COVID-19 Pandemic: Relief Measures and Restructuring Options in India

In the wake of the COVID-19 pandemic, several corporate borrowers will find themselves in challenging financial circumstances that may require negotiations with their lenders or even full-fledged restructuring. India offers both in-court and out-of-court restructuring and enforcement mechanisms. This note sets out such mechanisms and available relief measures. Given that the situation is constantly evolving, borrowers and lenders should remain vigilant about tracking legal and regulatory developments.

I. EXECUTIVE SUMMARY

1. Regulatory/ Judicial Relief

The Reserve Bank of India (***RBI***) has recently issued regulatory relief measures in the context of COVID-19, which include permission to lenders to grant a moratorium on payment of instalments falling due between March 1, 2020 and May 31, 2020 (including principal and/or interest components, bullet repayments, equated monthly instalments and credit card dues) and defer interest recovery on working capital loans during such period. Interest, however, will continue to accrue during this period. Such moratorium/deferment period, where granted, will be excluded from calculation of the overdue period for purposes of asset classification and for the determination of the out-of-order status, respectively, under the RBI's prudential norms on income recognition, asset classification and provisioning pertaining to advances (the ***RBI Prudential Norms***).

Indian courts have also granted temporary relief measures on account of the COVID-19 pandemic, e.g., certain State High Courts have granted temporary relief to borrowers in respect of enforcement of security and prevention of declaration of loan accounts as non-performing assets (***NPAs***). Other courts may be persuaded to grant similar relief. *See section II. for further details.*

2. Out-of-Court Restructuring/Enforcement Mechanisms

a. RBI Framework for Resolution of Stressed Assets. In June 2019, the RBI issued the Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions 2019, which provides a framework for early recognition, reporting and time-bound resolution of stressed assets through a resolution plan involving, for example, restructuring of loans, change of management or ownership of the borrower, bifurcation of debt and write-off of unsustainable debt, which process comprises a 30-day review period and a 180-day implementation period. Such timelines have been extended by the RBI on account of COVID-19. This framework can be triggered only by scheduled commercial banks and certain other specified lenders, requires execution of an inter-creditor agreement and is intended to be implemented prior to initiation of proceedings under the Insolvency and Bankruptcy Code, 2016, as amended (the ***Insolvency Code***) (the mechanism does not, however, prohibit any creditor from initiating proceedings under the Insolvency Code). *See section III. for further details.*

b. Securitisation, Asset Reconstruction and Enforcement of Security Interests. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, as amended (the ***SARFAESI Act***) provides a statutory mechanism for: (i) acquisition of financial assets of a bank or financial institution by an asset reconstruction company for the purposes of securitisation or asset reconstruction; and (ii) enforcement of security interest by a secured creditor without the intervention of a court or tribunal pursuant to a security agreement between the secured creditor and the borrower. As a practical matter, the SARFAESI Act will be available either prior to admission by the National Company Law Tribunal (***NCLT***) of any application for insolvency resolution under the Insolvency Code or after commencement of liquidation proceedings. *See section IV. for further details.*

3. Corporate Insolvency Resolution Process (CIRP) (in-court)

The Insolvency Code and the regulations thereunder govern the CIRP in India. In view of COVID-19, the Government had announced its intention to consider suspension of borrowers’ and creditors’ rights to initiate CIRP for six (6) months – according to news reports, such suspension has been approved by the Indian Cabinet and will be announced soon. Other jurisdictions have already effected significant amendments to their insolvency laws in response to COVID-19 – e.g., in England, ‘wrongful trading’ provisions, pursuant to which a director of an insolvent company may be personally liable if he/she knew (or ought to have known) that there was no reasonable prospect of avoiding insolvent liquidation or administration, have been suspended for three (3) months effective from March 1, 2020, and in Germany, companies' obligations to file for insolvency have been suspended until September 30, 2020 and creditors' rights to initiate insolvency proceedings against borrowers have been suspended until May 31, 2020.

