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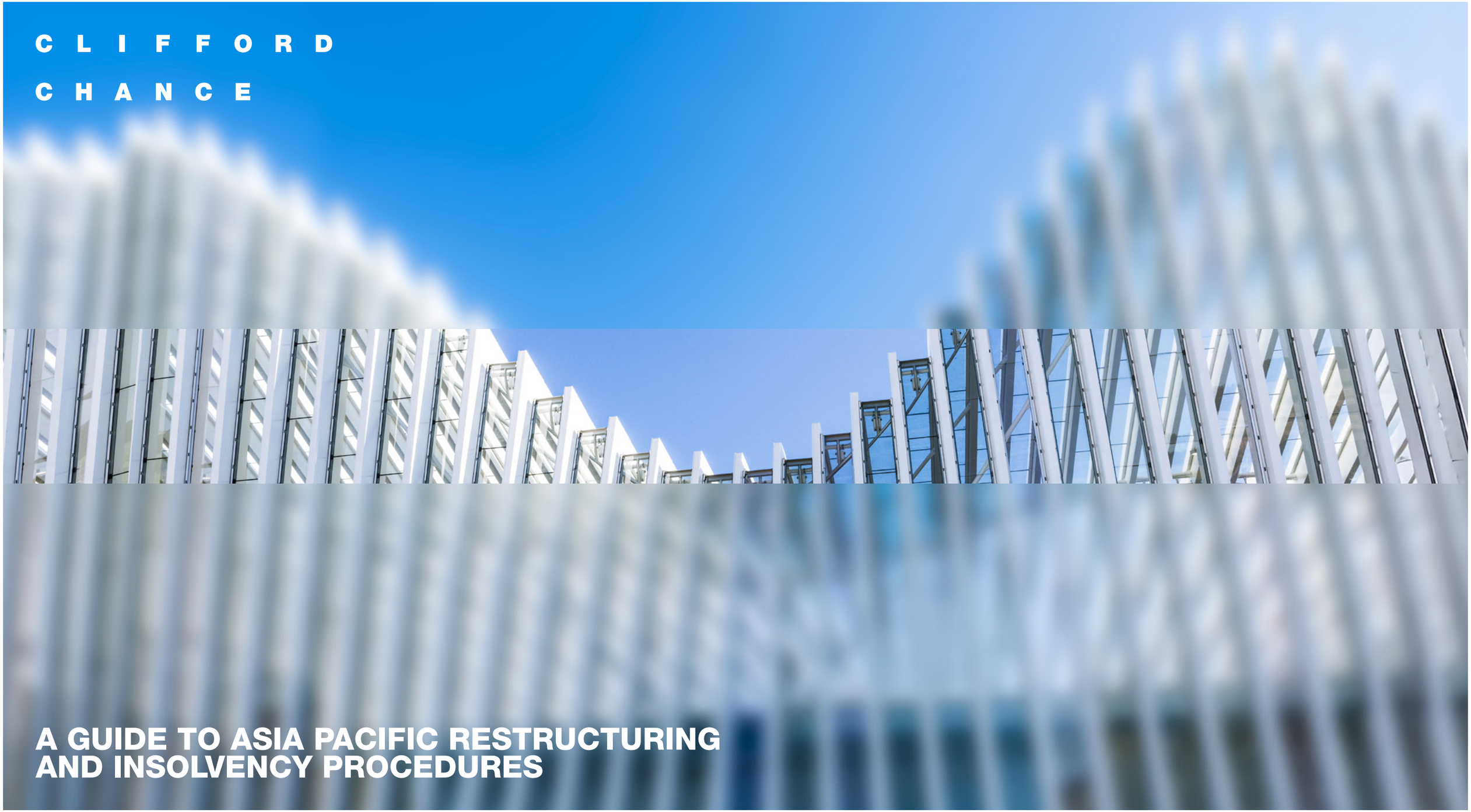

# A GUIDE TO ASIA PACIFIC RESTRUCTURING AND INSOLVENCY PROCEDURES

# INDIA

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## Introduction

This section provides a general outline of the insolvency procedures in India. The Indian insolvency regime has undergone a significant change since 2016. In May 2016, the Parliament of India passed the Insolvency and Bankruptcy Code 2016 ("IBC"). The IBC replaces in most relevant respects the entire gamut of insolvency laws in India and is applicable to corporate persons (i.e. companies and limited liability partnerships) as well as individuals and partnerships. The IBC covers insolvency resolution, liquidation, voluntary liquidation (or solvent liquidation) for corporate persons, pre-packaged insolvency resolution process for micro, small or medium enterprises and insolvency resolution and bankruptcy for individuals who have provided guarantees to corporate persons.

This chapter also briefly discusses schemes of arrangement, the limited statutory self help remedies available to creditors, liability of directors, voidable transactions, guarantees, and the recognition of foreign insolvency proceedings.

