated 07 June 2019 ("Prudential Framework") applicable to entities regulated by the RBI, i.e., Indian banks and financial institutions. A restructuring under the Prudential Framework can be undertaken in case of the debtor experiencing 'financial difficulty'. The Prudential Framework gives flexibility to the banks and financial institutions to lay down their own policies to define the signs of financial difficulty. In terms of organizing the creditors, the Prudential Framework provides a consent-based framework for the creditors wherein the creditors enter into an Inter-Creditor Agreement ("ICA").

Among other things an ICA ought to provide that any decision agreed by creditors representing 75 per cent by value of total outstanding credit facilities (fund based as well non-fund based) and 60 per cent of creditors by number is binding upon all the creditors. Upon initiation of the process under the Prudential Framework in conformity with the policies approved by any of the individual creditor, a review period of 30 days is observed wherein the creditors decide on strategy matters including resolution strategy, the nature of resolution plan and approach for implementation of the resolution plan, and may execute an ICA and carry out independent credit evaluation by appointing RBI approved credit rating agencies. The resolution plan has to be implemented within 180 days of the review period and it may also involve restructuring with or without change of ownership of the debtor or any other measure including initiation of insolvency proceedings or debt recovery proceedings. Delay in implementation of the resolution plan entails increased provisioning requirements for the creditors.

Any resolution plan implemented under the Prudential Framework which involves granting of any concession on account of financial difficulty of the debtors entails an asset classification downgrade, except when it is accompanied by a change in ownership, which allows the asset classification to be retained as or upgraded to standard, subject to the prescribed conditions. The downgrade of an account necessitates increased provisioning by the creditor and results in blocking of capital for the creditor. Thus, Prudential Framework is a

unique framework which incentivizes the creditors to recognize financial difficulty at early stages and to take necessary measures without giving any concession to debtor and promotes change in ownership of the debtor effected by the creditors to avail benefits in form of relaxed provisioning norms. The courts / tribunals do not get involved in implementation of resolution plan unless the resolution plan itself stipulates initiation of recovery proceedings or insolvency proceedings.

Further, the Companies Act, 2013 includes a court supervised process for schemes of compromise or arrangements that may be used for implementing a scheme for the revival of a company through a compromise with the creditors, and the restructuring of the debtor by way of merger, amalgamation or demerger. However, such schemes are not used often for insolvency resolution for reasons such as extensive court involvement, and the absence of a cross-class cram-down, amongst others. Accordingly, they have not been discussed in further detail. These are in addition to informal procedures that may be resorted to for insolvency resolution of businesses.

4. Can a debtor in restructuring proceedings obtain new financing and are any special priorities afforded to such financing (if available)?

Under the Code, the Resolution Professional has the authority to incur debt and raise interim finance on behalf of the corporate debtor to ensure that it continues as a going concern during the CIRP. Where the amount of interim finance raised is above a threshold decided by the CoC, the Resolution Professional must take the prior approval of the CoC. In case of the PPIRP, the debtor in possession may also raise interim finance in a manner similar to the Resolution Professional in the CIRP.

Under the Code, interim finance and costs associated with raising interim finance form a part of the 'insolvency resolution process costs'. These costs are to be paid in priority to other debts under the Resolution Plan in CIRP/ PPIRP as well as in liquidation.

In case the restructuring proceedings are undertaken under the Prudential Framework or any other method outside the statutory regime, there is no bar on obtaining a new financing and the priority of any such rescue finance will be governed as per the contractual arrangements arrived at by the creditors amongst themselves.

5. Can a restructuring proceeding release claims against non-debtor parties (e.g. guarantees granted by parent entities, claims against directors of the debtor), and, if so, in what circumstances?

Under the Code, a restructuring proceeding i.e. a CIRP/ PPIRP culminates in a resolution plan. The resolution plan binds all the creditors and other stakeholders of the corporate debtor only. Consequentially, claims against non-debtor parties cannot be released, except with the assent of the relevant claimants. In practice, resolution plans typically expressly reserve creditors' rights to pursue remedies in law against non-debtor parties, such as guarantors even where these liabilities are secondary to the discharged liabilities of the corporate debtor. This practice has been upheld by the Supreme Court of India in Committee of Creditors of Essar Steel v. Satish Kumar Gupta, (2020) 8 SCC 531. Furthermore, in Lalit Kumar Jain v. Union of India, (2021) 9 SCC 321, the Supreme Court affirmed that the liability of a guarantor is not extinguished by approval of a resolution plan. The Court noted that the guarantor's liability arose out of an independent contract, and thus, would not be ipso facto extinguished through a resolution plan.

In restructuring proceedings outside the Code, the restructuring of debt with debtor without involving the non-debtor parties like third party security providers or guarantors can amount to release of such non-debtors if they do not give their consent to the restructuring of debt. To hedge against such eventualities, as a matter of industry practice, the agreements and instruments executed by the non-debtor parties contain provisions granting upfront consent for variation of the underlying credit agreements by the creditor and the debtor.

6. How do creditors organize themselves in these proceedings? Are advisory fees covered by the debtor and to what extent?

Under the Code, a CoC, comprising all unrelated financial creditors of the corporate debtor, is formed in all CIRPs. The CoC has key powers and responsibilities during the CIRP. The CoC is required to either appoint the Interim Resolution Professional (a registered insolvency professional appointed by the Adjudicating Authority on the recommendation of the applicant) as the Resolution Professional or appoint another person as the Resolution Professional. Based on the recommendation of the CoC, the Adjudicating Authority appoints the Resolution Professional. Further, during the CIRP, the CoC has authority to remove and replace the Resolution Professional. After the formation of the CoC, the

Resolution Professional is required to obtain prior approval from the CoC for certain specified actions, including but not limited to:

- raising interim finance beyond specified limits;
- creating any security interest over the assets of the company;
- changing the capital structure;
- changing management;
- undertaking any related party transactions; and
- amending constitutional documents of the company.

