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Company Secretaries of India**

भारतीय कम्पनी सचिव संस्थान

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SUPPLEMENT PROFESSIONAL PROGRAMME

CORPORATE RESTRUCTURING, INSOLVENCY, LIQUIDATION & WINDING UP

**(Supplement covers amendments/developments from August 2021
to November 2022)**

MODULE 2

PAPER 5

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Lesson 2

Acquisition of Company/ Business

SEBI Takeover Code- Person Acting in Concert interpretation of the term- explained by Supreme Court

In the case of *Daiichi sankyo company ltd v. Jayaram chigurupati & ors [SC] Civil Appeals No.7148 of 2009 & 7314 of 2009 S.H. Kapadia, Aftab Alam, & Swatanter Kumar, JJ. [Decided on 08/07/2010] Equivalent citations: [2010] 157 Comp Cas 380*; the Hon'ble Supreme Court of India observed that, in terms of the definition (given in the Takeover Code), on entering into the SPSSA on June 11, 2008 (with Ranbaxy) Daiichi became the acquirer (directly) of Ranbaxy and also of Zenotech (indirectly, through the acquisition of Ranbaxy). Thus, on the date of the SPSSA both Ranbaxy and Zenotech became "Target Companies" for Daiichi, the acquirer, the former directly and the latter indirectly.

We now proceed to examine the question whether Daiichi and Ranbaxy came together in the relationship of "persons acting in concert" as claimed by the respondents and connected with it the larger question as to the stage when the relationship of "persons acting in concert" must be in existence for the applicability of regulation 20(4)(b) of the Takeover Code. For this, we must first understand what is the true meaning of "persons acting in concert" as defined in regulation 2(e).

To begin with, the concept of "person acting in concert" under regulation 2(e)(1) is based on a target company on the one side, and on the other side two or more persons coming together with the shared common objective or purpose of substantial acquisition of shares etc. of the target company. Unless there is a target company, substantial acquisition of whose shares etc. is the common objective or purpose of two or more persons coming together there can be no "persons acting in concert". For, de hors the target company the idea of "persons acting in concert" is as irrelevant as a cheat with no one as victim of his deception. Two or more persons may join hands together with the shared common objective or purpose of any kind but so long as the common object and purpose is not of substantial acquisition of shares of a target company they would not comprise "persons acting in concert".

The other limb of the concept requires two or more persons joining together with the shared common objective and purpose of substantial acquisition of shares etc. of a certain target company. There can be no "persons acting in concert" unless there is a shared common objective or purpose between two or more persons of substantial acquisition of shares etc. of the target company. For, de hors the element of the shared common objective or purpose the idea of "person acting in concert" is as meaningless as criminal conspiracy without any agreement to commit a criminal offence. The idea of "persons acting in concert" is not about a fortuitous relationship coming into existence by accident or chance. The relationship can come into being only by design, by meeting of minds

between two or more persons leading to the shared common objective or purpose of acquisition of substantial acquisition of shares etc. of the target company. It is another matter that the common objective or purpose may be in pursuance of an agreement or an understanding, formal or informal; the acquisition of shares etc. may be direct or indirect or the persons acting in concert may cooperate in actual acquisition of shares etc. or they may agree to cooperate in such acquisition. Nonetheless, the element of the shared common objective or purpose is the *sin qua non* for the relationship of “persons acting in concert” to come into being.

The submission made on behalf of the respondents that on signing the SPSSA Ranbaxy became a person acting in concert with Daiichi overlooks this basic precondition and ingredient of the relationship. The consequential takeover of Zenotech and its acknowledgment are not same thing as the shared common objective or purpose of substantial acquisition of shares or voting rights or gaining control over Zenotech. As stated above, the relationship of “persons acting in concert” is not a fortuitous relationship. It can come into being only by design. Hence, unless it is shown that Daiichi and Ranbaxy entered into the SPSSA for the common objective or purpose of substantial acquisition of shares or voting rights or control over Zenotech they cannot be said to have come in the relationship of “persons acting in concert”. This is not even the case of the respondents. The inevitable conclusion, therefore, is that on signing the SPSSA Daiichi and Ranbaxy did not come within the relationship of persons acting in concert within the meaning of regulation 2(e)(1) of the Takeover Code.

We are clearly of the view that for the application of regulation 20(4)(b) it is not relevant or material that the acquirer and the other person, who had acquired the shares of the target company on an earlier date, should be acting in concert at the time of the public announcement for the target company. What is material is that the other person was acting in concert with the acquirer at the time of purchase of shares of the target company.

In light of the discussion made above the inevitable conclusions are that in so far as Zenotech is concerned Ranbaxy was not acting in concert with Daiichi either from the date of the SPSSA or even after becoming a subsidiary of Daiichi and the acquisition of Zenotech shares by Ranbaxy in the month of January 2008 did not come within the ambit of regulation 20(4)(b). The offer price in the public announcement for Zenotech shares made by the appellant was correctly worked out. It follows that the judgment of the Appellate Tribunal is unsustainable and it has to be set aside.

