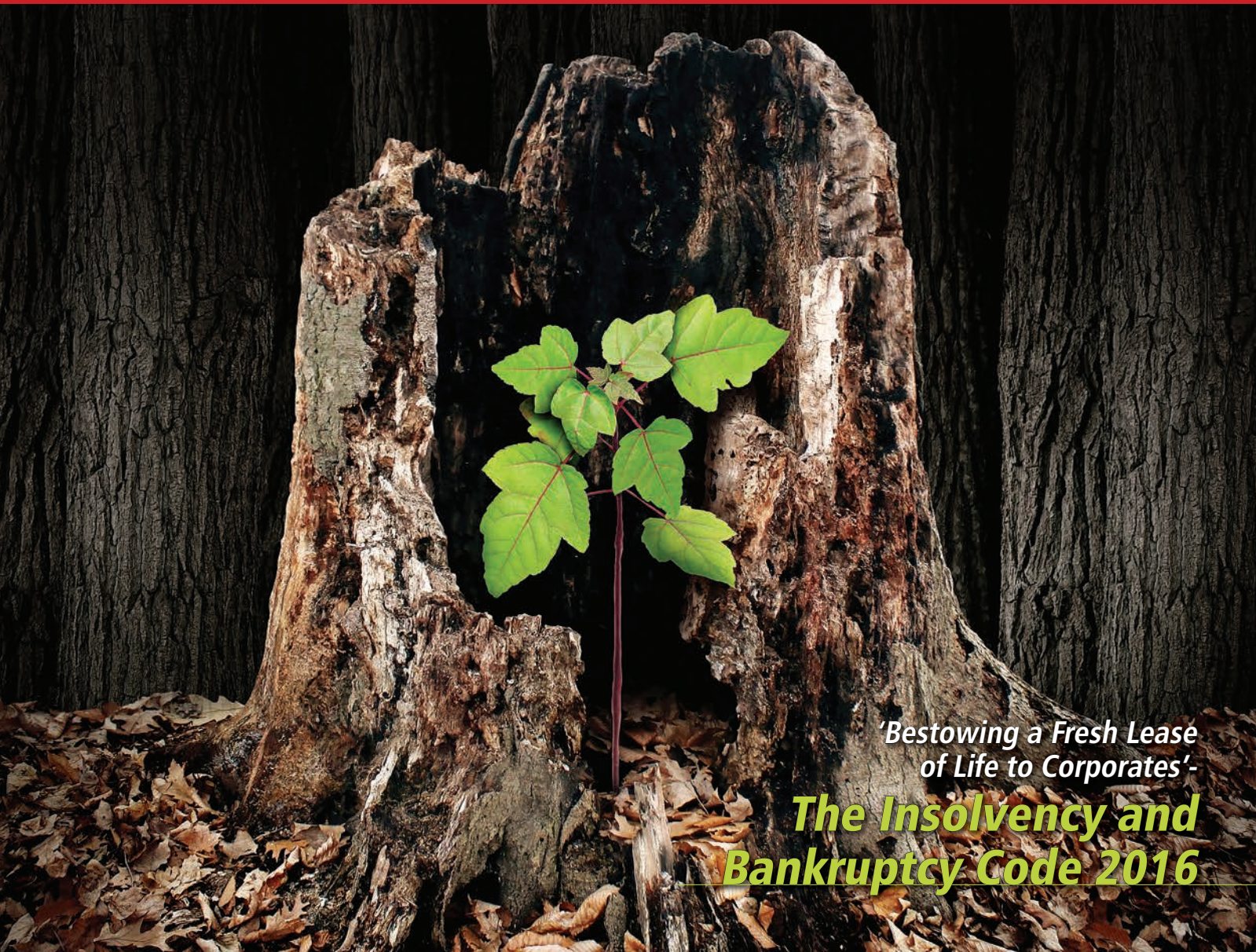


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CHARTERED SECRETARY

THE JOURNAL FOR CORPORATE PROFESSIONALS



*'Bestowing a Fresh Lease
of Life to Corporates'*

***The Insolvency and
Bankruptcy Code 2016***



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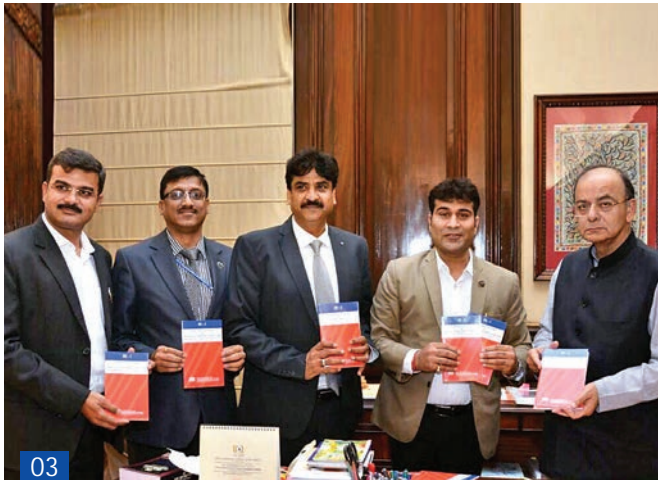
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2. Unveiling of ICSI Golden Jubilee Celebration logo by Hon'ble Union Minister of Finance and Corporate Affairs – Standing from Left: CS Ranjeet Kumar Pandey, CS Dinesh C Arora, CS (Dr.) Shyam Agrawal and Arun Jaitley (Hon'ble Union Minister of Finance and Corporate Affairs).
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गते शोको न कर्तव्यो भविष्यं नैव चिन्तयेत् ।
वर्तमानेन कालेन वर्तयन्ति विचक्षणाः ॥

*(Gatae shoko na kartavyo bhavishyam naiva chintayet |
vartamAnena kAlena vartayanti vichakshanah ||)*

-चाणक्य नीति



My Valued ICSI Members

The above quote from Chanakya Niti translates as: The past is gone, you can do nothing about reversing the same but to learn from it. The future is not yet here, so what can you do by worrying? **What you do is only in the present.** What you can do for the future is to prepare for it. That can only happen in the present. And worrying surely doesn't help. The clearheaded (vichakshanah) resides in the present, focuses in the present, where actions are performed. Sure they see visions of the future and strive to make it better.

This quote connects me to the newly introduced Insolvency and Bankruptcy Code, 2016 (Code). The Code has brought in several legal and structural changes in the insolvency framework of India, seeking to consolidate the fragmented legal framework and to facilitate time bound resolution process of CORPORATES, LLPs, Partnership Firms and Individuals with an aim to maximize the value of assets, promote entrepreneurship and enhance the availability of credit.

A plethora of opportunities have opened up for the members of our fraternity who can register themselves as Insolvency Professionals (IPs) in the new regulatory framework envisaged under the Code. ICSI Insolvency Professionals Agency (ICSI IPA), a wholly owned subsidiary of the Institute and

an Insolvency Professional Agency registered with Insolvency and Bankruptcy Board of India (IBBI), has already enrolled more than 350 Professional Members who are registered as IPs with IBBI. Many of the Professional Members enrolled with ICSI IPA have taken up assignments as Interim Resolution Professionals (IRPs) or Resolution Professionals (RPs) or Advisors or Representative of a particular stakeholder in corporate insolvency resolution process of different corporate debtors and as liquidators in liquidation process.

I urge and appeal to the eligible members of the Institute to appear for the Limited Insolvency Examination and explore the opportunities under the Code, to widen their professional horizon. It is needless to mention that the opportunities for IPs will rise remarkably with the notification of insolvency resolution process for individuals and partnership firms. ICSI IPA is taking all strides to equip the Professional Members with the new insolvency regime of India. In this direction, ICSI Insolvency Professionals Agency (ICSI IPA) has introduced the Online Registration Process for the ease of the applicants. An eligible individual who has cleared the Limited Insolvency Examination may now **apply online for enrolment as a professional member with ICSI IPA.** I believe that the initiatives of ICSI IPA shall go a long way in not only developing the

new law but also in providing more clarity to its Professional Members in dealing with the practical aspects of the Code. Keeping this in mind, ICSI has kept the theme 'Insolvency and Bankruptcy Code 2016' as polestar of September issue of Chartered Secretary.

Launch of Revised Secretarial Standards

Benchmarking standards of excellence in every sphere of corporate activities is the need of the day. For the first time, the Companies Act, 2013 has given statutory recognition to the Secretarial Standards on Board and General Meetings issued by the ICSI and this will be a milestone in prescribing the parameters for good corporate practices and conduct. Being a governance professional, it is a proud achievement for all of us as no similar Standards are in existence anywhere in the world with this unique statutory recognition.

I am pleased to share that ICSI released the Revised Secretarial Standards on the Meetings of Board of Directors (SS-1) and General Meetings (SS-2) at the hands of Sh. Arun Jaitely, Union Minister of Finance and Corporate Affairs. Revisions in Secretarial Standards (SS-1 & SS-2) were considered to fill interpretation gaps, to further ease of doing business, to address the issues/suggestions received from stakeholders and to give effect to the amendments in Companies Act, 2013 and notifications issued by Ministry of Corporate Affairs. I urge upon all the members to follow the Secretarial Standards in true letter and spirit.

A journey of 'Digital Transformation'

तमसो मा ज्योतिर्गमय

(Brihadaranyaka Upanishad)

*(O Lord Keep me not in the Darkness of Ignorance,
but lead me towards the Light of Knowledge.)*

I am pleased to share with you that in line with the Shaloka from Brihadaranyaka Upanishad, ICSI has embarked on an innovative journey of 'digital transformation' by coming up with one of its kind '24x7 e- learning platform'. The ever dynamic educational environment requires that focus of delivery of education should shift to bringing 'learning to people' instead of bringing 'people to learning'. Therefore, ICSI has attempted integrating boons of technology to the CS curriculum. The first phase of E-learning has been already launched on 15th August 2017, specifically catering to the requirements of the Foundation student registered under New Syllabus (2017). I urge all learners to reap the maximum fruit of this out of the box initiative of ICSI to reach pinnacle of success in your professional journey in the sphere of Corporate Governance.

18th All India Students' Conference at Jaipur

Youth is the most precious asset of any country.

Youth is often envisioned to represent the future as they bring new ideas and energy and add to the pool of knowledge that exists currently. The role of CS youth in shaping Good Governances environment in any nation is also undeniable. They are the ones who will be guards of Governance in any sphere from Corporate Governance to National Governance. Keeping this in mind, ICSI is organizing its 18th All India Students' Conference at Jaipur on a very dynamic theme "CS Youth: Shaping New Paradigms in Governance". I urge all my dear students to actively participate in this conference and deliberate upon new ideas to shape such new paradigms in Governance.

Launch of Golden Jubilee Logo

As already shared with you all, ICSI is commemorating the beginning of its Golden Jubilee Year on 4th October 2017 at New Delhi and Hon'ble Prime Minister Sh. Narendra Modi ji has graciously consented to grace the event as Chief Guest. The logo of the ICSI Golden Jubilee Year signifying the monumental journey of the Institute was unveiled by Hon'ble Union Minister of Finance and Corporate Affairs on 28th August 2017. You are all welcome to send your innovative and valuable ideas to celebrate our Golden Jubilee Year.

Epilogue

Addressing Lok Sabha during a special discussion in the month of August, the Hon'ble Prime Minister said that from the year 2017 to 2022, there is a need to create the same spirit that existed between 1942 and 1947 for creating a 'New India'. He urged that in the next five years, till 2022, India must try to bring positive changes so that it can be an inspiration for other nations, and added that this is possible only by following the path of "Sankalp se Siddhi tak". I call upon my fraternity to come up with their unique, innovative and concrete 'Sankalps' to reach 'Siddhi' by the year 2022 to form a 'New India, New ICSI'. Let us all pour our drop to the ocean and commit ourselves to the cause of Nation building.

Happy reading!!

Best wishes.

Yours sincerely



SEPTEMBER 05, 2017
New Delhi

सी एस (डॉ.) श्याम अग्रवाल
अध्यक्ष, भारतीय कंपनी सचिव संस्थान

RECENT INITIATIVES TAKEN BY ICSI

In furtherance to our earlier communications, we are pleased to share the following initiatives taken by the Institute during the month of August, 2017:

1. Meetings with Dignitaries

Taking forward our pursuit for exploring opportunities for the profession and also for joint participation in flagship government initiatives, the Institute met the following dignitaries:

- Shri Arun Jaitley, Hon'ble Union Minister of Finance and Corporate Affairs
- Smt. Vasundhara Raje, Hon'ble Chief Minister of Rajasthan
- Shri Om Prakash Mathur, Member of Parliament (Rajya Sabha)
- Shri Rajiv Kumar, Vice Chairman, NITI Aayog
- Shri Vaibhav Rikhari, DANICS
- Ms. Jane Cunliffe, Trade Commissioner, New Zealand Trade and Enterprise
- Shri Alex Campbell, MD, Asia, Xero, New Zealand

2. Celebration of 71st Independence Day, 2017

“Jo Bhara Nahi hai Bhavo Se, Behati Jisme Rasdhar Nahi; Wo Hridya Nahi hai Pathar hai, Jisme Swadesh Ka Pyar Nahi”. Aligning the Institute's dedication towards the service of the nation and in the wake of saluting our freedom fighters who have laid down the foundation of our freedom, the Institute celebrated the 71st Independence Day on August 15, 2017 with the honoured flag hosting at the Head Quarters, Regional Offices and Chapters pan India. On the celebration of this splendid day, The President, ICSI, CS (Dr.) Shyam Agrawal clearly indicated about widening the perspective of Governance from Corporate to National in a wave towards New India, 2022 and New ICSI, 2022.

3. ICSI Golden Jubilee Celebrations : LOGO Unveiled

On the occasion of the entering into the 50th year of Institute's existence while rejoicing momentous journey of the professional excellence and commitment towards establishing, preserving and promoting the standards of governance with the global presence, the Institute is beginning its Golden Jubilee Celebrations on October 4, 2017. The Honourable Prime Minister of India, Shri Narendra Modi ji has generously granted his gracious consent to inaugurate the Golden Jubilee function of the Institute at New Delhi.

With a view to commemorate this momentous journey of the Institute along with the contribution made in the Nation Building by holding the torch of Governance to stand tall in India since 49 years, Shri Arun Jaitley, Hon'ble Union Minister of Finance and Corporate Affairs unveiled the ICSI Golden Jubilee Logo on August 28, 2017. The Golden Jubilee Logo would be effective from October 4, 2017 to October 4, 2018.

Indeed the glorious journey of the Institute would not have been promising without the whole hearted support and efforts of its members and therefore, the Institute is seeking to felicitate the illustrious 50 members on the celebration of Institute's Golden Jubilee on October 4, 2017 at Vigyan Bhawan, New Delhi.

4. 45th National Convention of Company Secretaries, 2017 – Registration Open

As you are aware that in continuation of deep rooted culture of organizing pan India annual and mammoth congregation for all its members, students and related stakeholders known as National Convention of Company Secretaries, this year the Institute is all set to organize its 45th National Convention of Company Secretaries during November 22-24, 2017 at Thiruvananthapuram, Kerala. Aligning the Institute's dynamism with vision New India, 2022 which imbibes sustainable governance as one of its parameters, the National Convention is planned on the theme “Company Secretary: Shaping New India 2022 Through Good Governance.” The registration for the same is open for all. Interested Participants may register through Institute's website by clicking on www.icsi.in/student/DelegateRegistration/tabid/137/ctl/ViewEventDetails/mid/454/EventId/49/Default.aspx

5. ICSI 50th Study Centre in India

Under its initiative to facilitate and empower the students to avail optimum of the services rendered by the Institute along with easy access for learning throughout the country, the Institute initiated with the opening of the study centres at the places where the chapters or offices of the Institute are not existent. Marking a milestone in this initiative, the Institute opened its 50th Study Centre at Dadra and Nagar Haveli embarking its entry to the 50th year of its service to the nation with the professional excellence in governance at par.