One of the most important responsibilities of the CoC is to determine whether a debtor's business is economically feasible. The CoC may then decide to either liquidate the debtor or invite and approve a resolution plan proposed to rescue the debtor as a going concern. The CoC first approves the criteria that a person must meet in order to be eligible to submit a resolution plan as well as the criteria on which it will evaluate all resolution plans it receives. Once resolution plans are received, the CoC must deliberate and record its deliberations on the feasibility and viability of each resolution plan, and vote on all such plans simultaneously. The plan which gets the highest percentage of votes, and at least 66% of the votes of the CoC is considered the approved resolution plan.

Under the Code, the interim resolution professional and the Resolution Professional may appoint accountants, legal, or other professionals to assist her in carrying out the CIRP and running the business as a going concern. The CoC is tasked with approving their fees and expenses. These are included in the insolvency resolution process cost which are to be paid in priority to other debts under the Resolution Plan in CIRP as well as in liquidation. While independent financial creditors and the CoC too may appoint professionals to assist them during the CIRP, these are privately funded by such creditors/ CoC and are not part of the costs to be paid out of the debtor's estate.

The responsibilities of the CoC under a PPIRP are similar. While the management retains control of the business during a CIRP, the board of directors is required to take approvals from the CoC for the same actions that a Resolution Professional requires prior CoC approval for. The CoC is also responsible for approving a resolution plan. Within two days of the commencement of the PPIRP, the debtor must submit the base resolution plan to the Resolution Professional, who in turn presents it to the CoC for approval. If a resolution plan does not impair any claims owed by the corporate debtor to the operational creditors, it may be approved by the CoC. Alternatively, prospective third party resolution applicants may be invited to submit resolution plans. This plan will either compete with the base resolution plan, or will be chosen for voting without competition if it is significantly better than the base plan. The CoC may then approve either the base resolution plan, or the best amongst the invited plans, on the basis of the feasibility and viability of the plan and the manner of distribution proposed. A plan may be approved by a 66% vote of the CoC by voting share. Once approved, the plan is placed before the Adjudicating Authority for its approval. During a PPIRP, the Resolution Professional may appoint advisers, the fees for whom would be paid out of the PPIRP costs. While the CoC may also retain advisers during the PPIRP, the costs incurred in this regard would be funded privately.

Under the restructuring proceedings outside the Code, there is no specific rule on payment of advisory fees. The fees of external advisors appointed by the creditors in the restructuring proceedings is a subject matter of contract and is generally debited to the debtor's account under the cost and indemnity provisions of the financing agreement.

7. What is the test for insolvency? Is there any obligation on directors or officers of the debtor to open insolvency proceedings upon the debtor becoming distressed or insolvent? Are there any consequences for failure to do so?

A test of 'default' is used to determine insolvency. Default is defined as the non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor. This test is akin to the 'cash flow test' followed in other jurisdictions, where a company is deemed to be insolvent if it fails to repay its debts as and when they fall due. As per the statute, the existence of a legally payable debt and default on repayment is sufficient to commence CIRP.

There is no obligation on directors or officers to open insolvency procedures upon the debtor becoming distressed or insolvent. However, directors or officers have the duty to avoid wrongful trading i.e. trading in a manner that does not minimize the potential loss to the creditors of the corporate debtor, when they knew or ought to have known that there was no reasonable prospect of avoiding the commencement of insolvency proceedings. If directors are found responsible for wrongful trading, they may be inter alia made liable to contribute to the assets of the debtor.

8. What insolvency proceedings are available in the jurisdiction? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually take to complete?

Please see the response to Question No. 3

9. What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the enforcement of creditors' claims? Does that stay or moratorium have extraterritorial effect? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?

Under the Code, the Adjudicating Authority is required to declare a moratorium at the time it accepts an application for the CIRP. The moratorium prohibits:

- the institution or continuation of suits or proceedings against the corporate debtor;
- any actions for foreclosure, recovery or enforcement of any security interest created by the company in respect of its property;
- transferring, encumbering, alienating, or disposing of any of its assets or any legal or beneficial interest in such assets by the corporate debtor;
- recovery of any property by an owner or lessee where such property is owned by or in possession of the corporate debtor;
- termination or suspension of a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;
- termination, suspension or interruption of supply of essential goods and services (which includes electricity, water, telecommunication and information technology services to the extent that these are essential services for the company); and
- termination, suspension or interruption of supply of goods and services critical to the preservation of the value of the company and its management as a going concern (as determined by the Resolution Professional), except if they are not paid for during the moratorium period or in such other circumstances as may be specified.

The moratorium is required to continue until the completion of the CIRP. Under the Code, such moratorium will not apply to the guarantor of a company undergoing the CIRP. Apart from this, the Central Government, in consultation with financial sector regulators or other authorities, has the power to carve out certain transactions, agreements or arrangements from the moratorium. Generally, the Code does not envisage exceptions to the moratorium on a case-by-case basis. However, in some cases, courts have carved out a limited exception for adjudication of counter-claims against the corporate debtor as long as the adjudication of the counter-claim would not adversely impact the assets of the corporate debtor [SSMP Industries Ltd. v. Perkan Food Processors Pvt. Ltd., 2019 SCC OnLine Del 9339].

A moratorium with a similar scope applies to the PPIRP proceedings. However, supplies of essential and critical goods and services are not guaranteed typically, as long as the debtor remains in possession during the PPIRP.

In liquidation, subject to the right of the secured creditors to stand outside liquidation proceedings, no suit or other legal proceedings are permitted to be instituted by or against the company after a liquidation order has been passed by the Adjudicating Authority, except with the approval of the Adjudicating Authority. Since the Code extends only to India, the moratoria in the CIRP, the PPIRP and the liquidation proceedings would not have extra-territorial effect. However, where actions are instituted outside India, and require enforcement within India, enforcement actions may be prevented by the moratorium.

For restructurings outside the Code, there is no specific rule governing moratorium against the initiation or continuation of proceedings for enforcement of creditors' claims and grant of such moratorium to debtor purely depends on the contents of the definitive documents executed for implementation of restructuring.

