

ICSI-EIRC NEWSLETTER



EASTERN
INDIA
REGIONAL
COUNCIL

**THE INSTITUTE OF
Company Secretaries of India**
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament

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CHAIRMAN'S MESSAGE



No one should abandon duties because he sees defects in them, every action, every activity is surrounded by defects as a fire is surrounded by smoke

Lord Shri Krishna (Bhagavad Gita)

accepting payments for Professional Development & Student Programmes by e-wallet.

Friends, In the month of November we organized 27th Regional Conference of Company Secretaries theme of the conference was "Governance with Excellence". The programme was attended by approx. 550 delegate members and students which is the **highest ever number of participants in any members programme in the history of ICSI-EIRC**. The inaugural session was marked by the august presence and addresses of Special Guests Mrs. Manorama Kumari, Hon'ble Member (Judicial), NCLT; Shri Navrang Saini, DII, DGC&A, Ministry of Corporate Affairs and Shri Alok Samantrai, Regional Director, MCA.

On 26th of November, 2016 the EIRC organized the second ICSI Convocation of 2016 at Vidya Mandir Auditorium. Around 227 new members got their membership certificates during this convocation. Shri Gyanesh Chaudhary, MD & CEO, Vikram Solar Pvt. Ltd was the Chief Guest of this convocation and **in his Convocation Address** said that the ICSI is an institution of phenomenal education and is ahead of its time. A person learns when he studies but actual learning happens outside the textbooks and a Professional need to be very much

updated about all events that concerns him.

It is our endeavor to continuously update and enhance the knowledge of our students and members and in line of this we will be organising class room sessions the current

The EIRC of ICSI would be organising the 01st Regional Women Company Secretaries Conference not only in EIRC but in ICSI, Full day Seminars, Half Day workshops in the coming month. I appeal to all of you to attend these programmes in large numbers and make them successful. On behalf of EIRC, I sincerely request you to send your suggestions and feedback from time to time on the activities of EIRC. I assure you, that we at EIRC would give importance to all your suggestions and consider them for implementation in the right perspective.

I would like to thank everybody for their continued support and feedback which have helped us to march ahead with quality professional development programs for members and students.

CS Sandip Kumar Kejriwal
Chairman

Dear Professional Colleagues,

As autumn sets in after the festive occasions of Diwali & Chathth, ushering in winter and as year end compliance dates get extended by the MCA for Professionals, I wish that Almighty bless you with all vigour to encounter the new rules, regulations and the queries of the stakeholders w.r.t to the occurring changes.

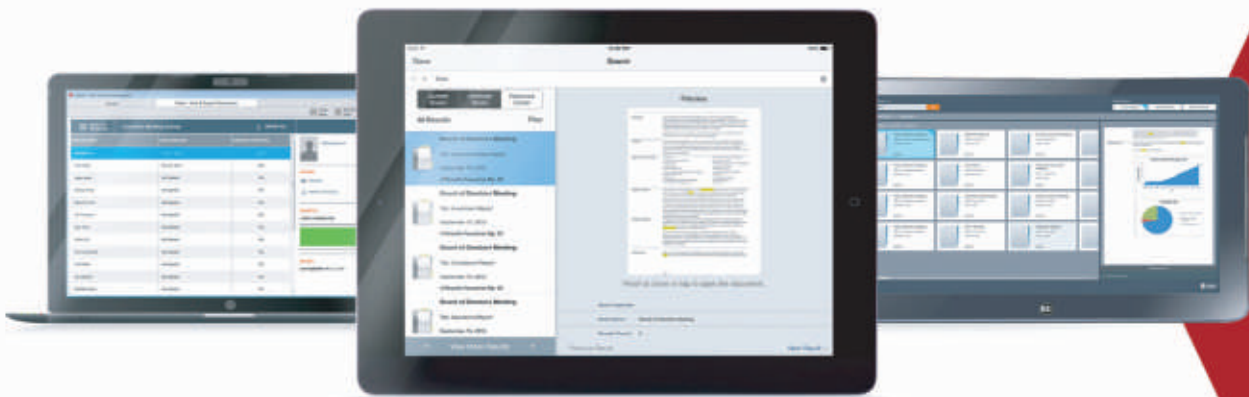
The Hon'ble Prime Minister of India, Shri Narendra Modi, unveiled the demonetization scheme on 08th November thus making the then five hundred and one thousand rupee notes obsolete. The nation waits in bated breath about the effects of demonetization but overall it's a good step aiming to curb corruption and black money. The Prime Minister have also encouraged us to go cashless and to embrace the digital economy thus making things more transparent. **The EIRC of ICSI has already initiated the cashless route where we are**



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List of Activities organised by EIRC from 1.11.2016 to 30.11.2016

Date	Programme / Activity
2.11.2016 to 22.11.2016	114th MSOP Batch
2.11.2016 to 22.11.2016	115th MSOP Batch
5.11.2016	27th Regional Conference of Company Secretaries
26.11.2016	ICSI Convocation
29.11.2016 to 16.11.2016	116th MSOP Batch
4 Career Awareness Programmes were organised during this period	

