ESG IN RESTRUCTURING

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INDIA

1. General overview of the restructuring regime

1.1 Formal restructuring procedures

1.1.1 Corporate insolvency resolution process

The main procedure for restructuring in India – the corporate insolvency resolution process (CIRP) – is prescribed under the Insolvency and Bankruptcy Code 2016 (IBC) and the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations 2016 (CIRP Regulations).

The CIRP for a corporate debtor can be initiated before the national company law tribunal (NCLT) having territorial jurisdiction over the place where the registered office of the corporate person is located, upon non-payment of debts. The minimum amount of default for the initiation of a CIRP is INR 1 crore (approximately US $120,720). The CIRP against a corporate debtor can be initiated by a financial creditor, operational creditor (i.e. trade creditors, employees / workmen and governmental authorities) or the corporate debtor itself, upon there being a default as mentioned above.

Significantly, with the initiation of the CIRP under the IBC: (i) the board of directors of the corporate debtor stands suspended and its powers are exercised by an interim resolution professional (IRP) (akin to an administrator) under the scrutiny of a committee of creditors (COC); and (ii) a moratorium is declared.[1] During the continuation of the moratorium, the following actions are prohibited:

- the institution of suits or continuation of pending suits or proceedings against the corporate debtor, including the execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- transferring, encumbering, alienating or disposing by the corporate debtor of any of its assets or any legal right or beneficial interest therein;
- any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property; and
- the recovery of any property by an owner or lessor where the property is occupied by or in the possession of the corporate debtor.

The CIRP under the IBC must be completed within 330 days,[2] although this timeline is amenable to extension and is usually exceeded.[3]

The COC generally comprises the unrelated financial creditors of the corporate debtor and its consent by 66% value of debts is required for key decisions with respect to the corporate debtor, including any sale of assets, incurring insolvency costs and importantly approving a resolution plan. The IBC also provides that a CIRP may be withdrawn with a vote of 90% of the COC.[4]

The IBC requires the approval of a resolution plan – otherwise, the corporate debtor must be liquidated. For the most part, "connected parties" are not permitted to participate. Resolution plans can include provisions for restructuring the corporate debtor by way of merger, demerger or amalgamation – other than simply share acquisitions – although there is still some ambiguity on whether a demerger or asset sale is possible.

A resolution plan generally respects the following insolvency waterfall: insolvency costs, secured creditors at par with priority workmen and employee dues, secured financial creditors, unsecured financial creditors, unsecured trade creditors, statutory dues and then remaining unsecured

1 IBC, s 14.
2 *Idem*, s 12.
3 *Essar Steel India Limited v Satish Kumar Gupta and Ors* (2020) 8 SCC 531.
4 IBC, s 12A.

creditors. However, recent decisions have enhanced the standing of statutory dues[5] and certain forms of employee dues.[6] Even so, some decisions of the bankruptcy court permit the COC, in its commercial wisdom, to alter the senior-junior security interests of financial creditors on the ground that this alteration is required to revive the corporate debtor as a going concern.[7] Once a resolution plan is approved, trade creditors and dissenting financial creditors are required to be paid their distributions under the plan in priority in time to others.[8] Unsecured financial creditors presently rank ahead of unsecured trade creditors. This distinction is unique to India and is sought to be reversed through legislative amendments under discussion.

The commercial wisdom of the COC is supreme and the power of the NCLT to interfere in commercial decisions taken is limited to grounds such as the resolution plan being in violation of applicable law.

From the date of approval of the resolution plan by the NCLT, the IBC absolves the corporate debtor from liability for pre-CIRP offences (such as anti-bribery violations) committed by the erstwhile management of the corporate debtor.

The IBC also provides that a corporate debtor is to be liquidated if:

- the COC cannot agree on a workable resolution plan within the period of the CIRP;
- the COC decides to liquidate the corporate debtor during the period of the CIRP;
- the NCLT rejects the resolution plan; or
- the corporate debtor contravenes the provisions of a resolution plan that has been approved by the NCLT.