10. How do the creditors, and more generally any affected parties, proceed in

such proceedings? What are the requirements and forms governing the adoption of any reorgnisation plan (if any)?

During the CIRP, all the unrelated financial creditors of the corporate debtor form the CoC, which is the primary decision-making authority in the process. The powers and responsibilities of the CoC have been described in detail in Question 6.

The Resolution Professional is appointed by the CoC and conducts the resolution process as per the Code and its underlying regulations, subject to approval from the CoC on certain actions. Operational creditors (i.e., creditors in respect of the provision of goods and services) and workmen typically do not play a role during the resolution process. The erstwhile management of the corporate debtor is suspended and all its powers are vested in the Resolution Professional. However, the erstwhile management is expected to extend co-operation to the Resolution Professional, failing which the Resolution Profession can approach the Adjudicating Authority for issuance of necessary directions. Furthermore, the members of the suspended Board of Directors may attend meetings of the CoC without a right to vote in such meetings.

The CoC can approve a resolution plan with a majority not less than 66% of the voting share of the financial creditors. If multiple resolution plans cross the 66% threshold, the plan which receives the highest percentage of votes will be deemed to have been approved. While voting, the CoC is may consider the 'feasibility and viability' of the plan, which includes the manner of distribution proposed in the plan. Under the Code, a dissenting financial creditor is mandatorily entitled to a minimum amount equivalent to what it would have received in the event of liquidation of debtor (i.e. liquidation value of its debt). If a resolution plan does not comply with the said mandatory requirement to pay the minimum guaranteed amount to the dissenting financial creditor, such plan is liable to be rejected by the Adjudicating Authority. The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons), 2016 ("CIRP Regulations") also prescribes certain mandatory contents for a resolution plan:

- It must give a statement of how it has dealt with the claims of all stakeholders;
- It must give a statement with details if the resolution applicant or any of its related parties has previously failed to implement or contributed to a failure to implement an approved resolution plan;
- It must state the term of the plan and its implementation schedule, the management and control of the business of the corporate debtor during its term and adequate means for supervision of its implementation;
- It must provide for the manner in which proceedings in relation to avoidance transactions, fraudulent trading or wrongful trading will continue after approval of the plan and how the proceeds from these proceedings will be distributed.
- A resolution plan must demonstrate that it addresses the cause of default, is feasible and viable, has provisions for its effective implementation, has provisions for requisite approvals and timelines for obtaining the same, and that it has the capacity to implement the plan.

Once a resolution plan has been approved by the CoC, the Resolution Professional has to file an application seeking approval of the plan from the Adjudicating Authority. The Code states that the resolution plan must have provisions for its implementation. Additionally, the Adjudicating Authority will ensure that the plan has not been submitted by an applicant ineligible under Section 29A of the Code and that it provides the minimum statutory entitlement to dissenting financial creditors and operational creditors, as described below:

- Operational creditors should not be paid less than the amount that they would have received in the event of liquidation or if the amount proposed under the resolution plan were distributed as per the liquidation waterfall in Section 53(1).
- Dissenting financial creditors should not receive an amount less than the amount they would have received in the event of liquidation and distribution under Section 53(1).

Similarly, for a PPIRP, the role of each stakeholder has been described in detail in Question 6. The mandatory requirements of a resolution plan through PPIRP is broadly similar to CIRP, subject to certain additional requirements:

- The Resolution Applicant must provide an affidavit that it is eligible to submit a resolution plan under the Code;
- The Resolution Applicant must provide an undertaking that information and records provided in connection with the resolution plan is true and correct, and discovery of false information will render it ineligible to participate in any processes under the Code;

- If the Adjudicating Authority vests the management of the corporate debtor with a Resolution Professional due to fraud or gross mismanagement of the existing management of the corporate debtor, the resolution plan must result in a change in management or control of the corporate debtor to a person who was not a promoter or in the management of the corporate debtor, failing which the Adjudicating Authority will reject the resolution plan and direct initiation of liquidation proceedings of the corporate debtor.

Except the Prudential Framework, in restructuring proceedings outside the Code, there are no specific rules governing the conduct of the creditors and debtor in such proceedings. Under the restructurings under the Prudential Framework, creditors collectively take decisions and a decision of creditors representing 75 per cent by value of total outstanding credit facilities (fund based as well non-fund based) and 60 per cent of creditors by number is binding upon all the creditors. Significantly, there are no requirements and forms governing the adoption of any re-organization plan under any of the aforesaid avenues of restructuring and insolvency redressal, re-organization plan may differ from case-to-case basis.

11. How do creditors and other stakeholders rank on an insolvency of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities, DIP financing)? Could the claims of any class of creditor be subordinated (e.g. recognition of subordination agreement)?

Distributions from sales in liquidation would be according to the statutory waterfall which is as follows:

1. insolvency resolution process costs and liquidation costs in full;
2. (a) debts owed to a secured creditor in the event such secured creditor has relinquished its security; and (b) worker's dues for the period of 24 months prior to liquidation both of which rank equally amongst each other;
3. wages and any unpaid dues owed to employees other than workmen for the period of 12 months prior to liquidation;
4. financial debts owed to unsecured creditors;
5. (a) dues to the Government; and (b) debts owed to secured creditors for unpaid amounts following the enforcement of security interests outside liquidation both of which rank equally amongst each other;
6. any remaining debts;
7. preference shareholders, if any; and
8. equity shareholders or partners, as the case may be.

In the CIRP and PPIRP, costs of the CIRP and PPIRP are to be paid in priority to all other payments. Payments to operational creditors are to be made before any financial creditors are paid, and dissenting financial creditors are to be paid before assenting financial creditors. However, the resolution plan needs to only guarantee liquidation value to dissenting financial creditors. For operational creditors, the resolution plan must guarantee the higher of the liquidation value or the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority above.