List of Activities organised by Chapter under EIRC from 1.11.2016 to 30.11.2016

Dhanbad Chapter 14.11.2016	Children's Day Celebration
Hooghly Chapter 27.11.2016	Half Day Workshop on "Role of Company Secretaries in the Financial Sector with special focus on the NPAs of Banks and Intervention of RBI - An overview" and "Demonetization and Indian Economy"
27.11.2016	Half Day Workshop on "Overview on Redundant Disclosures under The Companies Act, 2013 and Company Incorporation using SPICE" 3 CAREER AWARENESS PROGRAMME were organized during this period.
Ranchi Chapter 01.11.2016 To 03.11.2016	3rd 3-days e-Governance Programme
18.11.2016	Study Circle on 'Opportunities in GST'
Patna Chapter 14.11.2016	Swachhta Abhiyan
22.11.2016	Beginning of Class Room Teaching (Foundation Programme)

Disclaimer

While every effort has been made and care has been taken in preparation of this newsletter and to ensure its accuracy at the time of publication, EIRC of ICSI assumes no responsibility for any errors which despite all precautions may creep in. ICSI-EIRC does not own any responsibility for the information and views published in the journal which are of the contributors.



114th & 115th Management Skill Orientation Programme Batch on 2.11.2016



CS Sandip Kejriwal addressing the 114th & 115th MSOP Batch; Others on the Dais (L to R) CS Gautam Dugar, Secretary, ICSI-EIRC, CS Ashok Purohit, Treasurer, ICSI-EIRC, CS Siddharth Murarka, Vice-Chairman, ICSI-EIRC, Shri B. Mohanty, ROC, WB, CS Rupanjana Dey, Council Member, ICSI-EIRC, Shri DVNS Sarma, RD, EIRO



Group photo of 114th MSOP Batch



Group photo of 115th MSOP Batch



Dignitaries & Council Members of EIRC inaugurating the 114th & 115th MSOP Batch

27th Regional Conference of Company Secretaries on 5.11.2016



CS Sandip Kejriwal addressing; Others on the Dais (L to R) CS Ashok Purohit, Treasurer, ICSI-EIRC, CS Siddharth Murarka, Vice-Chairman, ICSI-EIRC, Shri Alok Samantarai, RD, MCA (Eastern Region), Shri Manorama Kumari, Member, NCLT (Judicial), CS Mamta Binani, President, ICSI, Dr Navrang Saini, DGCoA, MCA HQ, Dr Rajesh Sharma, Council Member, ICSI, CS Santosh Kumar Agarwala, Council Member, ICSI CS Gautam Dugar, Secretary, ICSI-EIRC.



Dignitaries lighting the inaugural lamp at 27th Regional Conference of Company Secretaries



Hon'ble Dignitaries standing for National Anthem



CS Vinod Kothari, Practicing Company Secretary addressing



Shri Gaurav Kapoor Addressing



CS Anil Murarka, Past President, Practicing Company Secretary addressing



CS Sanjay Kumar Gupta, Past Chairman, Practicing Company Secretary addressing



CA Sushil Goyal, Practicing Chartered Accountant addressing



CS Manoj Banthia, Past Chairman, Practicing Company Secretary addressing

Convocation on 26.11.2016



On the dais from (L to R) CS Sandip Kumar Kejriwal , Chairman, ICSI-EIRC; CS Santosh Kumar Agarwala, Council Member, Shri Gyanesh Chaudhary, MD & CEO, Vikram Solar Pvt. Ltd, CS Mamta Binani, President, ICSI, Shri Ashok Dixit, Joint Secretary, ICSI



CS Sandip Kejriwal, Chairman, ICSI-EIRC addressing



Hon'ble Dignitaries presenting the certificates to the new members of ICSI.



Group photo of Hon'ble guests, new members of ICSI and their family members.



CS Erina Chakraborty
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Report of the Board of Directors

Every company shall attach its Board's Report to the statements laid before the general meeting of the company. [Section 134(3)]

Board's Report shall be prepared based on the stand alone Financial Statements of the company. [Section 134(3)(q) read with Rule 8(1) of Companies (Accounts) Rules, 2014]

Approval : The Board's Report shall be approved by the Board of Directors at a physical board meeting. The same cannot be approved by circulation or at any meeting held through video conferencing or other audio-visual means. [Section 179(3)(g) read with Rule 4 of Companies (Meetings of Board and its Powers) Rules, 2014]

Signing : The Board's report and any annexures thereto under section 134(3) shall be signed by the Chairperson of the company if he is authorised by the Board and where he is not so authorised, shall be signed by at least 2 Directors, one of whom shall be a Managing Director, or by the Director where there is one Director. [Section 134(6)]

Circulation : A copy of the Board's Report alongwith the Financial Statements and the Auditor's Report is required to be sent, physically or in electronic form, to every Member, Trustee of Debenture holder and to all other persons so entitled, at least 21 days before the date of Annual General Meeting. [Section 134(7) and 136 read with Rule 11 of Companies (Accounts) Rules, 2014]

Filing : (a) The board resolution approving the said Report should be filed with the RoC in Form MGT-14 within 30 days from the date of passing such resolution. [Sections 117(3)(g) read with Rule 24 of Companies (Management and Administration) Rules, 2014]

Private companies are exempted from filing of Form MGT-14 in this connection. [Notification No. GSR 464(E) dated 5th June, 2015.]