Under the liquidation process, a liquidator can realise amounts for the payment of creditors by way of, *inter alia*:

- the sale of piecemeal assets;
- the sale of undertakings or businesses of the corporate debtor on a going concern basis; or
- the sale of the corporate debtor itself as a "going concern".

1.1.2 Pre-pack

In India, recently the Pre-Packaged Insolvency Resolution Process (PPIRP) for micro, small and medium-sized enterprises (MSMEs) was introduced.[9] The minimum threshold for initiating a PPIRP is INR 10 lakh (approximately US $12,072). The PPIRP provides the "best of both worlds", by combining elements such as speed, efficiency and flexibility of an informal process with the binding effects and structure of a formal process under the aegis of the NCLT.

1.2 Informal restructuring procedures

The primary regime for informal out of NCLT restructuring in India is under the circular issued on 7 June 2019 by the Reserve Bank of India – namely, the Prudential Framework for Resolution of Stressed Assets (7 June Framework).

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5 *State Tax Officers v Rainbow Papers Limited* (Supreme Court order dated 6 September 2022).
6 *Jalan Fritsch Consortium v Regional Provident Fund Commissioner & Anr* (Supreme Court order dated 30 January 2023).
7 *K Sashidhar v Indian Overseas Bank & Ors* (Supreme Court order dated 19 March 2019) and *Jaypee Kensington Boulevard Apartments Welfare Association & Ors v NBCC (India) Ltd & Ors* (Supreme Court order dated 24 March 2021).
8 *Jaypee Kensington Boulevard Apartments Welfare Association & Ors v NBCC (India) Ltd & Ors* (Supreme Court order dated 24 March 2021).
9 Introduced by Act No. 26 of 2021, s 8 (w.e.f. 4 April 2021).

The 7 June Framework addresses a number of issues that had plagued its predecessor regimes. Among other things, it lays down the framework for the execution of an inter-creditor agreement (ICA) which can serve as the framework for lenders to act jointly for agreeing a mechanism to address default and a consequent resolution plan or enforcement action.

The 7 June Framework has proved to be an important tool for debtors and their promoters to resolve stress without the spectre of the IBC. This framework allows for several different ways in which stress may be resolved, including restructuring and one-time settlement. Similar to the IBC, for the full benefits of the 7 June Framework, often times a complete change in ownership is required (i.e. no connected party sales). However, there are several workarounds where sponsors can retain ownership and, practically, this is how the 7 June Framework has been mostly used.

The 7 June Framework does not cover several important categories of lenders who may easily feature in the list of creditors of a company – foreign lenders, foreign portfolio investors, mutual funds, PF trusts and liabilities such as those of trade creditors, which cannot be restructured under the 7 June Framework. Therefore, there is a strong possibility of holdouts.

Under the 7 June Framework, the decision of a majority of lenders (75% by value and 60% by number) is binding on the entire lender class of the debtor. However, dissenting lenders are required to be paid their liquidation value.

2. Restructuring of ESG-related liabilities

2.1 Environmental (E): restructuring environmental liabilities

There is lack of clarify as far as the restructuring of environmental liabilities is considered within the IBC, though it can be argued these liabilities (such as fines and penalties) can be restructured under a resolution plan in the same way as ordinary trade and statutory liabilities of a company.[10] However, not all liabilities of a company under Indian law can be restructured and extinguished. For example, India follows the principle of "absolute liability" when dealing with extremely hazardous waste or "inherently dangerous" activity,[11] and it is quite likely that a court would find that such "absolute liability" (whether presently due or contingent in nature) cannot be restructured under a resolution plan.

The concept of absolute liability is inherently a no-fault liability concept, which makes an entity liable when dealing with extremely hazardous waste or inherently dangerous activity, even if there is no negligence on its part. This principle was first practically examined and applied by the Supreme Court in the "*Oleum Gas Leak Case*".[12] In that case, Mr MC Mehta filed a petition before the Supreme Court for closing the manufacturing activities of Shriram Foods and Fertilisers, as it was producing hazardous substances and was located next to a heavily populated area in Delhi. During the pendency of the case, one of the units operated by Shriram Foods and Fertilisers leaked oleum gas and caused severe damage (including injuries) to the local population. The Supreme Court emphasised that the principle of absolute liability would be applied when an entity is "carrying on inherently dangerous activities".