Insolvency resolution proceedings may be initiated upon payment default by the borrower of INR 10,000,000[1] (approx. USD 131,500) by the corporate debtor[2] itself (subject to shareholders' approval by a 75% vote) or a financial or operational creditor. Upon commencement of CIRP and until the completion or the deadline for completion of the CIRP or the date of the liquidation order, a moratorium will be applicable, during which period no claims can be enforced against the corporate debtor and the corporate debtor itself cannot dispose of any assets.

During the CIRP, the powers of the board of directors of the corporate debtor stand suspended and such powers are exercised by a resolution professional in consultation with the Committee of Creditors (***CoC***). The resolution professional endeavours to manage the operations as a going concern while seeking resolution plans from eligible bidders for the corporate debtor. Bidders have flexibility to propose the mode of discharge of debt and other matters in the resolution plan (which may include, among other measures, acquisition of shares of the corporate debtor, debt restructuring, merger, de-merger or sale of assets), which is to be approved by the CoC and the NCLT. The resolution process is ordinarily required to be completed within 330 days from admission into insolvency, excluding the period of lockdown imposed by the Central Government on account of COVID-19 (currently, from March 25, 2020 through May 3, 2020). *See section V. for further details.*

As the regulatory and judicial responses to the COVID-19 crisis unfold, borrowers should analyse the impact of the COVID-19 pandemic on their business, earnings, cash flows, financial condition and prospects and review the terms of their existing debt arrangements, in particular, payment obligations and financial covenants, and their ability to comply. If required, borrowers should initiate discussions with lenders at the earliest to secure the moratorium permitted under the RBI relief package and adequate time for modification/ restructuring of loans, and proactively seek appropriate relief,

1 Note that the default trigger for CIRP has been recently increased from INR 100,000 to INR 10,000,000 in response to the COVID-19 pandemic.

2 In this note, the terms "corporate debtor" and "borrower" have been used interchangeably.

including modification or waiver, from covenants prior to actual non-compliance – if relief is not forthcoming, borrowers could consider the impact of non-compliance and explore refinancing. This approach may be preferable to relying on remedies such as frustration or impossibility given the high standard of proof required and that mere economic difficulty may be an insufficient basis. Lenders should assess the stress-levels of loan accounts and be prepared to exercise their information and inspection rights under financing documents to ascertain the true state of affairs of borrowers. *See section VI. for further details*. If these measures fail and grace periods available in view of COVID-19 expire, borrowers and lenders will have recourse to out-of-court and in-court restructuring and enforcement mechanisms as described herein.

II. REGULATORY/JUDICIAL RELIEF

The RBI has recently issued regulatory relief measures in the context of COVID-19 (the ***RBI Package***). Key takeaways from the RBI Package are set out below:

- Term loans. Commercial banks (including regional rural banks, small finance banks and local area banks), co-operative banks, all-India financial institutions and non-banking financial companies (***NBFCs***), including housing finance companies, can grant moratorium of three (3) months on payment of all instalments falling due between March 1, 2020 and May 31, 2020 (including principal and/or interest components, bullet repayments, equated monthly instalments and credit card dues). The repayment schedule/ residual tenor will shift by three (3) months, while interest will continue to accrue during the moratorium period. In respect of accounts which were classified "standard", as of February 29, 2020, the moratorium period, where granted, will be excluded from calculation of the number of days overdue for purposes of asset classification, even if overdue, under the RBI Prudential Norms.

- Working capital loans (cash credit/ overdraft). Lenders can defer recovery of interest during the period from March 1, 2020 through May 31, 2020. In respect of facilities which were classified "standard", as of February 29, 2020, the deferment period, wherever granted, will be excluded for purposes of determining out-of-order status in accordance with the RBI Prudential Norms. The accumulated accrued interest will be recovered immediately after May 31, 2020. Lenders may recalculate drawing power by reducing margins and/or reassessing the working capital cycle.