(b) Board's Report along with the audited Financial Statements of a company is required to be filed with RoC in Form AOC 4 within 30 days of the date of Annual General Meeting. [Section 137(1) read with Rule 12(1) of Companies (Accounts) Rules, 2014.]

(c) Particulars of employees posted and working in a country outside India, not being directors or their relatives, drawing more than the limit prescribed under the relevant provisions shall be filed with the RoC along with the Financial Statements and Board's Reports; such particulars shall not be circulated to the Members in the Board's report. [Rule 5(3) of Companies (Appointment and Remuneration) Rules, 2014]

Penalties : Section 134(8)

Company	Fine : Not less than Rs. 50,000 but which may extend to Rs. 25 Lakhs.
Officer in default	Fine : Not less than Rs. 50,000 but which may extend to Rs. 5 Lakhs; or Imprisonment : upto 3 years; or Both Fine and Imprisonment

Company wise Checklist on Board of Director's Report

1. The sections referred to in this Article shall be read as under the Companies Act, 2013 unless otherwise mentioned.

2. The following symbols shall denote :

* : Applicability subject to prescribed threshold limits.

** : Event based applicability.

Relevant Provision	Matters to be included in the Board's Report Company	Private Public Company	Unlisted Company	Listed
Disclosures pertaining to Financial Information & State of Affairs of the Company				
<i>Section 134(3)(q) read with Rule 8(5)(i) of Companies (Accounts) Rules, 2014</i>	Financial summary or highlights.			
<i>Section 134(3)(l)</i>	State of the company's affairs.			
<i>Section 134(3)(l)</i>	Material changes and commitments, if any, affecting the financial position of the company which have occurred between the end of the FY of the company to which the Financial Statements relate and the date of the report.	* *	* *	* *
<i>Section 131(1)</i>	Detailed reasons for revision of Financial Statements or Director's Report, if any.	* *	* *	* *
<i>Section 134(3)(q) read with Rule 8(5)(ii) of Companies (Accounts) Rules, 2014</i>	Change in the nature of business, if any.	* *	* *	* *
<i>Section 134(3)(q) read with Rule 8(5)(viii) of Companies (Accounts) Rules, 2014</i>	Details in respect of adequacy of Internal Financial Controls with reference to the Financial Statements.			
Disclosures pertaining to Directors and Key Managerial Personnel				
<i>Section 134(3)(q), 168(1) read with Rule 8(5)(iii) of Companies (Accounts) Rules, 2014</i>	The details of Directors or Key Managerial Personnel who were appointed or have resigned during the year.			
<i>Section 134(3)(d)</i> Independent Director(s).	Statement on declaration of independence by the x	*		
<i>Section 149(10)</i>	Re-appointment of Independent Director(s).	* *	* *	* *
<i>Section 134(3)(b), 177(8), 135(4) read with Clause 9 of SS-1</i>	The following details relating to meetings of the Board and its Committees held during the FY to be provided : ● Composition ● Date of Meetings held ● No. of Meetings held ● No. of Meetings attended			
<i>Section 134(3)(e)</i>	Company's policy on directors' appointment and remuneration including criteria for determining qualifications, positive attributes, independence of directors.	x	*	

Relevant Provision	Matters to be included in the Board's Report	Private Company	Unlisted Public Company	Listed Company
<i>Section 134(3)(p) read with Rule 8 (4) Companies (Accounts) Rules, 2014 and individual Directors.</i>	A statement indicating the manner in which formal annual evaluation has been made by the Board of its own performance and that of its Committees	x	*	
<i>Section 134(3)(c) and 134(5)</i>	Directors' Responsibility Statement.			
<i>Section 197(12) read with Rule 5(1) of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014</i>	Ratio of the remuneration of each Director to the median remuneration of the employees of the company and such other details as prescribed under the relevant provisions.	x	x	
<i>Schedule V – Part II – Section II of Companies Act, 2013</i>	Additional disclosures as prescribed in the Act, to be provided under the heading “Corporate Governance”, if any, attached to the Financial Statement in case of remuneration payable by companies having no profit or inadequate profit without Central Government approval to MD / WTD / Manager.	x	x	
<i>Section 197(14)</i>	Remuneration / commission received by MD / WTD of a company from its holding or subsidiary company.			
Disclosures Pertaining to Subsidiaries, Associates and Joint Ventures				
<i>Rule 8(1) of Companies (Accounts) Rules, 2014</i>	Report on the highlights of performance of subsidiaries, associates and joint venture companies and their contribution to the overall performance of the company during the period under review.			
<i>Section 134(3)(q) read with Rule 8(5)(iv) of Companies (Accounts) Rules, 2014</i>	Names of companies which have become or ceased to be the company's subsidiaries, joint ventures or associate companies during the year.			
Disclosures Pertaining to Corporate Social Responsibility				
<i>Section 134(3)(o) read with 135(5)</i>	- Details of CSR Policy and its implementation. - Reason for not spending the CSR amount as required.	*	*	*
<i>Section 135(4) read with Rule 9 of Companies (Accounts) Rules, 2014 and Rule 9 of Companies (CSR Policy) Rules, 2014</i>	Annual Report on CSR activities including contents of the CSR Policy of the Company.	*	*	*
Disclosures pertaining to Auditors, Auditor's Report and Audit Committee				
<i>Section 134(3)(ca), 143(12) read with Rule 13(4) of Companies (Audit and Auditors) Rules, 2014</i>	Details in respect of frauds reported by auditors under Section 143(12) other than those which are reportable to the Central Government : ● Nature of Fraud with description; ● Approximate Amount involved; ● Parties involved, if remedial action not taken; and ● Remedial actions taken.			



