DEBT COLLECTION, RESTRUCTURING & INSOLVENCY (DCRI)

Insolvency & Bankruptcy Code – Doing Business in India for Foreign Trade Creditors

By Adityar Kumar

The right of foreign creditors to participate in the winding up of Indian companies is well recognised by the Indian Judiciary. As early as 1961, the Supreme Court of India, in *Rajah of Vizianagaram* (AIR 1962 SC 500), clarified that foreign creditors have the same right as Indian creditors in winding up proceedings under Indian law. However, considering the immense litigation already pending in courts, it would take almost four to five years for creditors (both domestic and foreign) to be able to recover anything from the company.

To do away with this, The Insolvency and Bankruptcy Code (IBC) was introduced and has been dubbed to be a game changer in terms of the corporate insolvency resolution process. There are various stages in the entire process: admission of the insolvency petition, the process of forming a resolution plan to revive the company and ultimately the revival of the company. The Insolvency Code comes in an environment where many Indian companies have gone global and have made acquisitions outside India. While the current Government has been taking credit for the improvement of India's ranking in the global 'ease of doing business' lists, there are various issues that plague the Insolvency Proceedings and Matters, such as:

1. The NCLAT has noted that filing of the certificate of ***recognised financial institution*** confirming that there is no payment of operational debt is mandatory. NCLAT has further noted that any certificate given by a foreign bank cannot be relied upon to decide default of debt since it is not a financial institution under IBC. Thus, a foreign operational creditor which does not have a bank account in India would not be able to initiate an action for insolvency. However, this extremely narrow view needs to be tempered with the following caveats:

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(i) All definitions start with 'unless the context otherwise required'. The decisions laid down by the Hon'ble Supreme Court in the winding up regime under the Companies Act note that foreign creditors and Indian creditors stand on an equal footing and thus, there should be equitable treatment between them. The said premise of equal footing may have been watered down due to the technical reading of the IBC and giving impetus to ***form over substance.*** The intent of the certificate is to show that no payments have come and that the petition is bona fide, which can be easily shown by a certificate from a foreign bank or foreign institution with whom the operational creditor has an account.

(ii) The regulations framed under IBC show that debt can also be of a foreign currency. Thus, a foreign operational creditor to whom a debt is due in foreign currency should be able to initiate an action and its petition must not be denied on a technical ground. Also, the regulations provide that an operational creditor can submit its claim to the IRP during the insolvency process where the requirement is to provide 'a bank account'. It does not specify whether the bank account should be of a scheduled bank in India. So, a foreign trade creditor can give its claim to the IRP in the process but cannot initiate an action itself. This is an ambiguity which could not have been the intent of the legislature.

(iii) Another question which may arise is whether a certificate from foreign branches of Indian banks will suffice for a foreign creditor? This is a very critical issue which concerns the foreign trade creditors which must be settled by the Supreme Court or by way a clari-

fication issued by the concerned Department of the Central Government to safeguard the interest of the foreign trade creditors.

2. The foreign joint venture parties or investors are also concerned about the fact that the nature of their claim is difficult to classify under the IBC, and whether their rights against a company in difficulty are actually or potentially compromised not by the distress of their counterparty but by what appears to be odd drafting in the IBC. Given the intention of the IBC to improve the ease of doing business in India and facilitate realisations by all creditors, that cannot have been intended. Therefore, it is suggested that all foreign investors or creditors need to review their contracts with Indian counterparties so that, pending such a refinement of the drafting of the relevant definitions under the IBC, they are as well protected as they can be by the terms and conditions of their contract – by making as clear as possible that their claims would qualify either as financial debt or operational debt and therefore mitigating the risk that they will not be able to enforce and prove effectively under the IBC if their counterparty becomes financially distressed.

3. The IBC does not adequately address the issues that arise when a debtor has assets or creditors in jurisdictions outside India. The IBC does not discriminate between domestic and foreign creditors, and creditors who may be resident outside of India are permitted to commence and participate in proceedings under the IBC. However, the IBC does not provide any mechanisms by which an insolvency resolution professional or liquidator may access a debtor's assets located abroad other than to state that the Central Government may enter into bilateral agreements with other countries to deal with cross border insolvency issues. The new law also fails to address what happens if insolvency proceedings against a debtor are commenced concurrently in more than one jurisdiction. Ways of dealing with these challenges are provided in the UNCITRAL Model Law on Cross-Border Insolvency, which a number of countries have adopted into their domestic legislation.

To conclude, one may say that though the Indian Government has taken a leap in providing a mechanism for insolvency within a stipulated timeframe, there are various legislative changes that are required to make it even more friendly for the foreign creditors. It is necessary that the implementation of the Law be periodically reviewed to iron out any issues that may arise, some of which have been highlighted above.

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