VIRTUAL INSOLVENCY CONFERENCE

An Initiative by Center for Insolvency and Bankruptcy

RESTRUCTURING DURING TIMES OF COVID

EXPERIENCES FROM SINGAPORE AND INDIA

CONFERENCE PROCEEDINGS

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GRADUATE INSOLVENCY PROGRAMME

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RESTRUCTURING DURING TIMES OF COVID: *EXPERIENCES FROM SINGAPORE & INDIA*

The Welcome address was delivered by Dr. Neeti Shikha, Head, Centre for Insolvency and Bankruptcy, IICA.

The panel consisted of Ashish Chhawchharia –Partner & Head, Grant Thornton India, Bahram N Vakil - Senior Partner & Founder, AZB & Partners and Ashok Kumar – Director, BlackOak LLC, Singapore.

HIGHLIGHTS FROM THE KEYNOTE SESSION

DR. NEETI SHIKHA, HEAD CENTRE FOR Insolvency & BANKRUPTCY, IICA

Dr. Neeti thanked the esteemed panellists for their time and began by highlighting the purpose of this panel discussion. She stated that since the outbreak of Covid, there has been an intense debate on the proper response to the current crisis along with multiple contributions focusing on different aspects of recovery. For instance– the emergency has increased the need for public finance along with making debt sustainable, especially in emerging countries like India.

She observed that in the past, countries have taken various steps to tackle the impact of COVID. Some of the steps include bringing out regulatory forbearance, implementing high barriers to entry into the formal insolvency proceedings and extension of procedural deadlines.

Dr. Shikha noted that in the first series of webinars organized by the Centre for Insolvency and Bankruptcy, IICA, speakers from various jurisdictions were invited to discuss how insolvency regimes in general have responded to the Covid-19 situation. In this series, the intention is to deep dive into various aspects of restructuring activities that have taken place across the globe. She highlighted that the objective of this panel discussion is to deliberate upon the overall impact of Covid-19 on restructuring along with the new restructuring framework introduced in Singapore. The objective is also to look into the existing restructuring options available in India, the options available for financial institutions, assessment of One Time Restructuring option recently allowed by RBI and the ways to incentivise restructuring for NBFCs.

MR. ASHOK KUMAR, DIRECTOR BLACK OAK LLC.

Before sharing the experiences and approaches of Singapore, Mr. Ashok Kumar, starts with a very valid disclaimer, that when we talk in terms of the current global position due to the Covid 19 crisis, what maybe relevant to Singapore may not be the same for India or other jurisdictions.

He further dives into the difference of jurisdiction by briefly explaining the history of Restructuring laws in Singapore, which were mainly drawn from the UK administration and processes but did not prove to be very effective. He explains that there is a difference of opinion when it comes deciding

who is more suitable to be in charge of the company when it goes into restructuring, i.e. the debate between the Debtor-in-possession model (or the Scheme of Arrangement ("**SA**"), as it is referred to in Singapore) or the Judicial management model ("**JM**"). Giving some practical insights, he explains that the experience of Singapore shows that when you put someone else in charge of a company who does not understands its business, the management gets displaced and the value gets destroyed, and this was essentially the fate of most cases of JM which eventually ended up with terminal insolvencies and liquidations.

This led to a shift towards the Debtor-in-possession or the SA model, which also had its own limitations. Therefore, around two years ago, Singapore embarked on a process to become more rescue friendly and introduce a *Turbocharge* which was effectively a SA process and brought it more in sync with the *US Chapter 11* model, while at the same time keeping the JM process in place.

He explains that having both models in place is important because, there are situation where this is a lot frauds, irregularities or case where the restructuring is not suitable to remain in the hands of the people who were reasons behind the company getting in this situation in the first place.

He further describes Singapore's journey of totally revamping the entire legislation around the same time, through which it wanted to put everything in one omnibus similar to the Insolvency Act of 1986 in the UK, so as to bring personal bankruptcy and corporate bankruptcy all into a one bundle legislation. Prior to this, Corporate bankruptcy used to exist in *The Companies Act* while Personal Insolvency was in *The Bankruptcies Act*. This Act i.e. The Insolvency, Restructuring and Dissolution Act ("**IRDA**") came into force on July 30th, 2020.

After explaining this trajectory, he then proceeds to share the experience of Singapore during the Covid 19 crisis. When the crisis broke out in the months of February-March, the government came out with financial support measures *in tandem* with the IRDA. They introduced temporary covid measures, keeping in mind a rescue mindset, and it also extended moratoriums in order to extend the time available to a company to be put into liquidation and the life.

These measures were meant to co-exist with the financial measures that Government had introduced, and the prime objective was to ensure saving jobs in the economy and the temporary covid measures were designed to fit into these financial measures. However, these temporary measures are intended to come to an end by August 31st, 2020, and this when he expects the economy to start seeing the effects of the Covid 19 crisis on Singapore.

Mr. Ashok Kumar discusses the challenges on the economy and explains that, since Singapore is a very externally driven market, unlike India, which has a very domestically driven economy, the ability of Singapore to get out of this situation is more challenging as they are entirely driven on external factors. Due to these reasons, he believes that the Government is expected to extend the temporary measures.