In relation to pension dues, the Code states that all sums due to any workman or employee from the provident fund, gratuity fund and pension fund shall not be included in the liquidation estate assets. This principle has been affirmed by a series of cases, and therefore, social security dues payable to the employees / workmen (i.e., pension fund, provident fund and gratuity fund) will not form a part of the liquidation estate and will be distributed independently. Moreover, in some cases of CIRP, courts have directed full payment of all social security dues as a pre-condition for approval of the resolution plan.

While there is no specific provision granting power to subordinate claims in CIRP and PPIRP, in practice, the Adjudicating Authority has used its discretionary powers to subordinate claims of certain types of creditors. For instance, in J.R. Agro Industries P. Ltd v. Swadisht Oils P. Ltd., CA No. 59 of 2018 in CP(IB)13/ALD/2017 dated 24.07.2018, the Adjudicating Authority ordered the subordination of the claims of a related party to the claims of unsecured operational creditors of the debtor. For subordination agreements, even though the Code does not explicitly recognize them, the Insolvency Law Committee constituted by the Government of India has opined that subordination agreements that are not expressly prohibited under Section 53(1) will be upheld. For example, any subordination agreement that provides for priority of charges between secured creditors, will be upheld in the liquidation waterfall.

12. Can a debtor's pre-insolvency

transactions be challenged? If so, by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties impacted?

Yes, a debtor's pre-insolvency transactions can be challenged and set aside if they are:

- preferential transactions: transactions that put any person in a better position than they would have been in the distribution waterfall provided for under the Code in the event of a liquidation and which are not in the ordinary course of business;
- undervalued transactions: transactions in which the company has gifted or transferred property to a person for a value which is significantly less than the value of consideration provided by that person and which are not in the ordinary course of business of the company;
- transactions defrauding creditors: undervalued transactions that were deliberately entered into to keep assets beyond the reach of any person entitled to claim against the company, or adversely affect the interest of such a claimant; and
- extortionate credit transactions: transactions where credit has been extended on extortionate terms other than transactions where financial services are provided to the company in compliance with law.

Under the Code, the Adjudicating Authority has exclusive jurisdiction to set aside such transactions upon an application made by the Resolution Professional, the Liquidator or the creditors (only in case of undervalued transactions and transactions defrauding creditors). The Adjudicating Authority is vested with wide powers to remedy the effect of such transactions including the power to reverse the transactions, supplanting obligations and directing payment of adequate consideration. At the same time, interests of persons who acquire property in good faith and for adequate value have been safeguarded under the Code.

Preferential transactions undervalued transactions and transactions defrauding creditors are vulnerable to being set aside if they are entered into within the two years preceding the insolvency commencement date with related parties; or within one year preceding the insolvency commencement date when entered into with persons other than related parties.

Please note that the definition of 'related party' under the Code is broad and includes directors, partners, key managerial persons, shareholders having ownership beyond defined thresholds and persons who are involved with the policy making process of the company, amongst others.

'Extortionate credit transactions' entered into by a company within the two years preceding the insolvency commencement date are liable to be set aside (irrespective of whether or not such transactions are entered into with a related party).

13. How existing contracts are treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title and set-off provisions in these contracts remain enforceable? Is there any ability for either party to disclaim the contract?

Treatment of existing contracts during CIRP under the Code

Generally, on commencement of the CIRP, existing contracts of the debtor continue uninterrupted. The Resolution Professional is empowered to amend or modify contracts that were entered into before the commencement of the CIRP to maintain it as a going concern.

Termination of Contracts:

The Code does not contain any clear-cut provision that invalidates ipso facto clauses or termination clauses. Therefore, if contracts contain termination clauses, such termination would ordinarily be effective.

There are however, some exceptions to this rule. Certain parties are obligated to continue performance of their contracts after the commencement of the CIRP under the Code. Once the moratorium is declared, the supply of essential goods or services may not be terminated or suspended during the moratorium period. Accordingly, the supply of electricity, water, telecommunication and information technology services to the extent that these are essential services for the company may not be interrupted. Additionally, any license, permit, registration, quota, concession, clearance or a similar grant or right given by the any Government authority, may not be terminated on the grounds of insolvency subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period. Furthermore, when the

interim resolution professional or Resolution Professional considers the supply of certain goods or services critical to the preservation of the value of the company and its management as a going concern, such contracts may not be terminated; except where the debtor has not paid dues arising from such supply during the moratorium period. Lastly, in some exceptional cases, if a contract is crucial for the success of the CIRP and is therefore intrinsically linked to the preservation of the corporate debtor as a going concern, its termination may be set aside by the Adjudicating Authority (Gujarat Urja Vikas Nigam v. Amit Gupta, 2021 SCC OnLine SC 194).

Under a PPIRP, the termination of contracts for the supply of essential and critical goods or services, has not been expressly barred. However, even under a PPRIP, any license, permit, registration, quota, concession, clearance or a similar grant or right given by the any Government authority, may not be terminated on the grounds of insolvency – subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period.

Under Liquidation, there is no bar on the termination of contracts.

Retention of Title Provisions:

Once a moratorium has been declared at the commencement of the CIRP, the recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the corporate debtor, is prohibited. Accordingly, as long as the corporate debtor is in actual physical possession of a property (and does not merely have rights or interests in a property), a contractual counter-party could be prohibited from enforcing recovery after the commencement of the CIRP.

However, these assets, not being assets of the debtor would not be considered part of the debtor's insolvency estate. This would be the position of law under a PPIRP as well.

The moratorium during liquidation is generally more limited, and consequently, recovery of assets under a retention of title provision is not barred.

Set-Off Provisions:

In CIRP, PPIRP and Liquidation, a creditor filing a claim is required to provide details of the mutual credit, mutual debts, or other mutual dealings between the debtor and itself which may be set-off against its claim. Consequently, an insolvency set-off would be applied in all cases where claims are made and considered/ settled as part of the resolution plan. However, the jurisprudence on the validity of contractual set-offs that do not fall strictly within the scope of such an insolvency set-off has not been entirely settled under the Code at present.