6. ICSI National Awards for Excellence in Corporate Governance & ICSI CSR Excellence Awards

It is indeed a proud moment for the Institute as it unfolds the “17th ICSI National Awards for Excellence in Corporate Governance” to foster and reward globally acceptable corporate governance practices among Indian companies and at the same moment present the “2nd ICSI CSR Excellence Awards” to provide further impetus to the Government's efforts towards implementation of provisions relating to CSR and in recognizing good practices undertaken by corporate under the CSR umbrella.

The Institute constituted Expert Groups for the CG & CSR awards under the Chairmanship of CS Narayan Shankar and CS K R Radhakrishnan respectively, both

groups finalized the questionnaires and the evaluation methodologies for the awards.

The esteemed members of the Institute are requested to ensure participation of their companies by nomination for both these awards.

7. London Global Convention

The Institute has joined hands with the Institute of Directors (IOD) as an Associate Partner in organizing the annual '17th London Global Convention 2017' which is scheduled to take place on October 25-27, 2017, at Millennium Hotel, London Mayfair in London.

8. ICSI hosted webinar for Ministry of Corporate Affairs

The Institute successfully conducted a webinar for officials of the Ministry of Corporate Affairs on 'Cleaning and Updating of Corporate Registry' on August 26, 2017. The webinar was addressed by Shri Gyaneshwar Kumar Singh, Joint Secretary; Shri N K Bholra, DGCoA, Shri Manmohan Juneja, Joint Director; Shri Sanjay Shorey, Joint Director; Shri A K Sethi, Deputy Director and Shri S. Bhasker, E-Governance Cell of MCA, Industry Principal, Infosys Limited.

9. ICSI Corporate Leadership Development Program

The Institute has come up with 45 days residential Corporate Leadership Development Program to create a comprehensive, streamlined, skill based facilitative training experience which would prepare members to enhance their career opportunities and vigour in entailing the openings in organizations. The first phase of this ICSI Corporate Leadership Development Program was successfully launched on August 1, 2017 at Noida in the eminent presence of CS Preeti Malhotra as the Chief Guest of the Day and Dr. S. Sivakumar, our Guest of Honour for the event along with CS (Dr.) Shyam Agrawal, President of the Institute.

10. Global Summit on Corporate Restructuring, Insolvency Resolution and Sustainability - Emerging Opportunities and Strategies

The Institute joined hands with ASSOCHAM India, as an Institutional Partner in organizing a Global Summit on Corporate Restructuring, Insolvency Resolution and Sustainability - Emerging Opportunities and Strategies on August 19, 2017 at Mumbai. The global summit was inaugurated by Hon'ble Shri Mahesh Mittal Kumar, the first President of National Company Law Tribunal (NCLT) as the Chief Guest of the Day. The Global Summit was well addressed by eminent speakers including our President CS (Dr.) Shyam Agrawal rendering thought provoking discussions on the latest developments and impending opportunities in India and global restructurings.

11. Origin of Corporate Governance from Indian Ethos: Invitation for Articles

The concept of corporate governance is profoundly rooted in India since the ancient times. The identical structure of governance principles followed in the ancient kingdoms as well as in the contemporary corporations is well evident from our ancient transcripts and scriptures including Vedas, Manusmriti, Arthashastra, Baharspatya Neeti and alike. Even the Epic Kavyas like Ramayana and Bhagwad Geeta set down the essential principles for the kings to rule their kingdom under the perspective of good governance and optimum welfare of the populace. Henceforth, in view to thick thread all these principles of Governance from Indian Philosophy, the Institute is inviting the Articles from the members/scholars/experts on the 'Origin of Corporate Governance from Indian Ethos' discussing and explaining these principles, their origin and interpretation apt to the contemporary times of sustainable governance at par. Best research papers would also be awarded honorarium as per the practice of the Institute.

12. 18th All India Students' Conference of ICSI

With the aim of creating vibrant and advanced understanding of the role of young professionals in sharing the new paradigm of governance, the Institute is organising 18th All India Students' Conference theming up "CS Youth: Shaping New Paradigms in Governance" on September 25, 2017 at Jaipur. Motivational and renowned speakers from the industry will be addressing the congregation during the conference. Apart from the motivational lectures, a session on GST will also be there.

13. Workshop on GST Implementation – Intricacies and Implications

The Institute collaborated with PHD Chamber of Commerce as an Associate Partner in organizing a Workshop on GST Implementation – Intricacies and Implications, an Interactive Open House Sessions for Industry and Government with an objective to deliberate through understating on the changes one need to incorporate in the existing system and processes to get the maximum recompense of the contemporary tax regime of GST in India. The workshop was organized in two sessions on August 18, 2017 and August 28, 2017 respectively at PHD House, New Delhi.

14. Conference on Merger and Acquisitions – Growth Mechanism and the Regulatory Framework

The Institute in association with PHD Chamber of Commerce as an Associate Partner organized a Conference on Merger and Acquisition – Growth Mechanism and the Regulatory Framework in the gracious presence of Dr. M. S. Sahoo, Chairperson, Insolvency and Bankruptcy Board of India as the Chief Guest of the event, on August 23, 2017 at PHD House, New Delhi. The conference was

aimed at deliberating the M&A process from strategy and valuation to execution and post-merger management. The discussions were focused on regulatory and commercial issues with a view to make a comprehensive advisory to all stakeholders on the way forward.

15. Seminar on Compliances under LODR and Secretarial Audit

The Institute in association with BSE Ltd., is in the process of organising Seminars on Compliances under LODR and Secretarial Audit at 14 locations including Bhopal, Kochi (Cochin), Goa, Jaipur, Kanpur, Lucknow, Nashik, Nagpur, Noida, Patna, Rajkot, Raipur, Surat and Vadodara.

16. Certificate Course in GST

As you are aware that the with a view to augment the advance understanding of the members in the realm of recently rolled out Goods and Services Tax, the Institute in association with National Institute of Financial Management, Faridabad launched a Certificate Course on GST in the month of July, 2017. Enduring a virtuous response by the members for this course, the first webinar class of Certificate Course on GST was held on August 13, 2017. This extensive learning program is highly focused and practice oriented and designed to impart technical expertise to the participants.

17. Revised Secretarial Standards on Meeting of the Board of Directors (SS-I) and General Meetings (SS-2)

The Secretarial Standards on Meetings of the Board of Directors (SS-1) and General Meetings (SS-2) duly approved by the Central Government on April 10, 2015 under Section 118(10) of the Companies Act, 2013 were published in the Gazette of India, Extraordinary Part III -Section 4 on April 23, 2015 vide ICSI Notification No. (1) SS of 2015, and subsequently made effective from July 1, 2015.

Recently in view to indoctrinate the application of the revised standards, it has been decided to withdraw above referred notification with effect from September 30, 2017 without affecting the enforceability of SS-1 and SS-2 during the period on or before such withdrawal.

As you are aware that the Secretarial Standards have been revised by the Institute and the required approval of the Central Government under section 118(10) of the Companies Act, 2013 has been obtained for the revised SS-I and SS-2 vide Ministry of Corporate Affairs letter No. 1/3/2014-CL.I dated June 14, 2017.

Successively, the Institute released the revised SS-I and SS-2 at the gracious hands of Shri Arun Jaitley, Hon'ble Union Minister of Finance and Corporate Affairs, which shall be applicable for compliance by all the companies (except the exempted class of companies) with effect from October 1, 2017 and will supersede the text of earlier SS-I

and SS-2.

18. ICSI conducted series of webinars on Companies Act, 2013 – Enable Evaluate and Excel

As you are aware that the Institute initiated to conduct the webinar series on Companies Act, 2013 under the title "Enable, Evaluate and Excel", to revive, refresh and sharpen knowledge of the members of the Institute on Companies Act, 2013 and to provide them with an opportunity for self-evaluation of their knowledge on the subject in adherence to prepare them for future challenges. In this regard after the successful conduct of 13 sessions till July, 2017, the 14th session has taken place on Share Capital - ESOP/ Sweat Equity/ Bonus issue of Share capital on August 19, 2017 duly addressed by CS S. Sudhakar, Vice President (Corporate Secretarial), Reliance Industries Limited.

19. ICSI Quest-eAssist

In the sustenance of the initiative towards knowledge building under the digitalized platform, the Institute has launched 'ICSI Quest-eAssist' at 18th National Conference of Practising Company Secretaries held at Shillong, Meghalaya on June 24-25, 2017. This is an online platform for members of the Institute where they can seek responses on the queries and difficulties pertaining to the Companies Act, 2013 and Rules and Notifications thereunder as well as issues related to e-filing. Till August end, around 400 queries of the members have been successfully replied by the experts at par.

20. Launch of E-Learning Module

The Institute launched the first phase of the E-Learning Module of CS Program on the glorious occasion of 71st Independence Day on August 15, 2017 through the gracious hands of Hon'ble Justice Jainendra Kumar Ranka, Retd. Justice of the High Court of Rajasthan.

21. Class Room Teaching fee Waiver Scheme for the students of Union Territories

With a view to empower the students to avail the maximum possible understanding and advancement in the CS Course on an equitable basis pan India, the Institute has initiated with "Class Room Teaching Fee Waiver Scheme" to reach out to the students of the Union Territories excluding Delhi and Chandigarh where awareness of the Profession is slight. This scheme is applicable for the students registered for the Foundation as well as Executive Programme from the Union Territories of Andaman & Nicobar Islands, Dadra & Nagar Haveli, Daman and Diu, Lakshadweep and Puducherry and subsequently undergoing Classes at the nearest Region /Chapter of the Institute. A complete fee waiver for the Class Room Teaching shall be given to the students of the above mentioned Union Territories in case they attend Class Room Teaching at the Regional Council/ Chapter offices of the Institute where the class room teaching is presently organised.

22. Girisagar Vidyarthi Vikas Yojana – Opening of Study Centres

With a prime objective to reach out to the students and schools/colleges to create clear visibility and presence of the Institute among the students initially with a focus on Hilly and Coastal Cities endorsing the huge potential for the growth of the profession, the Institute came up with ICSI Giri Sagar Vidhyarthi Vikas Yojana duly launched on July 1, 2017 at Vadodara. Four study centres have already been opened under the scheme in the month of July, 2017.

Taking this initiative forward in letter and spirit, four more centres were opened under the ICSI Giri Sagar Vidhyarthi Vikas Yojana in the month of August, 2017, with the details as below:

- Roorkee, Uttrakhand
- Chamoli, Uttrakhand
- Silchar, Assam
- Khed (Ratnagiri), Maharashtra

23. ICSI Signature Award Scheme

In January, 2016, the Institute initiated with ICSI Signature Award Scheme to felicitate the top rank holders in B.Com. Final Examinations in reputed universities and also specialised programmes/papers of IITs / IIMs with the award of a Gold Medal and a Certificate. So far, various MOUs have been signed with various universities throughout the country.

In the month of August 2017, one more MoU on ICSI Signature Award have been signed with Hemwati Nandan Bahuguna Garhwal University, Srinagar (UK).

In the year 2017, total (seven) Gold Medals have been awarded till date to the toppers of the Universities mentioned below: -

1. Guru Nanak Dev University, Amritsar (PB) on March 2, 2017
2. Indian Institute of Management, Tiruchirappalli (TN) on March 18, 2017
3. Panjab University, Chandigarh (UT) on March 25, 2017
4. Indian Institute of Management, Indore (MP) on March 29, 2017
5. Bhagat Phool Singh Mahila Vishwavidyalaya, Gohana (HR) on April 11, 2017
6. Indian Institute of Management, Raipur (CG) on May 4, 2017
7. Sri Dev Suman Uttarakhand University, Tehri (UK) on June 17, 2017

24. Fees Waiver Scheme for Students of State of Jammu & Kashmir and North-Eastern States: Opening of Study Centres

As you are aware that the Institute has recently launched a Fee Waiver Scheme for students of Jammu & Kashmir and North Eastern States of India to provide an opportunity to the youth of these States to come to the mainstream. The fee waiver scheme includes waiving the Fee for all students registering for the Foundation and Executive Programme Stages from respective regions of North Eastern States and State of Jammu and Kashmir till March 31, 2018. It is overwhelming to note that students are joining the course in

large numbers after launch of this Scheme. To facilitate the students with the optimum opportunities under this scheme, the Institute is also heading forward to open study centres in such areas. Recently two such study centres have been opened at Aizwal, Mizoram and Silchar, Assam

25. Foundation Stone of Gurugram Chapter, ICSI

The Institute has recently acquired an institutional plot from HSIIDC, Government of Haryana for establishing the new state of art and well equipped modern office of Gurugram Chapter of ICSI. Subsequently, the project on the land was well initiated through a Bhoomi Poojan and Laying of the Foundation Stone of the Gurugram Chapters' New Office Premises at the gracious hands of Shri Arjun Ram Meghwal, the then Hon'ble Union Minister of State for Finance and Corporate Affairs, Government of India on August 14, 2017 at Plot No. 3, Sector-2, IMT-Manesar.

26. Result of CS Examinations for Executive and Professional Program

Result of CS Examinations for the Professional and Executive Programme of the Institute held in June, 2017 were successfully declared on August 25, 2017. The result along with individual candidate's subject-wise breakup of marks was made available on the Institute's website at www.icsi.edu. Formal e-Result-cum-Marks Statement of Executive Programme examination was also uploaded on the Institute's website for downloading by candidates for their reference, use and records. The Result-cum-Marks Statement for Professional Programme Examination was processed for dispatch to the candidates at their registered address immediately after declaration of the result.

27. New Examination Centers

Moving forward in our constant endeavour to facilitate the students with the ease of writing the exams at their nearest possible exam centre, the Institute announced the opening of two new Examination centres one at Latur, Maharashtra (Centre Code - 437) and another at Mathura, Uttar Pradesh (Centre Code - 248) on experimental basis for the conduct of Computer Based Examination for Foundation Program beginning from December, 2017 session of the examination.

28. Progressive IT Services

In order to serve the stakeholders with utmost ease and simplified access to the Institute's service, following acceleration in the IT Linkage of the Institute has taken place in the month of August, 2017:

- Launched eLearning Portal for the Foundation Programme
- Executed Online Registration Process for Golden Jubilee functions
- Rolled out a Separate Child Portal for 45th National Convention of Company Secretaries
- Launched a dedicated webpage for the Project Girisagar Vidyarthi Vikas Yojana
- GST implementation for Online Event Registration

Paving the Way for the Ease of Doing Business in India: the Insolvency and Bankruptcy Code 2016

The Indian Government led by Prime Minister, Sh. Narendra Modi is keen on placing India high on the pedestal of economic growth and laying highest emphasis for bringing a paradigm by making India easiest place to do business in the world, thereby realizing India's potential to become an engine of Global growth. According to an output-outcome framework document prepared by the government, India wants to reach the 90th rank in 2017-18 and 30th by 2020. For meeting this goal, improvement in five categories has been earmarked i.e. starting a business, construction permits, paying taxes, trading across borders, and resolving insolvency. As resolving insolvency is a major focus area, therefore, the Insolvency and Bankruptcy Code (IBC), 2016 has been enacted with the intention of improving the ease of doing business in India. The Insolvency and Bankruptcy Code, 2016 ("Code") has been introduced with the primary objective of increasing lender's confidence and facilitating expansion of the credit market in India. As has been stated in the objects clause, the objective of this new law is 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....

