A&O SHEARMAN

Restructuring across borders
India

CORPORATE RESTRUCTURING AND INSOLVENCY PROCEDURES | JANUARY 2024

Contents

03
Introduction

04
Commencement of Corporate Insolvency Resolution Process

05
Moratorium/ Calm Period

06
Duties of the Insolvency Professional

07
Committee of Creditors: Rights and Duties

08
Resolution

10
Withdrawal of CIRP Proceedings

11
Avoidance Transactions

12
Liquidation

15
Pre-pack

16
Restructuring/Resolution outside the IB Code

17
Enforcement of Security

21
Director's Liability

22
Cross-border recognition

23
Key Contacts

24
Further Information

Introduction

The laws relating to insolvency in India have had a fragmented development over a period of more than a hundred years, these developments being mostly an offshoot of the common law developments in the English courts. Historically, provisions dealing with the insolvency of corporations were scattered across a number of legislations viz. the Companies Act, 1956/2013, the Sick Industrial Companies (Special Provisions) Act, 1985 (now repealed), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("RDDBFI Act") and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act"). The Indian Parliament enacted the landmark Insolvency and Bankruptcy Code, 2016 ("IB Code") on May 28, 2016. The IB Code is a comprehensive rules-based legislation for insolvency resolution of companies and limited liability partnerships (together, "Corporate Debtor/s"), individuals and partnership firms, which consolidates all the existing insolvency related laws. It has brought about a paradigm shift in Indian insolvency laws, moving from a 'Debtor in Possession' regime to a 'Creditor in Control' framework.

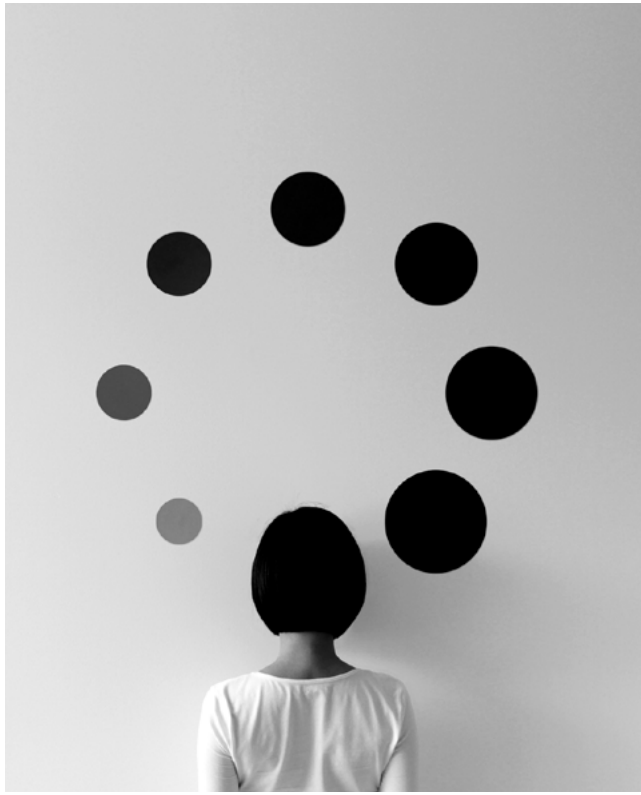
The IB Code includes the introduction of the concept of rescue of the stressed corporation through the use of procedures titled "corporate insolvency resolution process" ("CIRP") supported by four "key pillars" viz.: (i) the National Company Law Tribunal ("NCLT/ Adjudicating Authority"), which is the designated quasi-judicial authority under the IB Code; (ii) the Insolvency and Bankruptcy Board of India ("IBBI"), being the regulatory body with rule-making and supervising powers; (iii) insolvency professionals ("IP"), a new body of professionals registered with the IBBI, who play a central role in the insolvency process under the IB Code; and (iv) information utilities who store all financial information in relation to the Corporate Debtors thereby bringing information symmetry in insolvency.

Commencement of Corporate Insolvency Resolution Process

The IB Code provides for the commencement of the CIRP against a Corporate Debtor either by the Corporate Debtor itself or by its financial or operational creditors, in each scenario, by way of an application filed before the Adjudicating Authority. The pre-requisite for the initiation of the CIRP is the commission of a payment default of at least INR 10 million (USD 110000) ("Default") by the Corporate Debtor. Filing of an application by the Corporate Debtor for commencement of the CIRP requires such filing to be approved by a special resolution passed by its shareholders (in the case of companies) or a resolution passed by at least three-quarters of the total number of partners (in the case of limited liability partnerships) of the Corporate Debtor. An application for the CIRP can be made by a 'class' of financial creditors, i.e. where the financial debt (i) is in the form of securities or deposits; or (ii) is owed to a class with at least ten (10) financial creditors, such as debenture holders or other creditors in a class (such as holders of debt securities or deposit holders) (referred to as "Class of Creditors"). In case of filing of an application by a Class of Creditors, the application for initiation of the CIRP shall be filed jointly by not less than (a) 100 of such creditors in the same Class of Creditors; or (b) 10% of the total number of such creditors in the same Class of Creditors, whichever is less. The Class of Creditors is represented by an authorised representative during the CIRP.

The IB Code distinguishes between creditors based on the nature of debt owed to them. A financial creditor is one who the Corporate Debtor owes a debt which is disbursed against the time value of money. An operational creditor, on the other hand, is one who is owed: (i) a claim in respect of provision of goods or services, including employment; or (ii) a debt in respect of payment of dues arising under any law and payable to the statutory/governmental authorities by the Corporate Debtor. In 2017, the IBBI amended the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations") to recognise 'other creditors', which do not fall within the definition of a financial creditor or an operational creditor. This would include creditors claiming refund of advance payments, third party security holders, etc.

Upon the establishment of Default, and other requisites having been complied with under the IB Code, the Adjudicating Authority by an order admits the application for initiation of the CIRP against the Corporate Debtor. With the commencement of the CIRP, the Adjudicating Authority, inter alia, declares a calm period/ moratorium and appoints an IP as an interim resolution professional ("IRP") (to be proposed by the applicant, which, in cases of applications filed by the financial creditors or the Corporate Debtor, is mandatory) against whom no disciplinary proceedings are pending, for the conduct of the CIRP and management of the affairs of the Corporate Debtor. The IB Code prescribes a maximum period of 330 days for the completion of the CIRP, inclusive of any extension of the period of CIRP granted under the IB Code and time taken in legal proceedings concerning the CIRP.