Relevant Provision	Matters to be included in the Board's Report	Private Company	Unlisted Public Company	Listed Company
<i>Section 204 (1) read with Rule 9 of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014</i>	Secretarial Audit Report in Form MR-3.	x	*	
<i>Section 134(3)(f) and 134(4)</i>	Explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by Statutory Auditors in their reports.			
<i>Section 134(3)(f) and 204(3)</i>	Explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by PCS in the Secretarial Audit Report.	x	*	
<i>Section 177(8)</i>	If the Board had not accepted any recommendation of the Audit Committee, the same shall be disclosed along with the reasons therefor.	x	*	
<i>Section 177(10)</i>	The details of establishment of vigil mechanism.	*	*	
Disclosures pertaining to Deposits				
<i>Section 134(3)(q) read with Rule 8(5)(v) of Companies (Accounts) Rules, 2014</i>	Details relating to deposits, covered under Chapter V of the Act.			
<i>Section 134(3)(q) read with Rule 8(5)(vi) of Companies (Accounts) Rules, 2014</i>	Details of deposits which are not in compliance with the requirements of Chapter V of the Act.			
<i>Rule 2(1)(c)(viii) of Companies (Acceptance of Deposits) Rules, 2014</i>	Details of money accepted from any director of the company.			
Disclosures pertaining to Employees				
<i>Section 197(12) read with Rule 5(2) and 5(3) of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014</i>	Statement showing the name of the top 10 employees in terms of remuneration drawn and the name of every employee, who has drawn in excess of the limits prescribed under the relevant Rules.			
<i>Section 22 of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013</i>	Number of cases filed, if any, and their disposal			
Disclosures pertaining to Share Capital				
<i>Rule 4(4) of Companies (Share Capital and Debentures) Rules, 2014</i>	Details as required under the relevant Rules if equity shares are issued with differential rights.	* *	* *	* *
<i>Rule 8(13) of Companies (Share Capital and Debentures) Rules, 2014</i>	Details as required under the relevant Rules if sweat equity shares are issued.	* *	* *	* *

Relevant Provision	Matters to be included in the Board's Report	Private Company	Unlisted Public Company	Listed Company
<i>Rule 12(9) of Companies (Share Capital and Debentures) Rules, 2014</i>	Details as required under the relevant Rules relating to Employees Stock Option Scheme.			x
<i>Section 67(3) read with Rule 16(4) of Companies (Share Capital and Debentures) Rules, 2014</i>	Details as required under the relevant Rules, if voting rights are not exercised directly by the employees in respect of shares issue under the scheme for purchase / subscription of company's shares to trustees for the benefit of employees.	* *	* *	* *
Other Disclosures				
<i>Section 134(3)(n)</i>	Development and implementation of Risk Management Policy.			
<i>Section 134(3)(g)</i>	Particulars of loans, guarantees or investments under section 186.			
<i>Section 134(3)(h) read with Rule 8(2) of Companies (Accounts) Rules, 2014</i>	Particulars of contracts or arrangements with related parties in Form AOC-2.			
<i>Section 134(3)(j)</i>	Amount, if any, proposed to be carried to any reserves.			
<i>Section 134(3)(k)</i>	Dividend recommended for declaration, if any.			
<i>Section 134(3)(m) read with Rule 8(3) of Companies (Accounts) Rules, 2014</i>	Conservation of energy, technology absorption, foreign exchange earnings and outgo.			
<i>Section 134(3)(a) and 92(3) read with Rule 12 of Companies (Management and Administration) Rules, 2014</i>	Extract of the Annual Return in Form MGT -9.			
<i>Section 134(3)(q) read with Rule 8(5)(vii) of Companies (Accounts) Rules, 2014</i>	Details of significant and material orders passed by the Regulators / Courts / Tribunals impacting the going concern status and company's operations in future.			
Disclosures under SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015				
<i>Regulation 32(4) of SEBI (LODR) Regulations, 2015</i>	Explanation for deviation / variation in public issue, rights issue, preferential issues etc. as specified in Regulation 32(1).	x	x	
<i>Regulation 34(2)(e) of SEBI (LODR) Regulations, 2015</i>	Management Discussion and Analysis Report [may form part of the Board' Report or an addition thereto in the Annual report.]	x	x	
<i>Clause E of Schedule V of SEBI (LODR) Regulations, 2015</i>	Compliance Certificate from either the Auditors / Practicing Company Secretary regarding compliance of conditions of corporate governance shall be annexed with the Board's report.	x	x	



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ARTICLE ON THE INSOLVENCY AND BANKRUPTCY CODE, 2016

A Single Code for All types of insolvencies

The Insolvency and Bankruptcy Code, 2016 (IBC) gazetted on 28th May, 2016, that provides a consolidated single regulatory platform for insolvency of corporates, LLPs, individuals and partnership firms, has taken the positives of US and UK Bankruptcy Laws such as moratorium during insolvency process, time bound insolvency process, role of insolvency professionals, in the process such as taking over of management, powers of creditors in the process etc.