Unlike in the case of India, where Insolvency and Bankruptcy Code was suspended, Singapore has kept its tools in effect has not suspended the filling processes under the IRDA.

By the end of the year, in the last quarter, when Singapore may see a majority of businesses falling on the floor, with a few exceptions like the tech companies and businesses which stayed necessary during

the Covid crisis, Mr Ashok Kumar very interestingly explains that they will fall into three bucket categories, which are as follows:

> **Bucket 1**: Those Companies where the value chain and the business in completely gone and they cannot be saved and will die.
>
> **Bucket 2**: Those Companies which will remain relevant in post-Covid 19 economy and which must be saved.
>
> **Bucket 3**: Those companies that can maybe be saved in the balance sheets, but they may not remain relevant in post-Covid 19 economy.

He stresses on the importance to deliberate on the fate of Bucket 3 companies as he believes there are going to be a lot of such companies, for example, companies that have bricks and mortar real estate investment in retail, as the whole spending pattern in retail is changing already and with the technology disruption it is going to get even worse, so bricks and mortar retail may not be so relevant in the post-covid 19 economy. The biggest challenge right now is to see what needs to be done with such companies – *Should they be save? Should they be re-engineered?* – These are some of the most pertinent questions for any jurisdiction.

In the next round of reforms, the focus is going to be in supporting companies which will help revive the economy post Covid 19 crisis and save jobs.

Mr. Ashok Kumar also goes into the other nuanced features of the Insolvency and Restructuring regime of Singapore. He talks about how Singapore as a jurisdiction is moving towards a rescue culture in past 3-4 years. Debtor led restructuring was the way it decided to go with sufficient safeguards. The moratoriums provision has been enhanced and can extend beyond the shores of Singapore. The idea is not to create a conflict, but orders can be made to bind people within the jurisdiction. To be able to do proper restructuring it is important to recognize worldwide assets especially for group companies.

He explains how Singapore adopted UNCITRAL model law on Cross border insolvency and stressed on the importance of Cross border insolvency laws between jurisdictions.

He further describes how Judicial International Insolvency network of courts (JIIN Protocol) has been adopted for effective communication between courts, so the courts around the world can work together to facilitate global restructuring.

Singapore regime also introduced a new law of *ipso facto* clauses, which have been taken from Chapter 11 of US Bankruptcy Laws. This law prevents people from terminating contracts in the event of insolvency and encourages companies to come out early to seek help.

The other big thing, which Mr. Kumar stresses on as the cornerstone that will help Singapore become a regional centre for restructuring, is the rescue priority financing. If a new money provider is prepared to put money into the company, the company can go to court and ask for priority orders for the new money provider.

Moreover, Third Party Financing for litigation has been legitimized by IRDA and It is a big value contributor in terminal insolvency.

He also explains that It is very difficult to get secured banks to the table for agreeing to restructuring plan. Hence mediation is encouraged but is not compulsory. Order can be passed to get into mediation but not compulsory to settle through mediation.

Lastly, he describes the philosophical divide between India and Singapore. While India is creditor led system and Singapore is a debtor led one.

MR. ASHISH CHHAWCHHARIA –PARTNER & HEAD, GRANT THORNTON INDIA

Drawing a parallel between India and Singapore, Mr. Chhawchharia highlighted that the moratorium imposed by RBI is set to expire by the end of August 2020. Despite the demand from the market for the extension of the moratorium, he felt that a blanket extension is not the right way forward. That is where an alternate mechanism of one-time restructuring has been allowed by the RBI vide the 6th August circular. Although the details of the scheme are still awaited, it appears that the Government has tried to address some issues of stress caused due to Covid. Ashish stated that the Indian Economy was already under stress before the onset of Covid and the 6th August circular does not provide relief.

It would be interesting to see how banks manage their balance sheets and how the corporates start managing their cash flows and obligations in the next 3-4 months. He felt that the Indian Government did not provide adequate incentives compared to some of the other developed countries but he believed that other measures would soon be notified in the near future.

Answering to Ashok's question on whether the creditor led process has worked well for India or not, Ashish stated that it has been a success for India so far and it is likely to remain so until the borrowing culture changes. In regimes where there is distrust between the borrower and the lender, a creditor in possession mechanism is the way forward. He stated that the Indian courts are already over-burdened with cases and the IBC has been successful in limiting their roles to ensuring procedural compliance. He added that sec 29A has played a very important role in the IBC process and the Government has taken a positive step by providing certain relaxations for MSMEs.

In his closing remarks, Ashish mentioned that pre-packs are something that India is looking at and once implemented, it will facilitate swifter resolution of cases.

MR. BAHRAM VAKIL – FOUNDER AND SENIOR PARTNER OF AZB

Mr. Vakil began his address by stating that India has been going through a turbulent time and we all are in the same storm but in different boats and that we should try and work for solutions for those who are most needy. The moratorium imposed by Reserve Bank of India (RBI) was a good measure as it provided an immediate relief. The focus should now be on individuals and MSMEs as they are the ones who suffer the most in such crisis. He states that view moratorium was a good step and in fairness the RBI has done a good job. India is in a bit of predicament as the inflation is over the target of 6% and it will be difficult for RBI to cut rates anymore. India has had a very good monsoon and the inflation number should drop off and that should give some room.