Moratorium/Calm Period

Under the IB Code, simultaneous with the admission of the CIRP application, a moratorium is declared which prohibits:

(i) the institution or continuation of suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(ii) transferring, encumbering, alienating or disposing of by the Corporate Debtor of any of its assets, any legal right or beneficial interest therein;

(iii) 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 and;

(iv) recovery of any property by an owner or lessor where such property is in the possession of the Corporate Debtor.

The IB Code further provides that licences, permits, registrations, quotas, concessions, clearances or similar grants or rights granted by the central government, state government, local authority, sectoral regulator or any other authority shall not be suspended or terminated on the grounds of insolvency of the Corporate Debtor, provided there is no default in payment of current dues arising for the use or continuation of such rights during the moratorium period.

The objective of such a stay is to facilitate keeping the Corporate Debtor's assets together during the CIRP and to provide for an orderly completion of the CIRP ensuring that the Corporate Debtor continues as a going concern while the creditors take a view on resolution of default.

While the IB Code contemplates prohibition on termination of licences, approvals etc., there is no specific prohibition or restriction on termination of contracts. The Supreme Court has, however, set aside termination of a power purchase agreement by a Government authority (which was terminated solely on the ground of initiation of insolvency proceedings under the IB Code), to further the objective of the IB Code to resolve the corporate debtor on a going concern basis.

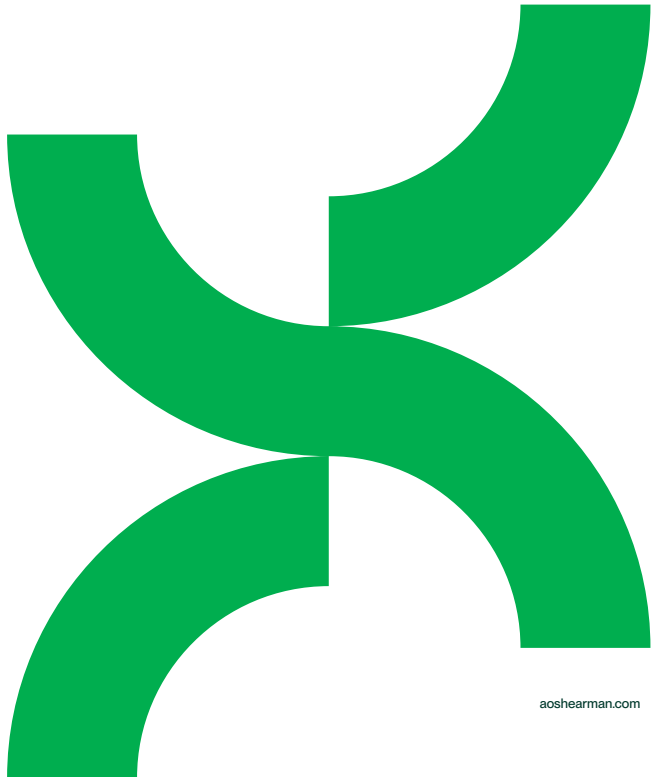
A moratorium is also not applicable in respect of:

(i) transactions as may be notified by the central government in consultation with any financial regulator; or

(ii) in respect of a surety in its capacity as a guarantor to the Corporate Debtor. Further, supplies of essential goods and services such as electricity, water, telecommunication and information technology cannot be terminated during the moratorium period, even if there is non-payment of dues towards these services. The unpaid dues towards the supplies of essential goods and services form part of the costs of the CIRP.

Supply of goods and services, to the extent considered critical by the resolution professional ("RP") for preserving the value of the assets of the Corporate Debtor and managing its operations as a going concern, is also not suspended or interrupted during the moratorium period, except where such services supplied during the moratorium period are not paid for by the Corporate Debtor or in circumstances as may be specified.

The judicial authorities have, however, recognised the calm period to be inapplicable in cases of criminal proceedings, proceedings filed under the writ jurisdictions of the High Courts and the Supreme Court as well as proceedings which are for the benefit of or in favour of the Corporate Debtor, eg a Section 34 proceeding under the Arbitration and Conciliation Act, 1996 for setting aside the arbitral award, in the nature of a pure money decree, passed by the arbitral tribunal in favour of the Corporate Debtor, has been held to be stalling the debtor's effort to recover its money and hence has been held to be outside the embargo of the moratorium under the IB Code.



Duties of the Insolvency Professional

With the commencement of the CIRP, the insolvency professional appointed as the IRP is required to make a public announcement for, inter alia, inviting claims from the creditors of the Corporate Debtor. The Adjudicating Authority can adjudicate any challenge to the admission or exclusion of the claims by the IRP/RP. The IRP has the powers and responsibilities to: (a) conduct the CIRP of the Corporate Debtor which, amongst others, includes (i) receiving, collating and verifying claims as on the insolvency commencement date (being the date the CIRP is commenced by court order) ("ICD"); and (ii) constituting, after verification of the claims received, a committee of creditors ("CoC") comprising (1) financial creditors (excluding related parties of the Corporate Debtor), with voting rights commensurate to the extent of debt owed to them; and (2) operational creditors whose debt value is at least ten percent of the debt owed to the Corporate Debtor, but with no voting rights; and (b) manage the operations of the Corporate Debtor as a going concern, which, among others, includes: (i) taking control and custody of any asset over which the Corporate Debtor has ownership rights across the world; (ii) protecting and preserving the value of the assets of the Corporate Debtor; and (iii) entering into contracts on behalf of the Corporate Debtor.

The RP, once appointed in the first CoC meeting as set out below, has a duty to conduct the entire CIRP of the Corporate Debtor. In addition to performing duties specified for the IRP, the RP also has the powers and responsibilities to: (i) raise interim finance subject to CoC approval; (ii) prepare the information memorandum for formulation of resolution plans; (iii) invite prospective resolution applicants (being a person who individually or jointly with any other person submits a plan for resolution of the Corporate Debtor) to submit their resolution plans by way of issuance of an invitation for an expression of interest ("EoI"); (iv) present all compliant plans before the CoC for voting; and (v) file applications for avoidance transactions, if any.

The personnel including the promoters or any other person associated with the management of the Corporate Debtor are statutorily mandated to extend their assistance and cooperation to the IRP/RP in managing the affairs of the Corporate Debtor.

Committee of Creditors: Rights and Duties

The CoC, once constituted, in its first meeting, inter alia, appoints a RP, which may either be the same person as the IRP or another IP, who then conducts the CIRP of the Corporate Debtor with wider powers and duties vested in him/her in comparison to that of an IRP as specified above. The IB Code vests the CoC with affirmative rights in relation to certain actions concerning the management of the Corporate Debtor to be undertaken by the RP, including key decisions such as raising interim finances in excess of the amount as decided and approved by the CoC in their meeting, creating security interests over the assets of the Corporate Debtor, undertaking any related party transaction, amending constitutional documents of the Corporate Debtor etc., thereby making them the primary and supervisory decision-making authority during the CIRP. Such prior approval of the requisite majority (i.e. approval by 66% vote of the CoC by value) of the financial creditors for specific matters becomes necessary as their rights may be adversely affected by some of these actions or the capital structure, ownership or management of the Corporate Debtor may be significantly altered by some of these actions.