Unlike the earlier regime, the IBC is a single comprehensive law that: (a) empowers all creditors (whether secured, unsecured, domestic, international, financial or operational) to trigger a resolution process; (b) enables the resolution process to start an early stage of financial distress; (c) provides for a specified forum i.e. the National Company Law Tribunal ("NCLT") for the corporate persons and Debt Recovery Tribunals ("DRT") and NCLT for individuals, as the case may be, to oversee all insolvency and liquidation/bankruptcy proceedings; (d) enables a moratorium where any proceedings against the debtor are restricted; (e) provides for suspension of the existing management of the corporate debtor during the continuation of the insolvency proceedings while maintaining the enterprise as a going concern; (f) offers a finite time limit within which the corporate debtor's viability can be assessed; (g) lays out a robust liquidation mechanism for corporate persons; (h) provides for a cross-class cramdown; and (i) allows for a clean slate for a company that has undergone the relevant IBC process.

Further, certain provisions of the Companies Act 2013 ("CA 2013") supplement the regime set up under the IBC. The introduction of these provisions of CA 2013 have led to the simultaneous replacement of the provisions of the Companies Act 1956 (the legislation previously governing the primary aspects of corporate law in India).

In addition, the secured creditors have recourse to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act") which deals with the enforcement of security by creditors, including in the case of liquidation of a company.

In this section, we set out the various processes laid down under the IBC. This section will also briefly set out the grounds for winding up a corporate entity under CA 2013.

## Processes Under the IBC

### A. Corporate insolvency resolution process Initiation

Under the IBC, an application may be filed by a financial creditor, an operational creditor or a corporate applicant to initiate a corporate insolvency resolution process ("CIRP") against a corporate debtor on a payment default of more than INR10,000,000.

Unlike most jurisdictions, the IBC makes a distinction between financial creditors and operational creditors. Financial creditors is a reasonably wide definition but typically includes banks, financial institutions and bond holders. Operational creditors are creditors who are owed a debt in lieu of provision of goods and services and also includes government dues including taxes. Operational creditors typically include trade suppliers, employees and persons owed statutory dues.

Further, a corporate applicant may also initiate CIRP against itself. The corporate applicant includes: the corporate debtor; a shareholder authorised under the debtor's constitutional documents; an individual who is in charge of managing the operations and resources of the corporate debtor; or a person who has the control and supervision over the financial affairs of the corporate debtor.

A financial creditor may file an application if a payment default by the corporate debtor has been made against that creditor or to another financial creditor (i.e. a cross default).

**Key Elements:**

- The Insolvency and Bankruptcy Code 2016 consolidates and amends the laws on reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time-bound manner to maximise the value of assets of such persons, to promote entrepreneurship, the availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of government dues.
- Enabling provisions have been put in place related to extra-territorial jurisdiction over the assets or property of a corporate debtor situated outside India.

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An operational creditor may only file an application if the payment default has been made against itself.

A financial creditor need not provide a notice to the corporate debtor prior to filing an application to initiate a CIRP. An operational creditor is required to serve a demand notice at least 10 days prior to filing an application to initiate CIRP. However, financial creditors should serve a demand notice on the corporate debtor prior to filing an application as good practice.

Information Utilities ("IU(s)") play a crucial role in assisting the courts in identifying defaults to initiate the insolvency resolution process. These professional organisations are registered with the Insolvency and Bankruptcy Board of India ("IBBI") (the regulator established under the IBC) and are responsible for collecting, validating, and storing financial information about debtors. By providing authenticated data on debts and defaults, IUs help reduce information asymmetry and disputes amongst stakeholders, thereby facilitating quicker and more efficient insolvency proceedings. This system ensure that all parties involved have access to reliable information, which is essential for making informed decisions during the resolution process.

The application to initiate CIRP must be filed at the relevant bench of the NCLT where the registered office of the corporate debtor is located. The NCLT is the adjudicating authority with jurisdiction on matters under the IBC that relate to corporate persons. The applicant must also propose an insolvency professional who shall act as the interim resolution professional ("IRP") during the CIRP.

On hearing the insolvency application filed, the NCLT makes a determination, within 14 days or such longer time as may be dictated by the courts, as to whether a payment default has taken place. These timelines through judicial pronouncements have been deemed to be merely advisory. If a payment default has taken place, the NCLT must admit the application and initiate CIRP against the corporate debtor.

On admission of the application, the NCLT: (i) imposes a moratorium for the duration of the CIRP, i.e. 180 days (extendable by a maximum of 90 days), which can be further extended at the discretion of the NCLT up to a period of 330 days and in some circumstances beyond that ("CIRP Period") during which no suits may be filed against the corporate debtor and all actions to enforce or foreclose security are stayed (including any action under the SARFAESI Act); and (ii) appoints the proposed IRP for the running of the CIRP of the corporate debtor. If the CIRP is not completed within the prescribed time limit or no resolution plan is approved, the corporate debtor is put into liquidation.

During a moratorium, supply of essential goods or services to the corporate debtor shall not be terminated, suspended or interrupted.