Disclaimer of Contracts:

Under the CIRP and PPIRP, neither party has a right to disclaim contracts. In CIRP, the Resolution Professional may amend or modify contracts of the debtor in accordance with the terms of the contract. On the other hand, once a liquidation process has commenced, a Liquidator has the right to disclaim unprofitable contracts. This is notwithstanding whether she has done anything in pursuance of the contract. The Liquidator may make an application to the Adjudicating Authority within six months from the commencement of the liquidation in this regard.

Treatment of existing contracts during restructuring proceedings outside the Code

Under the restructuring avenues outside the Code, the existing contracts of the debtor with the third parties remain unaffected and the debtor cannot claim discharge of any of its obligations. In relation to the contracts governing the existing credit facilities, definitive documents executed for implementation of the restructuring of debt may provide for modification or supersession of the existing contracts governing the credit facilities. Therefore, the treatment of termination, retention of title and set-off provisions in the existing contracts for the credit facilities would depend on the terms of definitive agreements executed for implementation of restructuring of debt.

Section 133 of the Contract Act, 1872 provides for the discharge of surety by variance in terms of contract. Relying on the principle of discharge due to variance of the underlying contracts, the non-debtor parties may claim discharge of their guarantees / security interests provided for in the pre-restructuring credit facilities, if their consent is not obtained for variation of the underlying contract under the restructuring proceedings. Therefore, it is important to have consents from non-debtor obligors to enable effective restructuring of debt.

14. What conditions apply to the sale of assets / the entire business in a restructuring or insolvency process? Does the purchaser acquire the assets "free and clear" of claims and liabilities? Can security be released without creditor consent? Is credit bidding permitted? Are

pre-packaged sales possible?

Sale of Assets / entire business under the Code

Sale of Assets / entire business in the CIRP:

During the CIRP, unsecured assets amounting to no more than 10% of the claims against the debtor may be sold. These may be sold with prior approval of 66% of the CoC on an as is where is basis.

As part of the resolution plan, while the assets of the corporate debtor may be sold, and the company restructured, courts have held that the company, and not just its business, must be rescued as a going concern. As such, asset or business sales are not common under the CIRP, and usually the whole company is acquired.

Technically there is no bar on creditors acquiring the debtor as part of a resolution plan, since the CIRP is intended to rescue the debtor as a going concern and is not viewed as a 'sale' proceeding. Some judicial decisions have however held that rescue plans that envisage that creditors would take over the management of the debtor without infusion of new funds, turn the business around and sell it, would not be permissible under the Code (Superna Dhawan & Anr. v. Bharati Defence and Infrastructure Ltd. & Ors. CA(AT)(Insolvency)195 of 2019 – dated 14.05.2019). However, through an amendment to the relevant regulations, sale of individual assets of the corporate debtor is allowed, if the Resolution Professional does not receive any resolution plans for sale of the corporate debtor as a whole.

Those who acquire the company do so free and clear of those claims and liabilities extinguished under the resolution plan, which could include disputed and other contingent claims. Consequently, other than as provided in the resolution plan, a stakeholder bound by the plan cannot pursue claims under any other law, after the resolution plan has been approved, except to the extent consistent with the resolution plan so that a successful resolution applicant gets a 'fresh slate'. (Committee of Creditors of Essar Steel v. Satish Kumar Gupta, (2020) 8 SCC 531) In addition, Section 32A of the Code provides that no action may be taken against the property of the debtor or the debtor itself in regard to any offence committed pre-commencement, as long as control doesn't continue with pre-existing management or other persons who may have been party to the commission of that offence.

The resolution plan may also release security over assets of the debtor, without the secured creditor's consent subject to receiving the requisite percentage of 66% of CoC approving the resolution plan. However, such a dissenting secured creditor would have to be paid the liquidation value due to it or be allowed to retain and enforce its security. The same principles on the scope of 'sales' in the resolution plans are applicable to PPIRPs. As such while pre-packaged resolutions are possible, pre-packaged sales of whole businesses as in England or as under Section 363 of the US Bankruptcy Code are not envisaged under Indian insolvency law.

Sale of Assets / entire business in the liquidation proceedings:

In liquidation, where a piece-meal asset sale is attempted (although a going concern sale of the corporate debtor or business may also be attempted), the assets are sold on an as is where is basis. However, no action may be taken against the assets of the debtor in regard to any offence committed pre-commencement, as long as the assets are purchased by persons who were not part of the pre-existing management of the debtor and were not party to the commission of that offence. Secured creditors are allowed to enforce their security in liquidation and stand outside the collective liquidation proceeding. While the Code doesn't prevent secured creditors from enforcing their security through credit bidding, the Liquidator has been given the power to propose that the assets be sold at a higher price and identify a purchaser for the same, except in certain circumstances.

Sale of Assets / entire business in restructuring proceedings outside the Code

In case of restructuring proceedings outside the Code, a sale can be either be voluntary in nature i.e. wherein the debtor sells its assets or entire business and remits the dues to its creditors or it can also be involuntary wherein creditors initiate sale of the asset / business charged to them as security. Under the SARFAESI Act, the secured assets or the business related to the secured assets can also be transferred by the secured creditors. However, the sale of assets / entire business of the debtor outside the Code may not always result into an encumbrance free title to the purchaser. Notably, in relation to the sale of secured asset in discharge of a first charge, the Supreme Court in Bank of India v. Agrawal Indotex Ltd., [(2021) 13 SCC 160] has held that sale by the first charge holder has no effect on the second charge, which continues to subsist, and gets converted into the first charge. Therefore, due to uncertainty on discharge of all encumbrances under restructuring proceedings outside the Code, sale of a business under the SARFAESI Act or in exercise of contractual rights, remains an unattractive proposition. For restructuring proceedings outside the Code, security cannot be released without the creditor's

consent and the manner of sale of business undertaking under resolution plans outside the Code, remains subject to the terms of restructuring.