Along the same lines, the Supreme Court has emphasised the role of the CoC as an overseeing body vested with the role of overseeing the administrative functions of the RP, which in turn facilitates the CIRP. The CoC also plays a pre-dominant role in the determination of the fate of the Corporate Debtor, ie whether it would continue to operate as a going concern or whether it should be liquidated, by evaluating the various possibilities and arriving at a business decision of an appropriate disposition of the Corporate Debtor, in line with the objectives of the IB Code. Judicial authorities have held that such decisions of the CoC in relation to the resolution of the Corporate Debtor are not to be interfered with by the courts. This is an enormous power vested in the hands of the members of the CoC as the decision of resolution or liquidation ultimately taken by them affects and binds all the stakeholders concerned with the Corporate Debtor – its creditors, employees, shareholders, guarantors and other stakeholders. The resolution plan as put forth by a resolution applicant for the resolution of a Corporate Debtor can only be approved if it is passed by a 66% vote of the members of the CoC by value.

The regulations applicable to the CIRP have also been recently amended to provide that the IBBI will be able to stipulate a code of conduct for the members of the CoC. The details of such a code are awaited.

Resolution Plan

The scheme of the IB Code (and related regulations) is such that the resolution of a corporate debtor is done through a specified process, in terms of which the RP invites 'resolution plans' from interested, eligible 'resolution applicants'. A 'resolution plan' is defined under the IBC as a 'plan submitted by a resolution applicant for resolution of the corporate debtor as a going concern in accordance with Part II'. The statute does not limit or restrict the kind of resolution plan that may be submitted other than the fact that it must contemplate the resolution of the corporate debtor as a 'going concern'. The intention of the statute is that for a resolution process of the corporate debtor to be approved and successfully implemented, the corporate debtor as an entity must survive post the implementation and to this effect, a resolution plan may contemplate a variety of measures. Having said that, in September 2022, the CIRP Regulations were amended to stipulate that if the RP does not receive a 'resolution plan', he may, with the approval of the CoC, issue a request for resolution plan for sale of one or more of assets of the corporate debtor.

The resolution plan submitted by a resolution applicant for insolvency resolution and maximising of the value of the assets of the Corporate Debtor may, inter alia, include the following measures: (i) transfer of all or part of the assets of the Corporate Debtor to one or more persons; (ii) sale of all or part of the assets of the Corporate Debtor, whether subject to any security interest or not; (iii) restructuring of the Corporate Debtor by way of merger, amalgamation and demerger; (iv) substantial acquisition of shares of the Corporate Debtor, or the merger or consolidation of the Corporate Debtor with one or more persons; and (v) curing or waiving of any breach of the terms of any debt due from the Corporate Debtor etc.

Further, the resolution plan submitted must, inter alia, address the cause of default, its feasibility and viability, have provisions for its effective implementation, approvals required, the timelines for the same and the capability of the resolution applicant to implement the resolution plan. The IB Code stipulates that dissenting financial creditors shall receive, under the resolution plan, at least the liquidation value owed to them, in priority over other financial creditors. Further, operational creditors are entitled to the payment of the higher of: (i) liquidation value that they are entitled to; or (ii) amounts due to be received under the resolution plan, if payment under the resolution plan is as per the waterfall set out in Section 53 of the IB Code.

Resolution Plan (cont.)

With respect to the scheme of distribution of the amounts under the resolution plan, the CoC may, in its sole discretion, decide on differential payment to different classes of creditors and negotiate for better or different terms, which may involve differences in distribution of amounts between different classes of creditor as well as the priority and value of the security interest of a secured creditor.

The IB Code prescribes elaborate criteria for persons who are disqualified from submitting a resolution plan. Such criteria, inter alia, include: (i) a person who is an undischarged insolvent; (ii) a wilful defaulter in accordance with the guidelines issued by the Reserve Bank of India ("RBI"), India's central bank; (iii) a person who has an account or an account of a Corporate Debtor under his management or control, at the time of submission of a resolution plan, which is classified as a non-performing asset per the guidelines issued by the RBI; and (iv) a person disqualified by the securities market regulator from trading in the securities market.

Once a resolution plan which conforms to the requirements as laid down under the IB Code is presented to the CoC by the RP for its consideration, and is in turn approved by financial creditors comprising at least 66% of voting shares of the CoC by value, it is submitted before the Adjudicating Authority. After a judicial examination as to the conformity of the resolution plan with the requirements under the IB Code, the Adjudicating Authority approves the resolution plan. The IB Code, however, does not vest in the Adjudicating Authority the jurisdiction or authority to analyse or evaluate the commercial decision of the CoC, thereby upholding the paramountcy of the 'commercial wisdom' of the financial creditors in the approval of the resolution plan. A resolution plan thus approved by the Adjudicating Authority is binding on the Corporate Debtor, its employees, members, all creditors (dissenting and otherwise), guarantors and other stakeholders involved in the resolution plan.

The Supreme Court has recently held a resolution plan cannot be withdrawn or modified at the behest of the resolution applicant, once approved by the CoC and presented before the Adjudicating Authority.

A challenge relating to the approval of a resolution plan can be referred before the Adjudicating Authority, with a first appeal before the National Company Law Appellate Tribunal ("NCLAT") and, thereafter, the possibility of an appeal to the Supreme Court.

Withdrawal of CIRP Proceedings

The IB Code permits withdrawal of the CIRP by the applicant: (i) through the IRP if the application is made before the constitution of the CoC; and, (ii) through the IRP/RP, as applicable, if the application is made after the constitution of the CoC with the approval of the 90% of the voting shares of the members of the CoC by value.

However, in the event such withdrawal is made pursuant to the issuance of the EoI, then, in addition to the requisite approval from the CoC, the applicant shall also have to submit reasons before the NCLT, justifying the withdrawal of the application at such a belated stage.