**Management**

The IBC establishes a cadre of regulated insolvency professionals ("IPs"). An IP, who is registered with the IBBI, can be appointed by the NCLT during the CIRP. Such IP is empowered to effectively run and manage the entity, including its assets, as a going concern during the CIRP Period, thereby addressing concerns of asset-stripping or siphoning during the CIRP Period. Under IBC, the IBBI is responsible for registering IPs, prescribing qualifications and monitoring their performance.

The NCLT, while admitting the application to initiate CIRP, appoints an IP as the IRP of the corporate debtor. The IRP, on appointment, displaces the board of directors of the corporate debtor and takes over its management. The term of the IRP is until the date of appointment of the resolution professional ("RP").

Until the RP is appointed, the IRP must make a public announcement inviting claims from the creditors (within three days of their appointment), verify and collate all the claims submitted by the creditors and constitute the committee of creditors ("CoC").

**Proof of claim**

All creditors must submit their proofs of claim to the IRP within 14 days from the date of the IRP's appointment in the relevant forms prescribed under the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2017 ("CIRP Regulations").

A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit their claim with proof to the IRP or the RP, as the case may be, up to the date of issue of request for resolution plans or 90 days from the insolvency commencement date, whichever is later. In case there is a delay of more than 90 days from the insolvency commencement, the creditor shall provide reasons for such delay in submitting the claim. In the event claims are not submitted within time, all decisions taken prior to admission of such claim will be binding on such creditor. The IRP shall verify all claims within seven days from last date of receipt of claims. On collection and verification of claims, the IRP collates all the admitted claims and keeps a record of all the creditors of the company. On this basis, the IRP forms the CoC.

**Decision making**

With the new regime set up under the IBC, India has moved from a 'debtor-in-control' model to a 'creditor-in-control' model. The CoC is a committee formed by the IRP on collation of claims and is vested with the responsibility of deciding the future of the corporate debtor – resolution or liquidation.

The CoC consists of only the financial creditors, who are not related parties of the corporate debtor. In the event a corporate debtor has no financial creditors (or all financial creditors are related parties), the CoC will comprise a total of 20 operational creditors (i.e. 18 largest operational creditors by value of debt owed, one representative of workmen and one representative of employees).

The CoC drives all major decisions relating to the company during the CIRP Period. At its first meeting, the CoC must confirm whether they want the IRP to continue as the RP or replace the IRP. The CoC must endeavour to restructure the capital and operations of the corporate debtor as a going concern by approving a resolution plan. In the event the CoC is unable to approve a resolution plan or there are no resolution plans received before the expiry of the CIRP Period, the NCLT is required to pass an order of liquidation against the corporate debtor. The CoC may also resolve to liquidate the corporate debtor at any time during the CIRP Period.

Decisions of the CoC are determined by a vote of 66% of its members (by value of debt owed). The mandatory conditions for a resolution plan are detailed below.

**Resolution plan**

As discussed above, a resolution plan must be approved by the CoC, and thereafter, the NCLT. Once approved by the NCLT, a resolution plan is binding on all stakeholders including all creditors, the corporate debtor and employees. Violation of the resolution plan is a ground for liquidating the company. To ensure the resolution plan is just and equitable, the IBC prescribes certain mandatory

conditions that a resolution plan must adhere to. If any plan adheres to these conditions, then the NCLT must approve such plan and may not otherwise challenge the commercial agreement in which the resolution plan is based.
The mandatory conditions are as follows:

(a) The resolution plan must provide for payment of 'insolvency resolution process costs' ("IRPC") to be paid in priority to all other payments. IRPC includes all costs of the CIRP such as fees of the IRP and RP, any interim finance raised during CIRP and other costs for running the corporate debtor as a going concern.

(b) All operational creditors must be paid a value no less than their recoveries in the event of a liquidation; 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 statutory order of priority, whichever is higher, and shall be paid in priority over the financial creditors.

(c) Any dissenting financial creditors (who vote against the resolution plan) must also be paid their liquidation value[1] and such payment must be made prior to any recoveries being made by the assenting financial creditors.

(d) The resolution plan must not contravene any provision of law.

If the mandatory requirements are satisfied, a resolution plan may cramdown dissenting financial creditors and other stakeholders.

The IBC provides the flexibility to the resolution applicant to obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the NCLT or within such period as provided for in such law, whichever is later.

Further, the IBC has laid down certain disqualifications for persons proposing a resolution plan or buying assets in liquidation, such as undischarged insolvents or individuals convicted of certain criminal offences.

The IBC also allows for the withdrawal of an insolvency application admitted against a corporate debtor. The withdrawal can be permitted by the NCLT if the applicant secures the approval of at least 90% of the voting share of the CoC. This mechanism provides a way for the parties to settle the matter amicably even after the initiation of the insolvency process. This provision was introduced to address concerns that the IBC could lead to the liquidation of viable companies that might otherwise be resolved through mutual agreement.

## B. Liquidation

An order of liquidation may be passed against the corporate debtor in the following circumstances: (a) if the CoC resolves to liquidate the corporate debtor during the CIRP Period; (b) if the CoC does not approve the resolution plan and the CIRP Period expires; or (c) if the resolution plan that has been approved is violated.