Offer Price under SEBI(SAST) Regulations, 2011

Regulation 8(1) of SEBI(SAST) Regulations states that the open offer for acquiring shares under regulation 3, regulation 4, regulation 5 or regulation 6 shall be made at a price not lower than the price determined in accordance with sub-regulation (2) or sub-regulation (3), as the case may be.

Regulation 8(2) states that in the case of direct acquisition of shares or voting rights in, or control over the target company, and indirect acquisition of shares or voting rights in, or control over the target company where the parameters referred to in sub-regulation (2) of regulation 5 are met, the offer price shall be the highest of, —

- a) the highest negotiated price per share of the target company for any acquisition under the agreement attracting the obligation to make a public announcement of an open offer;
- b) the volume-weighted average price paid or payable for acquisitions, whether by the acquirer or by any person acting in concert with him, during the fifty-two weeks immediately preceding the date of the public announcement;
- c) the highest price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, during the twenty- six weeks immediately preceding the date of the public announcement;
- d) the volume-weighted average market price of such shares for a period of sixty trading days immediately preceding the date of the public announcement as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, provided such shares are frequently traded;

Provided that the price determined as per clause (d) shall not apply in the case of disinvestment of a public sector undertaking by the Central Government or a State Government, as the case may be:

Provided further that this proviso shall apply only in case of a change in control in the public sector undertaking.

It may be noted that –

“Disinvestment” means the direct or indirect sale by the Central Government or any State Government or by a government company, as the case may be, of shares or voting rights in, or control over, a target company, which is a public sector undertaking. [Regulation 2(1)(g)]

“Public Sector Undertaking” means a target company in which, directly or indirectly, majority of shares or voting rights or control is held by the Central Government or any State Government or Governments, or partly by the Central Government and partly by one or more State Governments [Regulation 2(1)(u)]

“Frequently Traded Shares” means shares of a target company, in which the traded turnover on any stock exchange during the twelve calendar months preceding the calendar month in which the public announcement is required to be made under these regulations, is at least ten per cent of the total number of shares of such class of the target company:

Provided that where the share capital of a particular class of shares of the target company is not identical throughout such period, the weighted average number of total shares of such class of the target company shall represent the total number of shares [Regulation 2(1)(j)]

- e) where the shares are not frequently traded, the price determined by the acquirer and the manager to the open offer taking into account valuation parameters including, book value, comparable trading multiples, and such other parameters as are customary for valuation of shares of such companies; and
- f) the per share value computed under sub-regulation (5), if applicable.

Regulation 8(3) states that, in the case of an indirect acquisition of shares or voting rights in, or control over the target company, where the parameter referred to in sub-regulation (2) of regulation 5 are not met, the offer price shall be the highest of, —

- a) the highest negotiated price per share, if any, of the target company for any acquisition under the agreement attracting the obligation to make a public announcement of an open offer;
- b) the volume-weighted average price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, during the fifty-two weeks immediately preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain;
- c) the highest price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, during the twenty-six weeks immediately preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain;
- d) the highest price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, between the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain, and the date of the public announcement of the open offer for shares of the target company made under these regulations;
- e) the volume-weighted average market price of the shares for a period of sixty trading days immediately preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain, as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, provided such shares are frequently traded;

Provided that the price determined as per clause (e) shall not apply in the case of disinvestment of a public sector undertaking by the Central Government or a State Government, as the case may be:

Provided further that this proviso shall apply only in case of a change in control in the public sector undertaking; and

- f) the per share value computed under sub-regulation (5).

Regulation 8(4) states that, in the event the offer price is incapable of being determined under any of the parameters specified in sub-regulation (3), without prejudice to the requirements of sub-regulation (5), the offer price shall be the fair price of shares of the target company to be determined by the acquirer and the manager to the open offer taking into account valuation parameters including, book value, comparable trading multiples, and such other parameters as are customary for valuation of shares of such companies.

Regulation 8(5) states that, in the case of an indirect acquisition and open offers under sub-regulation (2) of regulation 5 where,—

- a) the proportionate net asset value of the target company as a percentage of the consolidated net asset value of the entity or business being acquired;
- b) the proportionate sales turnover of the target company as a percentage of the consolidated sales turnover of the entity or business being acquired; or
- c) the proportionate market capitalization of the target company as a percentage of the

enterprise value for the entity or business being acquired; is in excess of fifteen per cent, on the basis of the most recent audited annual financial statements, the acquirer shall, notwithstanding anything contained in sub-regulation (2) or sub-regulation (3), be required to compute and disclose, in the letter of offer, the per share value of the target company taken into account for the acquisition, along with a detailed description of the methodology adopted for such computation.