While the primary objective of the Code has been clarified by the Government, the Code also parallelly creates a host of professional opportunities for finance and legal professionals.

IBC presents an opportunity to alter that image and exhibit that India can deliver prompt and effective implementation. While the government has chartered the course of its implementation with great zeal, the onus to make IBC successful now rests with other key stakeholders—the judiciary, adjudicating authority, insolvency professionals, lenders and borrowers. Each stakeholder must play an enthusiastic and constructive role in potent implementation of IBC and ensure that IBC matures commensurately with economic developments in the country.

The Insolvency and Bankruptcy Board of India

Insolvency and Bankruptcy Board of India has been formed with the aim of creating the architecture of the new insolvency law in India which will support ease of doing business in India. It has set the bar high right from the beginning and must continually raise the benchmarks. Global standards demand that the insolvency regulatory body should be independent from the government. As a regulator operating in the financial sector, IBBI is expected to work closely with other financial sector regulators and institutions under the domain of the ministry of Finance. The Stakeholders expect a robust surveillance system from IBBI so that insolvency professionals are able to do justice with the role expected of them and run the whole show of insolvency resolution smoothly.

Insolvency Professionals

Besides the transition from a fragmented legal system to a unified Insolvency and Bankruptcy Code 2016 (IBC) is accompanied by certain challenges concerning its implementation in an effective and expeditious manner, here comes the role of an insolvency professional. The code clearly specifies functions and obligations of the Insolvency Professionals which makes them 'polestars' of any insolvency system. The complexity of insolvency system requires that there are sufficient number of insolvency professionals who are duly qualified and possess skills to strike an equilibrium between commercial reality with legal obligations to safeguard the entitlements of stakeholders. Equally important is that insolvency professionals are able to operate independently, free from the threats and pressures of frivolous complaints, constant nagging by creditors or debtors, and uncertainties around payments of legitimate fee and expense. It is critical that IBBI keeps eye on providing a stringent mechanism for licensing insolvency professionals.

Minister of State for Corporate Affairs talk on the Role of IBBI and Insolvency Professionals

ICSI sought views of newly appointed Minister of State for Corporate Affairs, Sh. P.P. Chaudhary for role played by the Insolvency and Bankruptcy Code 2016 in improving ease of doing business in India. His views hold an important ground as he has also been a Member of Joint Committee on the Insolvency and Bankruptcy Code before assuming vital responsibility of Ministry of Corporate Affairs. He meticulously explained this relation between the two as:



P.P. CHAUDHARY
Minister of State
Law & Justice
and
Corporate Affairs
Government of India

पी.पी. चौधरी
राज्य मंत्री
विधि और न्याय
और
कारपोरेट कार्य
भारत सरकार



MESSAGE

A seamless transition towards a unified Insolvency and Bankruptcy Code, 2016 (IBC) holds potential to significantly improve the "Ease of Doing Business" in India. A key facet of this Code is the vesting of the entire management and operations of a company undergoing insolvency proceedings to an Insolvency Professional. The role of an Insolvency Professional is pivotal in ensuring fair and speedy resolution of the insolvency proceedings.

Insolvency Professionals will have to take up the challenging role of addressing the varied demands of this ecosystem within the specified timelines. The endeavour of ICSI in bringing a special issue dedicated to Insolvency and Bankruptcy Code, 2016 is commendable. I extend my best wishes to ICSI for this endeavour.

(P.P. CHAUDHARY)
DATE : 05-09-2017



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Rendezvous with Dr. Madhusudan Sahoo, Chairperson, Insolvency and Bankruptcy Board of India (IBBI)



**“INSOLVENCY
AND BANKRUPTCY
CODE BIGGEST
ECONOMIC
REFORM IN RECENT
YEARS”**

**DR. M. S. SAHOO
CHAIRPERSON, IBBI**



Dr. M. S. Sahoo, an acclaimed thought leader in the area of securities markets and a distinguished public servant, currently serves as Chairperson of the Insolvency and Bankruptcy Board of India. He has served as a Member of the Competition Commission of India, Secretary of the Institute of Company Secretaries of India, Whole Time Member of the Securities and Exchange Board of India, Economic Adviser with the National Stock Exchange of India and held senior positions in Government of India as a Member of Indian Economic Service.

Dr. Sahoo has conceptualized, designed, authored and edited several publications relating to securities markets and corporate sector, including Indian Securities Market-A Review, NSE Research Initiative, Stock Exchange Fact book, SEBI Bulletin, and edited a professional journal, Chartered Secretary. He has delivered talks at various national and international fora and written over 100 articles.

Dr. Sahoo has been a Member/Chairman of several committees set up by Ministry of Finance, SEBI, RBI, IRDAI, and WDRA. These include Chairman of the Committees (Sahoo Committee I, II and III) on Depository Receipts, Domestic and Overseas Capital Markets, and External Commercial Borrowing. He has assisted in development and refinement of the Indian Financial Code (IFC) recommended by the Financial Sector Legislative Reforms Commission (FSLRC). He has served on Boards of a few organisations, including Oriental Bank of Commerce, Management Development Institute, National Institute of Securities Markets, SEBI and CCI. Dr. Sahoo has post-graduation degrees in Economics, Law, Management and Company Secretaryship.

The appointment of Dr. Sahoo for the Insolvency Board is viewed as a break ground for setting up of a complementary eco-system for successful implementation of the bankruptcy code. In this issue, ICSI is presenting excerpts of conversation of Dr. Harpreet Raman Bahl with Dr. Madhusudan Sahoo on contemporary developments after introduction of the Insolvency and Bankruptcy Code 2016, the code described in the words of Dr. Sahoo as the “biggest” economic reform in recent years:

Dr. Harpreet: IBBI came into being on October 1, 2016. What have been the major initiatives since then? What have been the challenges in your journey so far?

Dr. M.S. Sahoo: The IBBI is a unique regulator. It regulates a profession as well as transactions. It has regulatory oversight over the insolvency professionals, insolvency professional agencies and information utilities. It writes and enforces rules for transactions, namely, corporate insolvency resolution, corporate liquidation, individual insolvency resolution and individual bankruptcy under the Insolvency and Bankruptcy Code, 2016 (Code). Along with three other pillars of the ecosystem, it enables execution of transactions by stakeholders in a time bound manner.

The first and the most important initiative of the IBBI has been seeking proactive engagement with the stakeholders and building institutional capacity, in partnership with them, to implement the insolvency and bankruptcy reform. The reform witnessed exceptional cooperation from them and soon it became a reform by the stakeholders, of the stakeholders and for the stakeholders. They became emissaries of the reform and carried the message to every nook and corner of the country. Other initiatives of the IBBI include putting the entire regulatory framework and the ecosystem in place expeditiously. It has made regulations to govern transactions relating to corporate insolvency resolution, fast track resolution, corporate liquidation, and voluntary liquidation, and relating to service providers, namely, insolvency professionals, insolvency professional agencies, and information utilities. It has put in place a mechanism for registration and monitoring of service providers. These enabled commencement of transactions under the Code by 1st December, 2016 within 60 days of the establishment of the IBBI on 1st October, 2016.

The country was waiting for this reform since long. Hence, there was no particular challenge, at least no insurmountable challenge. There were usual challenges of setting up a new organisation, organising people and technology, etc. Thanks to the Institute of Cost Accountants of India which made premises available for immediate use by the IBBI. Ministry of Corporate Affairs extended all possible assistance to address any and every challenge the IBBI encountered. Help came from all possible corners, including other regulators. For example, SEBI exempted acquisitions under resolution plans under the Code from making public offers under the securities laws.

Further, we needed insolvency professionals (IPs) to start transactions. We did not have these professionals as such. We needed innovative, immediate solutions. Fortunately, we had statutorily regulated professionals, namely, chartered accountants, company secretaries, cost accountants, and advocates, who have been carrying on somewhat similar work. We allowed these professionals with 15 years of practice experience to register as IPs, but their registration was valid for only six months. This gave us the time to plan a more systematic solution. We developed a Limited Insolvency Examination and allowed professionals with 10 years of experience and graduates with 15 years' managerial experience to pass the examination and then register as IPs. We are now in the process of formulating a National Insolvency Examination.

Dr. Harpreet: What will be the role of IBBI in the ease of doing business, promote entrepreneurship and consequently macro-economic impact of Indian economy.

Dr. M.S. Sahoo: The IBBI is a part of ecosystem that is responsible, along with market participants, for implementation of the insolvency reform. Hence it will pay its assigned role under the Code to facilitate reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner.

We want growth. Growth comes to a large extent from competition and innovation. In competition, efficient firms drive out inefficient firms. In innovation, new order drives out old order. Higher the intensity of competition and innovation, the higher is the incidence of failure. The Code addresses honest failures by resolving insolvency at the earliest opportunity in a time bound manner and facilitating the least disruptive exit, if resolution is not feasible, and thereby promotes entrepreneurship.

It enables the optimum utilisation of resources, all the time, either by (a) preventing use of resources below the optimum potential, (b) ensuring efficient resource use within the firm through resolution of insolvency; or (c) releasing unutilised or under-utilised resources for more efficient uses through closure of the firm. It is believed that if the resources, that are currently unutilised or underutilized or rusting for whatever reason, can be put to more efficient uses, the growth rate may well go up by a few percentage points, other things remaining unchanged. It liberates resources stuck up in inefficient and defunct firms for continuous recycling, and thereby has changed the script from 'Hopeless End' to 'Endless Hope'.

Dr. Harpreet: Do you deem institutional infrastructure in India for adjudication as sufficient for handling the Corporate Insolvency Resolution Process?

Dr. M.S. Sahoo: This issue has quantitative as well as qualitative dimension. As regards quantity, it is usually a chicken and egg problem. As the core of the Code is utilisation of resources, we would not like huge adjudication infrastructure lying idle and waiting for transactions to come up. The infrastructure needs to develop in sync with workload and it has been happening. The adjudication infrastructure has disposed of over 650 matters by now and mostly within the prescribed time. As regards quality, the adjudicating authority and judiciary are in the forefront of this reform. Rich jurisprudence is evolving fast and a large number of issues has been settled. Hon'ble High Courts and the Hon'ble Supreme Court have been disposing of matters in days. In the matter of Industries Ltd. vs. ICICI Bank & ANR, the Hon'ble Supreme Court observed: "... we thought it necessary to deliver a detailed judgment so that all Courts and Tribunals may take notice of a paradigm shift in the law. Entrenched managements are no longer allowed to continue in management if they cannot pay their debts."

Dr. Harpreet: Many stakeholders perceive that the Insolvency and Bankruptcy Code, 2016 helps as an effective recovery tool. What are your take on that?

Dr. M.S. Sahoo: In the matter of Prowess International Pvt. Ltd. Vs. Parker Hannifin India Pvt. Ltd., the Hon'ble NCLAT settled this by the observation: "It is made clear that Insolvency Resolution Process is not a recovery proceeding to recover the dues of the creditors. I & B Code, 2016 is an Act relating to reorganisation and insolvency resolution of corporate persons, partnership firms and

individuals in a time bound manner for maximisation of value of assets of such persons and to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including the Government dues.” The Code envisages resolution within the firm as a going concern. It expects the creditors to get their default amounts from future earnings of the firm rather than from sale of its assets. That is why the Code prohibits any action to foreclose, recover or enforce any security interest during the resolution period and thereby prevents a creditor from rushing in to recover his dues. That is why it enables any financial creditor to trigger the resolution process even when the firm has defaulted to another financial creditor and does not envisage termination of the process even if claim of the party concerned is satisfied. In the matter of Parker Hannifin India Private Limited Vs. Prowess International Private Limited, the Hon’ble NCLT observed that once admitted, other creditors have a right to file their claims. The nature of insolvency petition changes to representative suit and the lis does not remain only between a creditor and the corporate debtor. Therefore, they alone do not have the right to withdraw the insolvency petition because the disputes between them have been settled.

Dr. Harpreet: Do you think we are ready with the institutional infrastructure to handle the insolvency cases, particularly individual insolvency cases, once notified?

Dr. M.S. Sahoo: Proof pudding lies in eating. As stated earlier, the adjudicating authority has disposed of over 650 applications for corporate insolvency resolution process (CIRP). There are about 1000 insolvency professionals. Debtor and creditors alike are undertaking corporate insolvency transactions. About 250 CIRP, including 11 of the 12 big accounts identified by the RBI, are on. At least one CIRP has completed its life cycle with approval of resolution plan by the Hon’ble NCLT, Hyderabad Bench on 2nd August, 2017. We will follow a calibrated approach to implement individual insolvency regime and develop institutional infrastructure in sync.

Dr. Harpreet: Information Utility would have information data base relating to financial creditors. What impact the information utility would make in efficient insolvency resolution process?

Dr. M.S. Sahoo: Information utilities, which constitute a key pillar of the insolvency and bankruptcy ecosystem, would store financial information that helps to establish defaults as well as verify claims expeditiously and thereby facilitate completion of transactions under the Code in a time bound manner. They will provide ready-to-use information to resolution professionals and adjudicating authority to conclude processes expeditiously.

Dr. Harpreet: As a regulator you have seen the performance of insolvency professionals since January 2017? What is your advice for the insolvency professionals especially with respect to the governance and ethical aspects relating to corporate insolvency resolution process?

Dr. M.S. Sahoo: An insolvency professional exercises the powers of the Board of Directors of a corporate debtor under CIRP. He runs the corporate debtor as a going concern and facilitates development and approval of resolution plans. Admittedly, he has huge responsibility. He is of course suitably empowered to do so. He needs to remain independent and impartial and must not allow any kind of conflict of interest. He has to complete certain tasks in a time bound manner.

Dr. Harpreet: Bankers are one of the major stakeholders and part of committee of creditors in approving the resolution plan? Do you think the bankers are equipped enough with restructuring strategies?

Dr. M.S. Sahoo: Fortunately, the bankers are key beneficiaries of the transactions under the Code and hence have the necessary motivation. They are highly sophisticated professionals. The entire process is under their control. They would do wonders if they move away from accounting figures on the books and take business decisions in a time bound manner, as required under the Code.

Dr. Harpreet: IBBI is a part of the ecosystem that relies on market forces to achieve outcome in a time bound manner. So how important is the market and how important is the government regulation?

Dr. M.S. Sahoo: The Code provides a market mechanism whereby the stakeholders are enabled to trigger and complete CIRP. Once a CIRP commences, an interim resolution professional manages the operations of the corporate debtor as a going concern. He may need access to interim finance if the corporate debtor does not have adequate liquid resources to support its operations during the CIRP period. The Code further requires a resolution professional to invite resolution plans from resolution applicants. In case the insolvency of the corporate debtor cannot be resolved, a liquidator needs to sell the liquidation assets for the highest possible value. The market mechanism would help in receiving interim finance and resolution plans and disposing of liquidation assets.

Dr. Harpreet: The Banking Regulation (Amendment) Act 2017 is one of the major amendments, authorising Reserve Bank of India (RBI) to direct banking companies to resolve specific stressed assets by initiating insolvency resolution process under the Code where required, by inserting Section 35AA and Section 35 BB of Banking Regulations Act, 1949. How do you foresee the impact of this amendment on initiation of Insolvency Resolution Process by banks and its impact on NPAs?

Dr. M.S. Sahoo: This has provided an impetus to the resolution of many large cases which have been stuck for many years. In a sense, this is another dimension of Swachh India. This will clean up the system and address the twin balance sheet problem to a large extent. This will tempt other stakeholders to use the Code, when they see banks using it.

ICSI Insolvency Professionals Agency (ICSI IPA), a vital institutional pillar under the Insolvency and Bankruptcy Code, 2016 (the Code), is committed to the principles and functions, governing the Insolvency Professional Agencies, as envisaged under the Code.