The NCLT shall, on satisfaction of any of the above conditions, order the initiation of liquidation proceedings against the corporate debtor, such date being the liquidation commencement date ("LCD").

A moratorium becomes applicable on the LCD where no suits or other legal proceeding may be instituted by or against the corporate debtor (except by the corporate debtor with approval of the NCLT). However, unlike in CIRP, the moratorium in liquidation does not extend to enforcement of security by secured creditors. Further, the order for liquidation is deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor (except when the business is continued by the liquidator).

The liquidator shall liquidate the corporate debtor within a period of one year from the LCD, failing which the liquidator shall make an application to the NCLT to continue such liquidation, along with a report explaining why the liquidation has not been completed and specifying the additional time that shall be required for liquidation.

A company in liquidation may be sold as a going concern. Unlike partial sale, where only specific assets are transferred, this preserves the value of the corporate debtor during the liquidation process. This approach aims to maintain continuity and maximise value for stakeholders.

### Priority of distributions

The priority of payments in liquidation is as follows:

(a) IRPC and costs of liquidation (including fees of the IRP, RP, liquidator and interim finance);

(b) amounts due to secured creditors (if security relinquished with the liquidator and not enforced separately) and workmen dues (workmen dues will be capped at two years);

(c) employees' dues (capped at one year);

(d) amounts due to unsecured financial creditors;

(e) amounts due to central and state government (capped at two years) and any shortfall due to secured creditors (if security was enforced separately outside liquidation process);

(f) any remaining debt (this is where operational debt would be paid out);

(g) preference shareholders; and

(h) equity shareholders or partners.

### Liquidator

The RP appointed for the CIRP of the corporate debtor shall continue as the liquidator, unless replaced by the NCLT. The liquidator is vested with all the powers of the board of directors, key managerial personnel and the partners of the corporate debtor. The fee payable to the liquidator shall form part of the liquidation cost and shall be decided by the CoC before a liquidation order is passed. Where no fee has been fixed, the consultation committee (which shall comprise all creditors of the corporate debtor) may fix the fee of the liquidator in its first meeting. In the event the fee is not decided, the liquidator shall be entitled to a fee as a percentage of the amount realised net of other liquidation costs and of the amount distributed so as to incentivise the liquidator to liquidate the assets in a fixed time period and maximise realisation.

### Powers and duties of the liquidator

The liquidator is entrusted with the following powers and duties (amongst others):

(a) making public announcements and calling upon stakeholders to submit their proof of claims within five days of their appointment;

(b) verifying claims of all the creditors;

(c) taking into their custody or control all the assets and property of the corporate debtor;

(d) consulting with stakeholders (such consultation shall not be binding on the liquidator);

1. 'Liquidation value' is the estimated realisable value of the assets of the corporate debtor if the corporate debtor were to be liquidated on the ICD.

(e) appointing professionals in order to assist the liquidator in the discharge of their duties and obligations;

(f) approaching the NCLT to direct any personnel of the corporate debtor to cooperate with the liquidator;

(g) applying to the NCLT within 6 months of the LCD to disclaim onerous property including contracts;

(h) appointing at least two registered valuers to value the assets where the liquidator after consultation with the consultation committee is of the opinion that fresh valuation is required; and

(i) applying to the NCLT to avoid any fraudulent preference or undervalued transactions.

**Reporting requirements**

The liquidator is required to form a consultation committee, comprising all creditors of the corporate debtor, within 60 days from the LCD to advise the liquidator on various matters. The liquidator is also required to report to and make various filings to the NCLT from time to time comprising:

(a) a preliminary report within 75 days of the LCD which shall include, amongst other things:

  (i) the capital structure of the corporate debtor;

  (ii) the estimates of the assets and liabilities of the corporate debtor as on the LCD; and

  (iii) the proposed plan of action for carrying out the liquidation, including the timeline and the estimated liquidation costs;

(b) an asset memorandum within 30 days of the LCD where the valuation has been conducted during the CIRP and within 75 days in case fresh valuation is being conducted;

(c) progress reports within 15 days of the end of every quarter;

(d) sale reports (on sale of an asset and enclosed with the progress report);

(e) minutes of consultation with stakeholders; and

(f) final report prior to dissolution.

The liquidator must also maintain certain records in relation to the liquidation of the corporate debtor, including a cash book, ledger and distributions register.

**New money lending**

The IBC recognises the concept of raising interim finance in a company undergoing CIRP. Section 5(15) of the IBC defines "interim finance" to mean any financial debt raised by the IRP or RP during the CIRP. The IBC allows the IRP or RP to raise interim finance for the purpose of protecting and preserving the value of the property of the corporate debtor and managing its operations as a going concern.

Under the IBC, all IRPC get the highest priority of payment in a resolution plan or in liquidation. IRPC includes, amongst other things, any interim finance raised for the corporate debtor, along with the cost of raising such interim finance. Therefore, interim finance has the highest priority when payments are being made under a resolution plan or in liquidation. However, payments of any interim finance *inter se* other IRPC shall be *pari passu* to such other IRPC. Similarly, in liquidation also, the distribution waterfall set out in Section 53 of the IBC provides for highest priority to IRPC (which must be paid out of the liquidation estate). If the resolution of the corporate debtor fails and it goes into liquidation, interest on interim finance receives this higher priority for either 12 months or for the period from the LCD until repayment of interim finance, whichever is lower.