Explanation.— For the purposes of computing the percentages referred to in clause (c) of this sub-regulation, the market capitalisation of the target company shall be taken into account on the basis of the volume-weighted average market price of such shares on the stock exchange for a period of sixty trading days preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain, as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period.

Regulation 8(6) states that, for the purposes of sub-regulation (2) and sub-regulation (3), where the acquirer or any person acting in concert with him has any outstanding convertible instruments convertible into shares of the target company at a specific price, the price at which such instruments are to be converted into shares, shall also be considered as a parameter under sub-regulation (2) and sub-regulation (3).

Regulation 8(7) states that, For the purposes of sub-regulation (2) and sub-regulation (3), the price paid for shares of the target company shall include any price paid or agreed to be paid for the shares or voting rights in, or control over the target company, in any form whatsoever, whether stated in the agreement for acquisition of shares or in any incidental, contemporaneous or collateral agreement, whether termed as control premium or as non-compete fees or otherwise.

Regulation 8(8) states that, Where the acquirer has acquired or agreed to acquire whether by himself or through or with persons acting in concert with him any shares or voting rights in the target company during the offer period, whether by subscription or purchase, at a price higher than the offer price, the offer price shall stand revised to the highest price paid or payable for any such acquisition:

Provided that no such acquisition shall be made after the third working day prior to the commencement of the tendering period and until the expiry of the tendering period.

Regulation 8(9) states that, the price parameters under sub-regulation (2) and sub-regulation (3) may be adjusted by the acquirer in consultation with the manager to the offer, for corporate actions such as issuances pursuant to rights issue, bonus issue, stock consolidations, stock splits, payment of dividend, de-mergers and reduction of capital, where the record date for effecting such corporate actions falls prior to three working days before the commencement of the tendering period:

Provided that no adjustment shall be made for dividend declared with a record date falling during such period except where the dividend per share is more than fifty per cent higher than the average of the dividend per share paid during the three financial years preceding the date of the public announcement.

Regulation 8(10) states that, where the acquirer or persons acting in concert with him acquires shares of the target company during the period of twenty-six weeks after the tendering period at a price higher than the offer price under these regulations, the acquirer and persons acting in

concert shall pay the difference between the highest acquisition price and the offer price, to all the shareholders whose shares were accepted in the open offer, within sixty days from the date of such acquisition:

Provided that this provision shall not be applicable to acquisitions under another open offer under these regulations or pursuant to the Delisting Regulations, or open market purchases made in the ordinary course on the stock exchanges, not being negotiated acquisition of shares of the target company whether by way of bulk deals, block deals or in any other form.

Regulation 8(11) states that, where the open offer is subject to a minimum level of acceptances, the acquirer may, subject to the other provisions of this regulation, indicate a lower price, which will not be less than the price determined under this regulation, for acquiring all the acceptances despite the acceptance falling short of the indicated minimum level of acceptance, in the event the open offer does not receive the minimum acceptance.

Regulation 8(12) states that, in the case of any indirect acquisition, other than the indirect acquisition referred in sub-regulation (2) of regulation 5, the offer price shall stand enhanced by an amount equal to a sum determined at the rate of ten per cent per annum for the period between the earlier of the date on which the primary acquisition is contracted or the date on which the intention or the decision to make the primary acquisition is announced in the public domain, and the date of the detailed public statement, provided such period is more than five working days.

Regulation 8(13) states that, the offer price for partly paid up shares shall be computed as the difference between the offer price and the amount due towards calls-in-arrears including calls remaining unpaid with interest, if any, thereon.

Regulation 8(14) states that, the offer price for equity shares carrying differential voting rights shall be determined by the acquirer and the manager to the open offer with full disclosure of justification for the price so determined, being set out in the detailed public statement and the letter of offer:

Provided that such price shall not be lower than the amount determined by applying the percentage rate of premium, if any, that the offer price for the equity shares carrying full voting rights represents to the price parameter computed under clause (d) of sub-regulation 2, or as the case may be, clause (e) of sub-regulation 3, to the volume-weighted average market price of the shares carrying differential voting rights for a period of sixty trading days computed on the same terms as specified in the aforesaid provisions, subject to shares carrying full voting rights and the shares carrying differential voting rights, both being frequently traded shares.

Regulation 8(15) states that, in the event of any of the price parameters contained in this regulation not being available or denominated in Indian rupees, the conversion of such amount into Indian rupees shall be effected at the exchange rate as prevailing on the date preceding the date of public announcement and the acquirer shall set out the source of such exchange rate in the public announcement, the detailed public statement and the letter of offer.

Regulation 8(16) states that, for purposes of clause (e) of sub-regulation (2) and sub-regulation (4), the Board may, at the expense of the acquirer, require valuation of the shares by an independent merchant banker other than the manager to the open offer or an independent chartered accountant in practice having a minimum experience of ten years.