The code has identified the delay in the insolvency and bankruptcy resolution process in the current regulatory system. Under the current system, considerable time is lost in obtaining credit information. Another source of delay is multi-layered adjudicating mechanism. The Code provides for Corporation Insolvency Resolution process within a period of 180 days which can be extended to 90 more days once.

Establishment of Board, Notification of Regulations

The establishment of the Insolvency and Bankruptcy Board of India (IBBI) on 1st October, 2016 and the notification of provisions of the Insolvency and Bankruptcy Code, 2016 (the 'Code') relating to Corporate Insolvency Resolution Process, Insolvency Professionals, Insolvency Professional Agencies and the Regulations/Rules made thereunder and notification of Sick Industrial Companies(Special Provisions) Repeal Act, 2003 with effect from 1st December, 2016, are one of the recent landmark regulatory reforms in India. This is expected to result in faster and efficient adjudication mechanism in a time bound manner for maximization of the value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Code of India, and for matters connected therewith or incidental thereto, as indicated in the preamble of the Code.

The Code has opened up a plethora of opportunities for the professionals in the areas of Corporate Insolvency Resolution Process, Corporate Liquidation Process and Individual Insolvency Resolution process. It calls for fresh approach in learning the new legislation and in dealing with the cases.

The Insolvency Professional Agencies and the Insolvency Professionals are already in place

Insolvency Professional Agencies

The Insolvency Professional Agencies, which are wholly owned subsidiaries of Premier institutes such as Institute of Company Secretaries of India, Institute of Chartered Accountants of India and Institute of Cost Accountants of India are incorporated as a Section 8 company and is registered with Insolvency and Bankruptcy Board of India and have started enrolling the professional members to be registered as insolvency professionals with Insolvency and Bankruptcy Board of India.

Registration of Insolvency Professionals for limited period has already started

Under Regulation 9 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, Chartered Accountants, Company Secretaries, Cost Accountants, and Advocates having more than 15 years of practice can register themselves as insolvency professionals for a limited period of six months. This registration for limited period is available upto 31st December, 2016.

Limited Examination for Insolvency Professionals is scheduled from 31st December, 2016

Under Regulation 5 of the Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, Chartered Accountants, Company Secretaries, Cost Accountants, and Advocates having ten years of experience are required to pass Limited Insolvency Examination, for registration as an insolvency professional. The insolvency and Bankruptcy Board of India has already announced the syllabus and the date of limited examination to be held from 31st December, 2016.

Opportunities and Challenges

Data on Pending Cases

1. Data on Winding up Cases (Based on Eradi Committee Report and the Report of the Joint Committee on Insolvency and Bankruptcy Code, 2016)

In 1999, Justice Eradi Committee had identified 473 winding-up cases that were pending for more than 25 years. The analysis of companies under liquidation as on 31st October, 2015, furnished by the Department of Financial Services, indicates that there were total of 5,141 winding-up cases pending, out of which 1,479 were pending winding-up cases for more than 20 years, indicating relative triple-time increase in data of winding-up cases still pending. The causes may be due to delays in deciding on the viability of businesses, tactics employed by company promoters to delay reorganisation or attempts to sell off assets, changes of management or litigation that goes on endlessly – consequently, the drag on new business units, jobs, income generation and economic growth can be significant.

2. Pending DRT Cases-Sources (Data from Live Mint dated 5th November, 2016)

As on 25th October, there are 95,537 cases pending in 32 DRTs, including the cases carried over from last year and new ones added this year. Only 9,918 were disposed of this year, of the total 1,05,455 cases. The amount involved in these cases is over Rs. 4 lakh crores.

The number of pending cases this year is also higher than the previous three years.

Some of these cases will move to the National Company Law Tribunals, which are set to handle corporate insolvency, which could reduce the stress on the DRTs.

DRTs form another arm of the insolvency scheme that the government has put in place through the passage of the Insolvency and Bankruptcy Code this year. DRTs will handle insolvencies for individuals.

3. BIFR pending cases (Data from report of joint Committee on the Insolvency and Bankruptcy Code 2015)

As per the data furnished by the Department of Financial Services, the Committee noted that 881 cases were pending in BIFR as on 14th January, 2016.

The data indicates that the opportunities and scope for insolvency practice is very wide in the area of Corporate Insolvency Resolution Process, Corporate Liquidation, Individual Insolvency Resolution Process etc.

Further, following the repeal of SICA, all cases under the BIFR and the Appellate Authority for Industrial and Financial Reconstruction stand abated and fresh cases must be filed with the National Company Law Tribunal.

Few Challenges

The time bound process of Corporate Insolvency Resolution Process (CIRP)

The 180 days time bound process for CIRP would be a major challenge calling for speedier process in collating credit information, preparation of information memorandum by Resolution Professional (RP), setting up of information utilities that provide credit information, establishment of full benches of NCLT to handle the work load of pending cases, availability of insolvency professionals, process involved in taking over of management by insolvency professionals, time for the adjudicating authority in evaluation of the resolution plan etc.

Establishment of infrastructure at the offices of adjudicating authorities

The IT and other infrastructure at the offices of adjudicating authorities is required to be strengthened to handle the CIRP and liquidation cases that are being filed with them.