- These measures will not, by themselves, lead to downgrade in asset classification and will not be reported to credit information companies as "defaults". The Securities and Exchange Board of India (***SEBI***) has stated that if credit rating agencies believe that delay in payments has arisen solely due to the COVID-19 lockdown conditions, they may not consider such delay as a default.

Prior to availing of the measures specified above, borrowers should take into account the impact of the accrued interest and concerns relating to credit ratings.

Apart from the RBI, Indian courts have also granted temporary relief measures on account of the COVID-19 pandemic. For example: (1) the Supreme Court of India has extended the limitation period in all proceedings with effect from March 15, 2020 until any future orders; (2) the Bombay High Court issued a temporary injunction against enforcing pledge of shares by the security trustee due to a steep decline in the price of the relevant shares as a result of the COVID-19 pandemic[3] (it is not clear whether the conditions for grant of temporary injunction under the Code of Civil Procedure, 1908 were met in this case); (3) the Bombay High Court (prior to the RBI issuing relaxations under the RBI Prudential Norms) held that the portion of the three-month moratorium announced by the RBI during which a lockdown is in force will not be counted towards calculation of the 90-day period for declaration of a loan account as an NPA[4]; and (4) the Delhi High Court held that in view of the RBI Package, a loan account in which there was a default in January 2020 could not be classified as an NPA during the moratorium period (i.e., from March 1, 2020 until May 31, 2020)[5]. Other courts may be persuaded to grant similar injunctions and relief during the pandemic.

III. RBI FRAMEWORK FOR RESOLUTION OF STRESSED ASSETS (OUT-OF-COURT)

In June 2019, the RBI issued the Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions 2019 (the ***RBI Framework***), which provides a framework for early recognition, reporting and time-bound resolution of stressed assets outside of the court-driven resolution process under the Insolvency Code, through a resolution plan involving, for example, restructuring of loans, change of management or ownership of the borrower, bifurcation of debt and write-off of unsustainable debt.

1. Trigger

The borrower must be reported as being in default by any of the following entities: (i) scheduled commercial banks; (ii) all-India financial institutions[6]; and (iii) small finance banks. However, the RBI Framework is also applicable to

3 *Rural Fairprice Wholesale Limited* v. *IDBI Trusteeship Services Limited*, Interim Application No.1 of 2020 in Commercial Suit (l) 307 of 2020, Order of the Bombay High Court dated March 30, 2020. See also *UBS AG London Branch* v. *Rural Fairprice Wholesale Limited*, Special Leave Petition (Civil) Diary No.10943/2020, Order of the Supreme Court of India dated April 17, 2020, in which the Supreme Court declined to interfere with the Bombay High Court's order in *Rural Fairprice Wholesale Limited* v. *IDBI Trusteeship Services Limited*.

4 *Transcon Skycity & others* v. *ICICI Bank Ltd and others,* Writ Petition (LD-VC) Nos.28 and 30 of 2020, Order of the Bombay High Court dated April 11, 2020. The Bombay High Court has specifically stated that this order will not serve as a precedent for any other case.

5 *Anant Raj Limited* v. *Yes Bank Limited,* Writ Petition (Civil) Urgent 5/2020, Order of the Delhi High Court dated April 6, 2020. See also *Shakuntla Educational Welfare Society* v. *Punjab and Sind Bank*, Writ Petition (Civil) 2959/2020, Order of the Delhi High Court dated April 13, 2020, in which the Delhi High Court has passed an interim order preventing classification of a loan account as an NPA on the basis that the Uttar Pradesh government has passed orders preventing collection of fees from students in view of COVID-19.

6 National Bank for Agriculture and Rural Development (NABARD); National Housing Bank (NHB); Export-Import Bank of India (EXIM Bank); and Small Industries Development Bank of India (SIDBI).

systemically important non-deposit taking non-banking financial companies and deposit-taking non-banking financial companies, which entities will be bound by any proceedings under this framework.