Avoidance Transactions

The IB Code provides for an antecedent transaction to be avoided/adjusted on grounds that it is: (i) a 'preferential transaction'; (ii) a 'transaction at undervalue'; (iii) a 'transaction defrauding creditors'; or (iv) an 'extortionate credit transaction'. For a transaction to be preferential, the impugned transaction should involve the transfer of property by the Corporate Debtor or a beneficial interest thereof to a creditor, surety or guarantor in relation to an antecedent debt which transaction puts the counterparty in a more beneficial position than it would have been in in the eventuality of the Corporate Debtor undergoing liquidation and the proceeds being distributed in accordance with the waterfall provided under Section 53 of the IB Code. Transfers: (a) made in the ordinary course of business of the Corporate Debtor; or (b) involving security for new value are exceptions to such a challenge. This provision is intended to deter transactions which disturb the pari passu distribution of assets in the liquidation of a Corporate Debtor. For a transaction to be impugned as undervalued, the Corporate Debtor should either make a gift to a person or enter into a transaction with a person which involves the transfer of one or more assets for a consideration, the value of which is significantly less than the value of the consideration provided by the Corporate Debtor. Further, such transaction should not have taken place in the ordinary course of business of the Corporate Debtor.

This provision strikes at the siphoning away of corporate assets by the management of the Corporate Debtor, which has knowledge of the Corporate Debtor's poor financial condition and may enter into such transactions in the vicinity of insolvency. Undervalued transactions deliberately entered into by the Corporate Debtor with the intent of keeping the assets of the Corporate Debtor beyond the reach of a person entitled to make a claim against the Corporate Debtor or, to adversely affect the interest of such a person qualify as transactions defrauding creditors.

Further, credit transactions entered into by the Corporate Debtor that require it to pay exorbitant payments can also be challenged by the RP or a liquidator. The provision, however, does not apply in respect of debt extended by regulated financial providers in compliance with law.

The IB Code prescribes the relevant time period during which the purported transaction should take place for the same to be avoided during the CIRP. The relevant claw-back period: (i) in respect of preferential and undervalued transactions is two years preceding the ICD in respect of related parties and one year preceding the ICD in respect of unrelated parties; and (ii) is two years preceding the ICD in respect of extortionate transactions. Unlike the other avoidance provisions, there is no set time limit under the IB Code during which the transaction must have been entered into for it to be challenged as a transaction defrauding creditors.

Liquidation

Under the IB Code, liquidation of a Corporate Debtor can be ordered by the Adjudicating Authority upon occurrence of any of the following events: (i) non-receipt of a resolution plan by the Adjudicating Authority before the expiry of the CIRP period or the maximum period of 330 days; (ii) rejection of a resolution plan when presented before the Adjudicating Authority; (iii) upon being informed by the RP of the CoC's decision to liquidate the Corporate Debtor which can be even prior to the end of the CIRP period (the RP may, however, inform the Adjudicating Authority of the CoC's decision to liquidate the Corporate Debtor only prior to confirmation of a resolution plan); or (iv) upon an application being filed by an aggrieved party (other than the Corporate Debtor), whose interests are prejudicially affected by the contravention of an approved resolution plan by the Corporate Debtor.

The IB Code also governs the voluntary liquidation of a company, the pre-requisite to which is that the company should not have committed any payment default.

A voluntary liquidation process can be initiated by the Corporate Debtor itself, upon meeting certain pre-conditions and procedural requirements, including a declaration from the majority of the directors, on affidavit of the following: (a) that they have made full enquiry into the affairs of the company and they are of the opinion that either the Corporate Debtor has no debt or that it will be able to pay its debts in full from the proceeds of assets sold in the liquidation process; and (b) the Corporate Debtor is not being liquidated to defraud any person. Further, approval of (a) shareholders by way of a special resolution in a general meeting requiring the Corporate Debtor to be liquidated voluntarily (either as a result of expiry of the period for which the Corporate Debtor was incorporated or otherwise) and appointing an insolvency professional to act as the liquidator; and (b) creditors (in case the Corporate Debtor owes any debt to any person) representing two-thirds in value of the debt of the corporate person, shall also be required to be obtained. Subject to creditors' approval, the voluntary liquidation proceedings in respect of a company shall be deemed to have commenced from the date of passing of the special resolution.

In case of liquidation, other than the voluntary liquidation, the RP is required to make an application before the Adjudicating Authority on the basis of the grounds specified above. If the Adjudicating Authority comes to a conclusion that the Corporate Debtor must be liquidated on the basis of any of the afore-mentioned grounds, it shall pass a liquidation order, in which case the RP appointed for the CIRP (or another IP) may act as a liquidator, unless replaced by the Adjudicating Authority. Upon passing of the liquidation order, no suit or other legal proceeding can be instituted by or against the Corporate Debtor (other than by the liquidator on behalf of the Corporate Debtor, upon approval from the Adjudicating Authority). The liquidation order is deemed to be a notice of discharge to the officers, employees and workmen of the Corporate Debtor, except when the business of the Corporate Debtor is continued during the liquidation process by the liquidator and all the powers of the board of directors and key managerial personnel of the Corporate Debtor cease to have effect and are vested in the liquidator.

Liquidation (cont.)

The liquidator has the powers (subject to directions of the Adjudicating Authority), inter alia, to verify claims of all the creditors, take into his/her custody or control all the assets, property, effects and actionable claims of the Corporate Debtor; preserve the assets and properties of the Corporate Debtor; carry on the business of the Corporate Debtor for its beneficial liquidation; sell the immovable and movable property and actionable claims of the Corporate Debtor in liquidation by public auction or private contract, with power to sell the same on a stand-alone basis or collectively or on a slump-sale basis or in parcels; and to invite and settle claims of creditors and claimants and distribute proceeds in accordance with the provisions of the IB Code. The liquidator forms a liquidation estate which it manages and holds in a fiduciary capacity for the benefit of all creditors, excluding, among others, assets in the possession of the Corporate Debtor but owned by a third party including bailment contracts; assets of an Indian and foreign subsidiary of the Corporate Debtor; and assets subject to set-off on account of mutual dealings between the Corporate Debtor and any creditors. The liquidation estate of the Corporate Debtor would also include the secured assets in respect of which security interest has been created in favour of creditors of the Corporate Debtor, if such assets are relinquished by the secured creditors to form part of the liquidation estate. The liquidator may, after verification of claims of creditors, either admit or reject the claims, either in whole or in part.

The liquidator is also responsible for the filing of applications for avoidance of transactions. Section 53 of IB Code lays down the order of priority and hierarchy of claims for the purpose of distribution of assets of the Corporate Debtor in liquidation. The payment waterfall, in case of liquidation, is set out as follows:

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

(b) the following debts rank equally between and among the following:

(i) workmen's dues for the period of 24 months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in Section 52 of IB Code;

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

(d) financial debts owed to unsecured creditors;

(e) the following dues rank equally between and among the following:

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the consolidated fund of a state, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date; and

(ii) 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 the partners, as the case may be.