He added that in terms of liquidity, like in most countries have ensured that the liquidity has remained very high RBI has ensured that liquidity remains very high. The real issue now is that the Banks are not lending to people who deserve it. He states that RBI has come out with one-time restructuring and fortunately it covers everyone and specially the MSMEs and individuals because, in his eyes they

are the ones who are affected most. The only question is that negotiation, there are incentive again for the bank going for restructuring, because the circular states that if you are not marked a NPA and there are some provisioning benefits as well and this way the Banks balance sheet benefit. He opines that when negotiation goes on forever, it doesn't benefit anyone. It is also targeted to only to those affected by Covid, the have taken a clean simple approach which is going by date from March onwards. The last challenge is to bring in all the lenders, because in today's world, besides the bank which the RBI circular covers, there is a very large proportion of money received through mutual funds where SEBI would be the regulator. Unless all of them sit together it is very difficult to do a successful restructuring. This is what was seen in earlier restructurings including the June 7 one so that challenge continues. IBC has been suspended, which is not the case in Singapore. He hopes that the suspension is lifted sooner than later. It would be a shame if it is suspended for too long and especially the one which allows the corporate itself to initiate insolvency.

Answering to Ashok, Mr Vakil said that the creditor led approach has worked well for India since vast majority of the credit comes from the bank loans. While in the US, courts play a major part in the Insolvency proceedings; in India we have left the commercial wisdom to the committee of creditors. The courts in India have been tasked to only ensure procedural compliance throughout the process. He also stated that in India pre-packs are on their way and that very soon we shall have it for MSMEs and within a few months for everybody else.

QUESTIONS & ANSWERS

Q. Do you think in current situation the court would interpret rescue financing provision in a more liberal way *or will they still have a more restrictive approach as currently in Singapore?*

A. Singapore is still going through the phase of shifting of mind-set but it has not matured yet. When you go into the process that allows you to use those provisions, you are required to get creditor's support. In such a situation the first question that banks ask is the details of the lawyer/accountants representing the borrower. At that stage, there is already some level of control on who advices the company. That has an impact on whether company is bold enough and only then company can apply for rescue finance. No creditor/investor can apply. In Singapore there have been a few rescue financing orders. There is no application till date by company for priming a secured creditor debt. New money providers are looking to invest in basically everything skunked into restructuring. In a rescue situation is a new GDP contribution and the new money is not going to come in unless they are either protected or can write outside the value. So national interest must prevail for Banks to understand that if they get a secured creditor to understand that if they get adjudicate protection on security. Singapore is slowly evolving but it has yet to reach that stage.

Q. Do u think SME in India are biased towards out of court settlements, if so why?

A. As compared to formal IBC process which is driven at least overseen by the court, yes that it is sadly it is a preference. The carve-out mentioned like 29A (which is basically restrict existing sponsor/promotion / promotion to back if they are defaulter more than 12 months). It would restrict them back in or acquiring the business so, no one wanted that and also because the sense is that they could manage thing better at it individual bank level, at the local level. They could handle things without need of external profession to the moment to get into IBC situation or resolution profession come in may or may not be aware of the business/ understand how to run it. This could cause damage (potentially) to business. They definitely would prefer out of court settlement from borrowers' point of view.

From creditor point of view that SMEs love IBC. Threshold was security before the suspension of IBC the shift was increased to 1 crore for new filing lot of people these are operational creditor SME supplier. This was great tool for them to bring the customers on table so they were upset about it. As creditor they like that but as debtor they would not be preferred.

Q. In contrast to India where the IBC has been suspended, Singapore has kept its insolvency statute functional with some caveats in place. How much activity have the Singapore Insolvency courts seen during the pandemic as compared to the pre-covid times?

A. Singapore courts have seen a lot of activity during the pandemic. Most of them have been related to trading companies, construction companies and oil & gas companies which are generally fraud driven. In Singapore, creditors in general have been very patient because they know that pulling the rug now is dangerous and there is not much value that they are going to recover. However in cases of fraud, filings have almost been immediate.

Once the temporary measures related to covid are lifted, it is expected that there will be a flood of cases. This is already happening in the hospitality and travel industries.

Q. Do you foresee reforms of Asset Reconstruction Companies as part of dealing with rising NPAs?

A. In terms of reforms in ARCs in India, the bigger issue is on the capital side. Most ARCs are not well capitalised in India. Despite a slowdown because of the provisioning norms, banks have gradually started opening up to these ARCs.

Additionally**,** for a foreign investor, the only way to enter the stressed asset market is via an ARC. The reform should be such that an ARC doesn't become the only route for a foreign investor. Some of the ARCs are highly leveraged and thinly capitalized. That has been an issue. But the RBI and SEBI are certainly looking at resolving this issue.

ABOUT THE SPEAKERS

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Mr. Ashok Kumar *Director* BlackOak LLC

Mr.Ashish Chhawachharia Partner & Head, Grant Thorton

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