Foreign lenders, other than scheduled commercial banks and foreign branches of entities specified in the paragraph above, are not covered under the RBI Framework. However, such foreign lenders could elect to execute the relevant inter-creditor agreement, if they have an exposure.

2. Timelines

Upon default, the lenders will have a 30-day review period (***Review Period***) to determine the resolution strategy and a 180-day period after the Review Period for implementation of the resolution plan (***Implementation Period***) – however, the consequence of not complying with the 180-day period (or the extended periods specified below) is that additional provisioning norms will apply. While lenders are expected to initiate the process of implementing a resolution plan even before a default, the Review Period of 30 days under the RBI Framework is triggered only upon declaration of default.

For borrowers with aggregate exposure to the lenders specified in (i), (ii) and (iii) in *section III.1* above (***Aggregate Exposure***) exceeding INR 15 billion, the Review Period is required to commence no later than the date of first default. For borrowers with Aggregate Exposure less than INR 15 billion, the Review Period is required to commence no later than: (i) the “reference date” (to be announced by the RBI) if in default as on the reference date; or (ii) the date of first default after the “reference date”.

On account of COVID-19, the RBI has modified the Review Period and the Implementation Period as follows: in respect of accounts that were within the Review Period as of March 1, 2020, the period from March 1, 2020 through May 31, 2020 will be excluded from the calculation of the 30-day timeline for the Review Period, which will resume from June 1, 2020 (the lenders will have 180 days from June 1, 2020 to implement the resolution plan); and in respect of accounts where the Review Period had expired but the Implementation Period had not yet expired, the 180-day timeline will be extended by 90 days from the date on which the 180-day period was originally set to expire.

3. Resolution Plan

During the Review Period, the lenders may choose to either resolve the stressed loans under the RBI Framework and prepare a resolution plan for such purpose or take legal action for insolvency or recovery.

The resolution plan may provide for the regularisation of the loan accounts, sale of debt to other entities/investors, change in ownership/management of the borrower, restructuring and incurring new debt. For instance, the resolution plan can provide for the bifurcation of existing debt into sustainable and unsustainable portions along with debt write-off.

In respect of any proposed change in ownership of the borrower, the new promoter should not be a person or entity from the existing promoters/ promoter group. Further, a resolution plan which involves restructuring/change in ownership requires an independent rating by at least one (1) credit rating agency where the aggregate exposure is INR 1 billion and above and by at least two (2) credit rating agencies where the aggregate exposure is INR 5 billion and above. The rating must be RP4 (moderate degree of safety regarding timely servicing of financial obligations) or higher.

In case of listed companies, a preferential issue of shares to scheduled commercial banks (excluding Regional Rural Banks) and all-India financial institutions through debt-equity conversion under the RBI Framework will be allowed certain exemptions under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, as amended, and the lenders can also avail of an exemption from the obligation to make a mandatory open offer to public shareholders under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

4. Inter-Creditor Dynamics

If the lenders determine to resolve the stressed loans, they are required to execute an inter-creditor agreement (***ICA***). The inter-creditor agreement shall provide that 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 the lenders by number shall be binding upon all the lenders. The ICA may also provide for, *inter alia*, 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.

While preparing a resolution plan under the RBI Framework, the borrower should review its debt portfolio, and be conscious of its lenders' divergent goals and voting power. For instance, to the extent practicable, the borrower should, in its resolution package in the resolution plan, take into account the interests of lenders with the ability to block decisions under the ICA. Note that dissenting lenders will be entitled to payment not less than liquidation value of the borrower's assets.

There is no publicly-available guidance from sectoral regulators such as the SEBI and the Insurance Regulatory and Development Authority of India regarding the participation of mutual funds and insurance companies as creditors under the RBI Framework.

5. Implementation of the Resolution Plan

Implementation of a resolution plan is required to be completed within the 180-day Implementation Period, subject to the modified timelines specified in *section III.2* above. The RBI Framework specifies the milestones at which a resolution plan is deemed to have been implemented in the event of restructuring/change of ownership, etc.