Completion of Acquisition under SEBI (SAST) Regulations, 2011

Under Regulation 22 (1), the acquirer shall not complete the acquisition of shares or voting rights in, or control over, the target company, whether by way of subscription to shares or a purchase of shares attracting the obligation to make an open offer for acquiring shares, until the expiry of the offer period:

Provided that in case of an offer made under sub-regulation (1) of regulation 20 of these regulations, pursuant to a preferential allotment, the offer shall be completed within the period as provided under sub-regulation (1) of regulation 170 of the Securities and Exchange Board of India (Issue of Capital and Disclosure requirements) Regulations, 2018, subject to the non-obstante clause in sub-regulation (4) of regulation 7 of these regulations.

Provided further that in case of a delisting offer made under regulation 5A, the acquirer shall complete the acquisition of shares attracting the obligation to make an offer for acquiring shares in terms of sub-regulation (1) of regulation 3, regulation 4 or regulation 5, only after making the public announcement regarding the success of the delisting proposal made in terms of sub-regulation (4) of regulation 17 of the Delisting Regulations.

Notwithstanding anything contained in sub-regulation (1), subject to the acquirer depositing in the escrow account under regulation 17, cash or providing unconditional and irrevocable bank guarantee issued in favour of the manager to the open offer by any scheduled commercial bank, subject to the approval of the Reserve Bank of India, of an amount equal to the entire consideration payable under the open offer assuming full acceptance of the open offer, the parties to such agreement may after the expiry of twenty-one working days from the date of detailed public statement, act upon the agreement and the acquirer may complete the acquisition of shares or voting rights in, or control over the target company as contemplated.

Explanation. - For the purpose of sub-regulation (2), bank guarantee shall only be issued by such scheduled commercial bank having 'AAA' rating from a credit rating agency registered with the Board, on any of its long term debt instrument.

Provided that in case of proportionate reduction of the shares or voting rights to be acquired in accordance with the relevant provision under sub-regulation (4) of regulation 7, the acquirer shall undertake the completion of the scaled down acquisition of shares or voting rights in the target company.

Under Regulation 22(2A), notwithstanding anything contained in sub-regulation (1), an acquirer may acquire shares of the target company through preferential issue or through the stock exchange settlement process, subject to,-

- i. such shares being kept in an escrow account,
- ii. the acquirer not exercising any voting rights over such shares kept in the escrow account: Provided that such shares may be transferred to the account of the acquirer, subject to the acquirer complying with requirements specified in sub-regulation (2).

Under Regulation 22(3), the acquirer shall complete the acquisitions contracted under any agreement attracting the obligation to make an open offer not later than twenty-six weeks from the expiry of the offer period:

Provided that in the event of any extraordinary and supervening circumstances rendering it impossible to complete such acquisition within such period, the Board may for reasons to be

published, may grant an extension of time by such period as it may deem fit in the interests of investors in securities and the securities market.

Lesson 13

Cross Border Mergers

A company in one country can be acquired by an entity (another company) from other countries. The local company can be private, public, or state-owned company. In the event of the merger or acquisition by foreign investors referred to as cross-border merger and acquisitions will result in the transfer of control and authority in operating the merged or acquired company. Assets and liabilities of the two companies from two different countries are combined into a new legal entity in terms of the merger, while in terms of acquisition, there is a transformation process of assets and liabilities of local company to foreign company (foreign investor), and automatically, the local company will be affiliated. Since the cross-border M&As involve two countries, according to the applicable legal terminology, the state where the origin of the companies that make an acquisition (the acquiring company) in other countries refer to as the Home Country, while countries where the target company is situated refers to as the Host Country.

Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2022 In exercise of the powers conferred by sub-sections (1) and (2) of section 469 read with sections 230 to 240 of the Companies Act, 2013, the Central Government amended to the Rule 25A (4) of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 vide notification of Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2022 dated 30th May, 2022.

According to the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2022, in case of a compromise or an arrangement or merger or demerger between an Indian company and a company or body corporate which has been incorporated in a country which shares land border with India, a declaration in Form No. CAA-16 shall be required at the stage of submission of application under section 230 of the Act.

Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rule, 2016 read as under:

Rule 25A: Merger or amalgamation of a foreign company with a Company and vice versa.

(1) A foreign company incorporated outside India may merge with an Indian company after obtaining prior approval of Reserve Bank of India and after complying with the provisions of sections 230 to 232 of the Act and these rules.

(2) (a) A company may merge with a foreign company incorporated in any of the jurisdictions specified in Annexure B after obtaining prior approval of the Reserve Bank

of India and after complying with provisions of sections 230 to 232 of the Act and these rules.

(b) The transferee company shall ensure that valuation is conducted by valuers who are members of a recognised professional body in the jurisdiction of the transferee company and further that such valuation is in accordance with internationally accepted principles on accounting and valuation. A declaration to this effect shall be attached with the application made to Reserve Bank of India for obtaining its approval under clause (a) of this sub-rule.

