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ALL ROADS LEAD TO RESOLUTION – RBI OPENS UP THE ECB ROUTE FOR IBC BIDDERS

11 February 2019

BACKGROUND

In what appears to be another step towards increasing the efficacy of the insolvency resolution process in India, the Reserve Bank of India (RBI), further relaxed the regime on external commercial borrowings (ECBs) in India by way of a circular dated 7 February 2019 (New ECB Circular). The New ECB Circular comes in shortly after the RBI revamped the regime for ECBs on 16 January 2019 (Revised ECB Framework) under which it had substantially relaxed the provisions for eligible borrowers and recognised lenders.

Under the Revised ECB Framework issued by the RBI on 16 January 2019, proceeds of external commercial borrowings could be utilised towards repayment of domestic rupee loans, only in the event such ECBs were availed from a foreign equity holder. Based on the present market scenario where the route under the Insolvency and Bankruptcy Code, 2016 (IBC) is being majorly resorted to in order to resolve stressed loan accounts, the RBI, in consultation with the Government of India has relaxed the end-use for ECBs for potential bidders under IBC, pursuant to which, resolution applicants can now explore the ECB route (with prior RBI approval) for availing cheaper loans from the overseas market in order to participate in the IBC process. However, under the New ECB Circular, the resolution applicants are not permitted to avail ECBs from overseas branches or subsidiaries of Indian banks for repayment of rupee loans.

Accordingly, in light of the relaxations provided through the new ECB Circular, the resolution applicants would be able to access ECB funds from any overseas recognised lender (other than overseas branches or subsidiaries of Indian banks) for repayment of domestic rupee loans, after obtaining specific approval from the RBI.

COMMENT

The New ECB Policy came close on heels of several judicial pronouncements made by the Supreme Court of India and the National Company Law Appellate Tribunal, which have clearly laid down that the primary objective of IBC is to resolve the stress in the corporate debtor and preserve its corporate existence on a going concern basis. The new policy provides a boost towards achieving the aforesaid objective of IBC by introducing an additional mechanism by way of which a resolution applicant can discharge the payment obligations of the corporate debtor towards its lenders, by accessing cheaper overseas funds.

While this move by the RBI is laudable, it is relevant to note that the relaxations provided pursuant to the New ECB Circular extends only to companies under IBC. It appears that this liberalisation would not be available in pre-IBC scenarios where the debtor entities may seek to explore the offshore market in order to avail ECB funds for providing one-time settlements (OTS) to domestic lenders under the terms of the RBI Circular on Resolution of Stressed Assets – Revised Framework dated 12 February 2018.

Further, although the RBI has opened up the ECB route for potential resolution applicants proposing to participate in the resolution process under IBC, such ECBs would still be subject to the pricing norms, minimum average maturity requirements and hedging costs and therefore the success of this route would be determined by the prevalent market forces.

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