The borrower's account will be upgraded to "standard" only when the account demonstrates satisfactory performance during the period from the date of implementation of the resolution plan until the date by which at least 10% of the aggregate of the outstanding principal as per the resolution plan and interest capitalisation sanctioned as part of the restructuring, if any, is repaid.

If the resolution plan is not implemented within the Implementation Period, the lenders will be required to make additional provisioning—20% additional provisioning after the expiry of such time period and an additional 15% after 365 days.

6. Interplay with the Insolvency Code

The mechanism under the RBI Framework is intended to be implemented prior to initiation of proceedings under the Insolvency Code. There is no mandatory reference of a borrower to the Insolvency Code under any circumstances except that the RBI has the right to direct initiation of insolvency proceedings in respect of specific borrowers.

The RBI Framework does not prevent any party from filing an insolvency application under the Insolvency Code. One solution could be the introduction of a stand-still provision in the ICA that restricts the parties to the ICA from initiating any recovery or insolvency proceedings against the borrower and third-party security/ guarantee providers during the Review Period and the Implementation Period. However, operational creditors and other financial creditors of the borrower will be able to file insolvency applications/ recovery applications during such stand-still period.

The NCLT has the statutory power to permit withdrawal of an insolvency application with the approval of 90% voting share of the CoC. However, prior to constitution of the CoC, if the borrower resolves the default that triggered the insolvency and no other defaults are subsisting or likely to occur and/or the lenders have approved and wish to implement a resolution plan under the RBI Framework, the NCLT could be persuaded to permit the borrower to withdraw from CIRP.

IV. SECURITISATION, ASSET RECONSTRUCTION AND ENFORCEMENT OF SECURITY INTERESTS (OUT-OF-COURT)

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, as amended (the ***SARFAESI Act***) provides a statutory mechanism for: (a) acquisition of financial assets of a bank or financial institution by an asset reconstruction company (***ARC***), whether by raising funds from qualified buyers (***QBs***) by issue of security receipts or otherwise; and (b) enforcement of security interest by a secured creditor without the intervention of a court or tribunal pursuant to a security agreement between the secured creditor and the borrower.

1. Applicability

Securitisation and reconstruction of financial assets can be carried out only by an ARC registered with the RBI.

The provisions in relation to enforcement of security interest can be invoked by a "secured creditor", which means: (i) any bank or financial institution or any consortium of banks or financial institution; (ii) debenture trustee appointed by a bank or financial institution; (iii) ARC; (iv) debenture trustee appointed by any company for secured debt securities; and (v) any other trustee holding securities on behalf of a bank or financial institution in whose favour security interest is created. Foreign lenders, other than scheduled commercial banks and foreign branches of Indian banks, are not able to enforce their security interest under the SARFAESI Act.

2. Securitisation and Reconstruction

For purposes of securitisation, an ARC may acquire the financial assets of any bank or financial institution by: (i) issuing a debenture or bond or any other security in the nature of debenture, for an agreed consideration; or (ii) entering into an agreement with such bank or financial institution for the transfer of such financial assets to itself on mutually agreed terms and conditions. Following acquisition, the ARC may issue security receipts to QBs or other investors as may be specified by the RBI in consultation with the SEBI.

For purposes of asset reconstruction, an ARC may, subject to RBI guidelines, take measures such as change in management, enforcement of security interest and conversion of debt into equity.

3. Enforcement of Security Interest

A secured creditor may enforce any security interest without the intervention of the court or tribunal in accordance with the SARFAESI Act, other than a lien on any goods, money or security, a pledge of movables under the Indian Contract Act, 1872, any security interest for securing repayment of any financial asset not exceeding INR 100,000 (approx. USD 1,315) and any case in which the amount due is less than 20% of the principal amount and interest.