**CS (Dr.) Shyam Agrawal
President, ICSI**

The Insolvency and Bankruptcy Code, 2016, aims at promoting entrepreneurship, increasing availability of credit, maximisation of value of assets through an effective resolution of debts through negotiations while ensuring that the Company carries a business as a going concern, the focus is also on time barred resolution so that the value of the assets is not lost and interest of all stakeholders are preserved. The Code will help in attracting foreign direct investment and help improving India's ranking in World Bank's Ease of Doing Business Report. As reported, MSMEs contribute around 6.11% of the manufacturing GDP and 24.63% of the GDP from service activities as well as 33.4% of India's manufacturing output. The Code provides for fast track insolvency resolution for smaller businesses that will help in improving the MSME sector and thereby the overall economy.

ICSI Insolvency Professionals Agency (ICSI IPA), a vital institutional pillar under the Insolvency and Bankruptcy Code, 2016 (the Code), is committed to the principles and functions, governing the Insolvency Professional Agencies, as envisaged under the Code. For the purpose ICSI IPA has created a robust framework through setting up of an independent Board, Constitution of committees for developing, monitoring and disciplining the members, framing of policies for the purpose of monitoring and disciplining, setting up of a monitoring mechanism to monitor the conduct and behaviour of its members. ICSI IPA is also actively working towards capacity building of its members through training programmes, workshops, knowledge updates, webinars, publications, so that they can effectively contribute in achieving the objectives of the new legislation.

Pivotal Role of ICSI Insolvency Professional Agency



The ICSI Insolvency Professionals Agency is a Section 8 Company incorporated under the Companies Act, 2013 and formed by the Institute of Company Secretaries of India as its 100% subsidiary. The Company is registered as an Insolvency Professional Agency with Insolvency and Bankruptcy Board of India to enrol and regulate the members practising as Insolvency Professionals (IPs) in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 read with rules and regulations made thereunder. Eminent practising professionals are enrolled with ICSI IPA. Here are the excerpts of conversation with CS Alka Kapoor, Chief Executive Officer (Designate), ICSI IPA on role of Insolvency Agencies which have been viewed as one of the institutional pillars that lay down standards of professional conduct under the IBBI Code:

Dr. Harpreet: There are three Insolvency Professional Agencies that have been registered with the Insolvency and Bankruptcy Board of India. What is the primary role of Insolvency Professional Agencies w.r.t your organisation and how is ICSI IPA taking this forward?

CS Alka Kapoor: The role of Insolvency Professional Agencies is to enrol, discipline, monitor, educate and train the professional members (Insolvency Professionals) enrolled with the Insolvency Professional Agency (IPA) and registered with IBBI. Insolvency Professional Agencies being one of the institutional pillars envisaged under the Code are also obligated to lay down standards of professional conduct for its members and to monitor performance of its members. The ICSI IPA has put in place procedure and process, with suitable checks and balance, for scrutiny of every application received for enrolment before the same is forwarded to IBBI for registration of such applicant as Insolvency Professional. If and where, any defect is observed during scrutiny, the same is promptly intimated to the applicant with an opportunity to rectify the same. Due to procedures and process followed by ICSI IPA hardly any application forwarded by it is rejected by the IBBI. Since its registration with IBBI in November 2016, the ICSI IPA has already enrolled over 500 Insolvency Professionals.

To educate and train its Insolvency Professionals and to widen their knowledge and understanding, the ICSI IPA has focussed on capacity building initiatives, e.g. webinars, interactive sessions, weekly updates on cases, training programmes, workshops and the like. The webinars conducted by ICSI-IPA were open to Insolvency Professionals enrolled with any Insolvency Professional Agency and also to any other interested person, and focussed on practical aspects of Corporate Insolvency Resolution Process as well as on challenges facing such Professionals during the course of discharge of their duties as an Interim Resolution Professional (IRP) or Resolution Professional (RP). It also conducted interactive sessions of Insolvency Professionals with regulators and adjudicating authorities. The ICSI IPA has, in the short span of 9 months, already brought out the following three publications for the benefit of Insolvency Professionals and others interested, viz. Insolvency and Bankruptcy Code, 2016 (with Rules and Regulations), Interim Resolution Professional – A Handbook and IBC Case Law Compendium (with Case Briefs). To monitor and discipline its members, ICSI IPA has constituted Monitoring and Disciplinary Committees.

Dr. Harpreet: Are there any challenges in advocating the IB Code to the grass root level? What are ICSI IPA's plan to reach out to the common man with the benefits of the Code?

CS Alka Kapoor: Any new enactment would be faced with some challenges initially – Insolvency Bankruptcy Code is no exception. The Code encompasses a whole lot of diversified beneficiaries/stakeholders that include corporate borrowers, bankers, employees, suppliers, customers, start ups, small traders, farmers, individuals, partnership firms, regulators and so on. The promotion of Code to such spread out stakeholders, though challenging, is essential to reap the benefits. Such advocacy can be effectively carried out through social media, print media, circulation of brochures, handouts, pamphlets and booklets and the like in simple and easy to understand language. Easily comprehensible material could also be made available to the Heads of various Panchayats for further propagation to the masses. ICSI



Insolvency system starts with 600 professionals

Agencies under ICAI, ICSI see brisk registration in the first month

Around 600 member associations have registered to operate as insolvency professionals (IPs) under the new Insolvency and Bankruptcy Code, 2016. The ICAI and ICSI, which were the only two bodies to qualify as an insolvency professional, will implement the provisions of the Code. The ICAI members will take over the affairs of a corporate debtor in the insolvency process while the ICSI members will take over the affairs of a corporate debtor in the liquidation process. The ICAI members will also take over the affairs of a corporate debtor in the liquidation process. The ICSI members will also take over the affairs of a corporate debtor in the liquidation process.

ICSI IPA launches its new website



The ICSI Insolvency Professional Agency (ICSI IPA) is a Section 8 Company incorporated under the Companies Act, 2013. It is wholly owned subsidiary of The Institute of Company Secretaries of India (ICSI) and is registered as an Insolvency and Bankruptcy Professional Agency with the Insolvency and Bankruptcy Board of India (IBBI). ICSI IPA is a frontline regulator to enroll, regulate and monitor the members practicing as Insolvency Professionals (IPs) in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016. ICSI IPA has announced the launch of its website www.icsiipa.com recently at the hands of CS Shyam Agrawal, President ICSI for effective interface with stakeholders.

NEW DELHI | THURSDAY, 23 FEBRUARY 2017 Business Standard

ICSI INSOLVENCY PROFESSIONALS AGENCY
(Section 8 Company registered under the Companies Act, 2013)

Become an Insolvency Professional

Add more to your career
Give more to the corporate world

"The Institute of Company Secretaries of India (ICSI) heartily congratulates the Government of India in bringing out the Insolvency and Bankruptcy Code, 2016 ("Code") within the shortest possible time through the marathon exercise of consultative process. With an objective to enroll, regulate, educate, train and monitor the members practicing as Insolvency Professionals (IPs) under the aegis of the Code and the rules/regulations framed thereunder, ICSI has incorporated ICSI Insolvency Professionals Agency (ICSI IPA), being its 100% subsidiary and a frontline regulator for promoting the growth and development of the profession of IPs in India."

-CS (Dr.) Shyam Agrawal, President, ICSI

ICSI News

Ethical conduct of Insolvency Resolution professionals is crucial

(Retd.) Sudhanshu Jyoti Mukhopadhyaya, Chairperson, National Law Appellate Tribunal while inaugurating the Interface of Opportunities & Challenges for Insolvency Professionals under the Insolvency and Bankruptcy Code, 2016 organised by ICSI Insolvency and Bankruptcy Professionals Agency on recently at New Delhi in association with Chamber of Commerce and Industry, Justice Mukhopadhyaya discussed certain thought provoking cases filed before NCLAT and other scenarios which required deliberation between the various stakeholders and panelists present there.

ICSI-IPA begins enrolling insolvency professionals

Company Secretaries Institute pumps in ₹14 crore in ICSI-IPA; plans courses

The recently formed ICSI Insolvency Professionals Agency (IPA) has started enrolling insolvency professionals, said Mamta Binani, President of the Institute of Company Secretaries of India.

Only few days ago, Finance Minister Arun Jaitley had handed over the registration certificate for ICSI Insolvency Professionals Agency (IPA) to act as an Insolvency Professional Agency (IPA).

As of now, members with over 15 years experience could directly opt to become an insolvency professional and start practicing. They would have to write an exam after a period of six months to continue as an insolvency professional.

that going forward the IPA would also look to introduce training modules for those interested in a career as an insolvency professional. For ICSI IPA, three nominees have come from ICAI and four independent directors have also been appointed. The four independent directors are Nalin Kohli, one of the spokespersons of BIP and Supreme Court advocate; former Justice Berla, former President of PHDCCI; Sudhanshu Mukhopadhyaya, former President; and Ashish Chauhan, former Managing Director and CEO of Bombay Stock Exchange.



IPA has devised an effective media plan and simultaneously proposes to propagate the Code through its professionals spread through the length and breadth of the country.

Dr. Harpreet: Are there any challenges being faced by the Insolvency Professionals?

CS Alka Kapoor: An Insolvency Professional remains under the watchful eyes of his Insolvency Professional Agency and the Insolvency and Bankruptcy Board of India. The unique position held by him is of trust and confidence. It demands the highest standards of integrity and probity as well as independence in the process of decisions-making. As the deemed CEO of the company under insolvency/ bankruptcy, Insolvency Professional's role encompasses a wide range of functions including compliance of laws, accounts and finance related functions, managing the affairs of the Corporate Debtor and acting as a 'bridge' between the NCLT and stakeholders. The challenges include verification of claims, (we have already witnessed the case of home buyers in respect of construction companies), constitution of committee of creditors, taking over of diversified business with different locations, synergy with employees and other stakeholders, time bound resolution plan, indentifying the manpower needs during insolvency resolution process and ensuring that the company continues as a going concern. Such challenges also include inadequate or non-cooperation from Corporate Debtor and its staff.

Dr. Harpreet: Is there sufficient number of Insolvency Professionals? Are they equipped enough to perform their duties despite the above challenges?

CS Alka Kapoor: Yes, as of now, the number of cases under Insolvency and Bankruptcy Code, 2016 are rising and so is the number of IPs. As regards performing their duties, an Insolvency Professional comes into picture, even before an insolvency/bankruptcy application is admitted and stays till the resolution plan is accepted and even beyond that, when the company goes into liquidation. An Insolvency Professional is the key person in negotiating with the creditors, resolving the insolvency and turning life around for the organisation in the future. A single wrong step can lead to the liquidation of the Company which shows the criticality of the position held by the IPs in the economy. Training of insolvency professionals therefore, assumes significant importance.

To equip its insolvency professionals to effectively discharge their functions, the ICSI IPA has already undertaken /proposes a number of training and capacity development programmes. These programmes inter alia include practical aspects such as court craft, drafting skills, management aspects, business aspects, financial aspects, negotiating skills, and an analysis of the case law.

Dr. Harpreet: Are there any challenges foreseen in monitoring the performance of Insolvency Professionals? What are the systems and controls required for monitoring?

CS Alka Kapoor: One of the primary duties of Insolvency Professional Agency is to monitor and evaluate the performance of its members and to submit a related report to the IBBI. ICSI IPA has been communicating with its members sensitising their reporting obligations with IBBI and IPA for the purpose of monitoring. The exceptions and red flags are also to be identified for the purpose of inspection of insolvency professionals. With the number of Insolvency Professionals and the assignments of insolvency resolution rapidly growing, IT infrastructure is inevitable for the purpose of monitoring. Insolvency Professional Agencies, on their own, are in the process of finalising the mechanism for monitoring since the Code/Regulations are silent on the subject and also to establish necessary IT infrastructure to achieve the purpose. ICSI IPA has its Monitoring Committee in place to guide on the establishment of systems and controls for monitoring. The Monitoring Committee is also finalising the Monitoring Policy.

The Road Ahead

The objectives of the Insolvency and Bankruptcy Code 2016 are curative indeed as these aim at 'insolvency resolution' as to improve ease of doing business in India, there was a dire need for such a legislation to improve the Insolvency & Bankruptcy regime in the country. The Insolvency and Bankruptcy Board of India has made laudable endeavours to overhaul the Indian bankruptcy ecosystem by providing time-bound mechanism to expedite resolution of insolvency and aid ease of exit. Taking into account the powers and duties of the Insolvency Professionals described under the Code, it is beyond doubt that they will act as a catalyst of change in Indian Insolvency regime and provide a fresh lease of life to Indian corporate sector hence contributing towards Nation building and a New India of 2022.



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CS WOMEN EMPOWERED AND EMPOWERING...!!!



■ B. CHANDRA

Hailing from non decrepit village in South Tamilnadu and studied in Tamil medium till the school final, joined Group B Central Govt Service in the Government of India through a competitive exam for audit of Public Sector Undertakings at 21 years of age. Due to her exceptional brilliance, within a few years she got recruited as an Indian Company Law Service Officer through the Union Public Service Commission. She served the Ministry of Corporate Affairs for 17 years at a fairly senior positions such as Deputy Registrar recognising probity is surest of all oaths for a public servant. Due to slow progress in the career path decided to take up practice as a Company Secretary. She had the experience in being part of the team in drafting the concept paper and the Companies Bill (till 2008) and the close association as a domain input provider for e-governance project of MCA 21 both during service and post retirement professional engagement. She is now in active practice as a Company Secretary having the unique experience of looking at the various issues both from the angle of a Regulator and also from the corporate sector point of view in order to provide a comprehensive and acceptable solution. She is a sought after faculty in addressing seminars/study circle meetings of the Institute of Company Secretaries of India. She firmly believes that changing with times is the only way to tide over change. Come on young girls be it from any remote corner of the world, life shrinks or expands in proportion to one's courage, perseverance and hard work.

CS B. Chandra's profile

- Joined the Office of the Comptroller and auditor General of India as Section Officer (Commercial) in the year 1982

- Joined the Indian Company Law Service in August 1990
- Worked for 17 years as an Indian Company Law Service Officer
- As part of the service, had worked in different capacities as Registrar of Companies, Inspecting and Investigating officer and other capacities in the different wings of the Ministry of Corporate affairs.
- Had a unique opportunity to be part of a team for drafting the Concept paper on Company Law and the draft of the Companies Bill.
- Had been part of the team which envisioned the MCA 21 e governance Project and provided domain inputs for developing the program to the service provider.
- Took up Practice as a Company Secretary in 2008
- During these years in practice apart from the routine secretarial work comprising of incorporation of Companies, conducting Board/General Body Meetings, Drafting Minutes, filing of Forms under the Act, obtaining approvals under various provisions of the Act at different levels of the Ministry has handled the following specific aspects concerning the Companies Act.
 - Furnishing Opinions on different aspects of Corporate Laws
 - Assisting companies in FEMA compliances
 - Taking up composite assignments of mergers, demergers, reduction and other corporate restructuring work
 - Carrying out Secretarial audit of companies under all corporate laws
 - Advising on corporate law compliances and furnishing opinions under various corporate laws
 - Taking up voluntary Liquidation
 - Assisting in matters in taking up matters with the Company law Board involving allegations of oppression and mismanagement
 - Giving lectures on Company Law, addressing students as a part of MSOP conducted by the Institute, member of the expert Committee on company law in the Madras chamber of Commerce.

Let us hear her story in her own words:

Lord Krishna says **“Your work is your responsibility, not its result. Never let the fruits of your actions be your motive. Nor give in to inaction.”**

Rise up Young Girls, we are second to none; hard work pays and intelligent honest hard work showers rewards.