(3) The concerned company shall file an application before the Tribunal as per provisions of section 230 to section 232 of the Act and these rules after obtaining approvals specified in sub-rule (1) and sub-rule (2), as the case may be.

(4) Notwithstanding anything contained in sub-rule (3), in case of a compromise or an arrangement or merger or demerger between an Indian company and a company or body corporate which has been incorporated in a country which shares land border with India, a declaration in Form No. CAA-16 shall be required at the stage of submission of application under section 230 of the Act.

Explanation 1. For the purposes of this rule the term “company” means a company as defined in clause (20) of section 2 of the Act and the term “foreign company” means a company or body corporate incorporated outside India whether having a place of business in India or not:

Explanation 2. For the purposes of this rule, it is clarified that no amendment shall be made in this rule without consultation of the Reserve Bank of India.

Lesson 16

Role, Functions and Duties of IP, IRP and RP

In exercise of the powers conferred by section 196(1)(t) read with section 240 of the Insolvency and Bankruptcy Code, 2016, the Insolvency and Bankruptcy Board of India amended the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, vide notification of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2022 dated 9th February, 2022.

Amendments are pertaining to the Meetings of the Committee (Regulation 18) & Preservation of Records (Regulation 39A) respectively. The details amendment are as follows:

Meetings of the Committee (Regulation 18)

(1) A resolution professional may convene a meeting of the committee as and when he considers necessary.

(2) A resolution professional may convene a meeting, if he considers it necessary, on a request received from members of the committee and shall convene a meeting if the same is made by members of the committee representing at least thirty-three per cent of the voting rights. (3) A resolution professional may place a proposal received from members of the committee in a meeting, if he considers it necessary and shall place the proposal if the same is made by members of the committee representing at least thirty-three per cent of the voting rights.

Preservation of Records (Regulation 39A)

(1) The interim resolution professional or the resolution professional, as the case may be, shall preserve copies of all such records which are required to give a complete account of the corporate insolvency resolution process.

(2) Without prejudice to the generality of the obligations under sub-regulation (1) stated above, the interim resolution professional or the resolution professional, as the case may be, shall preserve copies of records relating to or forming the basis of: -

(a) his appointment as interim resolution professional or resolution professional, including the terms of appointment;

(b) handing over / taking over of the assignment;

(c) admission of corporate debtor into corporate insolvency resolution process;

(d) public announcement;

- (e) the constitution of committee and meetings of the committee;
- (f) claims, verification of claims, and list of creditors;
- (g) engagement of professionals, registered valuers, and insolvency professional entity, including work done, reports etc., submitted by them;
- (h) information memorandum;
- (i) all filings with the Adjudicating Authority, Appellate Authority and their orders;
- (j) invitation, consideration and approval of the resolution plan;
- (k) statutory filings with Board and insolvency professional agencies;
- (l) correspondence during the corporate insolvency resolution process;
- (m) insolvency resolution process cost; and
- (n) preferential, undervalued, extortionate credit transactions or fraudulent or wrongful trading.

(3) The interim resolution professional or the resolution professional shall preserve: (a) electronic copy of all records (physical and electronic) for a minimum period of eight years; and (b) a physical copy of records for a minimum period of three years; from the date of completion of the corporate insolvency resolution process or the conclusion of any proceeding relating to the corporate insolvency resolution process, before the Board, the Adjudicating Authority, Appellate Authority or any Court, whichever is later.

(4) The interim resolution professional or the resolution professional shall preserve the records at a secure place and shall be obliged to produce records as may be required under the Code and the Regulations.

Lesson 19

Preparation and Approval of Resolution Plan

The Insolvency and Bankruptcy Code, 2016 (Code) aims at resolving the woes of insolvent companies through the corporate insolvency resolution process (CIRP), wherein the assets or business of the corporate debtor are transferred as a going concern to the most eligible party approved by the Committee of Creditors. Such an eligible party is willing to take up the management of the Corporate Debtor as well as to service its debts. The parties that are willing to take over the corporate debtor are called resolution applicants and they participate in the CIRP by submitting a document called a resolution plan. It is a comprehensive document which covers, *inter alia*, overview of the eligible party, how does the party plan to take over the corporate debtor, debt repayment schedule etc. The resolution plans are first analysed by the resolution professional to ensure that they meet the conditions prescribed under the Code, pursuant to which, they are placed before the committee of creditors for their discussion, evaluation and approval. The resolution plan, so approved by the committee and scoring the highest points, is then filed by the resolution professional with the Adjudicating Authority.