A secured creditor may seek to enforce its security interest only if: (a) the borrower defaults in repayment of any secured debt and the account is classified by the secured creditor as an NPA[7]; or (b) in the case of debt securities, the borrower fails to repay an amount due after notice of 90 days demanding payment. The security interest must also have been duly registered with the Central Registry of Securitisation Asset Reconstruction and Security Interest.

If the borrower fails to discharge its liabilities (or make an acceptable objection) within 60 days of receipt of notice from the secured creditor, the secured creditor may take certain measures, including taking possession of secured assets, taking over management and requiring any acquirer of the borrower's secured assets from whom any money is due to the borrower, to pay such secured creditor directly. If the borrower's debt has been financed by more than one (1) secured creditor, the secured creditors will be allowed to take these measures only with the agreement of secured creditors representing at least 60% of the amount outstanding.

Secured creditors may approach the relevant Debts Recovery Tribunal (***DRT***) for recovery of the balance amount after sale of the secured assets. Any person (including the borrower) aggrieved by the measures taken by a secured creditor may also file an application with the DRT for relief.

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[7] An NPA is an asset or account of a borrower which has ceased to generate income and has been classified by a bank or financial institution as sub-standard, doubtful or loss assets in accordance with the applicable guidelines or directions of the body regulating such bank or institution or the RBI, as applicable. In respect of term loans, an NPA is a loan or an advance where interest and/or principal remain overdue for a period of more than 90 days.

4. Interplay with the Insolvency Code

In May 2019, the National Company Law Appellate Tribunal held that a secured creditor who had taken physical possession (but not title) of mortgaged property prior to admission of an application for initiation of CIRP was required to hand over custody of such property to the interim resolution professional on the basis that the provisions of the Insolvency Code prevailed over any inconsistent provisions of the SARFAESI Act.[8] Once the NCLT admits an application for initiation of CIRP, a moratorium is imposed on certain proceedings and matters as described in *section V.3.* below, including any action to foreclose, recover or enforce any security interest against the borrower under the SARFAESI Act, which will continue until the completion or the deadline for completion of the CIRP or the date of the liquidation order.

Therefore, as a practical matter, the mechanism under the SARFAESI Act will be available: (i) prior to admission by the NCLT of any application for initiation of the CIRP under the Insolvency Code; and (ii) after failure of the CIRP and entry of the borrower into liquidation proceedings – the Insolvency Code permits secured creditors to enforce their security interest in accordance with applicable law, subject to the provisions of the Insolvency Code.

V. CORPORATE INSOLVENCY RESOLUTION PROCESS (CIRP) IN INDIA (IN-COURT)

The Insolvency Code and the regulations thereunder govern the CIRP in India. During the CIRP, the powers of the board of directors of the corporate debtor stand suspended and such powers are exercised by a resolution professional in consultation with the CoC. The resolution professional endeavours to manage the operations as a going concern while seeking resolution plans from eligible bidders for the corporate debtor. Bidders have flexibility to propose the mode of discharge of debt and other matters in the resolution plan (which may include, among other measures, acquisition of shares of the corporate debtor, debt restructuring, merger, de-merger or sale of assets), which is to be approved by the CoC and the NCLT.

1. Trigger

Payment default by the borrower of INR 10,000,000 (approx. USD 131,500), following which the corporate debtor itself (subject to shareholders' approval by a 75% vote) or a financial or operational creditor may file an application with the

[8] *Encore Asset Reconstruction Company Pvt. Ltd.* v. *Charu Sandeep Desai and Others,* Company Appeal (AT) (Insolvency) No. 719 of 2018, National Company Law Appellate Tribunal, New Delhi.

NCLT (and propose the name of the resolution professional). There is no restriction on the nature of the creditor (i.e., operational, financial, foreign currency) that can initiate insolvency proceedings.

The Central Government has stated that it may consider suspending the statutory provisions that allow initiation of insolvency under the Insolvency Code for a period of six (6) months if the economic distress due to COVID-19 extends beyond April 30, 2020. According to news reports, such suspension has been approved by the Indian Cabinet and will be announced soon.