Furthermore, any contractual arrangement which changes or disrupts the order of priority, for those with equal ranking, is required to be disregarded by the liquidator. Additionally, during liquidation, secured creditors have the option of standing outside the distribution waterfall process and enforcing their security interests individually, unless such secured creditors fail to inform the liquidator of their decision within 30 days from the liquidation commencement date, in which case the assets covered under the security interest will be part of the liquidation estate.

The IB Code prioritises 'rescue' or 'resolution' over liquidation of a Corporate Debtor, which has been time and again been ruled to be a measure of last resort. The Supreme Court of India has time and again observed that if resolution is possible, every effort must be made to try and see that it is made possible.

Liquidation (cont.)

The CIRP Regulation provides that a sale of the Corporate Debtor or its business on a 'going concern' basis can also be recommended by the CoC when approving a resolution plan or deciding to liquidate the Corporate Debtor. If such a recommendation has been made or if the liquidator is of the view that such sale shall maximise the value of the Corporate Debtor, he/she is mandated to endeavour to first sell the assets in this manner. The IBBI (Liquidation Process) Regulations, 2016 ("Liquidation Process Regulations") provide that the liquidator may sell: (i) assets of the Corporate Debtor on a standalone basis; (ii) the assets of the Corporate Debtor on a slump-sale basis; (iii) a set of assets collectively; (iv) the assets in parcels; (v) the Corporate Debtor as a going concern; or (vi) the business(es) of the Corporate Debtor as a going concern. If the liquidator is unable to sell the Corporate Debtor or its business within 90 days from the liquidation commencement date, he shall proceed to sell the assets under the other modes prescribed by the Liquidation Process Regulations. The Liquidation Process Regulations also allow a compromise or an arrangement to be proposed in respect of a Corporate Debtor undergoing liquidation.

This process is required to be completed within 90 days of the commencement of liquidation. The timeframe for completion of the liquidation process has also been reduced from two years to one year (excluding the ninety-day period in case of sale on a going concern basis, as stated above). Additional time may be granted by the Adjudicating Authority on the basis of a specific application by the liquidator, which amongst others, is required to specify the reasons for noncompletion of the liquidation within the specified period of one year.

The Liquidation Process Regulations also contemplate that the liquidator shall constitute a stakeholders' consultation committee to advise them (although this is not binding) in respect of appointment of professionals and sale of assets/ Corporate Debtor (as detailed above). The Liquidation Process Regulations also provide for the composition of, and representation in, the stakeholders' consultation committee, for instance, one representative of the workmen and employees and two or four representatives of the secured financial creditors depending on whether the admitted claims of such creditors are less than or more than 50% of the liquidation value, etc.

Pre-pack

In April 2021, the IB Code was amended to introduce a pre-packaged insolvency resolution process framework ("Pre-Pack") for micro, small and medium enterprises ("MSME"). MSME are classified based on investment and annual turnover. The Pre-Pack process is a debtor-in-possession regime as opposed to the primary creditor-in-control model for the CIRP.

The MSME in default of a minimum amount of INR 1 million (approx. USD 13,500) can initiate the process by filing an application before the Adjudicating Authority. MSMEs already subject to rescue or liquidation processes or ineligible under the IB Code to submit a resolution plan are not eligible to initiate the process. Further, the filing of the application has to be preceded by shareholders' approval by way of a special resolution as well as by approval of financial creditors (excluding related parties of the Corporate Debtor) of 66% majority by value, for initiation of the process and selection of an insolvency professional, who will be appointed as the RP. While seeking the approval of the financial creditors, the MSME is required to provide such creditors with a declaration of the filing being bona fide, the shareholders' resolution and a base resolution plan for the MSME which conforms to the requirements of the IB Code ("Base Resolution Plan").

The NCLT is required to admit or reject an application within 14 days. Upon the admission of the Pre-Pack application, the NCLT will order a moratorium from the date of admission, similar to a moratorium during the CIRP. The NCLT will also appoint the RP who will monitor the management of the affairs of the MSME during the Pre-Pack resolution process. However, unlike in a CIRP, the RP's role in the Pre-Pack is very limited and the management of the MSME continues to vest with its directors. Having said that, if the affairs of the MSME are conducted in a fraudulent manner or in the event of gross mismanagement, the CoC can by way of resolution decide to vest the management with the RP, which has to be further approved by the Adjudicating Authority. The RP is also required to constitute a CoC, which is the key decision-making body in the process, similar to a CIRP.

The MSME is required to submit the Base Resolution Plan to the RP within two days of the date of the admission of the Pre-Pack application. The RP will present the plan to the CoC. The CoC may approve the Base Resolution Plan (by a majority of 66% by value) if it does not impair any claims owed to the operational creditors.

If the Base Resolution Plan is not approved or it impairs claims of the operational creditors, then the RP will invite prospective resolution applicants to submit a resolution plan, in order to compete with the Base Resolution Plan. At this stage, a Swiss-style challenge mechanism is contemplated for maximising the value of the assets of the MSME. In this regard, selected resolution applicants will have an option to improve their respective resolution plans on certain parameters specified by the CoC (for instance, upfront payment, equity component, etc). The parameters, the tick size (being minimum improvement over another resolution plan in terms of score) and the manner of scoring will be disclosed to the resolution applicants in the invitation for resolution plans. The process of improvement will continue until either of the applicants fails to improve their proposal within the timelines specified in the invitation of the resolution plan. The entire process has to be completed within 48 hours. The resolution plan having the highest score (as per the criteria approved by the CoC, which is generally evaluated by the evaluation advisers appointed by the CoC) upon completion of the process of improvement, will be considered by the CoC for final approval.

The selected resolution plan has to be approved by the CoC by a vote of not less than 66% of the voting shares, after considering its feasibility and viability.

The approved resolution plan is then submitted to the NCLT and, once approved, is binding on all the stakeholders of the MSME.

The outer timeline for completion of the Pre-Pack is 120 days from the date of the admission order. However, the RP is required to submit the approved resolution plan within 90 days from the date of admission order, failing which the process will be terminated.