The Supreme Court also noted that the rule of absolute liability is stricter than the rule of strict liability and does not allow any exceptions to the liability arising out of inherently dangerous activities carried out by an entity. According to this rule, once the activity carried on is hazardous or inherently dangerous, the person or entity carrying on the activity is liable to make good the loss caused to any other person by the activity irrespective of whether reasonable care was taken while carrying on the activity.

The principle of "absolute liability" further gained recognition from the Supreme Court and was reaffirmed in the "Bhopal Gas Tragedy Case",[13] in which a factory operated by Union Carbide

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10 IBC, s 53(1)(e).

11 *M.C. Mehta v Union of India* (Supreme Court order dated 20 December 1986); *Union Carbide Corporation v Union of India* (Supreme Court order dated 3 October 1991).

12 *M.C. Mehta v Union of India* (Supreme Court order dated 20 December 1986).

13 *Union Carbide Corporation v Union of India* (Supreme Court order dated 3 October 1991).

Company in Bhopal led to a major leakage and resulted in deaths of over 3000 people from the leakage. The Supreme Court held that an entity engaged in inherently dangerous activities will have absolute liability. The Bhopal gas leak also led to the enactment of the "Public Liability Insurance Act 1991", which makes it mandatory for entities engaged in handling hazardous substances to take insurance. The objective of the legislation is to provide public liability insurance, with the aim of offering swift assistance to individuals or persons affected by accidents occurring while handling any hazardous substance and for matters connected therewith or incidental thereto.

It is pertinent to note that as far as the resolution regime under the IBC is concerned, the principle of "absolute liability" in relation to a company undergoing insolvency proceedings is untested, given the IBC is still fairly nascent.

Nevertheless, as noted above, it is quite likely a court would find that "absolute liability" (whether presently due or contingent in nature) cannot be restructured under a resolution plan and a bidder may have to price in such a liability in its bid and / or provide compensation as and when such a liability arises.

India also follows the principle of "polluter pays" – that is, the entity that pollutes the environment must pay to reverse the damages caused by its acts. Indian courts have previously directed companies to pay and compensate for damages caused due to their activities,[14] including compensation, and have even required the relocation of concerned factories. It cannot be ruled by the court that, post-acquisition of a corporate debtor under the IBC, a bona fide buyer is to make good claims by way of compensation arising from the actions of previous management.

Given the IBC is still fairly nascent (enacted in 2016), there is lack of clarity and precedents on these issues.

2.1.1 *Types of environmental liabilities*

Environmental liabilities under Indian law could encompass:

- civil claims; and
- statutory liabilities, such as:
  - fines – may be imposed for various statutory offences under the Environment (Protection) Act 1986[15] (EPA 1986), the Air (Prevention and Control of Pollution) Act 1981[16] (Air Act) and the Water (Prevention and Control of Pollution) Act 1974[17] (Water Act).. These include the failure to maintain air pollution control equipment on industrial or trade premises, the discharge of untreated trade effluents, oil, chemical, sewage or other polluting matters, and the failure to store, use or deal with hazardous substances in such a manner so as not to cause pollution to the environment. In additional to fines and penalties, these statutes also provide penalties in the form of imprisonment, although a bona fide bidder under the IBC could claim protection from such criminal liabilities;[18] and
  - remediation / clean-up costs – for example, under the Air Act, the relevant pollution control board has the power to direct closure of a premise or regulate any operation.[19]

2.1.2 *Priority given to environmental liabilities*

As mentioned above, there is lack of clarity under Indian insolvency law regarding the treatment of certain environmental liabilities, though fines and penalties imposed by governmental

14 *Vellore Citizens Welfare Forum v Union of India (UOI) and Ors* (Supreme Court order dated 28 August 1996).
15 EPA 1986, s 15.
16 Air Act, ss 37, 39.
17 Water Act, ss 43-45A.
18 IBC, s 32A.
19 Air Act, s 31A.

authorities would fall within the ambit of operational dues and would have a low ranking under the liquidation waterfall prescribed under the IBC. However, there are exceptions to this. For example, where an enterprise has engaged in a hazardous or inherently dangerous activity, any ensuing harm could, under the principle of "absolutely liability" or "polluter pays", sit outside the insolvency / liquidation waterfall. As noted, however, the scope of this possible exception remains untested.