Specification, creation and capacity building of insolvency professionals

The Code requires RPs who are insolvency professionals and are to be member of Insolvency Professional Agencies and is required to pass the qualifying examination. To generate such professionals to handle CIRP cases will take few years. As per Section 244 which deals with transitional provisions relating to treating such categories of persons with such qualification and experience as insolvency professional agencies and insolvency professionals, capacity building of such professionals would be a challenge, since the Code is very new.

Cross Border Insolvency

The report of the Joint Committee on Insolvency and Bankruptcy Code observes the following paragraph in point no. 62:

“The Committee deliberated the issue and noted that “The Code at present does not explicitly deal with issues and text related to cross border insolvency. However given that many corporate transactions and businesses today involve an international and cross border element, the implications of cross border insolvency cannot be ignored for too long if India is to have a comprehensive and long lasting insolvency law as the Code aims to achieve. Not incorporating this will lead to an incomplete Code”

Accordingly the following clause has been incorporated in the code in Section 234

234. (1) The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code.
- (2) The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified.

The process of recognition of foreign proceedings and cross court recognitions, agreements with countries is a long term process and challenging.

Consequential amendment in other legislations and harmonisation with IBC

The impact of Insolvency and Bankruptcy Code, 2016 will have an overriding effect on other legislations, requiring amendments of the following:

- a. The Indian Partnership Act, 1932
- b. The Central Excise Act, 1944
- c. The Income Tax Act, 1961
- d. The Customs Act, 1962
- e. Recovery of Debts Due to Banks and Financial Institutions Act, 1993
- f. The Finance Act, 1994
- g. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
- h. Sick Industrial Companies (Special Provisions) Repeal Act, 2003
- i. The Payment and Settlement Systems Act, 2007
- j. The Limited Liability Partnership Act, 2008
- k. The Companies Act, 2013

The amendment of the above mentioned legislations and their harmonisation with the Insolvency and Bankruptcy Code, 2016 would be a big challenge.

The Insolvency and Bankruptcy Code, 2016 (IBC) is a vital reform that will make it much easier to do business in India. The IBC will lead to promote entrepreneurship, availability of credit, and balance the interests of all stakeholders by consolidating and amending the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner and for maximization of value of assets of such persons and matters connected therewith or incidental thereto. This Law promises to make it easier to wind up a failing business and facilitate a better and faster debt recovery mechanism in the country.



Arjun Chaturvedi
Senior Manager, Group Investment Management,
Tata Steel Ltd.



Deepak Jindal
Manager
Tata Steel Ltd.

Place of Effective Management: Concept Note

Place of effective management ('POEM') is an internationally recognized residency test in case of foreign companies and hence many tax treaties recognize this concept for avoidance of double taxation. Finance Act, 2015 has introduced this concept in India. Pursuant to this, CBDT issued a draft of guidelines for determination of POEM. As POEM helps in determination of residence of a company for the purpose of tax liabilities, its effect will be across all sectors of economy, and thus, all corporates must have a clarity on the concept and actions required to be taken for their tax planning process.

- A. **Change in Law:** Finance Act, 2015 amended section 6(3) of Income Tax Act as following:

Section 6(3) defines which company is a resident of India.	
Before Amendment	After Amendment
It is an Indian company; or during that year, control and management of its affairs is situated wholly in India	It is an Indian company; or Its Place of Effective Management (PoEM), at any time in that year, is in India

- A. **Object of the Amendment:**
- To align with DTAA's entered into by India with other countries and in line with international standards.
 - To deal with cases of foreign shell companies being controlled and managed from India.
- B. **Origin of concept:** The concept originated from comments submitted by country delegations to OECD in 1957.
- C. **Meaning of Concept:** PoEM means a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance, made.

Test of PoEM	
Whether or not the company is engaged in active business (defined below) outside India? For this, the average of the data of previous year and two years prior to that shall be taken into account. In case the company has been in existence for a shorter period, then data of such period shall be considered.	
Yes	No
Whether majority meetings of the board of the company are held outside India?	Identify persons who actually make the key management and commercial decision for conduct of the company's business as a whole.
Yes	Determine place where these decisions are in fact being made by abovementioned persons. (The place where management decisions are taken would be more important than the place where such decisions are implemented.)
PoEM shall be presumed to be outside India. However, if it is established that the powers of Board are exercised by either the holding company or any other person (s) resident in India, then PoEM shall be considered to be in India.	PoEM would be at the place where decisions are actually taken by abovementioned persons.



E. **Important Definitions:**

Active Business Outside India

- Active Business means that Passive income is less than 50% of its total income. Here, Passive Income refers to income from transactions where both purchase and sale of goods is from/to its associated enterprises and income by way of royalty, dividend, capital gains, interest or rental income.
- Outside India means that:
 - less than 50% of its total assets are situated in India; and
 - less than 50% of total number of employees are situated in India or are resident in India; and
 - the payroll expenses incurred on such employees is less than 50% of its total payroll expenditure

Head Office

- It refers to the place where the company's senior management and their direct support staff are located. If they are located at multiple locations, Head Office is the place where they are primarily or predominantly located. Head Office is not necessarily the same as the place where the majority of its employees work or where its board typically meets.