Like what Steve Maraboli quotes ‘We should be clear that incredible change happens in your life when you decide to take control of what you do have power over instead of



craving control over what you don't.'

I believe every woman is an achiever and this narration is only to tell you that I am also one of the achievers alongside you.

Let's amble through my journey:

Family

I was born in a lower middle class orthodox family as the second of the four daughters to a Railway booking clerk belonging to a very small village in Southern Tamilnadu. My father, being innocent and ignorant of the outside world and an honest committed Government Servant was guided by his father-in-law, my grandfather, who was a teacher in St. Joseph's College High School, Trichy who had a great vision of having educated, independent and empowered grand daughters. I am grateful that my father had the grace to be guided by his father-in-law which itself was a rare phenomenon those days. More than my elder sister and me, my two younger sisters have reached heights due to sheer hard work and aptitude for learning. My immediate younger sister is a noted Genomic scientist in understanding the initiation and progression of human diseases in New York, USA; and the youngest sister, also member of our Institute, is holding a Global position in a Foreign Bank, of course with tremendous sacrifice on the part of our parents and my elder sister.

School

We were sent to a Government aided Girls school and it was really heartening to think that for an annual fee of Rs 7/- (I am not wrong in quoting the figure- my mother vouches for the same), the school provided, among other things, moral education and also 'better fast reading', a concept which only perhaps international schools would offer today. The school library had a lot of books donated

by a sugar mill owner in the vicinity and I had the privilege of reading almost all the books, being one of the fastest readers. Year after year we were asked to take a national examination on General knowledge and on the United Nations Organisation. In one such examination conducted , may be in the 8th or 9th grade **I stood first and had the privilege of getting the first price from the iconic woman, the then Prime Minister of India, Mrs. Indira Gandhi, at an imposing ceremony at Vigyan Bhavan, New Delhi.** My travel to Delhi by train with my class teacher and the naivety of not even collecting the photograph is still etched in my reminiscence.

College

I stood first in the school final examination and got into Seethalakshmi Ramaswamy College for Women in Trichy, a small town, in Tamil nadu. As advised by my grandfather, I was admitted to B. Com Course and took a well deserved interest in accounts even from the first year. After the first year of under graduate course, as per my wish, with great financial difficulty, my father admitted me in the oral coaching for the intermediate course of the Institute of Cost and Works accountants of India. **The class had strength of 34 boys and the only girl who was unique by being the only person passing the exam at the end of 6 months.** My attendance to the class was 100 per cent though it was not easy to reach home, after each day's class, which was in the interior of a village 6 Kms away from Trichy, especially on new moon days, with no street light what so ever.

Employment

While doing both the courses, I also wrote the Railway Service Commission, a test for filling up clerical posts in the accounts Department of Railways, in which I got selected even before my final year B Com results were announced. After a short stint of less than a year in Southern Railway, I was selected for the post of section

officer (Commercial) on probation, a gazetted post at the age of 21. My father's joy knew no bounds as getting into a gazette post were a day dream for him. I enjoyed my job as Government Audit officer in Bharat Heavy electrical Limited, Trichy, Ranipet & Hyderabad, Indian Oil Corporation, The Oil and Natural Gas Commission etc. I was part of an audit team of 4 officers who competed with each other in order to get their audit points printed in the Report of the Comptroller and Auditor General of India. Having passed the final examination of the Institute of Cost and Works accountants of India, all the matters relating to cost calculation/price fixation were given to me for checking/vouching before the accounts could be signed off by the Principal Director. In fact the Commercial Audit Department was an eye opener for me to learn about the nuances of a business entity. My service for almost 8 long years in the Audit Department never resembled that of a Government service, without which, I would not be a successful practitioner today, after about 28 years in Government Service. In fact, work is worship, the basic ideology was taught by my father apart from commitment to work, punctuality and he would not tolerate even a few minutes delay in meeting a committed schedule.

Entry into the Indian Company Law Service

Though the job profile was interesting, there was a burning desire to join Class I service of the Government of India and applied for the post of Grade IV in the Indian Company Law Service to the Union Public Service Commission based on my qualification as a Cost Accountant with a few years of experience. I attended the interview before the UPSC, the highest body for recruiting Government servants, in the year 1990. I knew that I had a very slim chance of getting selected with my very limited exposure to Company Law; my job profile was more into auditing under Section 619 of the Companies Act. Before the interview I had only read about the latest amendments in permitting managerial remuneration without approval of the Central Government in 1990. True to its name, the interview by the UPSC was very interesting and lasted an hour. As soon as I mentioned that I have not dealt with much of Companies Act, the Chairman of the interview committee was fascinated with my hobby of reading books and switched on to discussing the latest books I have read including the one which I read in the train the day before, **which incidentally was 'Atlas Shrugged' by the famous woman ideologist and Philosopher Ayn Rand.** When I forgot about the interview, the appointment order came posting me as Assistant Registrar of Companies, Bombay and was ranked first in the batch of officers recruited in that year.

Service as an ICLS officer

Being new to Company law, where my assistants, colleagues and superior officers knew almost the whole of the law, all the procedures, clarifications, Circulars and what not, I had a tough time coping up with all of them in the midst of the huge number of Companies, the office had to manage. In this connection, I should mention the role played by my mentor in Company law as well as in service, Mr R Aghoramurthy, the then Regional Director

in Mumbai & Chennai. In fact I was privileged to get the exposure in both the regions where I served consecutively

During my 17 years of service in the Ministry, I believe that I left an impression of an officer, capable of providing quick and easy solutions to complex corporate issues, from the regulatory point of view and was very popular amidst all my colleagues. At some point, I also enrolled for my CS course and passed the examination, of course with a tremendous support from my family.

In 2004, when the Government wanted to introduce a **'Concept paper'** on Company law and mandated Mr R Vasudevan, a senior ICLS officer to select a team of two (needless to say that I was one among them) for preparing the concept paper based on the Companies Act 1956, the Companies Bill 2000 (which was later withdrawn), the Report of the Committees which were available at that time. The decision to shift the procedural part to the Rules, which could give the Government the flexibility of making amendments without going to Parliament, was taken as early as 2004, a decade before the new Act came into force. The 'Concept paper' was ready and was thrown open for public comments within the target time of 45 days. The spate of criticism and comments, which the Government received were in no small measure. The comments were duly considered and a comprehensive document was submitted to the High Powered Committee headed by Dr. J. J. Irani. I had an opportunity as well as privilege of attending every meeting of the Committee which were attended by various stake holders. The frequent travels would not have been possible but for the unstinted support given by my mother to take care of my young daughter.

The team was again given the task of drafting the bill which had to undergo innumerable changes before it could be even discussed with the Law Ministry. It was a rare and golden opportunity to have closely watched the conception of the Companies Act 2013; no opportunity comes without personal compromises and pressures. Being a mother of young daughter it was an act of fine balancing with significant travels, work pressure along with my daughters' classes. When we were mentioning the hardship to late Mr Achuthan, the man who drafted today's take over code, he shared his experience that drafting a law is like doing "Thapas"; I wish to drive home today that what we did was not anything unique except that we took the role assigned seriously enough.

Even before the draft law could take a shape, the Ministry started the ambitious MCA 21 project which would revolutionise the way in which the offices of Registrars would be run. In fact the maze of Paper that would be found in all the RoC offices was mind boggling. Various other attempts earlier to introduce computerisation did not go through and the project was the first initiative in India to offer an internet based solution to the filing and archiving of the records filed by various corporate bodies. In fact the very low level of internet connectivity in the years 2004-06, made everyone in the project, skeptical about the future of the project. I was deployed by the



Ministry to give technical inputs to the technical partner for the project.

With the projects having been commissioned, with transfer again lurking on my head, I decided to get into practice as a Company Secretary and quit service with the support of my husband, a cost accounting professional employed with a multinational Company. In fact when I submitted my request for voluntary retirement request, the then joint Secretary impressed upon me the need for such honest officers and sought withdrawal of my request. Though honoured, I stuck to my decision of entering the unknown world of practice.

Setting up practice was not an easy task having been on the other side of the table and the assignments I got were in the nature of giving replies to the Inspection Report, giving the regulatory angle to any issue faced by Corporate etc. In the initial stages of e filing, it was in fact tough to handle simple filing with no assistants/ trainees but my determination and attitude of not giving up is the story behind my success.

Now that I am into practice for almost 10 years, with three qualified women Company Secretaries and a few of trainees, I am proud that I have handled all types of assignments, a practicing company Secretary is permitted to take up. This decade of experience has been also due to significant contributions and sacrifices by my three women Company secretaries and my husband who are associated with me and my progress.

With the Secretarial audit since 2014-15, the practice of the profession is highly rewarding, motivating and satisfying. From the time I entered practice, I have been regularly in touch with the Institute as a regular faculty in the MSOP Program/ study circle meetings and seminars conducted by the Institute, Chambers and the Institute of

Chartered Accountants of India.

Hard work and honesty have been the guiding force instilled early in life, by my parents, through my journey thus far.

It is Swami Vivekananda's golden words that we should have it as our Mantra **"Arise, Awake and Stop not till the goal is reached"**.

RAPID FIRE ROUND WITH ICSI

- **Dr. Harpreet: What is the definition of a 'woman' in your words?**
- **CS B. Chandra:** Woman is a human being who respects others and likes to be respected by others. Recently I read a Whatsapp post which read as below, "God Created Man and was engaged in the creation of another being and he took a lot of time to create another being. When someone asked God why he is taking more time to create this being, God replied "As he cannot be everywhere he is creating this being to assist him in his role." This describes the woman.
Woman is a magnificent creation of GOD, neither higher nor lower than any other being.
- **Dr. Harpreet: You have been both in employment and in practice. In your view what support ICSI can extend to its CS Women in employment and in practice?**
- **CS B. Chandra:** ICSI is a well rounded course both for practice as well as for employment. The need of the hour is to develop the skills of advocacy for the budding professionals and employed Company Secretaries. The IBC code and the examination for

IBC professional should be part of the curriculum rather than as a separate examination.

In my personal opinion, however, full time requirement of Company Secretaries to Private Limited Companies is more in law than in compliance. Rather this could have been avoided by introducing Sec1 audit or may be a compliance certificate for all Companies and the practicing professionals can be made responsible for compliance.

- **Dr. Harpreet: What are the particular areas where women CS in practice can take special leverage in contemporary context?**

CS B. Chandra: Secretarial Audit, Take over and Acquisitions, Insolvency code, advising on governance.

- **Dr. Harpreet: women are super human beings who have equal responsibilities at work as well as at home. How women should strike a 'work-family' balance?**

CS B. Chandra: Women are having far higher emotional quotient and hence stronger than men. We are endowed with multi tasking capabilities in no small measure. Be empowered and empower the whole society. It is for us to make the best of our lives.

Dear Young women, Focus, fear not and tread in the right path. Success is waiting at the end of the journey. Don't measure success by money, power or position but only with the right things a woman does which would help the society.

- **Dr. Harpreet: What is your recipe for 'success' in life?**

CS B. Chandra: Hard work and focus. Walk towards the goal with un diverted attention.

- **Dr. Harpreet: What steps need to be taken by ICSI to emerge as a Global Leader in Corporate Governance?**

CS B. Chandra: The existing curriculum combined with developing advocacy skills, making a research project mandatory and developing management skills will improve the standard of the students and young members which will take the ICSI to a different plane altogether.

- **Dr. Harpreet: ICSI is going to celebrate its Golden Jubilee commencing this year. You are an empowered CS ICSI is proud of. In your words how would you sum up your journey as a CS?**

CS B. Chandra: Absolutely fabulous. I took up the Company Secretary Course on the insistence of my husband and I think I did the right thing in listening to him.

- **Dr. Harpreet: What will be your piece of advice to**

the young women CS who wish to excel as an empowered CS woman?

CS B. Chandra: I quote the parting speech of Michelle Obama from White House "Empower yourself with a good education. Then get out there and use that education to build a country worthy of your boundless promise. Lead by example with hope, never fear." I don't want to add anything and make it more complex.

Epilogue

Reading Chandra's story makes me feel so proud that an empowered woman doesn't only mean the woman who excels in her professional life, rather, is a woman who gets personal and professional responsibilities so well as cited in this Sanskrit quote:

कार्येषु मन्त्री करणेषु दासी, भोज्येषु माता शयनेषु रम्भा ।
धर्मानुकूल क्षमया धरित्री, भार्या च षाङ्गुण्यवतीह दूर्लभा ॥

(कार्य प्रसंग में मन्त्री, गृहकार्य में दासी, भोजन कराते वक्त माता, रति प्रसंग में रम्भा, धर्म में सानुकूल, क्षमा करने में धरित्री)

The empowered woman is the one who is able and intelligent to provide brilliant and tactful advice like a minister in professional matters. At the same time, she prudently executes the tasks of her family and manages her home skilfully with finite resources. She feeds the family members with unconditional love like a mother and takes care of her husband like a fairy during night. In forgiveness, she has a heart as generous as Mother Earth who bears the weight of all good and bad of human beings living on her; likewise, a woman forgives, protects and even corrects the unpleasant facets of any family with the blessed quality of compassion in her. ICSI is proud to have many such women as a part of its fraternity who have travelled such a long but cherished journey with ICSI. Her journey is unique and despite all travails, she treasures the ups and downs of her journey as an empowered being.

Let us salute and celebrate spirit of our womanhood for all 365 days of the year.

Happy reading



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Insolvency Professionals as Office Holders: Rising to the Challenge

» P-33

ALKA KAPOOR

An Insolvency Professional (IP) acts as a guide and steers the way forward in which the Company under default shall move in the interests of all stakeholders. An IP should have the bandwidth to understand a company's functioning, strategise a resolution plan and also manage the affairs of the corporate debtor on a going concern basis. The effective role of Insolvency Professional calls for multiple skills in the fields of finance, legal, human resource management, court procedures, stakeholder management, business dynamics, strategic foresight, business valuation, negotiation and so on. A single step in the wrong direction may push the corporate debtor towards liquidation which evinces the criticality of the position held by the IPs in the eco-system of insolvency and bankruptcy framework.

Realisation of Liquidation Estate of Corporate Debtor

» P-39

G M Ramamurthy

Insolvency and Bankruptcy Code, 2016 aims at time bound liquidation, inter alia, of corporate debtor for maximisation of value of the assets involved. Realisation process is very important for the success of the Code. Realisation of liquidation assets is achieved through the insolvency professional acting as the liquidator. Secured creditors are also afforded an option to realise their security. This will supplement the efforts of the liquidator so that he can concentrate on realisation of other assets. Secured creditors realising their security interest are permitted to appropriate the proceeds to recover their debts due, except to the extent of sharing the insolvency resolution process costs, thus incentivises them to opt more for the sale of secured assets. The elaborate procedure for the liquidation estate emphasises on transparency and maximisation of the sale proceeds. The liquidators should seize this opportunity and demonstrate their ability towards furtherance of the object of the Code.

Rights of homebuyers on insolvency of Real Estate Developers

» P-43

Madhukar Umarji

There are multiple parties involved in a Real Estate Development Project. The Developer, Lender Banks & Financial Institutions who have lent money against the security of Project Assets, Homebuyers in whose favour sale agreements are executed by the Developer and Lenders of Homebuyers. In the event of commencement of insolvency proceedings against the Developer, the Homebuyers

become one of the unsecured claimants ranking at the bottom. The Real Estate (Regulation & Development) Act, 2016, which has become effective recognises the rights of homebuyers and treats them differently as compared to a financial claimant. The article makes an analysis of various applicable provisions and suggests amendments to the Insolvency & Bankruptcy Code, 2016 to recognise property rights of Homebuyers in the Project assets.