2.1.3 Disclaimer of environmental obligations

Disclaimer would be difficult to achieve in a CIRP. The IBC, in the first instance, requires that the corporate debtor must be restructured as a going concern. This means together with all its properties. Therefore, in principle, the CIRP does not allow the disclaimer of a particular property. That said, recently a new provision has been added under which the resolution professional can sell assets of the debtor rather than sell the entire debtor, but only if no bidder comes forth for the entire debtor. In practice, it may be possible that bids are received for non-polluted assets, and the polluted assets would be effectively disclaimed (in substance) and left to liquidation.

Unlike a CIRP, liquidation under the IBC permits the trustee to disclaim onerous property from the debtor's estate without describing whether a polluted property would fall within this category. This remains an untested proposition.

2.2 Social (S): restructuring health or safety-related liabilities

Similar to the restructuring of environmental liabilities, health or safety-related liabilities can be restructured under a scheme in the same way as other creditors of a corporate debtor. There are no special restrictions or conditions that apply when restructuring health or safety-related liabilities.

Though the Indian Supreme Court has held that there should be no "hydra heads" (or surprises),[20] it remains unclear whether this extends to liabilities that are yet to crystallise, such as product liability tort claims or asbestos claims which may accrue in the future. While generally resolution plans provide for their whitewash, it is yet to be seen how the NCLTs may treat such liabilities, and it cannot be ruled out that a resolution applicant may be required to pay such claims at a later stage, even though resolution applicants have protections from any criminal liability arising due to such actions under the IBC. Additionally, and more relevant for asbestos claims, the position under "absolute liability" could equally apply here as well, depending on the facts and circumstances of each case.

2.2.1 Types of health and safety-related liabilities

There is a very wide gamut of such laws. For example, health or safety-related liabilities under Indian law could encompass:

- civil claims from employees and workmen in case of bodily harm or death of an employee or workmen; and
- statutory liabilities such as fines and penalties under the Factories Act 1948,[21] the Petroleum Act 1934[22] and the Occupation Safety, Health and Working Conditions Code 2020.[23] Fines may be imposed for the failure to maintain prescribed safety measures, sub-standard samples, non-maintenance of safety equipment for employees and workmen, exposure to harmful substances, non-maintenance of health or medical records of workers, non-appointment of competent and trained employees and neglect in handling harmful products.[24]

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20 *Essar Steel India Limited v Satish Kumar Gupta and Ors* (2020) 8 SCC 531; *Ghanashyam Mishra and Sons Private Limited v Edelweiss Asset Reconstruction Company Limited and Ors* (2021) 9 SCC 657.
21 Factories Act, ss 41B, 41C, 92, 96.
22 Petroleum Act, s 23.
23 Occupation Safety, Health and Working Conditions Code, s 12.
24 IBC, s 32A.

2.2.2 Treatment of health and safety-related liabilities

Fines and penalties imposed by government authorities on account of health and safety-related violations would fall within the ambit of operational dues and would receive a low ranking under the liquidation waterfall prescribed under the IBC. There is no special priority prescribed to health and safety related claims under Indian insolvency law.

2.3 Governance (G): third party releases in favour of directors and officers of the company

Indian insolvency law does not provide releases to third parties (such as directors) for past breaches committed by them.

3. Protection of stakeholders' interests

3.1 Environmental (E): influence by environmental protection authorities or environmental advocacy groups in a restructuring

3.1.1 Approving a restructuring plan

There is no requirement for a resolution plan under the IBC to be approved by any environmental authority or environmental advocacy group. However, these stakeholders have a say in the underlying project itself. For example, the law may require the approval of the environment protection agency before a project can proceed. The IBC does not, and cannot, disturb this requirement. Thus, if the resolution plan proposes changes to what was originally submitted to the relevant environment protection agency, the consent of that specific regulatory authority will again be required to implement the resolution plan.