Salient features of the amendment to the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016(CIRP Regulations)

- With the objective to maximise value in resolution, the amendment to the CIRP Regulations enables the resolution professional (RP) and the Committee of creditors (CoC) to issue request for resolution plan a second time for sale of one or more of assets of the corporate debtor (CD) in cases where no resolution plan has been received for the corporate debtor as a whole. It enables for a resolution plan to include sale of one or more assets of CD to one or more successful resolution applicants submitting resolution plans for such assets and providing for appropriate treatment of the remaining assets.
- To improve the value received in the resolution plan, the amendment to the CIRP Regulations enables marketing of assets of the CD. It provides for formulating a strategy for marketing of assets of CD in consultation with the CoC to disseminate information about the asset to a wider and targeted audience of potential resolution applicants. The amendment also enables a longer time for the asset in the market as the invitation for expression of interest in Form G has been advanced to 60th day from insolvency commencement date (ICD). Changes have also been made to Form G to provide more relevant information to persons for expressing interest.

- To improve information availability to stakeholders, the amendment provides for the following changes to:
 - Changes timeline for filing application for preferential and other transactions on or before 130th day of ICD. It provides that a copy of application made regarding preferential and other transactions be shared with the prospective resolution applicants to enable them to account for such information while proposing the resolution plan.
 - Changes the timeline for submission of information memorandum to on or before 95th day from the ICD from 54th day. It also mandates that information memorandum should also include further relevant information such as operations of CD, financial statements, contingent liabilities, geographical coordinates of fixed assets, company overview. It also includes details of business evolution for CDs with asset size of more than Rs.100 crore.
- With the aim to reduce delays in the process and enhance efficiency of available time the amendment enables the CoC to examine whether it wants to explore option of compromise or arrangement and file such recommendation with AA while applying to AA for liquidation order. In cases where it decides to explore, it should explore the option during the period, order for liquidation is awaited from the AA. The amendment also introduces guiding factors that may be considered by CoC while making an early decision to liquidate the CD. It also provides that the reasons be recorded based on these factors and presented to AA as part of the application for liquidation.
- To make the resolution process more transparent and robust the amendment provides for:
 - A common email address be used throughout the CIRP, and Liquidation of a CD and this email needs to be handed over to the succeeding IP conducting the process.
 - The IRP/RP to communicate to the creditors of corporate debtor (CD), as per the last available books of accounts, the public announcement and invite claims through post or electronic means.
 - It has been clarified that a meeting of COC can be convened till resolution plan is approved or an order for liquidation is passed and matters which do not affect the resolution plan can be decided upon.
- The fee of the interim resolution professional or the resolution professional, appointed on or after 1st October 2022 shall be decided by the applicant or committee in accordance with the said amendment regulations.
- An insolvency professional shall be paid minimum fixed fee in the range of one lakh rupee to five lakh rupees, per month, depending on the quantum of claims admitted, as specified under Table-1 of Schedule-II of the said amendment regulations. However, the applicant or committee may decide to fix higher amount of fees than the said minimum fixed fee, after taking into consideration market

factors such as size and scale of business operations of corporate debtor, business sector in which corporate debtor operates, level of operating economic activity of corporate debtor and complexity related to process.

- For the resolution plan approved by the committee on or after 1st October 2022, the committee may decide to pay, after approval of such resolution plan by the Adjudicating Authority on commencement of payment to creditors by the resolution applicant, performance-linked incentive fee, not exceeding a total of five crores of rupees;
 - a. for timely submission of resolution plan to the Adjudicating Authority, as specified under Table-2 of Schedule-II to the said amendment regulations, and/or
 - b. for value maximisation, at the rate of one per cent of the amount by which the realisable value is higher than the liquidation value, or
 - c. other than a. or b. above, as the committee may deem necessary.
- The fee may be paid from the funds, available with the corporate debtor, contributed by the applicant or members of the committee and/or raised by way of interim finance and the same shall be included in the insolvency resolution process cost.
- Regulatory Fee: A regulatory fee calculated at the rate of 0.25 per cent of the realisable value to creditors under the resolution plan approved under section 31, shall be payable to the Board, where such realisable value is more than the liquidation value: Provided that this sub-regulation shall be applicable where resolution plan is approved under section 31, on or after 1st October 2022.
- A regulatory fee calculated at the rate of one per cent of the cost being booked in insolvency resolution process costs in respect of hiring any professional or other services by the interim resolution professional or resolution professional, as the case may be, for assistance in a corporate insolvency resolution process, shall be payable to the Board, in the manner as specified in clause (cb) of sub-regulation (2) of regulation (7) of Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016.

Lesson 25

Voluntary Liquidation

IBBI (Voluntary Liquidation Process) Regulations, 2017 apply to the voluntary liquidation of corporate persons under Chapter V of Part II of the Insolvency and Bankruptcy Code, 2016.