Restructuring/Resolution outside the IB Code

COMPANIES ACT, 2013

The Companies Act, 2013 ("Companies Act"), provides the statutory framework governing the schemes for corporate re-organisation such as compromise, arrangements and amalgamations. Such schemes for restructuring/ reorganisation require the approval of the NCLT. The Companies Act provides for such schemes to be entered into between: (i) a company and its creditors or any class of them; or (ii) between a company and its members or any class of them. As a precondition for making the application before the NCLT for debt restructuring, the scheme is required to be consented to by 75% of the secured creditors by value. Once such a restructuring scheme is filed before the NCLT for its approval, and the necessary meetings are convened (if ordered), it requires the affirmative vote of three quarters of the creditors (or class thereof) and members (or class thereof) in value, as the case may be. Post the receipt of due approval and sanction of the scheme, it becomes binding on the company and its creditors (or class of creditors), its members (or class of members), its contributories (including shareholders liable to contribute towards the assets of a company in the event of winding-up), and the liquidator (if any), thereby providing for a cram-down to the dissenting creditors/members or class thereof, although the NCLT has the powers to provide for the protection of any class of creditors/members in the order sanctioning the scheme, such as providing an exit offer to dissenting shareholders in the order approving the scheme, should it find it necessary.

However, a stay or a moratorium is not available for purposes of the initiation of such reorganisations/restructurings under the Companies Act framework. This exposes such restructurings to the possibility of disruption and the commencement of simultaneous enforcement or insolvency proceedings by creditors.

WINDING-UP PROCEEDINGS

The Companies Act, 2013 ("Companies Act"), provides for the In relation to companies, winding-up proceedings can also be initiated under the provisions of the Indian Companies Act, 2013 for reasons other than payment default, such as: (a) passing of special resolution by the shareholders of the Company to that effect; (b) if the company has acted against the sovereignty and integrity of India, security of the Indian state, friendly relations with foreign states, public order, decency or morality; (c) if the company has conducted affairs in a fraudulent manner; (d) if the company has made default in the filing of financial statements or annual returns with the Registrar for the immediately preceding five consecutive financial years; and (e) on just and equitable grounds in the opinion of the NCLT.

The liquidator takes control of the company to collect, realise and distribute its assets to creditors according to the statutory order of priority. The provisions dealing with the winding-up of a company by the NCLT on account of the company's inability to pay its debts have been omitted by Section 255 of the IB Code. The same is now dealt with in accordance with the provisions of the IB Code, being the initiation of a CIRP by financial and operational creditors.

Restructuring/Resolution outside IB Code (cont.)

CIRCULARS OF THE RESERVE BANK OF INDIA

The RBI has also, from time to time, laid down guidelines and mechanisms with respect to the restructuring and resolution of stressed assets, including the introduction of schemes such as Strategic Debt Restructuring ("SDR"), Corporate Debt Restructuring, Sustainable Structuring of Stressed Assets, Change in Ownership outside an SDR, Scheme and guidelines for Joint Lenders' Forum. However, in view of the enactment of the IB Code, the RBI has decided to substitute the extant framework under these schemes and guidelines with a harmonised and simplified generic framework for resolution of stressed assets.

To effect the same, the RBI, on 7 June 2019, announced a revised framework for resolution of stressed assets applicable to Indian banks and financial institutions ("Stressed Assets Framework") which currently governs the out-of-court resolution of stressed assets. It puts in effect a framework for early identification of incipient stress in loan accounts and mandates classification of such accounts as special mention accounts depending on the period for which the principal or interest amount has been overdue. The lenders are required to report the credit information including the classification of the accounts to the central repository of information on large accounts of all borrowers having an aggregate exposure of INR 50 million (USD 750,000) or more with them. Further, the banks are required to put in place board-approved policies for resolution of stressed assets and have detailed policies on various signs of financial difficulty, providing quantitative as well as qualitative parameters for determining financial difficulty, as expected from a prudent bank.

The Stressed Assets Framework makes it incumbent upon the lenders to initiate the process of implementing a resolution plan upon default being committed in respect of a loan owed to even one lender as the same is considered an indicator of the f inancial stress faced by the borrower. If the borrower is reported to be in default by any of the lenders, the lenders are required to take a prima facie view of the borrower account within 30 days from such default ("Review Period"). During the Review Period, the lenders are given the opportunity to deliberate upon the resolution strategy; the nature of the resolution plan; and the approach for implementation of the same. The resolution plan may involve any action/plan/reorganisation including, but not limited to, regularisation of the account by payment of all overdues by the borrower entity, sale of the exposures to other entities/ investors, change in ownership and restructuring. The lenders may also choose to initiate insolvency proceedings for insolvency or recovery.

Restructuring/Resolution outside IB Code (cont.)

In case the implementation of the resolution plan is the way forward, the lenders are required to enter into an Inter-Creditor Agreement ("ICA") during the Review Period, to provide ground rules for finalisation and implementation of the resolution plan in respect of borrowers with credit facilities from more than one lender. This is with a view to bridging the gap among individual lenders who are not able to align their resources to effectuate the resolution of stressed accounts. Any decision agreed by lenders representing 75% by value of total outstanding credit facilities (fund-based as well as non-fund-based) and 60% of lenders by number, in terms of the ICA, is binding upon all the lenders. Additionally, the ICA may, inter alia, provide for rights and duties of majority lenders, duties and protection of rights of dissenting lenders, treatment of lenders with priority in cash flows/differential security interest, etc. In respect of large accounts (i.e. where the aggregate exposure exceeds INR 15 billion) (USD 225,000,000), the Stressed Assets Framework provides strict timelines for the implementation of such a plan.

The Stressed Assets Framework also empowers the RBI to issue directions to banks for initiation of insolvency proceedings against borrowers for specific defaults, whenever necessary, so that the momentum towards effective resolution remains uncompromised.

Recently, the RBI also issued a circular dated 8 June 2023 ('8 June Circular') setting out the regulatory framework for the specified regulated entities (such as scheduled commercial banks and non-banking finance companies) in relation to (a) compromise settlements involving negotiated arrangement with the borrower for full settlement of the claims in cash; and (b) technical write-offs wherein the non-performing loans are written off for accounting purposes without any waiver of claims. Partial settlement and compromise settlement where the time for payment of agreed settlement amount exceeds 3 months will be considered as restructuring and governed by the Stressed Assets Framework.

In relation to compromise settlements, the 8 June Circular provides indicative guidance on key aspects to be captured in the board-approved policy of the regulated entities (for instance, permissible sacrifice for different categories of exposure, conditions precedent (such as minimum ageing, deterioration in collateral value, etc.), cooling period, etc.) so as to maximise the possible recovery with minimum cost.

PARTICIPATION SPECIAL SITUATION FUNDS

In January 2022, the Securities and Exchange Board of India ("SEBI") introduced a new sub-category of the Category I Alternative Investment Funds ("AIF"), referred to as Special Situations Fund ("SSFs"), by way of amendment to the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012 ('AIF Regulations'). The SSFs (subject to them meeting the minimum corpus and capital requirements) are permitted to (a) invest only in special situations assets; and (b) act as a resolution applicant under the IB Code. The term special situation assets covers a wide gamut of stressed assets, i.e., (a) stressed loans available for acquisition in terms of RBI directions, or as part of a resolution plan approved under the IB Code or in terms of any other policy of the RBI or the Government of India issued in this regard; (b) security receipts issued by an asset reconstruction company registered with the RBI; (c) securities of specified investee companies, subject to certain requirements; (d) any other asset as may be specified by SEBI from time to time.