3.1.2 Discretion to consider wider public interest concerns

The IBC is essentially a creditor restructuring tool and tries to restrict the discretion of the NCLT. The NCLTs can only reject a resolution plan if it is in violation of any applicable law (including environmental laws) or does not conform to the payment principles prescribed under the IBC. To this end, an advocacy group could intervene in the resolution plan hearings stating that the business and revival plan envisaged in the resolution does not conform to environmental laws. However, practically, we have not seen this, since it is the duty of the resolution professional as well to ensure the resolution plan complies with environmental laws.

3.1.3 Influence by environmental protection authorities or environmental advocacy groups in a restructuring

There are no statutory provisions which grant environmental protection authorities or environmental advocacy groups standing to air their views in a restructuring.

3.2 Social (S): influence by labour authorities, unions or employee / worker advocacy groups in a restructuring

3.2.1 Approving a restructuring plan

There is no requirement for a resolution plan under the IBC to be approved by labour authorities, unions or employee / worker advocacy groups. Only the approval of the NCLT and COC is required for approval of a resolution plan. However, these groups can object to the distribution under the resolution plan if it is not in accordance with the IBC and they can also object on the basis that the resolution plan breaches Indian laws. Given the purpose of the IBC is revival, in practice workmen and employee complaints in resolution plan hearings are given due regard by the NCLT.

3.2.2 Discretion to consider wider public interest concerns

The NCLT does not have such a power. Under previous laws, plan approval hearings were time consuming.

Therefore, it is a policy prescription under the IBC to curtail the NCLT's discretion. However, as mentioned previously, the resolution professional is required to ensure the resolution plan complies with applicable laws. Therefore, there are enough checks and balances in the process.

3.2.3 Protection of employee rights

There are no statutory provisions which grant labour authorities, unions or employee / worker advocacy groups standing to air their views in a restructuring. However, as mentioned above, they can object on grounds of the plan not complying with the IBC or applicable laws. Given their importance to the revival of the debtor, NCLTs do give them a reasonable hearing.

3.3 Governance (G): board / management conflicts addressed in a restructuring

Under Indian insolvency law, in the case of a CIRP and liquidation, the board of directors and management of the corporate debtor stand suspended, and their powers are vested in the resolution professional (RP), who acts under the supervision of the COC and the NCLT. The erstwhile board of directors and management have no say during the CIRP of the corporate debtor. Further, pursuant to section 29A of the IBC, the erstwhile management or promoter are not permitted to be part of the management or control of the corporate debtor in any manner under a resolution plan. The purpose of section 29A is that management cannot benefit from their own wrongs.

In certain circumstances (such as a PPIRP or where the management is eligible under section 29A), they may bid and retain their position in the debtor. Under the insolvency waterfall, any payments or incentives to them would typically rank bottom of the liquidation / insolvency waterfall.

4. "Soft law" framework

4.1 Environmental (E): industry guidelines and / or best practices that are prescribed for the protection of the environment in a restructuring

There is no prescribed "soft law" framework for the protection of the environment specifically in the restructuring context. However, general industry guidelines have been prescribed, which may be applicable to corporate entities.

The Confederation of Indian Industry (CII), which is a business association in India, has formulated a voluntary code of conduct[25] for its members, which lays down the following recommendations for organisations in relation to ESG principles:

- as a responsible corporate citizen, the organisation should integrate ESG principles in business;
- the organisation should establish clear policies and systems to conform to the highest standards of moral, ethical, transparent and fair conduct, encourage fair and equitable treatment of all stakeholders and avoid practices like bribery (including receiving bribes), corruption, insider trading, market manipulation and anti-competitive practices; and
- organisations are encouraged to extend their sustainability principles, ethics practices and code of conduct to their supply chain and sourcing partners.