To enable better participation of stakeholders and streamline the liquidation process to reduce delays and realise better value, Insolvency and Bankruptcy Board of India amended the Liquidation Regulations with the following major modifications:

- The Committee of Creditors (CoC) constituted during Corporate Insolvency Resolution Process (CIRP) shall function as Stakeholders Consultation Committee (SCC) in the first 60 days. After adjudication of claims and within 60 days of initiation of process, the SCC shall be reconstituted based upon admitted claims.
- The liquidator has been mandated to conduct the meetings of SCC in a structured and time bound manner with better participation of stakeholders.
- The scope of mandatory consultation by liquidator, with SCC has been enlarged. Now, SCC may even propose replacement of liquidator to the Adjudicating Authority (AA) and fix the fees of liquidator, if the CoC did not fix the same during CIRP.
- If any claim is not filed during liquidation process, then the amount of claim collated during CIRP shall be verified by the liquidator.
- Wherever the CoC decides that the process of compromise or arrangement may be explored during liquidation process, the liquidator shall file application only in such cases before Adjudicating Authority for considering the proposal of compromise or arrangement, if any, within thirty days of the order of liquidation.
- Specific event-based timelines have been stipulated for auction process.
- Before filing of an application for dissolution or closure of the process, SCC shall advise the liquidator, the manner in which proceedings in respect of avoidance transactions or fraudulent or wrongful trading, shall be pursued after closure of liquidation proceedings.
- The Amendment Liquidation Regulations and Amendment Voluntary Liquidation Regulations further lay down the manner and period of retention of records relating to liquidation and voluntary liquidation of a corporate debtor or corporate person, respectively.

CASE LAWS

1. In the matter of *Vallal RCK Vs. M/s Siva Industries and Holdings Limited and Ors.* [Civil Appeal Nos. 1811-1812 of 2022] the Hon'ble Supreme Court in its judgment dated 3rd June, 2022 observed that Section 12A was brought on the basis of the Insolvency Law Committee's Report. Though by the Amendment Act No. 26 of 2018, the voting share of 75% of CoC for approval of the resolution plan was brought down to 66%, section 12A of the Insolvency and Bankruptcy Code, 2016 (Code) which was brought by the same amendment, requires the voting share of 90% of CoC for approval of withdrawal of corporate insolvency resolution process (CIRP).

The provisions under section 12A of the Code have been made more stringent as compared to Section 30(4) of the Code. Whereas under section 30(4) of the Code, the voting share of CoC for approving the resolution plan is 66%, the requirement under section 12A of the Code for withdrawal of CIRP is 90%.

When 90% and more of the creditors, in their wisdom after due deliberations, find that it will be in the interest of all the stake-holders to permit settlement and withdraw CIRP, the adjudicating authority or the appellate authority cannot sit in an appeal over the commercial wisdom of CoC.

This Court has consistently held that the commercial wisdom of the CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the IBC. It has been held that there is an intrinsic assumption, that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts.

The interference would be warranted only when the adjudicating authority or the appellate authority finds the decision of the CoC to be wholly capricious, arbitrary, and irrational and de hors (outside) the provisions of the statute or the Rules.

2. In the case of *NOIDA vs. Anand Sonbhadra* [Civil Appeal No. 2222, 2367-2369 of 2021] Judgement dated 17th May, 2022, Hon'ble Supreme Court inter-alia observed that a debt is a liability or an obligation in respect of a right to payment. Irrespective of whether there is adjudication of the breach, if there is a breach of contract, it may give rise to a debt. In the context of section 5(8), disbursement has been understood as money, which has been paid. In the context of the transaction involved in such real estate projects, the homebuyers advance sums to the builder, who would then utilise the amount towards the construction in the real estate project.

What is relevant is to attract section 5(8), on its plain terms, is disbursement. While, it may be true that the word 'transaction' includes transfer of assets, funds or goods and services from or to the corporate debtor, in the context of the principal provisions of section 5(8) of the Code, to import the definition of 'transaction' in section 2(33), involving the need to expand the word 'disbursement', to include a promise to pay money by a debtor to the creditor, will be uncalled for straining of the provisions.

'Debt' means a liability or obligation, which relates to a claim. The claim or right to payment or remedy for breach of contract occasioning a right to payment must be due from any person.

In the lease in question, there has been no disbursement of any debt (loan) or any sums by the NOIDA to the lessee.

The subject matter of section 5(8)(d) is a lease or a hire-purchase contract. It is not any lease or a hire purchase contract, which would entitle the lessor to be treated as the financial creditor. There must be a lease or hire-purchase contract, which is deemed as a finance or capital lease. The law giver has not left the courts free to place, its interpretation on the words 'finance or capital lease'. The legislature has contemplated the finance or a capital lease, which is deemed as such a lease under the Indian Accounting Standards.

The Appellant is not the financial lessor under section 5(8)(d) of the Code. Needless to say, there is always power to amend the provisions which essentially consist of the Indian Accounting Standards in the absence of any rules prescribed under section 5(8)(d) of the Code by the Central Government.