Senior Management

- It refers to persons who are generally responsible for developing and formulating key strategies and policies for the company and ensuring or overseeing the execution and implementation of those strategies on a regular and on-going basis. These persons may include MD/CEO, CFO, COO and Heads of various divisions or departments (for example, Chief Information or Technology Officer, Director for Sales or Marketing).

F. **Primary Factors in determination of PoEM:**

1. Place of Board Meeting: The location of regular Board Meetings may be the company's PoEM, if the Board:
 - (i) Retains and exercises its authority to govern the company; and
 - (ii) Does, in substance, make the key management and commercial decisions necessary for the conduct of the company's business as a whole.

However, mere formal holding of Board Meetings at a place would not be conclusive for determination of PoEM. The key issue is the location at which key decisions are being taken by the directors. This principle becomes relevant in following cases:

- (i) Board Meetings are held in a location distinct from Head Office of the company
 - (ii) Board Meetings are held in a location unconnected with the place where predominant activity of company is carried out.
 - (iii) Board has delegated some/all of its authority to one or more committees. The delegation of authority may be either de jure (through formal resolution or Shareholder Agreement) or de facto (through actual conduct of the board and the executive committee). And Board Meetings are conducted to routinely ratify the decisions already made.
 - (iv) Board has delegated the authority to make the key decisions to the senior management or any other person including a shareholder. And Board Meetings are conducted to routinely ratify the decisions already made.
2. Place of Company's Head Office: Location of company's Head Office is important factor in the determination of PoEM as it often represents the place where key company decisions are made. Location of Head Office may be determined by following factors:
 - (i) If company's senior management and their support staff are based in a single location and that location is held out to the public as the company's principal place of business or headquarters then that location is the place where head office is located.
 - (ii) If company is decentralized (for example where members of senior management may operate, from time to time, at offices located in the various countries) then the Head Office would be where senior managers:
 - Are primarily or predominantly based; or
 - Normally return to following travel to other locations; or
 - Meet when formulating or deciding key strategies and policies for the company as a whole; or
 - Where highest level of management (for example, MD and CFO) and their direct support staff are located (in case senior management operates from different locations they participate in various meetings via telephone or video conferencing); or

However, if senior management is so decentralised that it is not possible to determine the company's head office with a reasonable degree of certainty, then location of head office would not be relevant in determining company's PoEM.

3. Residence as a factor: Usual residence of majority of directors/persons taking key decisions may also be a relevant factor.

G. **Secondary Factors in determination of PoEM:**

1. Place where main and substantial activity of the company is carried out; or
2. Place where the accounting records of the company are kept.

H. **Other Key elements to be noted:**

- a) Concept of PoEM is driven by substance over form. The above principles are to be seen with reference to activities performed over a period of time including past year. So, a "snapshot" approach is not to be adopted.
- b) Determination of PoEM will depend upon the facts and circumstances of each case.
- c) It may be noted that an entity may have more than one place of management, but it can have only one place of effective management at any point of time.
- d) Test of PoEM should be on year to year basis.
- e) Day to day routine operational decisions shall not be relevant for determination of PoEM.
- f) The following fact/activities will not be conclusive evidence for establishing PoEM in India in isolation:
 - A foreign company is completely owned by an Indian company; or
 - One or some of the Directors of a foreign company reside in India; or
 - Local management being situated in India in respect of activities carried out by a foreign company in India; or
 - The existence in India of support functions that are preparatory and auxiliary in character

Thus, in light of above discussion, it is recommended to company secretaries that it is advisable to strengthen documentation regarding delegation of powers and procedures for identification of centres of authority to assist external stakeholders in identification of place of effective management of corporates.

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CHARGE – AT A GLANCE REGISTRATION, MODIFICATION & SATISFACTION

CHARGE is a **right** created by a company (**Borrower**) on its **assets and properties**, in favour of a financial institution or a bank, (**Lender**) which has agreed to extend **financial assistance**.

- ★ Section – 2(16) – Charge means an **interest or lien** created on the **property or assets** of a company or any of its **undertakings** or both as **security** and includes a **mortgage**.
- ★ Chapter VI, **Section 77 to 87**, The Companies (Registration of Charges) Rules 2014.
- ★ Property or assets may be tangible or intangible, situated in India or outside India, present or future, movable or immovable.
- ★ Mortgage, hypothecation, pledge, lien etc. also comes under the definition of charge.
- ★ There should be two parties to the transaction, the **creator of the charge** and the **charge holder**. Both the party has to sign the form to be filed.

TYPES OF CHARGE

- ★ Fixed Charge - a charge on the real asset of the company that is identifiable when the charge is created.
- ★ Floating Charge - a security interest over a fund of changing assets (e.g. stocks) of a company which 'floats' or 'hovers' until the point at which it is converted into a **fixed charge**.

- ★ Pari Passu Charge – provide equivalent right of a specified assets of a borrowing company to all the lenders under the arrangement.
- ★ Exclusive Charge – the charge holder has an exclusive right over the security of the property over and above all other persons.
- ★ Further Charge / second charge

CHARGES REQUIRING REGISTRATION

All types of charges are required under the Act to be registered –

- ★ Charge securing issue of debenture / deposit
- ★ Charge on uncalled share capital
- ★ Charge on calls made but not paid
- ★ Charge on movable / immovable property
- ★ Floating Charge on book debt / stock in trade or any other assets
- ★ Charge on any undertaking
- ★ Charge on ship or share in a ship
- ★ Charge on intangible assets including goodwill, patent, copyright, licence, trade mark etc.
- ★ **Charge by lien on FDs**
- ★ Charge on property situated outside India
- ★ **Hypothecation of Motor Vehicles**
- ★ **Pledge of securities or other assets**
- ★ Others as specified by CG from time to time.