**Secured creditors**

During CIRP, a moratorium is placed on the corporate debtor by an order of the NCLT. The moratorium prevents and suspends all legal proceedings against the corporate debtor and also restricts any recovery action or enforcement of security interest. Therefore, during the CIRP Period, secured creditors are not permitted to enforce their security or take any action towards enforcing security.

However, once the CIRP Period lapses and an order of liquidation is passed against the corporate debtor, a secured creditor in the liquidation proceedings may then:

(a) relinquish its security interest to the liquidation estate and receive proceeds from the sale of assets by the liquidator; or

(b) realise its security interest outside of the liquidation process.

The IBC incentivises secured creditors to relinquish their security interest by placing such secured creditors very high in the distribution waterfall (at level 2 – please refer to section on 'Priority of Distributions'). However, in the event the secured creditor enforces their security outside the liquidation process and is not able to recover its entire debt then such secured creditor is placed at level 4 to the extent of the shortfall.

The IBC liquidation waterfall at level 2 (please refer to section on 'Priority of Distributions') does not distinguish between the secured creditors holding the first-charge and subordinate-charge or an exclusive charge and a *pari passu* charge when it comes to repaying the secured creditors who have relinquished their security. This remains an area of contention.

Secured debt may be owed to certain government creditors based on the charge created by statute.

## C. Pre-packaged insolvency resolution process

An MSME that has committed a default of INR 10,00,000 may, with the approval of 66% of its financial creditors in value terms and subject to certain other prerequisites, file an application for the initiation of a pre-packaged insolvency resolution process ("PPRIRP"). Prior to seeking approval of the financial creditors, the corporate debtor presents the financial creditors with a base resolution plan.

Upon admission of the application, the PPIRP operates for a period of 120 days during which time a limited moratorium prevails which prevents, *inter alia*, enforcement of security interest by creditors. After commencement of the PPIRP, the CoC may either approve the base plan proposed by the corporate debtor if the plan does not impair the claims of the operational creditors or approve a resolution plan invited from other resolution applicants. Importantly, a PPIRP is not a creditor-in-control construct but debtor-in-possession model with the supervision of the IP. This option also has the cross-class cramdown and allows the debtor to achieve a clean slate when it comes to creditors. All of the above combined with the shortened period is expected to incentivise owner-managers to resolve stress early (given that they have historically tended to avoid the CIRP processes).

## D. Voluntary liquidation

The IBC, *inter alia*, envisages two processes for companies:

(a) resolving the 'insolvency' of companies and liquidating insolvent companies; and

(b) liquidation of 'solvent' companies.

A company may be liquidated under (a) above in the event the company has defaulted in its payment obligations to any person (which may include any other individual or other company).

Alternatively, if a company has not made any payment defaults to any person and wants to be wound up, then such company may choose to be liquidated under (b) above. We have set out the latter voluntary liquidation process in brief below:

(a) The board of directors of the company must ensure that the company has not defaulted in its payment obligations to any person.

(b) A majority of the board of directors to make a declaration (along with an affidavit in support):

  (i) that the directors have made a full inquiry into the affairs of the company, and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the liquidation;

  (ii) stating that the company has no debt or will be able to pay its debts in full, from the proceeds of assets to be sold in the liquidation process;

  (iii) stating that the directors are not liquidating the company to defraud any person; and

  (iv) stating that the company has made sufficient provision to meet the obligations arising on account of pending proceedings or assessments before statutory authorities, and pending litigations, in respect of the company.

(c) This declaration is to be accompanied with:

  (i) audited financial statements of the company for the previous two years (or period since incorporation, whichever is later); and

  (ii) report of valuation of the assets of the company, if any prepared by a registered valuer.

(d) The board of directors must call an extraordinary general meeting of its shareholders ("EGM").

(e) Within four weeks (or a shorter period approved by 95% of the shareholders of the company) of the aforementioned meeting of the board of directors, the Company to hold the EGM, where the shareholders may pass the following special resolutions (i.e. by at least 75% of the shareholders) approving:

  (i) the voluntary liquidation of the company;

  (ii) appointment of an insolvency professional that will act as the liquidator for the liquidation of the company; and

  (iii) fixing of the terms of appointment of the liquidator, including remuneration.

(f) Liquidation of a company is deemed to have commenced from the date of passing of the special resolution at the EGM (subject to creditors approval, if applicable) (i.e. the LCD).

(g) In the event the Company owes any debt to any person, creditors (representing two thirds of the value of the debt) to approve the special resolution passed by the members in EGM within seven days of the EGM. In case this approval is required, then the LCD will be such day.

(h) The company to notify the IBBI and the Registrar of Companies of the passing of the above special resolution within seven days of its passing or approval of the creditors, as the case may be.