2. Insolvency Commencement Date

The NCLT is required to consider an application for initiation of the CIRP within 14 days of the date of receipt of the application – in practice, the time period taken for admission is longer and could extend to two (2) to three (3) months or an even longer period. Prior to admission, lenders are able to enter into an inter-creditor agreement and initiate a resolution plan to restructure debt in accordance with the RBI Framework (after admission, the CIRP application will need to be withdrawn from the NCLT in accordance with the Insolvency Code to facilitate any restructuring under the RBI Framework).

3. Moratorium and Public Announcement

The NCLT is required to cause a public announcement of the initiation of the CIRP, which will *inter-alia*, specify details in respect of the last date of submission of claims by creditors and details of the interim resolution professional responsible for receiving such claims. The NCLT is also required to declare a moratorium, which will commence from the date of admission and continue until the completion or the deadline for completion of the CIRP or the date of the liquidation order. During such period, among other things, no claims can be enforced against the corporate debtor and the corporate debtor cannot dispose of any assets. Supply of essential goods or services to the corporate debtor cannot be terminated or suspended.

4. Timeline for Completion

The resolution process is ordinarily required to be completed within 330 days from NCLT's admission of the application, including any extension granted and time taken for legal proceedings in relation to such resolution process. The period of lockdown imposed by the Central Government on account of COVID-19 will not be counted towards such 330-day period.

5. Resolution Professional

A resolution professional is appointed by the NCLT, with CoC's approval (by not less than 66% vote), to manage the corporate debtor as a going concern with certain material matters requiring consent of the CoC (such as raising interim finance exceeding specified thresholds decided by the CoC, change in capital structure, related party transactions and change in management (including resignation of directors)). The powers of the corporate debtor's board of directors are therefore suspended and exercised by the resolution professional in consultation with the CoC.

6. CoC

The CoC will comprise of all financial creditors of the corporate debtor, excluding related parties of the corporate debtor who will not have any right of representation, participation or voting at CoC meetings. In the event a corporate debtor does not have any financial creditors or all financial creditors are related parties of the corporate debtor, the CoC will consist of: (i) 18 largest operational creditors by value (and if less than 18, all such operational creditors); and (ii) one (1) representative each of the workmen and employees of the corporate debtor (not covered in (i) above). Operational creditors whose aggregate dues are 10% or more of the total debt may attend CoC meetings but will not have voting rights. Unless specifically stated in the Insolvency Code, decisions of the CoC are required to be approved by a vote of not less than 51% of the voting share of the financial creditors (voting share assigned based on the quantum of financial debt owed).

7. Submission of Resolution Plans

The resolution professional will invite bidders to submit resolution plans. Promoters of the corporate debtor need to confirm eligibility under the Insolvency Code in order to submit a resolution plan. Resolution plans received are submitted to the CoC for approval (by not less than 66% vote) after considering *inter-alia* their feasibility and viability and the manner of distribution of proceeds. The resolution plan may provide recovery less than the liquidation value of the borrower. Resolution applicants may attend the CoC meeting in which their resolution plan is considered but will not have a right to vote at the meeting, unless the resolution applicant is also a financial creditor. The resolution plan selected by the CoC is submitted to the NCLT for approval.

8. Implementation of Resolution Plan

The NCLT-approved resolution plan is binding on all, including the corporate debtor, creditors and the Government, and payments to creditors are required to be implemented in accordance therewith. The resolution plan must accord priority to payment of insolvency resolution process costs, and payments to operational creditors are required to be not less than the higher of the amount they would have received in the event of liquidation or if the amount set out in the resolution plan had been distributed in accordance with the liquidation waterfall.

The successful resolution applicant is required to obtain any legal or statutory approvals for implementation of the resolution plan within one (1) year from NCLT approval of the resolution plan or within such period as specified in the relevant law, whichever is later. Anti-trust approval, if required, must be obtained prior to the approval of the resolution plan by the CoC.