Judgments Under Insolvency and Bankruptcy Code by Supreme Court and NCLAT

» P-45

NPS Chawla & Sujoy Datta

The operation and implementation of any legislation inevitably churns up issues on aspects of the law, that are between the lines and require judicial deliberation to interpret the statute and thereby guide the functioning of the law. The Insolvency and Bankruptcy Code 2016, enacted to radically change the process of insolvency resolution in India, is keenly watched by economists and jurists as well as businessmen and investors, for the reason that each aspect of the implementation of law has the potential to critically impact the ease of doing business in India. For this reason, the Code is especially sensitive to interpretation and it is vital that the issues thrown up in its inaugural year of implementation be recognized and the judicial remark on the same be understood. The present article thus traces the emerging jurisprudence of the Code through judgments of the Hon'ble Supreme Court of India and the Hon'ble National Company Law Appellate Tribunal

Impact of Limitation Act, 1963 on the Insolvency and Bankruptcy Code, 2016

» P-50

Jayashree Shukla Dasgupta

Insolvency and Bankruptcy Code, 2016 does not specifically provide for the time period within which a petition for insolvency resolution is required to be filed. The said issue has come for consideration before various benches of the National Company Law Tribunal as well as before the National Company Law Appellate Tribunal. The view of the Tribunals seems ambiguous as on date and warrants further judicial interpretation in so far as the applicability of the Limitation Act, 1963 vis-a-vis the Insolvency and Bankruptcy Code, 2016 is concerned. What the Tribunals ought to emphasise on is the intention of the legislature read in consonance with the Provincial Insolvency Act, 1920 (since repealed) as well as the Companies Act, 1956 which dealt with the concept of insolvency and winding up to evaluate that the legislature ought not have intended to grant unfettered power to any party to initiate insolvency proceedings, when otherwise the 'claim' was barred by law.

The Role of Insolvency and Bankruptcy Board of India Under The Insolvency and

» P-52

Bankruptcy Code 2016

Hema Gaitonde

The Bankruptcy Law Reform Committee (BLRC), under the Chairmanship Dr. T. K. Viswanathan, studied the various Bankruptcy related issues and submitted their report to the Government of India in November 2015. One of the most important recommendations of the Committee was the need for establishment of a regulator to be called the Insolvency and Bankruptcy Board (IBBI) which will be given clear regulation-making powers about certain elements of procedural detail. The report suggested that in each case where regulation-making power is given to the Board, there will be a clear statement of objectives, which would create a natural accountability mechanism in the future. The Committee visualised that the Board will perform four functions: (a) Regulation of information utilities; (b) Regulation of insolvency professionals and insolvency professional agencies; (c) Regulation-making in specific areas about procedural detail in the insolvency and bankruptcy process and (d) data collection, research and performance evaluation. The present article is an attempt to explain the role of IBBI under The Insolvency and Bankruptcy Code 2016

Practical Issues Posing Challenges to the Insolvency Professionals – Does the Code Show the Road Ahead?

» P-56

S. Rajendran & S. Srinivasan

In the brief span of less than twelve months of notification of the insolvency resolution process for corporate persons, the Insolvency and Bankruptcy Code, 2016 (“Code”) has made great strides. The creditors have begun to flex their muscles to reign order in repayment of debts. However, in the process of corporate insolvency resolution, the insolvency professionals face several challenges right from their appointment as interim resolution professionals. The time available to them being very limited, the challenges they face in every single step assume great significance. Public announcement, determination of claims, discovering corporate debtor’s assets and valuing them, constitution of committee of creditors and determining their voting share, conducting their first meeting, e-voting, non-cooperation from directors, etc., are some of the challenges. The authors, with their practical experience of handling a few cases, have attempted to highlight some of the challenges and offer suggestions to get over them. As the “Code” evolves, more challenges could emerge but the will to surmount them being stronger, bad days are ahead for defaulting business owners.

Insolvency Resolution Professionals’ Predicament Against Difficult “Corporate Debtors”

» P-61

Delep Goswami & Anirrud Goswami

On 31st August, 2017, the Hon’ble Supreme Court of India for the first time, in a detailed judgement analysed the important provisions of the Insolvency & Bankruptcy Code, 2016 (IBC) and highlighted the role of the Insolvency

Resolution Professional (IRP) once they are appointed under the orders of the NCLT. Further, the Principal Bench of Hon’ble NCLT, in the case of M/s Hotel Gaudavan Pvt. Ltd. had the occasion to deal with various applications moved by the IRP against the recalcitrant attitude of the erstwhile promoter-directors/ management of the corporate debtor company and their repeated attempts to somehow thwart the efforts of the IRP in carrying out its duties under the IBC. How the Hon’ble NCLT, Principal Bench, had issued directions on the applications by the IRP are important for similarly placed IRP’s who are facing resistance from the management of the debtor company. The article would be beneficial for the professionals who are registered as IRP’s.

Special Powers of Supreme Court against Inherent Powers of NCLAT under IBC, 2016 Insolvency application allowed to be withdrawn post admission

» P-65

Dheeraj Kumar Sharma

The judgment pronounced by Supreme Court is an important one in the course of development of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “IBC 2016” or “the Code”) in which the inherent powers of the Tribunals were prayed to be invoked by the parties to the suit for settlement of their disputes, which were denied both by the NCLT and NCLAT but the Apex Court used its extraordinary powers to serve justice. However, the same should not be treated as a carte blanche to grant any relief by overlooking the express or implied provisions contained in the law and therefore the inherent powers of the court being complementary to the powers specifically conferred, are free to be exercised by the court subject to its exercise being in a way that it should not be in conflict with what has been expressly provided in the law.

Insolvency and Bankruptcy Code, 2016: A Sustainable Structuring of Stressed Assets

» P-68

Komal Jain & Karuna Jain

The Insolvency and Bankruptcy code, 2016 is a welcome overhaul which has directly addressed in resolving the insolvency and bankruptcy issues of corporates and simulatiously serving creditors and public financial institutions by helping them in recovery of bad and distress loans and ultimately tackling Non Performing Assets. The Main objective of code is distribution of the effects of a debtor in the most expeditious, equal and economical mode. The code lays down the complete procedure of Insolvency Resolution process which involves collating claims and reviewing the requisite financial and other relevant records of the company.

Information Utility – A New Home for Digital India

» P-74

S. K. Pandab

- Under the Insolvency and Bankruptcy Code, 2016 a new concept 'Information Utility' has been introduced. The National Company Law Tribunal recognizes financial information of any corporate debtor provided by the Information Utility. Various corporate entities may submit financial information to the Information Utility or access the information from the Information Utility. This is a single window for maintaining digital information in secured and authentic manner.

Corporate Liquidation and IBC 2016

» P-80

Sachin Sardar

In finance and economics, liquidation is an event that usually occurs when a company is insolvent. Meaning, it cannot pay its obligations as and when they come due. The company's operations are brought to an end, and its assets are divided up among creditors and shareholders' according to priority of their claims. Liquidation is the process of bringing a business to an end and distributing its assets to claimants. Once the process is complete, the business is dissolved. Liquidation can also refer to the process of selling off inventory, usually at steep discounts. It is not necessary to file for bankruptcy to liquidate inventory. Liquidation can also refer to the act of exiting a securities position. In the simplest terms, this means selling the position for cash. Corporate Liquidation refers to the various regulated processes to close down an insolvent company.

Corporate Insolvency Process Under The Insolvency and Bankruptcy Code 2016 – New Area of Practice for Company Secretary & Other Professionals

» P-84

Santosh Kumar Sharma

Insolvency and Bankruptcy Code, 2016 (IBC-2016) w.e.f. May 28, 2016 was introduced in order to protect the interest of Corporate Creditors and lenders. It is one of the biggest reform post liberalization in the year 1991, which creates a new institutional framework that will facilitate a formal and time bound insolvency resolution process and liquidation.

On August 16, 2017 The Insolvency and Bankruptcy Board of India amended IBBI (CIRP) Regulation for the purpose widening the scope of claim by those creditors, who are neither financial creditor nor operational creditor. This Amendment has come after the acceptance of insolvency application by IDBI Ltd. Vs. Jaypee Infratech Ltd by NCLT. The scope of the Insolvency Professionals, under IBC-2016 is very grooming and bright in both employments as well as in practice. The main quest is the Professional has to make themselves ready for grabbing the professional opportunities created under the IBC-2016

The IBC 2016 route to industrial revival Corporate Insolvency Resolution through Revival Packages

» P-90

V V Anand

Defaulting companies, often have significant organisational capital invested and also high employment intensity. Many are viable and there is more value to the economy in their revival than in their liquidation. The touchstone for a feasible Resolution Plan for revival is the Liquidation Value (LV) of the assets. LV is what the assets will fetch in liquidation. An LV much lower than the dues to the secured creditors, provides opportunity for a Resolution Plan and restructuring that can offer the creditors better value than liquidation. A winning strategy. Regulation 37 of the Resolution Process Regulations allows for most of the reliefs traditionally available under BIFR. You can scale down debt, eliminate or trim statutory dues, and also seek reliefs under extant govt. policies. Insolvency and Resolution Professionals must take advantage of these provisions to press ahead with revival packages under IBC and restore employment and secure MSME survival.

Voluntary Liquidation made easy under IBC

» P-93

Kanwal Goyal

Section 59 of the Insolvency and Bankruptcy Code, 2016 (Code) which deals with voluntary liquidation of corporate entities came into effect from 1 April 2017. On the following day, the Insolvency and Bankruptcy Board of India (Board) has also, vide its notification dated 31 March 2017, notified the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 with effect from 1 April 2017. This has set the ball rolling for the voluntary liquidation of a corporate person under the Code, which includes companies, limited liability partnerships and any other persons incorporated with limited liability. Any corporate entity may initiate a voluntary liquidation proceeding if it has not committed any default, obtained prescribed declaration from directors that company is not being liquidated to defraud and resolution from the members etc. Once the liquidation process starts public announcement has to be made, claims collected and verified, assets realized and distributed. The liquidator has to make efforts to complete this work within 12 months.

Decoding the major challenges of the Insolvency and Bankruptcy Code 2016

» P-96

Kapil Dev Taneja

Post independence India's laws pertaining to corporate revival/insolvency processes, have had a gradual but steady growth. These statutes have been scattered in several legislations which made their implementation difficult to handle. The introduction of the Insolvency and Bankruptcy Code 2016 (IBC) is a landmark move in the history of our country's Banking Credit culture. All the stakeholders had clamored for the need to introduce a unified legal framework

that would address the emerging issues pertaining to insolvency and expedite recovery of dues. The IBC 2016 addressed all these concerns and manifested significant structural changes. It is a comprehensive law that offered time bound solution to revive a company under stress with a mechanism to hasten the liquidation process in case of its non-revival. Aiming towards addressing the interests of all stakeholders, the Act has been created on grounds of equity, asset-maximisation and promoting entrepreneurial spirit. The article reviews the impact of various steps taken & lists the challenges ahead.

PART II
ARTICLES ON GST

Impact of GST on Hotels & Restaurants

» P-99

Pradeep Kumar Mittal

The Indian Hospitality Industry is one of the key drivers of growth in the service sector. Apart from hotels, lodges and restaurants, it includes tourism services as well. Tourism and Hospitality Sector's direct contribution to GDP in 2016 was estimated to be \$47 billion. In fact, the National Restaurant Association of India (NRAI) in the Indian Food Services Resort (IFSR) 2016 estimated the total contribution of the restaurant industry would alone contribute 2.1% of GDP by 2021. Since hospitality market is quite big, the introduction of GST is going to have far reaching implications in this industry.

How SMEs and Industries can maximize benefits under GST

» P-103

Timir Baran Chatterjee

Goods and Services Tax (GST), has been introduced in the country effective from 1st July, 2017 on an all India basis and we have just two months practical experience. Small and Medium Enterprises (SMEs) are the ones most directly impacted by GST implementation. Its impact is constructive as well as unfavorable in a few cases. It will bring with itself a sea change in the way we file taxes, and also how we conduct business. Many have called it a 'behavioural change' more than a tax change because its successful implementation depends largely on how quickly businesses adapt to the digital format of taxation.

RESEARCH CORNER

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ICSI – CCGRT ANNOUNCES

Unique Critical Research Analysis of Indian Companies Act, 2013

» P-106

LEGAL WORLD

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- **LMJ 23:09:2017** It is not necessary for the Income-tax Officer to obtain leave of the liquidation court, when he wants to re-assess the company for escaped income in respect of past years.[SC]

- **LW 63:09:2017** Disobedience to respond to the summons issued under Section 40(3) FERA would not amount to an offence under Section 56 of FERA, 1973.[SC]
- **LW 64:09:2017** In the considered opinion of this Court, the aforesaid activity of bottling LPG gas would definitely fall within the expression 'production'. [SC]
- **LW 65:09:2017** No doubt, Section 245C (1) of the Act requires the applicant to make a full and true disclosure of the income which has not been disclosed before the AO and the manner in which said income has been earned but this, by no means, requires to the applicant to demonstrate that there is a fresh source of income which was not earlier disclosed by the Assessee. [Del]
- **LW 66:09:2017** This Court is of the view that a reasonable apprehension that NDTV may liquidate the assets thwarting the recovery of tax liability is not unwarranted.[Del]
- **LW 67:09:2017** Ward No.69 being the correct Ward from where the Petitioner carries on its business, and this fact already being well within the knowledge of the authorities, the AVATO Ward-72 clearly lacked the jurisdiction to pass the impugned orders. [Del]
- **LW 68:09:2017** Allegations relating to the Foreign Trade (Development and Regulation) Act, 1992 and the Customs Act, 1962 and reliefs claimed do not fall within the ambit of the Commission as provided under the Act. [CCI]
- **LW 69:09:2017** Unilateral price fixation during the Turn System, is contravention of Section 3(3) (a) read with Section 3(1) of the Act.[CCI]
- **LW 70:09:2017** Tread pattern in truck tyre has copyright protection under the Designs Act as design. [Del]

FROM THE GOVERNMENT

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- National Company Law Appellate Tribunal Rules, 2016,
- Companies (Incorporation) Second Amendment Rules, 2017
- Companies (Arrests in connection with Investigation by serious Fraud Investigation Office) Rules, 2017.
- Date of coming into force of section 212 (8), (9) & (10) of the Companies Act, 2013
- Clarification on Exchange Traded Option contracts on EUR-INR, GBP-INR and JPY-INR currency pairs
- Issuance, listing and trading of debt securities on exchanges in International Financial Services Centres (IFSC)
- Securities and Exchange Board of India (International Financial Services Centres) Guidelines, 2015 – Amendments
- Online Registration Mechanism for Custodian of Securities
- Disclosures by listed entities of defaults on payment of interest/repayment of principal amount on loans from banks / financial institutions, debt securities, etc.
- Margin Trading Facility- Clarification