(i) Within five days from appointment of the liquidator, the liquidator to make a public announcement:

  (i) calling for claims of stakeholders (which will include counterparties to the contracts executed by the company);

  (ii) providing the last date for submission of claims (30 days from the LCD);

  (iii) which must be published in English and in a regional newspaper where the company's registered office and principal office is located; and

  (iv) which must be published on the website of the company and website of the IBBI.

(j) The liquidator must endeavour to complete liquidation of the company within 270 days from the LCD in case there are creditors. In other cases, it shall be completed within 90 days of the LCD.

(k) On completion of the liquidation, the liquidator must prepare a final report and submit it to the NCLT along with an application for the company's dissolution.

(l) The NCLT may pass an order of dissolution and may give appropriate directions to the company to effect the dissolution.

(m) Within 14 days of the NCLT order, a copy of the same is to be forwarded to the Registrar of Companies/the authority the company is registered with.

**Companies Act Grounds**

The CA 2013 lays down certain grounds under which a petition may be presented at the NCLT to wind up a company. These are grounds for a direct winding up/liquidation. A company may be wound up by the NCLT:

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

(b) if the company has acted against the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality;

(c) if on an application made by the Registrar of Companies or any other person authorised by the government, the NCLT is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purposes or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;

(d) if the company has made a default in filing its financial statements or annual returns with the Registrar of Companies for the immediately preceding five consecutive financial years; or

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

The IBC as introduced in 2016 also led to an amendment under the CA 2013 to restrict the grounds for initiating winding up proceedings under the CA 2013 to exclude default.

## E. Self-help remedies available to creditors

The SARFAESI Act sets out a procedure for creditors to enforce security interests when a borrower defaults on certain classes of secured debt. The creditor must classify the account as a non-performing asset ("NPA") prior to initiating actions under the SARFAESI Act. An NPA is a loan or advance for which the principal or interest payment has remained overdue for a period of 90 days. The creditor is required to issue a notice to the borrower, demanding repayment within 60 days of issuance of the demand notice. If the borrower fails to comply within this period, the creditor can take actions such as taking possession of the secured assets, including the right to transfer by way of lease, assignment or sale for realising the

secured asset, taking over the management of the business of the borrower, appointing any person to manage the secured assets and requiring any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor any amount up to the amount of the secured debt. Once the creditor has taken possession of the secured assets, they can proceed with the auction process to recover the outstanding loan amount. Such creditors typically do not need to approach a court before undertaking such a sale process.

## F. Schemes of arrangement

The CA 2013 allows for restructuring via a scheme of compromise and arrangement ("Scheme"). This provision is applicable not only to insolvent companies but to any company seeking to restructure. On an application made by a creditor, member, or liquidator of a company, the NCLT may order a meeting of creditors or shareholders or classes thereof. A notice of such meeting, along with details of the Scheme and other requisite documents, is sent to all creditors, shareholders (and classes thereof), and debenture holders of the company. Notice is also sent to the central government, income tax authorities, and other sectoral regulators and authorities that are likely to be affected by the Scheme to enable them to make adequate representations. The Scheme is required to be approved by a majority in number representing 75% in value of those creditors or shareholders in each class who are present and voting. It is important to note that no moratorium arises as part of a Scheme. Thus, approval of the Scheme by the NCLT is required to bind the dissenting and abstaining creditors.

## G. Director liability

Directors' liability under the IBC may be classified into two broad categories:

(a) **Wrongful trading giving rise to disgorgement based liability**
A director is liable to make contributions to the assets of the company and the NCLT may disgorge such amounts from the director's personal assets if two conditions required to establish wrongful trading are satisfied:

(i) the director knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a CIRP against the company; and

(ii) the director did not exercise due diligence in minimising the potential loss to the creditors of the company. A director is said to have exercised sufficient due diligence if such diligence was reasonably expected of a person carrying out the same functions as the director.

(b) **Other actions by directors giving rise to punitive liability**
Directors may also be liable for offences such as defrauding creditors, asset stripping and falsification of books of accounts of the company. The liability that is imposed under the IBC is punitive.

## H. Voidable transactions

Under section 43 and section 45 of the IBC, the NCLT may reverse any transaction which it deems to be a preferential transaction or an undervalued transaction, in the period leading up to the commencement of the CIRP. The relevant look-back period for scrutinising suspected transactions is two years in case of related party transactions and one year with any other person. Under section 50 of the IBC, the NCLT may reverse any transaction which is deemed to be an extortionate credit transaction, in the two-year period leading up to the commencement of the CIRP. Under Section 49, undervalued transactions entered into with a fraudulent intent do not have a lookback period.

## I. Guarantees

Indian companies may issue financial or performance guarantees in relation to the obligations undertaken by another company (whether or not the other company is related to the guarantor company). There are, however, certain restrictions that apply to the issue of such guarantees.

Under the CA 2013, for instance, a public limited company may not issue a guarantee should its value exceed 60% of its paid-up share capital, free reserves and securities premium account, or 100% of its free reserves and securities premium account (whichever is higher), unless a special resolution has been passed by the shareholders of the company. These limits are not applicable in certain circumstances.