Section 5(8)(f) is a residuary and catch all provision. A lease, which is not a finance or a capital lease under section 5(8)(d), may create a financial debt within the meaning of section 5(8)(f), if, on its terms, the Court concludes that it is a transaction, under which, any amount is raised, having the commercial effect of the borrowing.

The lease in question does not fall within the ambit of section 5(8)(f). This is for the reason that the lessee has not raised any amount from the Appellant under the lease, which is a transaction. The raising of the amount, which, according to the Appellant, constitutes the financial debt, has not taken place in the form of any flow of funds from the Appellant/Lessor, in any manner, to the lessee. The mere permission or facility of moratorium, followed by staggered payment in easy instalments, cannot lead to the conclusion that any amount has been raised, under the lease, from the Appellant, which is the most important consideration.

The appeal failed, Supreme Court held that the Appellant is not a Financial Creditor.

However, the Apex court indicated that the Centre can bring a prospective amendment to classify NOIDA as a financial creditor. Hon'ble Justice K.M. Joseph in his initial remark noted that hardly six years old, the Insolvency and Bankruptcy Code (hereinafter referred to as the 'IBC') continues to be a fertile ground to spawn 2 litigation.

3. In the case of *Sunil Kumar Agrawal (Appellant) vs. New Okhla Industrial Development Authority (Respondent)* 12th January, 2023, National Company Law Appellate Tribunal, Principal Bench, New Delhi Company Appeal (AT) (Ins.) No. 622 of 2022, Hon'ble National Company Law Appellate Tribunal inter-alia observed that Section 14 of the Code

deals with the moratorium and Section 14(1)(d) of the Code says that there would be a prohibition from the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor. However, explanation appended to Section 14(1) (d) says that with the prohibition of recovery of any property by an owner or lessor, a license, permit, registration, quota, concession, clearance or a similar grant or right either given by the Central Govt., State Govt. local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency but there would be a condition for its continuation if there is no default in payment of the dues of such license, permit, registration, quota, concession, clearance or a similar grant or right during the moratorium period. The similar grant or right has to be read in respect of the licence, permit, registration, quota, concession, clearance but it cannot be read as the premium amount or lease rent which has been so ordered by the Adjudicating Authority to be paid by the Appellant to the Respondent.

4. In the matter of *Ms. Ashish Ispat Private Limited Vs Primuss Pipes & Tubes Ltd.*, NCLAT held that when a withdrawal application u/s 12A of the Code is filed prior to constitution of CoC, the requirement of 90% vote of CoC is not applicable, and the Adjudicating Authority has to consider the application without requiring any approval from CoC. Approval of 90% shall be applicable only when Committee of Creditors is constituted and withdrawal application u/s 12A of IBC has been filed post that.

5. Supreme Court in the matter of *Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Vs. NBCC (India) Ltd. & Ors.* held that:

- The AA has limited jurisdiction in the matter of approval of a resolution plan. In the adjudicatory process concerning a resolution plan under IBC, NCLT does not have scope for interference with the commercial aspects of the decision of the CoC; and there is no scope for substituting any commercial term of the resolution plan approved by CoC.
- There is no scope for the NCLT or the NCLAT to proceed on basis of perceptions or to assess the resolution plan on the basis of quantitative analysis. Thus, the treatment of any debt or asset is essentially required to be left to the collective commercial wisdom of the financial creditors.
- There is no prohibition in the scheme of IBC and CIRP Regulations, that CoC cannot simultaneously consider and vote upon more than one resolution plan at the same time for electing one of the available plans. i.e. CoC can vote upon multiple resolution plans at the same time.

6. The Supreme Court in the matter of *Lalit Kumar Jain Vs. Union of India & Ors.* upheld the validity of notification dated November 15, 2019 enforcing the provisions related to personal guarantor to corporate debtor under the Code. Approval of resolution plan of a corporate debtor undergoing CIRP does not per se operate as a discharge to its surety/guarantor of their liabilities under the contract of guarantee. The nature and extent of liability would depend upon the terms of guarantee.

7. In the matter of *Ghanashyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruction Company Limited and Others*, Supreme Court held that:

- Any debt due to government (Central/State/Local Authority) including statutory dues is covered under the term “Creditor” and in any other case by the term “Other Stakeholders” as provided u/s 31(1) of IBC,2016 and hence an approved resolution plan is also binding on government.
- After the approval of Resolution Plan no surprise claim should flung upon the successful resolution applicant. Once a resolution plan is approved by an Adjudicating Authority, the claim forming part of Resolution Plan stands frozen and claims not forming part of Resolution Plan stands extinguished and no one would be entitled to initiate or continue any proceeding in respect of the claim which is not part of the approved Resolution Plan.
- An approved Resolution Plan is binding upon the Corporate Debtor, its employees, members, creditors, government (Central/State/Local Authority) and any other stakeholder.