The Ministry of Corporate Affairs (MCA) released the National Guidelines on Responsible Business Conduct[26] (NGRBC) in 2019 as a framework for guiding Indian multinational corporations in their overseas operations, in addition to aligning with applicable local national standards and norms governing responsible business conduct. These principles also capture key international

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[25] Guidelines on Integrity and Transparency in Governance and Responsible Code of Conduct, Confederation of Indian Industry. February 2020. (https://www.cii.in/pdf/CII%20Guidelines%20on%20Integrity%20Transparency%20in%20Governance%20and%20Responsible%20Code%20of%20Conduct_Feb%202020_Final.pdf).

[26] National Guidelines on Responsible Business Conduct, Ministry of Corporate Affairs, Government of India, March 2019. (https://www.mca.gov.in/Ministry/pdf/NationalGuildeline_15032019.pdf).

developments in the sustainable development agenda and business responsibility field such as the UN Guiding Principles for Business and Human Rights, the UN Sustainable Development Goals, the Paris Agreement on Climate Change and Core Conventions 138 and 182 on Child Labour by the International Labour Organisation.

According to the MCA, the NGRBC are designed to be used by all businesses, irrespective of their ownership, size, sector, structure or location, and it is expected that all businesses investing or operating in India, including foreign multinational corporations, follow these guidelines.

4.2 Social (S): industry guidelines and / or best practices that are prescribed for the protection of employee rights in a restructuring

There is no prescribed "soft law" framework for the protection of employee rights specifically in a restructuring context.

4.3 Governance (G): industry guidelines or codes of conduct relating to the avoidance of conflicts of interests that restructuring professionals are subject to

The Insolvency and Bankruptcy Board of India (IBBI) has laid down a code of conduct for insolvency professionals while undertaking assignments under the IBC, and it has the force of law. The following measures have been provided under the code to avoid any potential conflict of interest:[27]

- insolvency professionals are bound to act with objectivity in their professional dealings by ensuring their decisions are made without any conflict of interest, whether directly connected to the insolvency proceedings or not;
- insolvency professionals are also required to disclose the details of any conflict of interests to the stakeholders, whenever they come across such conflicts during an assignment;
- insolvency professionals have been restricted from acquiring any of the assets of the debtor, whether directly or indirectly;
- in cases where insolvency professionals are dealing with a debtor's assets during liquidation or a bankruptcy process, they are also required to ensure that they or their relatives do not knowingly acquire any such assets, unless it is shown that there was no impairment of objectivity, independence or impartiality in the liquidation or bankruptcy process and the IBBI's approval had been obtained;
- insolvency professionals are also required to disclose the existence of any pecuniary or personal relationship with any of the stakeholders entitled to distribution under the IBC, and the concerned debtor;
- insolvency professionals are required to disclose whether they were employees of or have been in the panel of any financial creditor of the corporate debtor to the committee of creditors and to the insolvency professional agency (IPA) of which they are a professional member;
- insolvency professionals are required to disclose their relationship, if any, with the corporate debtor, other professionals engaged by them, financial creditors, interim finance providers and prospective resolution applicants to the respective IPAs of which they are a member; and
- insolvency professionals are required to ensure disclosure of the relationship, if any, of the other professionals engaged by them, with themselves, the corporate debtor, the financial creditor, the interim finance provider, if any, and the prospective resolution applicant to the IPAs of which they are a member.

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[27] First Schedule, Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations 2016. (https://ibbi.gov.in//uploads/legalframwork/213cd7f2c53374800f7cf1e881b58d51.pdf).

As of November 2022, there are three IPAs registered with the IBBI: the Indian Institute of Insolvency Professionals of ICAI, the ICSI Institute of Insolvency Professionals and the Insolvency Professional Agency of Institute of Cost Accountants of India. These IPAs have their own respective codes of conduct which apply to their members, containing measures to avoid conflicts of interest. However, these codes have largely been formulated on the basis of IBBI's code of conduct and contain similar or identical provisions for the avoidance of conflicts of interest.