An acquisition of a listed corporate debtor pursuant to an approved resolution plan is exempt from open offer requirements under Indian takeover regulations.

9. Liquidation

The NCLT may direct a corporate debtor to be liquidated if: (i) no resolution plan is received or the resolution plan is rejected by the NCLT; or (ii) the CoC (by not less than 66% vote) decides to liquidate the corporate debtor prior to approval of a resolution plan; or (iii) the resolution plan approved by the NCLT is contravened by the corporate debtor, and any person prejudicially affected by such contravention makes an application to the NCLT. Upon liquidation, the proceeds from the sale of such assets will be distributed in the following order of priority of payment: (i) CIRP costs and liquidation costs; (ii) workmen's dues (for the preceding 24 months) and debts owed to secured creditors who have relinquished security interest; (iii) wages and any unpaid dues owed to employees (other than workmen) for the preceding 12 months; (iv) financial debts owed to unsecured creditors; (v) any amount due to the Government and debts owed to secured creditors for any amount unpaid following the enforcement of security interest; (vi) any remaining debts and dues; (vii) preference shareholders; and (viii) equity shareholders.

VI. DO'S FOR BORROWERS AND LENDERS

As the regulatory and judicial responses to the COVID-19 crisis unfold, borrowers should review the terms of their existing debt arrangements, in particular, payment obligations and financial covenants, and their ability to comply.

Borrowers could consider the following steps:

- Analyse the impact of the COVID-19 pandemic on their business, earnings, cash flows, financial condition and prospects. Projections and business models presented to lenders may require revision.

- Proactively seek appropriate relief, including modification or waiver, from covenants prior to actual non-compliance. The form and duration of relief will likely depend on the negotiations, borrower's credit history and relationship with the bank. Borrowers should initiate discussions with lenders at the earliest in order to secure the moratorium permitted by the RBI Package and adequate time for modification/ restructuring of the loans; if relief is not available, borrowers should consider the impact of non-compliance and explore refinancing. This approach may be preferable to relying on remedies such as frustration or impossibility given the high standard of proof required and that mere economic difficulty may be insufficient to establish this.

- Identify whether a potential default may cause cross-defaults in other loan facilities.

- Listed companies should assess whether modifications in the terms of debt documents will require disclosure to the stock exchanges under the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, as amended, and their respective materiality policies on disclosure.

- Be prepared to address divergent interests and goals of different creditor groups (e.g., public and private banks, NBFCs, mutual funds, debenture-holders, offshore lenders, related party lenders and operational creditors).

- Borrowers with undrawn commitments should initiate discussions with lenders and be prepared to share plans to mitigate any material adverse change (for which there is no bright-line test) on account of COVID-19. It is not uncommon for financing documents to allow lenders to declare material adverse change at their sole discretion. Representation and warranties are typically brought down at draw-down and borrowers should proactively examine whether any representations and warranties will be untrue at that stage.

- Directors, management and promoters/shareholders of the borrower should take all reasonable steps to minimise losses to the creditors.

Lenders could consider the following steps:

- Assess the stress-levels of loan accounts on the basis of their policies. In particular, lenders should examine whether any RBI-indicated signs of financial difficulty are present — for example, delisting of the borrower's securities, pattern of payment delinquencies.
- Be prepared to exercise information and inspection rights under financing documents to ascertain the true state of affairs of the borrower.
- Prior to granting relaxations, lenders may conduct due diligence on material business contracts (in particular, termination and *force majeure* provisions) and insurance policies of the borrower.
- Exercise caution in obtaining additional security/collateral. If the borrower is admitted into insolvency, the creation of such security interests can be challenged as preferential transfers or undervalued transactions. Security interests created over assets of the borrower's group companies can be scrutinised for preference if such companies are admitted into insolvency.

If these measures fail and grace periods available in view of COVID-19 expire, borrowers and lenders will have recourse to the out-of-court and in-court restructuring and enforcement mechanisms set out above.

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