15. What duties and liabilities should directors and officers be mindful of when managing a distressed debtor? What are the consequences of breach of duty? Is there any scope for other parties (e.g. director, partner, shareholder, lender) to incur liability for the debts of an insolvent debtor and if so can they be covered by insurances?

The special duties of the directors begin during the twilight zone, or the 'zone of insolvency'- when the directors or partners knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process. During this time, the directors or partners of the debtor are responsible for exercising adequate due diligence to avoid potential loss to the creditors of the company. In case such diligence is not exercised, the director may be held liable for wrongful trading during CIRP or Liquidation. The Adjudicating Authority may, on an application by the Resolution Professional, order that the director or partner will be liable to make such contribution to the assets of the corporate debtor as it may deem fit. Moreover, if it is found that the business of the corporate debtor was carried on with the intent to defraud the creditors of the corporate debtor, or for any fraudulent purpose, the persons who were knowingly parties to this would be liable for fraudulent trading and would be ordered to make contributions to the assets of the corporate debtor. If the Adjudicating Authority has made a finding of fraudulent or wrongful trading, it may also pass directions to consider such liability for making contributions a charge on any debt owed by the debtor to herself, her agents and assignees.

During the CIRP, the management of the corporate debtor does not vest with its board of directors. The primary duty of the officers of the company is to extend all assistance and cooperation to the Resolution Professional, as may be required by her in managing the affairs of the corporate debtor. In case any director or partner does not extend such cooperation, the Resolution Professional may file an application before the Adjudicating Authority, which may then in turn direct such personnel to comply with the instructions of the Resolution Professional and to cooperate with her in collection of information and management of the corporate debtor.

Under the PPIRP, the directors retain control over the corporate debtor. On admission of the application, the management of the affairs of the corporate debtor shall continue to vest in the board of directors or the partners, as the case may be, of the corporate debtor. The management will ensure that the value of the debtor is preserved and that it is maintained as a going concern. However, the board of directors or partners will require the approval of the CoC for certain actions as discussed in response to Question 6 above. Further, if the affairs of the corporate debtor are conducted in a fraudulent manner; or there has been gross mismanagement of the affairs of the corporate debtor, the Adjudicating Authority would pass an order vesting the management of the corporate debtor with the Resolution Professional even in the PPIRP.

To cover the risk of personal liability of the directors and officers arising due to wrongful acts in their managerial capacity, there is no legal bar on an insurance policy and there are insurance products in India for protection for claims brought against directors, officers and employees for actual or alleged breach of duty, neglect, misstatements or errors in their managerial capacity.

16. Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions? In which context could the liability of the directors be sought?

Subject to certain conditions, once a resolution plan is approved, the corporate debtor is absolved of any liability arising from previous claims, and from any offence committed prior to the commencement of the CIRP (as discussed in response to Question 14). However, this does not release directors and other officers from liability for their prior actions and decisions.

Specifically, under Section 32A of the Code, a partner, director or any officer who was in-charge of the business of the debtor, and who was involved in the commission of any offence, will continue to be liable for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased. The right to an action against the property of any person other than the corporate debtor itself (including the directors and all other stakeholders), has also not been barred. Further, resolution plans also ordinarily reserve the right to hold previous management of the corporate debtor liable for any prior actions and decisions.

The suspended Board of Directors might face liability

under different laws pertaining to economic offences, based on the nature of their activity. A common example of directors facing liability after approval of a resolution plan is under India's money laundering statute – the Prevention of Money Laundering Act, 2002. Section 32A permits prosecution of the suspended management under this law even after the resolution plan has been approved.

Even under restructuring proceedings outside the Code, liability of the directors and other stakeholders is not condoned for their previous actions and decisions. The liability of the directors can be sought under the Companies Act, 2013 and other specific laws, for example the Legal Metrology Act, 2009, which fix liability of a company's actions on its designated director or provide punishment for the breach of specified duties as a director. The personal liability of the directors and other stakeholders survive the restructuring and insolvency of the debts of the debtor.

17. Will a local court recognise foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Does recognition depend on the COMI of the debtor and/or the governing law of the debt to be compromised? Has the UNCITRAL Model Law on Cross Border Insolvency or the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments been adopted or is it under consideration in your country?

Under the Code, bilateral, reciprocal arrangements are the only basis for granting assistance or recognition to foreign insolvency processes. The Code also provides that in cases where a company's assets are located in a country with which there are reciprocal arrangements, the Resolution Professional and/or the Liquidator may make an application to the Adjudicating Authority, which may then issue a letter of request to the relevant foreign court or authority for necessary assistance. No such bilateral or reciprocal arrangements have been put in place thus far. In 2018, the Indian Government proposed the enactment of a chapter on cross-border insolvency based on the UNCITRAL Model Law on Cross-Border Insolvency with certain modifications. A key rationale behind the proposal is that it will benefit the Resolution Professional (and Indian businesses generally) in being able to seek assistance in other jurisdictions. However, this has not yet been enacted, and a Committee of Experts was constituted in January 2020 to recommend rules and a regulatory framework for the smooth implementation of the proposed cross-border insolvency framework. The Committee of Experts submitted its report in June 2020, along with a second report on group insolvency in December 2021. The Government has not enacted any regulations based on the report of the Committee of Experts.

While legal reform remains pending, in the case of Jet Airways v State Bank of India, (Company Appeal (AT) (Insolvency) No. 707 of 2019, NCLAT, dated 26.09.2019), the Appellate Authority gave access to a foreign insolvency representative and directed the Resolution Professional to enter into a Cross-Border Insolvency Protocol with the administrator of Dutch proceedings. The Appellate Authority also recognised the Cross Border Insolvency Protocol entered into between the Dutch Administrator and the Resolution Professional and directed that the Protocol should be treated as the direction of the Appellate Authority. As such, it may be possible for the Adjudicating Authority to grant recognition or assistance in future cases based on this precedent.

18. For EU countries only: Have there been any challenges to the recognition of English proceedings in your jurisdiction following the Brexit implementation date? If yes, please provide details.