Moreover, since India is an exchange-controlled jurisdiction, cross-border guarantees are subject to compliance with the Foreign Exchange Management Act 1999 and the related rules and regulations. Therefore, Indian subsidiaries will not, generally speaking, be permitted to issue guarantees for obligations of their direct or indirect foreign parent entities without regulatory approval.

The IBC amendments in 2019 brought personal guarantors within its ambit, allowing simultaneous or independent insolvency proceedings against them when the corporate debtor undergoes insolvency. The NCLT has jurisdiction over insolvency proceedings for both corporate debtors and their guarantors, ensuring a comprehensive resolution process. Independent insolvency proceedings against guarantors can be initiated without initiating insolvency proceedings against the principal borrowers.

## J. Recognition of foreign insolvency proceedings

The IBC provides enabling provisions for cross-border insolvency and states that the central government may enter into agreements with foreign governments to enforce provisions of the IBC. Further, the IRP, RP or liquidator have powers to make an application to the NCLT if the corporate debtor has assets which are located abroad (in a country which has reciprocal arrangements with India). The NCLT, on receipt of such application, may issue a letter of request to enforce provisions of IBC (or other request) to a court or other competent authority of such country to deal with such request.

Further, India has been considering the adoption of the UNCITRAL Model Law on Cross-Border Insolvency to equip Indian law with the ability to deal better with issues relating to cross-border insolvency and cater to the deficiency of recognition of foreign insolvency proceedings.

Pending the adoption of the UNCITRAL Model Law, ad hoc protocols between insolvency practitioners across jurisdictions have been used to facilitate a coordinated restructuring process. These protocols, which have received the approval of the adjudicating authorities of the domestic and foreign jurisdiction, are designed to streamline insolvency proceedings and maximise stakeholder value.

## Rehabilitation, moratoria, enforcement and cramdown

| | Australia | Mainland China | Hong Kong SAR | India | Indonesia | Japan | South Korea | Malaysia | Philippines | Singapore | Taiwan | Thailand | Vietnam |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Rehabilitation procedure available** | ✓ Voluntary Administration/ Deed of Company Arrangements.<br>✓ Scheme of arrangement. | ✓ Reorganisation.<br>✓ Compromise. | × No statutory process.<br>✓ Provisional liquidators in some circumstances are granted powers by the court to formulate restructuring plans. | ✓ Corporate insolvency resolution process.<br>✓ Scheme of arrangement. | ✓ Suspension of Payments (PKPU Composition Plan). | ✓ Civil Rehabilitation.<br>✓ Corporate Reorganisation. | ✓ Rehabilitation. | ✓ Scheme of Arrangement.<br>✓ Judicial management. | ✓ Rehabilitation. | ✓ Judicial Management.<br>✓ Scheme of Arrangement. | ✓ Reorganisation.<br>✓ Composition. | ✓ Business Rehabilitation. | ✓ Restoration Procedure. |
| **Automatic moratorium on claims against the company** | ✓ Voluntary Administration (*ipso facto* and general).<br>✓ Receivership (*ipso facto* only; general moratorium available by court order).<br>✓ Scheme of arrangement (*ipso facto* only; general moratorium available by court order).<br>✓ Liquidation. | ✓ Reorganisation.<br>✓ Compromise.<br>✓ Bankruptcy. | ✓ Provisional liquidator appointment.<br>✓ Liquidation. | ✓ Yes, in insolvency resolution proceedings.<br>× Scheme of arrangement.<br>✓ Liquidation. | ✓ Suspension of Payments.<br>✓ Bankruptcy. | ✓ Corporate Reorganisation.<br>✓ Civil Rehabilitation.<br>✓ Bankruptcy.<br>✓ Special Liquidation. | × Rehabilitation (available upon application to the court).<br>✓ Bankruptcy. | × Scheme of arrangement (available upon application to the court) (up to 60 days).<br>✓ Judicial management (up to 60 days).<br>✓ Liquidation. | ✓ Rehabilitation.<br>✓ Liquidation. | ✓ Judicial Management.<br>× Scheme of Arrangement (but automatic 30-day moratorium available upon application).<br>✓ Liquidation. | ✓ Reorganisation.<br>✓ Composition.<br>✓ Bankruptcy. | ✓ Business Rehabilitation.<br>✓ Bankruptcy. | ✓ Restoration Procedure.<br>✓ Bankruptcy. |
| **Possibility of enforcement by secured creditors during moratorium (if applicable) without court approval** | × Voluntary Administration: subject to certain exceptions.<br>✓ Scheme of Arrangement.<br>✓ Receivership.<br>✓ Liquidation. | × Reorganisation.<br>✓ Compromise.<br>✓ Bankruptcy. | ✓ Provisional liquidator appointment.<br>✓ Liquidation. | × Corporate insolvency resolution process.<br>✓ Scheme of arrangement.<br>✓ Liquidation. | × Suspension of Payments.<br>× Bankruptcy (although secured creditors can enforce after the initial 90 days (or less if the court declares) for a period of up to 2 months). | × Corporate Reorganisation<br>✓ Civil Rehabilitation (subject to certain specific restrictions).<br>✓ Bankruptcy (subject to certain specific restrictions).<br>✓ Special Liquidation (subject to certain specific restrictions). | × Rehabilitation.<br>✓ Bankruptcy. | × Scheme of arrangement.<br>× Judicial management.<br>✓ Liquidation (where the security is granted over land pursuant to a registered legal charge). | × Rehabilitation.<br>× Liquidation (free to enforce security after 180 days from date of liquidation order). | × Judicial Management.<br>× Scheme of Arrangement.<br>✓ Liquidation (depending on the security). | × Reorganisation.<br>✓ Composition.<br>✓ Bankruptcy. | × Business Rehabilitation (only permitted after a stay period of 1 year (or up to 2 years if extended by the court) from the date of court's acceptance of rehabilitation petition).<br>✓ Bankruptcy. | × Restoration Procedure.<br>× Liquidation procedure. |