Unlike other AIFs which are restricted by diversification norms prescribed by SEBI, SSFs are be able to invest up to 100% of their investable funds in a single special situations asset and may set up specific schemes targeting specific special situations assets. Further changes are expected to streamline the process.

Enforcement of Security

In case of CIRP proceedings, the rights and remedies otherwise available to a creditor for enforcement of security created in respect of a debt are subject to a moratorium. However, once the Adjudicating Authority passes an order for liquidation, the moratorium ceases to be in effect, and the secured creditor can then choose to either relinquish its security interest to the liquidation estate or realise its security, upon verification of such security interest by the liquidator. These claims of secured creditors which remain unpaid after enforcement of security can be claimed from the liquidation estate. However, the priority of payment of such unpaid claims will be below financial debt owed to unsecured creditors and at par with taxes and government dues.

OTHER REMEDIES/RECOVERY MEASURES

Secured creditors may also opt for recovery measures and for the enforcement of security under the SARFAESI Act, RDDBFI Act, or the CPC (as defined below). Security may be enforced by exercising self-help remedies in certain cases and with judicial intervention in others.

SARFAESI ACT, 2002

The SARFAESI Act provides for self-help enforcement of security held by Indian banks and financial institutions, large non-banking financial companies, foreign banks' Indian branches licensed to carry on banking operations in India, select multilateral financing institutions and holders of listed debt securities. Enforcement of security under the SARFAESI Act is limited to claims of at least INR 0.1 million (USD 1,500) and where at least 20% or more of the principal amount and interest thereon remains outstanding and does not cover pledge of shares. Any proceeds recovered from the enforcement of security under the SARFAESI Act must be shared pari passu with employee entitlements. Rights provided by the SARFAESI Act include the ability to take possession of, manage and sell the secured asset to realise funds to repay the loan. Such rights may only be exercised after a loan account has been classified as a nonperforming asset by a secured creditor in accordance with the asset classification guidelines issued by the relevant regulator and secured creditors holding 60% of the total outstanding amount secured by such asset have agreed to pursue the remedies available under the SARFAESI Act. The secured creditors are required to give 60 days' notice to the company. Where security is taken over a company's business and that business is severable, the secured creditor may be able to take over the management of that part of the business to which the security relates. If the security is over a "substantial part" of the business, the creditor can exercise the right to transfer by lease, assignment or sale the whole or part of that business for the satisfaction of the outstanding debt. The SARFAESI Act also establishes Asset Reconstruction Companies ('ARCs'), which are debt resolution companies to which non-performing loans may be sold. ARCs may exercise rights to change or take over the management, sell or lease the business, subject to the guidelines issued by the RBI. ARCs are eligible to receive foreign investment and are frequently used by stressed debt funds to invest in the non-performing loan market in India.

Enforcement of Security (cont.)

INDIAN CONTRACT ACT, 1872

The Indian Contract Act, 1872 ("Contract Act") provides for remedies where security over moveable goods has been created by way of pledge. The secured creditor may enforce the pledge without recourse to the court, provided that it has given reasonable notice to the pledgor. This notice period is usually specified in the pledge. Enforcement of pledges of shares that are held in a dematerialised account must be processed through the depositary participant and could take up to six weeks. This time period may run concurrently with the notice period to the pledgor. Experience in relation to enforcement of share pledges in India is generally favourable.

RDDBFI ACT, 1993

Security held by Indian banks and financial institutions and Indian branches of foreign banks may also be enforced with judicial intervention under the RDDBFI Act. For claims exceeding INR 2 million (USD 30,000), secured creditors can initiate proceedings under the RDDBFI Act by filing an application before the Debt Recovery Tribunal ("DRT"). The RDDBFI Act establishes a timeframe within which the DRT must dispose of the application. A creditor may seek remedy under this act only if it is a bank or a notified financial institution (as specified under the act).

For claims amounting to less than INR 2 million (USD 30,000), or in the case of creditors who do not fall under any of the above categories, proceedings must be initiated under the CPC in a civil court.

CODE OF CIVIL PROCEDURE, 1908 (CPC)

Enforcement proceedings initiated in civil courts can be affected as follows: (i) if a Scheme of Arrangement has been sanctioned by the court, the company may apply to the court for a moratorium on creditor legal action; and (2) if a petition for liquidation has been brought before a High Court, all proceedings instituted in civil courts for the enforcement of security against that company will be stayed.

Director's Liability

UNDER THE IB CODE

Pursuant to Section 66(2) of the IB Code ('wrongful trading'), a director may be held personally liable to make contributions to the assets of the Corporate Debtor (on an application made by the RP to the NCLT), if such director knew or ought to have known that 'there was no reasonable prospect' of avoiding the initiation of a CIRP against the Corporate Debtor under the IB Code, and did not exercise the due diligence in minimising the potential loss to the creditors during this period. Section 66(1) of the IB Code ('fraudulent trading'), further, upon an application made by the RP to the Adjudicating Authority, holds such persons who are knowingly party to the carrying on of the business of the Corporate Debtor during its CIRP or liquidation, in a way that demonstrates their intent to defraud the creditors of the company, or for any other fraudulent purpose, responsible for making contributions to the assets of the Corporate Debtor.

The IB Code also imposes sanctions on directors if they are found liable of inter alia: (i) wilful concealment of the company's debt/property; (ii) fraudulent removal of the company's property; (iii) wilful destruction/falsification/ mutilation/alteration of any books or papers relating to the company's affairs; (iv) wilful creation of security interest over or transfer or disposal of the company's property, which property has been obtained on credit and has not been accounted for (except in the ordinary course of business) within 12 months preceding the ICD or after the ICD; (v) non-disclosure to the RP of details of the property of the Corporate Debtor and details of transactions; (vi) accounting for any part of the property of the Corporate Debtor for fictitious losses; (vii) making any false representations; and (viii) contravening the provisions of the moratorium etc.

UNDER THE COMPANIES ACT

The Companies Act, inter alia, holds persons who had participated in the promotion or formation of the company or been a director, manager or liquidator of the company, and, during the winding-up of the company (upon an application filed by the contributories or the liquidator), had (a) misapplied, retained or become liable or accountable for any money or property of the company; or (b) been guilty of any misfeasance or breach of trust in relation to the company, liable for such acts. In case it is proved that the directors carried out any of the abovementioned acts, the NCLT may direct such directors to repay or restore such monies or property along with interest or damages or to contribute such sum to the asset of the company by way of compensation in respect of such acts.