N/A

19. Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction? What are the eligibility requirements? Are there any restrictions? Which country does your jurisdiction have the most cross-border problems with?

Debtors incorporated outside India may not enter into restructuring or insolvency proceedings under the Code, as the Code requires that a debtor be incorporated in India to avail of the processes under it. India's experiences with cross-border insolvency have been very limited, and therefore, it is difficult to state the jurisdiction which India faces the most cross-border problems with.

For restructuring proceedings outside the Code, there is no bar on restructuring of debt availed by foreign debtors.

20. How are groups of companies treated on the restructuring or insolvency of one or more members of that group? Is there scope for cooperation between office holders? For EU countries only: Have there been any changes in the consideration granted to groups of companies following the transposition of Directive 2019/1023?

While the Code does not have an extensive framework to deal with the issues that arise in the insolvency of group companies, judicial precedents have developed on how situations relating to insolvency of companies in corporate groups may be dealt with. Most significantly, in relation to Videocon Industries Limited, first, the Adjudicating Authority ordered that different CIRPs of different companies be heard by the same bench in order to ensure procedural coordination (CA-1022(PB)/2018, order dated 24.10.2018). Thereafter, the Adjudicating Authority ordered a substantive consolidation of the assets of 13 out of 15 companies and observed that on a case to case basis, substantive consolidation of group entities could be considered inter alia basis the following parameters i.e. common control, common directors, common assets, common liabilities, interdependence, interlacing of finance, co-existence for survival, pooling of resources, intertwined accounts, interloping of debts, singleness of economics of units, common financial creditors and common group of corporate debtors (MA/2385/2019 in CP (IB) 02/MB/2018, order dated 12.02.2020). Similarly, for Infrastructure Leasing & Financial Services Ltd. – a financial services conglomerate with over 301 group entities – the Union of India conducted a resolution process that incorporated certain elements of group level insolvency.

Since then, in various cases, the Adjudicating and Appellate Authorities have ordered consolidation of different group entities undergoing insolvency resolution. In many cases, the Resolution Professional appointed in the CIRPs of different group companies is the same in order to ensure coordination in different cases, and where different, requests for cooperation would be considered favourably. It should be noted that the Cross Border Insolvency Rules/Regulations Committee had submitted a report in December 2021. The Government has not proposed any amendments based on this report as of now.

21. Is your country considering adoption of the UNCITRAL Model Law on Enterprise Group Insolvency?

A Committee of Experts was constituted in January 2020 to recommend rules and a regulatory framework for the smooth implementation of a cross-border insolvency framework. The remit of the Committee was subsequently expanded to include an examination of the UNCITRAL Model Law on Enterprise Group Insolvency. In its report submitted in December 2021, the Committee opined that the UNCITRAL Model Law on Enterprise Group Insolvency should not be adopted in India at present. The Committee was of the view that it should first evolve a framework for group insolvency of domestic entities, before considering cross-border implications. Nonetheless, while evolving a domestic group insolvency framework, the Committee considered the observations and insights of the UNCITRAL Model Law. The aforesaid committee is an advisory body and its recommendations may or may not be accepted by the legislature and the executive.

22. Are there any proposed or upcoming changes to the restructuring / insolvency regime in your country?

The following changes are currently being considered by the Government of India and may be adopted in the medium term:

a) Applications for initiation of CIRP: In January 2023, the Ministry of Corporate Affairs has proposed certain amendments with respect to the process for initiation of CIRP.

First, it has been proposed that a creditor, whether, financial or operational1 – must mandatorily submit all financial information pertaining to a debt to an Information Utility2 and furnish this record while filing an application for initiation of insolvency proceedings against the debtor company.

Second, due to mis-interpretation of the threshold requirements for initiation of the CIRP and the addition of a subjective analysis of financial health by the courts in a few isolated cases, the Ministry has proposed to clarify the Code by explicitly providing that upon demonstration of the existence of debt and default, it will be mandatory for the Adjudicating Authority to admit a debtor into the CIRP. The proposed amendment is aimed at expediting the adjudication process for checking if the concerned debtor meets the threshold requirements to be admitted into the CIRP.

b) Expanding the Pre-Packaged Insolvency Resolution Process (“PPIRP”): At present, the PPIRP is only available for companies with relatively low thresholds of turnover, referred to as micro, small and medium enterprises. The Government is considering extending this process to

large corporates as well.

c) Approval of Multiple Resolution Plans: In larger corporates having multiple lines of independent businesses, interest is often expressed only in certain assets of the corporate debtor, rather than the corporate debtor in its entirety. Under the current regulations for the CIRP, if there are no resolution plans received for the corporate debtor as a going concern, the Resolution Professional, with the approval of the CoC, can also seek resolution plans for sale of assets of the corporate debtor, which implies that the CoC can either approve a resolution plan for the corporate debtor as whole and a going concern or approve two or more resolution plans at the same time for the sale of the assets of the corporate debtor. In case of approval of resolution plans for individual assets of the corporate debtor, there is no clarity as to the fate of the corporate debtor as whole. To alleviate this anomaly, under the proposed amendment, it is recommended that at least one of the multiple resolution plans ought to provide for insolvency resolution of the corporate debtor as a going concern..

d) Distribution of resolution proceeds: The Ministry of Corporate Affairs has observed that in several cases resolution of the corporate debtor is delayed due to inter-creditor disputes and litigation arising therefrom. In this view, it has been proposed that an objective formula for distribution of resolution proceeds be adopted for all resolution plans, as per which all creditors would get paid up till the liquidation value of their debt in the order prescribed in the distribution waterfall under Section 53(1) of the Code. For the remaining surplus, all creditors will be paid equally. Lastly, if any sum remains after satisfaction of all creditor dues, it will be distributed amongst the shareholders/partners of the debtor.

23. Is your jurisdiction debtor or creditor friendly and was it always the case?

Indian insolvency and restructuring law was historically debtor friendly, the enactment of the Code has however, transformed the Indian insolvency landscape to become a creditor-friendly regime.