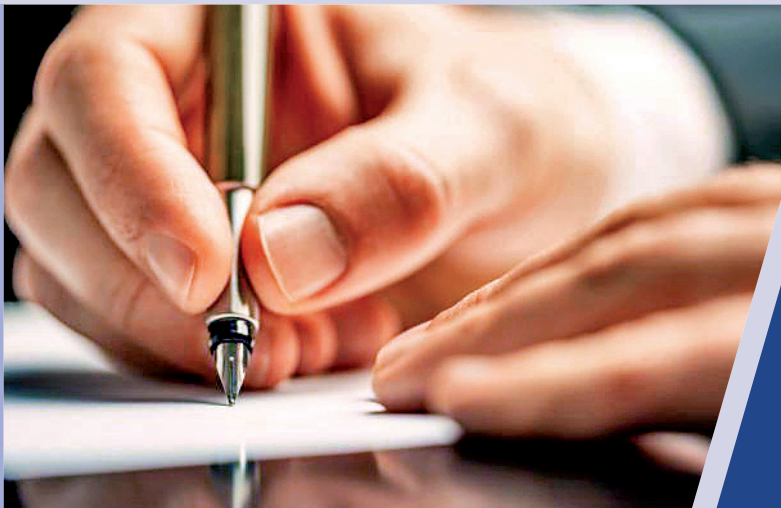
OTHER HIGHLIGHTS

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- Members Restored
- Certificate of Practice cancelled
- Ethics & Sustainability Corner
- Competition Law Corner
- GST Corner
- CG Corner

1

ARTICLES



- **INSOLVENCY PROFESSIONALS AS OFFICE HOLDERS: RISING TO THE CHALLENGE**
- **REALISATION OF LIQUIDATION ESTATE OF CORPORATE DEBTOR**
- **RIGHTS OF HOMEBUYERS ON INSOLVENCY OF REAL ESTATE DEVELOPERS**
- **JUDGMENTS UNDER INSOLVENCY AND BANKRUPTCY CODE BY SUPREME COURT AND NCLAT**
- **IMPACT OF LIMITATION ACT, 1963 ON THE INSOLVENCY AND BANKRUPTCY CODE, 2016**
- **THE ROLE OF INSOLVENCY AND BANKRUPTCY BOARD OF INDIA UNDER THE INSOLVENCY AND BANKRUPTCY CODE 2016**
- **PRACTICAL ISSUES POSING CHALLENGES TO THE INSOLVENCY PROFESSIONALS – DOES THE CODE SHOW THE ROAD AHEAD?**
- **INSOLVENCY RESOLUTION PROFESSIONALS' PREDICAMENT AGAINST DIFFICULT "CORPORATE DEBTORS"**
- **SPECIAL POWERS OF SUPREME COURT AGAINST INHERENT POWERS OF NCLAT UNDER IBC, 2016 INSOLVENCY APPLICATION ALLOWED TO BE WITHDRAWN POST ADMISSION**
- **INSOLVENCY AND BANKRUPTCY CODE, 2016: A SUSTAINABLE STRUCTURING OF TRESSED ASSETS**
- **INFORMATION UTILITY – A NEW HOME FOR DIGITAL INDIA**
- **CORPORATE LIQUIDATION AND IBC 2016**
- **CORPORATE INSOLVENCY PROCESS UNDER THE INSOLVENCY AND BANKRUPTCY CODE 2016 – NEW AREA OF PRACTICE FOR COMPANY SECRETARY & OTHER PROFESSIONALS**
- **THE IBC 2016 ROUTE TO INDUSTRIAL REVIVAL CORPORATE INSOLVENCY RESOLUTION THROUGH REVIVAL PACKAGES**
- **VOLUNTARY LIQUIDATION-MADE EASY UNDER IBC**
- **DECODING THE MAJOR CHALLENGES OF THE INSOLVENCY AND BANKRUPTCY CODE 2016 (IBC)**
- **IMPACT OF GST ON HOTELS & RESTAURANTS**
- **HOW SMEs AND INDUSTRIES CAN MAXIMIZE BENEFITS UNDER GST**

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Insolvency Professionals as Office Holders: Rising to the Challenge



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INTRODUCTION

The World Bank, in its report titled “Doing Business 2017”, ranked India at 130th position among the 190 countries in Ease of Doing Business Index. Of the 11 indicators set by World Bank to measure Ease of Doing Business, resolving insolvency is one of the indicators which measures time, cost, outcome and recovery rate for a commercial insolvency and the strength of the legal framework for insolvency. With the enactment of Insolvency and Bankruptcy Code, 2016 (“Code”), and its implementation, India should be in a position to notch up by 40 ranks to the 90th position on the index by the end of this year from the current 130th position.

The Global success of Insolvency and Bankruptcy legal framework depends majorly on quality of the Insolvency Professionals (IPs) handling the cases, how well they negotiate with creditors and other stakeholders and how well they strategise the resolution plan which is viable and practical and at the same time in the interest of all stakeholders. The challenges faced by these professionals are daunting but they are rising to such challenges.

Globally, Insolvency Professionals (IPs) are an important component of a well functioning insolvency and bankruptcy system. It is recognized worldwide that the success of a bankruptcy case depends majorly on quality of the professional handling the case. The effectiveness of the Code therefore depends on how well the IPs handle the cases, how well they negotiate with creditors and other stakeholders and how well they strategise the resolution plan which is practical as well as in the interest of all stakeholders.

ROLE OF INSOLVENCY PROFESSIONALS

The **Bankruptcy Law Reforms Committee**, in its Final Report,¹ emphasized the role of insolvency professional in para 4.4 as follows:

“4.4 ...In an insolvency and bankruptcy resolution process driven by the law there are judicial decisions being taken by the adjudicator. But there are also checks and accounting as well as conduct of due process that are carried out by the IPs. Insolvency professionals form a crucial pillar upon which rests the effective, timely functioning as well as credibility of the entire edifice of the insolvency and bankruptcy resolution process.

In administering the resolution outcomes, the role of the IP encompasses a wide range of functions, which include adhering to procedure of the law, as well as accounting and finance related functions. The latter include the identification of the assets and liabilities of the defaulting debtor, its management during the insolvency proceedings if it is an enterprise, preparation of the resolution proposal, implementation of the solution for individual resolution, the construction, negotiation and mediation of deals as well as distribution of the realisation proceeds under bankruptcy resolution. In performing these tasks, an IP acts as an agent of the adjudicator. In a way the adjudicator depends on the specialized skills and expertise of the IPs to carry out these tasks in an efficient and professional manner.”

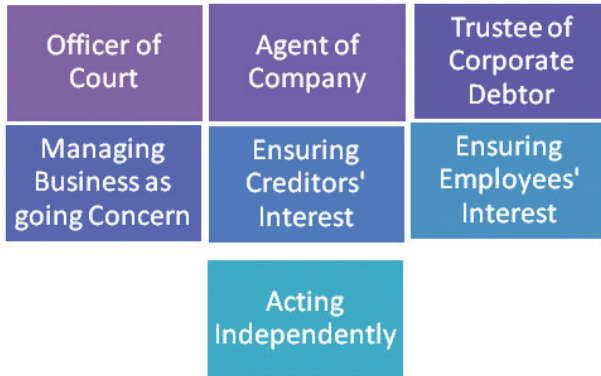
The introduction of IPs has given birth to the most potent professionals in the economy. With less than a year when the provisions with regard to Corporate Insolvency Resolution Process (“CIRP”) came into effect, the role of IPs is being discussed, not merely as a facilitator for bringing out a resolution plan, but rather as a ‘bridge’ between the National Company Law Tribunal (NCLT) and all other stakeholders.

An IP comes into picture, even before an application is admitted and stays till the resolution plan is accepted and even beyond that, in case the company goes into liquidation. The

1. The Report of Bankruptcy Law Reforms Committee Volume I : Rationale and Design (November 2015).

importance of the functions of an IP thus, cannot be overstated. He plays an integral role in achieving the objectives of the Insolvency Law.

Major Roles Played by Insolvency Professional



ROLE OF IPS UNDER VARIOUS JURISDICTIONS

Insolvency Professionals play varied roles in the Insolvency and Bankruptcy regime. Their role in different jurisdictions is enlisted here in brief:

UNITED STATES OF AMERICA (USA)

The Bankruptcy Code in USA provides for six basic types of bankruptcy cases. The details of two main bankruptcy cases along with the role of the trustees in these cases are enumerated below:

- Chapter 7 (bankruptcy leading to liquidation):** Chapter 7 of the Bankruptcy Code deals with liquidation. In this type of bankruptcy, a court-appointed trustee or administrator takes possession of any non-exempt assets, liquidates these assets and then uses the proceeds to pay creditors. He shall be accountable for all the property received and has the right to investigate the financial affairs of the debtor. He shall also file accounts of the administration of the estate with the United States Trustee and the Court. The trustee under this Chapter is authorized to employ accountants, attorneys, appraisers, auctioneers and other professionals, whenever the need arises for their assistance, while carrying out his or her duties.
- Chapter 11 (Reorganization):** Reorganization is ordinarily used by commercial enterprises that desire to continue operating a business and repay creditors concurrently through a court-approved plan of reorganization. The appointment or election of a trustee occurs only in a small number of cases under this Chapter. Generally, the debtor, as "debtor in possession," operates the business and performs many of the functions that a trustee performs. The Court shall pass an order for appointment of a trustee under this Chapter only when the court is satisfied that the reorganisation may be subject to any fraud, dishonesty, incompetence, gross mismanagement or where such an appointment will be in the interest of creditors, any equity security holders, and other interests of the estate. The trustee, wherever appointed, is responsible for management of the property of the estate, operation of the debtor's business, and, if appropriate, the filing of a plan of reorganization. Section 1106 of the Bankruptcy Code requires the trustee to file a plan "as soon as practicable" or,

alternatively, to file a report explaining why a plan will not be filed or to recommend that the case be converted to another chapter or dismissed.

UNITED KINGDOM (UK)

Role of Insolvency Practitioners in reviving the Company:

There are four possibilities for a company in financial difficulty, other than liquidation, which are enumerated as follows along with the role of the Insolvency Practitioners in each of the cases:

- Administration:** 'Administration' offer gives companies a breathing space during which creditors are restrained from taking action against them. During this period, an Insolvency Practitioner (acting as an administrator) is appointed by a court to put forward proposals to deal with the company's financial difficulties. The entire procedure is managed by the licensed insolvency practitioner.
- Administrative Receivership:** 'Administrative Receivership' permits the appointment of a receiver (the insolvency practitioner) by certain creditors (normally the holders of a floating charge) with the objective of ensuring repayment of secured debts. The company must be in breach of the terms of its debenture for the charge-holder to trigger the appointment. In this case, administrative receiver will seek to realise the assets charged for the benefit of the debenture holder after meeting the costs and the claims of the preferential creditors.
- Company Voluntary Arrangement:** 'Company Voluntary Arrangement' (often abbreviated to 'CVA') is a formal arrangement between debtors and creditors. It provides a way in which a company in financial difficulty can come to a binding agreement with its creditors. The company remains under the control of the directors but an insolvency practitioner supervises the arrangement and pays the creditors in line with the accepted proposals.
- Informal Arrangement:** 'Informal Arrangement' is where the company writes to all its creditors to see if a mutually acceptable agreement can be reached. The agreement is not legally binding, therefore, neither party has to honour the agreement. The advantage of this option is that the agreement is likely to be less costly than formal proceedings. An insolvency practitioner is not necessary, although they would be able to offer advice on the option. Thus, the role of insolvency practitioner here is more advisory in character.

CANADA

A Licensed Insolvency Trustee (LIT) is an individual or a corporation entrusted with the duty to distribute bankrupt's property among the creditors in accordance with the distribution scheme under the Bankruptcy and Insolvency Act (BIA). The bankrupt and all other persons holding bankrupt's property must transfer the property to trustee. The trustee may also assist individual in preparing and submitting a consumer proposal to creditors. The trustee must arrange mandatory counselling of the bankrupt. The trustee must call creditors meetings and send the parties required, notices of proceedings and documents. The trustee is responsible for preparation of pre-discharge report and may oppose the bankrupt's discharge.

SINGAPORE

The Insolvency Practitioners in Singapore undertake functions in case of liquidation, judicial management and receivership. They assume the role of liquidator in case of liquidation proceedings,

judicial manager in case of judicial management and the role of receiver or manager in case of receivership.

INDIA

Corporate Insolvency Resolution Process

During the Resolution Period, the entire management of the debtor and custody of the assets of the debtor are placed in the hands of a resolution professional to ensure the protection of the assets of the debtor. The officers of the corporate debtor shall report to him. He is further vested with diverse powers ranging from executing contracts and documents in the name of the corporate debtor, appointing accountants, legal or other professionals as may be necessary for managing the affairs of the corporate debtor.

The resolution professional also constitutes a committee of the creditors comprising of all financial creditors and conducts the meetings of the committee wherein all the resolution plans are laid down to bring the corporate debtor out of insolvency. This plan needs to be approved by 75% of the voting share of the committee of creditors within the prescribed time, failing which, the corporate debtor must undergo liquidation.

Liquidation

When corporate debtor initiates liquidation, the resolution professional assumes the role of the liquidator. He verifies all the claims of the creditors and takes over and evaluates the assets of the corporate debtor against which a report is prepared by him. He shall carry on the business of the corporate debtor for its beneficial liquidation. He can obtain professional assistance from any person or appoint any professional to help him in the discharge of his duties. Moreover, he can institute and defend any suit or legal proceedings in the name of the corporate debtor. He shall take all such actions, steps or sign, execute and verify any paper, deed, receipt document, petition, affidavit or any other instrument as may be necessary for liquidation, distribution of assets and in discharge of his duties.

Voluntary Liquidation

An insolvency professional shall act and assume the role of a liquidator in case of voluntary liquidation. Where the affairs of the corporate person have been completely wound up and its assets liquidated, the liquidator shall make an application to the NCLT for the dissolution of such corporate person.

Fast track Corporate Insolvency

The insolvency professionals engaged in fast track corporate insolvency shall have the same duties, powers and role as in the case of corporate insolvency resolution process.

BRIEF ANALYSIS OF THE ROLE PLAYED BY INSOLVENCY PROFESSIONALS IN CASE OF CORPORATE INSOLVENCY RESOLUTION PROCESS (CIRP) UNDER THE CODE

On admission of an Application initiating CIRP, NCLT appoints an Interim Resolution Professional (IRP) for a period of thirty days, who is responsible for issue of public announcement, collection and verification of claims, constitution of Committee of Creditors (CoC), appointment of Registered Valuer, conducting first meeting of CoC etc. In fact the Code has detailed the role of IP under Part II, dealing with CIRP and Part III, dealing with insolvency process for individual and firms of the Code. The major heads are:-

- (i) **Management of the affairs of the corporate debtor**
Sick Industrial Companies (Special Provisions) Act, 1985

["SICA"] adopted the theme of 'debtor-in-possession' implying that the debtor continues to remain in possession of the management of the entity during the resolution process. The Code, on the other hand, adopted the theme of "creditor-in-possession" and therefore, Section 17 of the Code vests the Interim Resolution Professional (IRP) with the management of the affairs of the Corporate Debtor, starting from the date of appointment itself. Further, the powers of the Board of the corporate debtor stand suspended and same are to be exercised by the IRP, who chairs the meeting of committee of creditors, which approves the resolution plan.

(ii) **Management of the entity as "going concern"**

Section 20 of the Code emphasises that the IRP shall manage the operations of the Corporate Debtor as a "going concern" i.e. managing business continuity and insolvency resolution together.

(iii) **Taking over Custody of the assets of the Corporate Debtor**

Section 18 of the Code requires the IRP to take control and custody of any asset over which the Corporate Debtor has ownership rights and section 20 of the Code obliges the IRP to make every endeavour to protect and preserve the value of the property of the Corporate Debtor. Again, section 25 of the Code provides that it shall be the duty of the resolution professional to preserve and protect the assets of the Corporate Debtor, including its continued business operations. The Code also amended section 429(1) of the Companies Act, 2013 empowering NCLT to write to Chief Metropolitan Magistrate, Chief judicial Magistrate or the District Collector in order to take into custody or under its control all property, books of account or other documents of the company undergoing CIRP.