Additionally, all the IPAs have jointly formulated a statement of best practices concerning the role of insolvency professionals in avoidance proceedings. This statement acts as a guide to all insolvency professionals undertaking the identification of avoidance transactions and filing applications before the NCLT. However, this statement also provides for mostly identical measures as laid down by the IBBI in its code of conduct.

Moreover, the professionals conducting valuation under the IBC (i.e. registered valuers) are also guided by their own code of conduct.[28] This code is also somewhat identical to the IBBI's code of conduct, with some specific measures laid down for registered valuers:

- valuers are prohibited from dealing in securities of any company after they first become aware of the possibility of their association with the valuation; and
- valuers are restricted from taking up any assignment if they or any of their relatives or associates are not independent in terms of association with the debtor.

As of November 2022, there are 16 registered valuer organisations (RVO) registered with the IBBI. Some of these RVOs also have their own respective codes of conduct which apply to their members, containing measures to avoid conflicts of interest. However, these codes have largely been formulated on the basis of code of conduct prescribed for valuers and contain similar or identical provisions for avoidance of conflict of interest.

Therefore, it can be said that by and large, the IBBI's code of conduct is the guiding force behind all the measures enumerated under various instruments, whether having the force of law or not, in relation to preventing any conflict of interest during any restructuring exercises being undertaken under the provisions of the IBC.

5. ESG in financing

5.1 ESG-linked loans, bonds or investments

As of December 2021, a total of 75 Indian issuers had issued green, social and sustainability related bonds amounting to US $19.5 billion in three different currencies. The US $20 million green deal from Nagar Nigam Ghaziabad in 2021 marked the debut of local governments in the Indian green, social and sustainability market.[29] Out of these issuances, as of March 2021, Indian renewable energy developers such as Greenko, ReNew Power, Adani Green Energy, Azure Power, JSW Hydro, Continuum Green Energy, Hero Future Energies and NTPC had issued green bonds to the tune of US $11.2 billion through 21 issuances, with these green bonds providing cost advantages due to favourable hedging costs.[30] Further, as of August 2022, the ESG-related mutual funds in India reached a fund size of INR 11,981 crores (approximately US $1.5 billion).[31] Although this was a decrease from March 2022 when they were valued at INR 12,450 crores (approximately US $1.6 billion), it was an increase almost by a factor of five from INR 2,268 crores (approximately US $270 million) in March 2019.[32]

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28 Annexure – I, Companies (Registered Valuers and Valuation) Rules 2017.

29 S Bhattacharya, N Kumar and P Lonika, "India State of the Market 2021", Climate Bonds Initiative, May 2022.

30 S Garg, R Jain and G Sidhu, "Financing India's Energy Transition Through International Bond Markets, Council on Energy, Environment and Water", August 2021.

31 A Usmani, "ESG Mutual Funds In India Are Having A Reality Check", BQ Prime, 3 October 2022.

32 C Madia, "ESG Funds Rise 5x in Four Years to Rs 12,450 Crore, Shows Data", Business Standard, 24 April 2022.

India also gained a place as the second-largest green bond issuer among emerging markets and developing economies in 2021, with an issuance of US $5.9 billion, wherein most of the proceeds from these bonds were allocated to renewable energy, airport infrastructure and a municipality.[33]

5.2 Financial institutions (banks and funds) and their commitment to achieve ESG targets

The RBI has recently conducted a survey of 34 leading commercial banks regulated by it to assess the status of climate risk and sustainable finance in these banks.[34] This survey provided an overview of proactivity shown by banks in implementing ESG related measures and incorporating ESG in their lending / investment portfolios, some highlights of which are as follows:

- 56% of the surveyed banks had discussed the need to enhance lending or investment towards sustainable finance during the previous and current financial year;
- 32% of the surveyed banks have mobilised new capital to scale up green lending / investment or set a target for incremental lending / investment for sustainable finance;
- 56% of the surveyed banks had decided to gradually reduce their exposure to high carbon emitting / polluting businesses in the coming year;
- 35% of the surveyed banks had initiated discussions with their large corporate borrowers regarding plans to reduce their carbon emissions and had also offered to support them in the process;
- 53% of the surveyed banks had come up with an ESG strategy;
- 79% of the surveyed banks had taken measures to decrease carbon emissions arising from their operations and increase the proportion of renewable energy in their total sourced electricity; and
- 24% of the surveyed banks had announced plans to become carbon neutral, with another 26% intending to do so within the next 12 months.