This is manifested in the design of the CIRP, such as:

a. Financial and operational creditors can initiate CIRP upon establishment of default in payment of their debts.
b. Immediately on initiation of CIRP the entire management and control of the corporate debtor is vested with an independent insolvency professional. The appointment of the insolvency professional needs to be approved by the Committee of Creditors constituted of the financial creditors.
c. All key decisions with respect to CIRP are taken by the Committee of Creditors including approval of a resolution plan or liquidating the corporate debtor. The parameters for judicial review of such decisions are also defined under the Code and the courts usually defer to commercial wisdom of the creditors.
d. There is also bar on defaulting promoters and their connected persons to bid for and acquire the corporate debtor in CIRP, if they are willful defaulters; or those who have defaulted for more than 90 days on any of their debt obligation; or have defaulted on their guarantee obligations etc. This has ensured that the defaulting borrowers are not re-purchased by the promoters at a discount.
e. Even in the PPIRP regime, where the existing management would retain control over the corporate debtor, such promoters and managers of the corporate debtor are precluded from initiating the process except with the consent of 66% of the financial creditors by value. However, the Adjudicating Authority can vest management of the corporate debtor with a Resolution Professional basis if it is found that the affairs of the corporate debtor have been conducted in a fraudulent manner or that there has been gross mismanagement in the affairs of the corporate debtor. In such event, the PPIRP must result in a change in management or control of the corporate debtor failing which the Adjudicating Authority will reject the resolution plan and pass an order for liquidation.

24. Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)? What role does the State play in relation to a distressed business (e.g. availability of state support)?

The design of the Code protects the interests of workmen and employees both during the CIRP as well as at the time of its conclusion. The dues of workmen and employees during the CIRP are to be reckoned as part of the CIRP costs which are to be paid in priority to any other dues. The dues of workmen and employee to be paid by the corporate debtor in discharge of its statutory duty under laws governing payment of the provident

fund, the pension fund and the gratuity fund, prior to initiation of CIRP, if any, are also required to be paid in priority under a resolution plan by the acquirer of the corporate debtor. If the corporate debtor goes into liquidation even in that case the workmen dues prior to CIRP are treated in priority equal to secured creditor's dues.

Socio-political factors have led the legislature to make interventions to protect the interest of consumers, such as homebuyers of incomplete and under-construction residential buildings. Specifically, the legislature has introduced amendments to ensure that such homebuyers are considered financial creditors and may also be a part of the CoC. Moreover, while the homebuyers are considered 'creditors in a class' that act together unlike institutional financial creditors, the Adjudicating Authorities may intervene to ensure that treatment of these creditors is such that it adequately balances their interests.

Moreover, while operational creditors and other non-financial creditors are not a part of the CoC, the Adjudicating Authority also routinely intervenes to ensure that payments to these creditors are such that adequately protects their interests as well. Although the decision of the CoC is final in such cases, the Adjudicating Authority is empowered to return the resolution plan to CoC for reconsideration, if the amounts proposed for operational creditors are too low.

The role of the State in insolvency proceedings has increased in recent times. In 2021, the Government of India formed the National Asset Reconstruction Co. Ltd. (" NARCL"), which is a state-backed asset reconstruction company that works towards resolution of large stressed assets. Security receipts issued by NARCL are backed by guarantees issued by the Government of India. NARCL has been an active participant in the insolvency ecosystem in the last year and has submitted resolution plans for certain distressed entities. Furthermore, as a large number of institutional financial creditors that are part of the CoC are state-run banks, in some situations, banks may take decisions keeping in mind social objectives as well.

25. What are the greatest barriers to efficient and effective restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any such barriers?

The greatest barriers to efficient and effective restructuring and insolvencies in India include:

- Time certainty: While proceedings under the Code are statutorily time-bound, significant delays, particularly on account of litigation, often result in the process extending well beyond the statutory timelines and cause value destruction. The Indian Government has been seeking to address delays by improving the capacity of the Adjudicating Authorities, and by making changes in process that discourage unnecessary litigation.
- Improvement in the quality of information: While the CIRP generally envisages a rescue of the company by third parties, investors often face challenges in carrying out diligence due to the poor quality of information available regarding debtors in insolvency. To improve information symmetry, the Government has been taking steps to increase information availability with the information utility in India.
- Approvals/ Outcome certainty: At present, even after a resolution plan is approved by the CoC and the Adjudicating Authority, approvals envisaged in statute or contract may be required for the resolution applicant to smoothly take control of the corporate debtor. However, these are often not forthcoming. This also creates uncertainty for resolution applicants. Given this the Insolvency Law Committee in its Report of February, 2020 recommended that a single window be created to receive approvals of all government and regulatory authorities prior to approval of the resolution plan by the Adjudicating Authority. Moreover, even if all approvals have been received, there are numerous examples of resolution applicants failing to implement the plan approved by the CoC. Ensuring outcome certainty of insolvency processes will go a long way towards ensuring effective restructuring and insolvency resolution in India.
- Stringent staff accountability norms and highly regulated banking functions: Amongst the Indian banks, the commercial decisions taken by officials tend to be called into question very often if there is a loss caused to the bank due to sub-optimal return of capital. The officials of public sector banks and private banks are also covered under the anti-corruption law (the Prevention of Corruption Act, 1988). In addition, a layer of complexity is added by complex regulatory and internal guidelines applicable to the banks and financial institutions. To hedge against staff accountability issues and errors of judgment,

multi-tier committees are established in the banks to take a commercial decision. A combination of all these factors creates an environment wherein the bank officials are risk averse to take bold commercial decisions when needed and in general lack agility to respond to rapid deteriorations in the debtor's financial situation.

Contributors

Misha
Partner- Insolvency & Bankruptcy
misha@amsshardul.com

Mahima Sareen
Principal Associate
mahima.sareen@amsshardul.com

Abhilash Chaudhary
Senior Associate
abhilash.chaudhary@amsshardul.com

Satyajit Bose
Associate
satyajit.bose@amsshardul.com