REGISTRATION / CREATION OF CHARGE

- File Form No. **CHG – 1** (for other than Debentures) or Form No. **CHG – 9** (for Debentures) & **MGT -14** (for Special Resolution & Board Resolution) with ROC within **30 days**
- The following particulars in respect of each charge are required to be filed with the Registrar:
 - (a) date and description of instrument creating charge;
 - (b) total amount secured by the charge;
 - (c) date of the resolution authorising the creation of the charge; (in case of issue of secured debentures only);
 - (d) general description of the property charged;
 - (e) a copy of the deed/instrument containing the charge duly certified or if there is no such deed, any other document evidencing the creation of the charge to be enclosed;
 - (f) list of the terms and conditions of the loan; and
 - (g) name and address of the charge holder.
- ROC shall issue a certificate of registration in Form No. **CHG – 2**
- Every Company shall keep at its registered office a Register of Charges in Form No. **CHG – 7** and enter therein the particulars of Charge.
- It shall be the responsibility of the Company to file with ROC, for registration of each charge created.
- If the Company fails, then the person in whose favour the charge is created may apply with ROC for registration of charge and the ROC may, on such application, within 14 days after giving notice to the Company allow such registration. (Section – 78)

MODIFICATION OF CHARGE

- File Form No. **CHG – 1** (for other than Debentures) or Form No. **CHG – 9** (for Debentures including rectification) with ROC within **30 days**.
- File evidence of modification of Charge / Instrument regarding modification of Charge along with the Form.
- ROC shall issue a certificate of modification of Charge in Form No. **CHG – 3**
- Make necessary entry in the Register of Charges

SATISFACTION OF CHARGE

- File Form No. **CHG – 4** with ROC within 30 days of the payment or satisfaction in full of any charge registered.
- File evidence of satisfaction of Charge along with the Form.
- ROC shall issue a certificate of registration of satisfaction of Charge in Form No. **CHG – 5**.
- Make necessary entry in the Register of Charges.
- The Register of Charges and instrument of charges kept by the Company shall be open for **inspection –**
(a) by any member or creditor without payment of fees,
(b) by **any other person** on payment of such fees as may be prescribed.

CONDONATION OF DELAY IN CASE OF CREATION / MODIFICATION OF CHARGE

- ★ **Beyond 30 days upto 300 days**
 - **ROC** has the power to condone and grant extension of time, if satisfied that the Co. had sufficient cause for not filing the Charge.
 - Application for delay shall be made in Form No. **CHG – 1 / 9**.
 - File a **declaration** signed by CS or Director that such belated filing shall not adversely affect rights of any other intervening creditors of the Company.
- ★ **Beyond 300 days for Creation / Modification or Beyond 30 days for Satisfaction or in case of Rectification**
 - File Charge related Form with ROC.
 - Application for delay shall be made in Form No. **CHG – 8**.
 - File the Order of RD with ROC in Form No. **INC – 28**.
 - **CG (Regional Director)** has the power to condone if satisfied that omission / misstatements was accidental or due to inadvertence or due to some other sufficient cause and is not prejudicial to creditors or shareholders

APPLICABLE FORMS

- ★ CHG – 1 - Registration / Modification of Charge (other than Debenture)
- ★ CHG – 2 - Registration Certificate of Charge issue by ROC
- ★ CHG – 3 - Modification Certificate of Charge issue by ROC
- ★ CHG – 4 - Satisfaction of Charge
- ★ CHG – 5 - Satisfaction Certificate of Charge issue by ROC
- ★ CHG – 6 - Appointment / Cessation of Receiver
- ★ CHG – 7 - Register of Charge
- ★ CHG – 8 - Application to CG for condonation of delay
- ★ CHG – 9 - Registration / Modification of Charge for Debenture
- ★ INC – 28 - Order of CG to be filed with ROC
- ★ MGT – 14 – Special Resolution or Board Resolution

PENAL PROVISIONS

- ★ Fine on **Company** not less than Rs. 1 lakh which may extend to Rs. 10 lakhs
- ★ Fine on every **Officer in default** not less than Rs. 25 thousand which may extend to Rs. 1 lakh, or imprisonment which may extend to 6 months or with both.
- ★ Charge is void against the liquidator or other creditors
- ★ The offence is compoundable u/s 621A of Companies Act, 1956

COMPANIES AMENDMENT BILL 2016

- ★ The Bill seeks to enable the Central Govt. to notify such charges (**negative list of charges**) for which registration of charges will not be applicable. (fourth proviso to S - 77(1))
- ★ In case the Company fails to register the charge within the period of **thirty days**, the Charge Holder, may apply to the Registrar for registration of the charge. (S - 78)

Power given to the Registrar to grant extension of time upto **300 days** in case of satisfaction of charge. (proviso to S – 82(1))



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