5.3 Promoting ESG by the central bank and regulators

The Finance Minister of India announced in her Budget Speech 2022-23 that as a part of the Government's overall market borrowings in 2022-23, sovereign green bonds will be issued for mobilising resources for green infrastructure and the proceeds will be deployed in public sector projects which help in reducing the carbon intensity of the economy.[35] Accordingly, the Government of India has now brought in a Framework for Sovereign Green Bonds. The proceeds raised from these sovereign green bonds would be used to finance expenditure for eligible green projects falling under categories such as renewable energy, energy efficiency, clean transportation, climate change adaptation, sustainable water and waste management, pollution prevention and control, green buildings, sustainable management of living natural resource and land use and terrestrial and aquatic biodiversity conservation.[36]

The RBI joined the Central Banks and Supervisors Network for Greening the Financial System (NGFS) as a member on 23 April 2021, to benefit from the membership of NGFS by learning from and contributing to global efforts on green finance, and it recently also published the Statement of Commitment to Support Greening India's Financial System.[37] Through this statement, the RBI committed to:

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33 Emerging Market Green Bonds Report 2021, International Finance Corporation, June 2022.
34 Report of the Survey on Climate Risk and Sustainable Finance, Reserve Bank of India, July 2022.
35 Budget 2022-23, Speech of Ms. Nirmala Sitharaman, Minister of Finance, Government of India, 1 February 2022, para 103.
36 File No. 2891146/2022/Finance Unit, Department of Economic Affairs, Ministry of Finance, Government of India, 9 November 2022.
37 RBI Press Release No. 2021-2022/1143, 3 November 2021.

- exploring how climate scenario exercises can be used to identify vulnerabilities in RBI supervised entities' balance sheets, business models and gaps in their capabilities for measuring and managing climate-related financial risks;
- integrating climate-related risks into financial stability monitoring; and
- building awareness about climate-related risks among regulated financial institutions and spreading knowledge about issues relating to climate change and methods to deal with them accordingly.

The Sustainable Finance Group, Department of Regulation at the RBI recently carried out a survey to assess the status of climate risk and sustainable finance in leading scheduled commercial banks and concluded that although banks have begun taking steps in climate risk and sustainable finance, there remains a need for concerted effort and further action in this regard.[38]

Additionally, the Securities and Exchange Board of India (SEBI) has introduced a framework for business responsibility and sustainability reporting by listed entities[39] in 2021 which is based on the National Guidelines on Responsible Business Conduct. This has revised the earlier requirement of providing a business responsibility report, which was laid down by the SEBI in 2012. According to the SEBI, the reporting is intended to have quantitative and standardised disclosures on ESG parameters to enable comparability across companies, sectors and time as such disclosures will be helpful for investors to make better investment decisions. This filing has been made mandatory for the top 1000 listed companies by market capitalisation and is voluntary for the financial year 2021-22.

The SEBI has also introduced the concept of green debt security in its regulations,[40] which define such securities as being those the funds from whose issuance would be utilised for projects or assets falling under categories such as renewable and sustainable energy.

The International Financial Services Centres Authority also recently published a report on sustainable finance.[41] The objective of this report was to recommend a framework to develop a world-class sustainable finance hub at the International Financial Services Centre (IFSC).

[38] Report of the Survey on Climate Risk and Sustainable Finance, Reserve Bank of India, July 2022.
[39] SEBI Circular No. SEBI/HO/CFD/CMD-2/P/CIR/2021/562, 10 May 2021.
[40] Securities and Exchange Board of India (Issue and Listing of Non-Convertible Securities) Regulations 2021, reg 2(q).
[41] Report of the Expert Committee on Sustainable Finance, International Financial Services Centres Authority, 3 October 2022.

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