Further, liability also accrues upon directors for various types of other acts including, inter alia, concealment, destruction or fraudulent removal of property, books or papers of the company, the making of any material omission in a statement relating to the affairs of the company, commission of fraudulent actions with the intent to defraud creditors, not keeping proper books of accounts etc.

Cross-border recognition

So far as cross-border insolvency is concerned, two specific provisions – Sections 234 and 235 of the IB Code – were introduced as an enabling mechanism for enforcement of the provisions of the IB Code by providing for bilateral agreements (or even multilateral agreements) to be entered into by the Central Government of India with other countries as a means to tackle issues related to cross-border insolvency. Further, Section 235 provides for a mechanism which can be adopted by the Adjudicating Authority to seek assistance from foreign courts in countries with which a reciprocal arrangement has been entered into, for actions or evidences to be taken in relation to assets of the insolvent company located in the foreign country. The same is achieved by way of an application being filed by the IRP/RP to the Adjudicating Authority with respect to the assets held abroad by the insolvent company. Upon such an application, the Adjudicating Authority may, upon satisfaction as to the requirement for an evidence or action, issue a letter of request to the competent court or authority in the foreign jurisdiction. These provisions are, however, not adequate to effectively deal with cases where the Corporate Debtor has a global footprint. The Ministry of Corporate Affairs in India had 'set up' an Insolvency Law Committee on 16 November 2017 to make recommendations to the Government of India in relation to the adoption of the UNCITRAL Model Law on Cross-Border Insolvency, 1997. The committee submitted its report in October 2018. The committee attempted to provide a comprehensive framework for this purpose, based on the UNCITRAL Model Law on Cross-Border Insolvency.

The Government of India proposes to bring about the changes by amending the IB Code and adding a chapter on cross-border insolvency, a report stated. The amended law is aimed at giving comfort to foreign investors in India and efficient handling of assets situated in India and outside India. These lacunae became particularly evident in the case of Jet Airways ("Jet") when the Dutch Court passed an order of insolvency against Jet, based on a petition of creditors in the Netherlands, and appointed a Trustee. The Mumbai Bench of the NCLT, when directing the admission of petition filed under the IB Code against Jet, did not give recognition to the order of the Dutch Court. However, it was on appeal, in the observance of the extant shortcomings in the IB Code and being cognisant of the need of a sustainable insolvency resolution outcome for Jet, that the NCLAT advised exploration of a framework of cooperation. After extensive negotiations, a Cross-Border Insolvency Protocol ("Protocol"), based on the principles of the UNCITRAL Cross-Border Insolvency Model Law, was agreed upon in 30 September 2019. The Protocol was approved by the NCLAT and the Dutch bankruptcy court and is a significant milestone in this area of law.

Key contacts

If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at A&O Shearman, or email **rab@aoshearman.com**.

This factsheet has been prepared with the assistance of Vandana Shroff and Dhananjay Kumar of: Cyril Amarchand Mangaldas, Peninsula Chambers, Peninsula Corporate Park, GK Marg, Lower Parel, Mumbai, India, 400 013. Any queries under Indian law may be addressed to the key contacts from Cyril Amarchand Mangaldas listed below:

CYRIL AMARCHAND MANGALDAS

Vandana Shroff
Partner

Tel +91 22 24964455
vandana.shroff@cyrilshroff.com

Dhananjay Kumar
Partner

Tel +91 9833818020
dhananjay.kumar@cyrilshroff.com

A&O SHEARMAN

Rishi Hindocha
Partner

Tel +65 6671 6274
rishi.hindocha@aoshearman.com

Ian Chapman
Consultant

Tel +852 2974 7019
ian.chapman@aoshearman.com

Katrina Buckley
Global Co-Head of Restructuring

Tel +44 20 3088 2704
katrina.buckley@aoshearman.com

Fredric Sosnick
Global Co-Head of Restructuring

Tel +1 212 848 8571
FSosnick@aoshearman.com

Lucy Aconley
Counsel

Tel +44 20 3088 4442
lucy.aconley@aoshearman.com

Christopher Poel
Senior Knowledge Lawyer

Tel +44 20 3088 1440
christopher.poel@aoshearman.com

Akshita Pandit
Associate

Tel +44 20 3088 1745
akshita.pandit@aoshearman.com

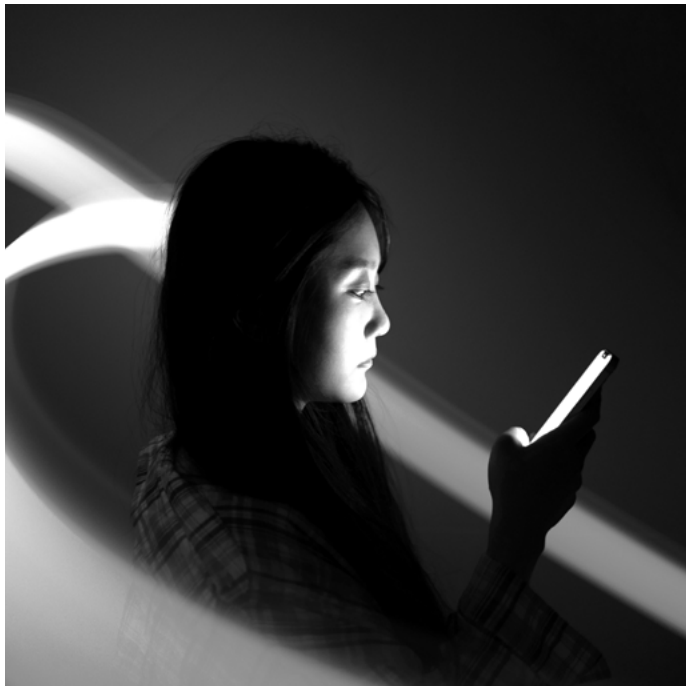
Ellie Aspinall
Associate

Tel +44 20 3088 1124
elena.aspinall@aoshearman.com

Further information

Developed by A&O Shearman's market-leading Restructuring group, "**Restructuring Across Borders**" is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, Asia, the Middle East and the U.S.

To access this resource, please **click here**.



For more information, please contact:

LONDON

Allen Overy Shearman Sterling LLP
One Bishops Square
London
E1 6AD
United Kingdom

Tel +44 20 3088 0000
Fax +44 20 3088 0088

ROW
CS2406_CDD-78120_ADD-1024-022716 India