## Rehabilitation, moratoria, enforcement and cramdown (continued)

| | Australia | Mainland China | Hong Kong SAR | India | Indonesia | Japan | South Korea | Malaysia | Philippines | Singapore | Taiwan | Thailand | Vietnam |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Cramdown of creditors for rehabilitation processes (voting thresholds required to bind all creditors)** | Voluntary Administration/Deed of Company Arrangements:<br>– Approval by creditors representing more than 50% in number and 50% in value.<br>– No court approval required.<br>Scheme of Arrangement:<br>– Approval of each class of creditors representing more than 50% in number and 75% in value.<br>– Court approval required. | Reorganisation:<br>– Approval by each class of creditors representing more than 50% in number (present at the relevant creditors' meeting) and 66 2/3% in value.<br>– Court approval required.<br>Compromise:<br>– Approval by creditors representing more than 50% in number (present at the relevant creditors' meeting) and 66 2/3% of the total value of the unsecured claims.<br>– Court approval required. | Scheme of Arrangement:<br>– Approval by each class of creditors representing more than 50% in number and 75% in value.<br>– Court approval required. | Scheme of arrangement:<br>– Approval by each class of creditors or shareholders (present and voting at the relevant meetings) representing more than 50% in number and 75% in value.<br>– NCLT approval required.<br>Corporate insolvency resolution process:<br>– Approval by unrelated financial creditors representing 66% in value.<br>– Court approval required. | Suspension of Debt Payments:<br>– Approval by unsecured creditors representing more than 50% in number and 66 2/3% in value and secured creditors representing more than 50% in number and 66 2/3% in value. | Civil Rehabilitation:<br>– Approval by creditors representing more than 50% in number and 50% in value.<br>Corporate Reorganisation:<br>– Approval by: (a) unsecured creditors with 50% or more of voting rights; and (b) in connection with:<br>– any changes to grace periods for payment of secured claims, at least 66 2/3% of secured creditors with voting rights;<br>– any other changes to the interests of secured creditors, at least 75% of secured creditors with voting rights; or<br>– in connection with cessation of the business, at least 90% of secured creditors with voting rights. | Rehabilitation:<br>– Approval by secured creditors representing more than 75% in value of secured claims, unsecured creditors representing more than 66 2/3% in value of unsecured claims and a majority of the shareholders present at the relevant meeting.<br>– Cross-class cramdown available (with court approval).<br>– Court approval required. | Scheme of Arrangement:<br>– Approval by each class of creditors representing more than 50% in number and 75% in value.<br>– Cross-class cramdown is available if approved by at least one class of creditors and 75% of the total value of creditors.<br>– Court approval required. | Rehabilitation:<br>– Approval by each class of creditors representing 50% of the total value of claims of each voting class.<br>– Cross-class cramdown is available if certain criteria are satisfied.<br>– Court approval required. | Scheme of arrangement:<br>– Approval by each class of creditors (present at the relevant creditor meetings) representing more than 50% in number and 75% in value.<br>– Cross-class cramdown is available if approved by more than 50% in number and 75% in value of creditors (present at the relevant creditor meetings) subject to various conditions.<br>– Court approval required. | Reorganisation:<br>– Approval by each class of creditors and shareholders representing more than 50% of the vote.<br>– Voting is weighted by the value of debt owed to the creditor or number of shares held respectively.<br>– Court approval required.<br>Composition:<br>– Approval of creditors representing more than 50% in number and 66 2/3% in value of the total unsecured debts.<br>– Court approval required. | Business Rehabilitation:<br>– Approval by each class of creditors representing more than 50% in number and 66 2/3% in value, or one class of creditors representing more than 50% in number and at least 66 2/3% in value of that class together with at least 50% in value of all creditors.<br>– Approval by the court.<br>Business Rehabilitation for registered SMEs:<br>– Approval by creditors representing at least 66 2/3% in value of the total debts.<br>– Approval by the court. | Restoration Procedure:<br>– Approval by more than 50% in number and at least 65% in value of the unsecured creditors. |