(iv) **Constituting Committee of Creditors (CoC)**

The Interim Resolution Professional is required to constitute the Committee of Creditors after collation of all claims received against the corporate debtor and determine the financial position of the corporate debtor. CoC comprises of all financial creditors of the corporate debtor. However the related party to whom a corporate debtor owes a financial debt shall not have any right of representation, participation or voting in a meeting of the CoC. The CoC appoints resolution professionals in its first meeting, which thereafter conducts the meetings of the CoC during resolution process.

(v) **Conducting the Corporate Insolvency Resolution Process**

Conducting the CIRP is a daunting task. The Code lists out the activities to be undertaken by IRP/RP during CIRP as under:

- Making public announcement
- Collection, verification and collation of claims
- Appointing a valuer
- Collection of all information relating to assets of Corporate Debtor
- Constitution of Committee of Creditors and conducting meetings
- Preparation of information memorandum
- Creating synergy among creditors
- Facilitating the approval of resolution plan by the CoC and subsequently by NCLT.

(vi) **Preparation of Information Memorandum**

The insolvency professional is required to prepare an information memorandum as laid down in section 29 of the Code read with the provisions in IBBI (Insolvency Resolution



Process for Corporate Persons) Regulations, 2016. As per the Regulations, certain minimum information shall be provided to each member of the committee of creditors and any potential resolution application before the first meeting of the committee of creditors. The information memorandum shall contain details on the basis of which a resolution plan may be formulated. Regulation 36(2) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 lists out the contents of the information memorandum.

(vii) Facilitating Resolution Plan

The information memorandum serves as an input for formulation of the resolution plan. A Resolution Professional must examine each resolution plan received by him to confirm that the same:

- provides for sources of funds needed to pay insolvency resolution process cost on priority
- liquidation value due to operational creditor
- liquidation value due to dissenting financial creditor
- does not contravene any provisions of the law for the time being in force.
- provides for the management of the affairs of the corporate debtor during his term
- term of the plan and implementation schedule
- provides for the implementation and supervision of the resolution
- conforms to requirements specified by the Board

DUTIES OF AN INSOLVENCY PROFESSIONAL

The code imposes certain duties on an IP which are:

- to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor;
- take immediate custody and control of all the assets of the corporate debtor including the business records;
- raise interim finances subject to the approval of the CoC;
- appoint accountants, legal or other professionals in the manner as specified by the Board;
- maintain an updated list of claims;
- convene and attend all meetings of CoC;
- prepare the information memorandum in accordance with section 29 of the Code;
- invite prospective lenders, investors and any other persons to put forward resolution plans;
- present all resolution plans at the meeting of the CoC;

- file application for avoidance of undervalued transactions in accordance with Chapter III, if any of the Code; and
- such other actions as may be specified by the Board.

Alongside the duties, an IP is also obligated and subjected to a code of conduct, in respect of which he has to:

- Act in good faith in discharge of his duties
- Endeavour to maximize the value of the assets of the debtor
- Discharge his functions with utmost integrity and objectivity
- Be independent and impartial
- Discharge his functions with highest standard of professional competence and ethics
- Continue to upgrade his professional expertise
- Perform duties as quickly and efficiently as reasonable subject to timelines under the Code
- Comply with applicable laws in performance of his duties
- Maintain confidentiality of information obtained in course of his professional activities unless required to disclose such information by law

CHALLENGES BEFORE AN INSOLVENCY PROFESSIONAL

An IP remains under the watchful eyes of his Insolvency Professional Agency ("Agency") and the Insolvency and Bankruptcy Board of India ("Board"). This unique position occupied by him is of trust and confidence and demands highest standards of integrity and probity as well as independence in taking decisions.

Bank of America identified certain traits of successful bankruptcy lawyers. Applying the traits in Indian context, the following traits may be considered essential for a successful Insolvency Professional:

- Understanding the nature of business and business viability options
- Clarity in presentation of cases
- Effective interface with Debtor and Creditors
- Knowledge and application of National Company Law Tribunal (NCLT) procedures
- Proficiency in bankruptcy laws and experience over years
- Understanding of business dynamics and assessing required professionals for supporting bankruptcy and business recovery
- Understanding management of business with capability to take key managerial decisions
- Ability to assess objectively the financial position of the

- company and to take financial decisions
- Rapport with senior management of Corporate Debtor
- Assessing the right fee for the right case
- Assessing the term of plan, implementation nuances

In fact the first phase of challenge for an IP starts when he gives his consent to act as Interim Resolution Professional. He is required to do the preliminary analysis of the corporate debtor and the peripherals relevant for the resolution process. This will help in assessing the resolution process cost including the proposed fee to be quoted by him.

On appointment as an Interim Resolution Professional, the next phase of challenge for an Insolvency Professional starts with identification of claims, constitution of committee of creditors, preparation of information memorandum, conducting first meeting of committee of creditors, protecting the properties of corporate debtor, taking over of management as going concern etc. He is required to perform his tasks as IRP within the allotted period of thirty (30) days.

If IRP is appointed as Resolution Professional by the Committee of Creditors, his role as Interim CEO of corporate debtor continues with managing the affairs subject to the approval of committee of creditors. Managing the affairs of the company becomes difficult when the business units are diversified and the business is a conglomerate one.

The challenges faced by an IP during his journey of 180 or 270 days as the case may be, briefly involve:

(a) Timeliness: The duties entrusted on an Insolvency Professional that are to be completed within the window of 180-270 days is a daunting task especially with regard to compilation of claims and coordination with all creditors towards formulation of an acceptable resolution plan.

NCLAT had passed a significant ruling in **J.K. Jute Mills Co. Ltd. v/s Surendra Trading Co.** stating that the 14-day timeline for rejecting or admitting a case under the IBC was directive and not mandatory, however, once a case is admitted, the 270-day timeline for resolution is mandatory.

(b) Claim Determination: In case of claim determination the IP faces the challenges in respect of:

(i) Assessing the Status of Claimant: Whether the person submitting a claim is a “financial creditor” or “operational creditor” or “creditor at all”. In case of **Jaypee Infratech**, the perception among home buyers, which were more than 25000 in number were-

- The homebuyers are financial creditors as it is a forward sale/purchase agreement having commercial effect.
- The home buyers are operational creditors as it is an operation of service.
- The homebuyers are not creditors as they are the owners of the flats.

(ii) To determine whether those claims filed are genuine: Whether the claims submitted are genuine and have been correctly calculated or arrived at is a herculean task. If the buyers had included interest element on the payments made in their claims (could be 10%, 12%, or rate of interest which the banks would be charging from them on the loans taken), whether these should be accepted or not. Also, if the buyers had claimed any damages, whether these damages are admissible or not

and, if so, on what basis and to what extent. As an illustration, the house owners are proclaiming that they have been paying both, the EMIs to the banks for the loans taken and the rents for their accommodations because of the huge delay in giving possession of their houses by the corporate debtor. Assessing and evaluating the rightful claims is a huge challenge for the Insolvency Professional.

(c) Availability of documents for information memorandum:

This is a big challenge faced by an IP since all the documents required for preparation of information memorandum may not be publicly available or the Corporate Debtor may not be willing to share all information. In such a situation, the IP would have to approach the authorities, who might be located at different places, for obtaining the required information, which in turn would stretch the already stretched time schedule.

(d) Non-Cooperation from Corporate Debtor and its staff:

Getting cooperation from the promoters and the company staff is essential but hard to come by. Employees and even KMPs may not cooperate by not providing the requisite data, documents and information required. This would impair the possibility of effective resolution of the debtor in terms of the Code. However, section 19 of the Code comes to his rescue and an IP can obtain necessary directions from the NCLT requiring the promoters, employees and KMPs to cooperate with IP in collection of information and management of the debtor company. Various insurance companies are developing a tailored insurance cover to protect such IP's who are exposed to multiple risks from charges of sabotage to negligence.

(e) Ensuring Compliances: Since an IP is responsible for management of the affairs of a company, an IP is also required to make sure that all legal compliances are met. A plethora of laws are applicable upon a company like labour laws, corporate and commercial laws, tax laws, land laws, local municipal laws, industry specific laws etc. and an IP is obliged to make sure that all the laws are complied with. Here an IP can take the support of Secretarial Audit Report to be given by an independent secretarial auditor under the Companies Act 2013.

(f) Conflict of Interest with any stakeholder: Inadvertent conflict of interest with any stakeholder of resolution plan may affect the independence of insolvency professional. It may be felt by certain stakeholders that the IP is favoring certain stakeholders, especially the corporate debtor, if the application has been filed by the corporate debtor himself under Section 10 of the Code and the IRP is nominated by him thereunder. In such a situation an IRP must first disclose his interest and must act bona-fide, above Board without fear or favor.

(g) Appointment of Professionals for Assistance: Depending upon the size of work involved, Insolvency Professional may need to hire professionals for their assistance. What shall be the fee and how many maximum professionals can be appointed or whether any bar is to be imposed on the maximum fee that can be paid to the professionals for assistance are some of the issues that IP may face.

(h) Identifying a Registered Valuer: Identifying a registered valuer and arriving at liquidation value within 14 days of first meeting of Committee of Creditors (CoC), as mandated under the IBBI (CIRP) Regulations, 2016 is another challenge to be tackled by an IP. Determination of correct liquidation value

through a registered valuer and its distribution to dissent financial creditor and operational creditors is crucial.

- (i) **Basis of receiving professional fee:** Whether the fee shall be received by an Insolvency Professional at the time of admission of application or in parts or on the basis of occurrence of events or after the completion of insolvency process is also a concern faced by IPs.
- (j) **Consensus amongst creditors:** CIRP is driven by financial creditors who constitute the committee of creditors. The Code requires approval of creditors with not less than 75% of voting share of the CoC. For effective resolution in terms of the Code, approval of committee of creditors is required, inter alia, on ratification of the expenses incurred by the IP, confirmation on appointment of IRP as RP, replacement of IP during CIRP, certain actions as stipulated under the Code and also on the resolution plan submitted by resolution applicant under section 30 of the Code.
- (k) **Dues to suppliers of essential goods and services:** Section 14(2) of the Code stipulates that the supply of essential goods and services to the debtor should not be terminated or suspended or interrupted during the moratorium period. However, one cannot rule out the fact that, in case the debtor has defaulted in paying dues to the suppliers of essential goods or services like electricity, water, telecommunication services and information technology services, despite having the legislative safeguard, the said suppliers may terminate/suspend the services. Such actions of supplier will adversely affect the operations of the debtor and result into shutdown of plants and factories. In order to address such concerns, IP will have to file application with NCLT under section 60 of the Code and obtain an order directing the said supplier to not terminate or suspend or interrupt the supply of essential goods and services to the debtor. However, the said process may take time and loss to debtor's business can be immense.
- (l) **Relevant Fee:** It is difficult on part of Insolvency Professional to ascertain the appropriate fee for their services. What criteria should actually be taken into consideration while calculating the fees is an area of concern. Further, issues have arisen where, after the admission of application, the financial/operational creditor settles the matter with Corporate Debtor and gets his dues. In such situation, where the applicant refuses to pay the fees of IRP or refuses to pay for the public announcement, the IP is left high and dry. In the case of **Inox Wind Limited**, NCLAT, while hearing appeal of Corporate Debtor, directed the NCLT to determine the fees of IRP and also directed that the same shall be paid by appellant/corporate debtor for the period he has worked.
- (m) **Taking up Appropriate Number of Assignments:** IPs are expected to bring about the insolvency resolution within a period of 180 days extendable once to 270 days which itself is a daunting task requiring complete commitment, resources and time. In **Lanco Infratech** case, an IP was denied appointment on the ground that he was already handling two big assignments, one of them being with regard to a company which was one of the 12 big defaulters identified by RBI and had recently been appointed. In such situation, the NCLT, Hyderabad Bench observed that most of the activities prescribed in Code are time bound and as such IP would not find sufficient time to act as IRP. In the light of this judgment the IPs should be very judicious and careful in accepting too many assignments on their plate which they may not be able

to chew. If they do so, they may make some money in the short term but are running a huge risk of losing their reputation, respect and credibility in the long run in case they are not able to handle such assignment effectively and to the satisfaction of the stakeholders.

- (n) **Insurance for IPs:** With the IPs taking up insolvency assignments where liabilities can be huge, they are looking for insurance to mitigate the risk involved in their assignments. The insurance cover assumes importance since an IP has discretionary power to take decisions on day to day running of the company. These decisions might involve transactions worth crores of rupees. Many jurisdictions like Australia, have such provisions in place.

RISING TO THE CHALLENGE

While rest of the world already had unified insolvency laws, a good insolvency regime was missing in India. With the coming into force of the Code, the said regime has now come into place. However, it is to be borne in mind that there is no precedent with regard to insolvency laws in India. The concept of 'creditor in possession', 'committee of creditors', 'resolution plan' have been introduced for the first time. The IPs, despite the absence of any precedent, have risen to the challenge. This is evident from the fact that as of now, several cases are being admitted each day by NCLT wherein Insolvency Professionals have been appointed. Further, many cases are coming at the stage of near completion with one resolution plan already in place and two companies already accepted by NCLT to be liquidated.

The effective role of Insolvency professionals calls for multiple skills in the field of finance, human resource management, court craft, stakeholder management, business dynamics, strategic foresight, business valuation and so on.

An IP acts as a guide and steers the way forward in which the Company shall move and the interests of all stakeholders are protected. A single wrong step can lead to the closure of the Company which shows the criticality of the position held by the IPs in the economy.

Though the regulators, Adjudicating Authorities, Insolvency Professional Agencies and IPs are all in a learning stage as the law is at its infancy and is evolving, the IPs have taken up great responsibility in steering through various cases. The IPs are acting in an independent manner in ensuring that Corporate Debtor runs as a 'going concern'. They are taking decisions fearlessly and without any hesitation despite the numerous challenges. The IPs are gradually rising to the challenge posed by the Code. CS

REFERENCES

- <https://www.justice.gov/ust/private-trustee-handbooks-reference-materials>
- <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics>
- https://www.r3.org.uk/media/documents/policy/research-reports/insolvency_industry/R3%20value%20of%20the%20industry_march%2015th.pdf
- <http://www.realbusinessrescue.co.uk/articles/uk-company-law/what-are-the-duties-of-an-insolvency-practitioner>
- <http://www.lits.ca/what-does-an-lit-do/role-of-a-licensed-insolvency-trustee-formerly-trustee-in-bankruptcy>
- <https://www.mlaw.gov.sg/content/io/en/corporate-insolvency/ShoisOR.html>

Realisation of Liquidation Estate of Corporate Debtor



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INTRODUCTION

The cases filed under Insolvency and Bankruptcy Code, 2016 (the Code) have crossed the resolution period and moved into the realisation stage where resolution plan was not feasible. Henceforth cases will increasingly be added to this list. It is heartening to note that the Code has been well understood and handled by the National Company Law Tribunal (NCLT), National Company Law Appellate Tribunal (NCLAT) and some of the High Courts. The Supreme Court also contributed its views in one of the cases. Despite being a nascent legislation, it has successfully overcome the initial hurdles and reached a stabilisation stage. The previous legislations like the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (Recovery Act) and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) were well meant enactments; but they failed their purpose due to lackadaisical approach of the administering authorities. The success of Code has become the responsibility of the Insolvency Professionals acting as liquidators; who should demonstrate their ability to complete the liquidation process within two years or such time extended by the Adjudicating Authority (AA).

The object of the Code is revival of the viable corporate debtors failing which early liquidation of

The Insolvency and Bankruptcy Code, 2016 and the Regulations contain extensive provisions regarding realisation of liquidation estate. Realisation of liquidation estate is achieved through the insolvency professional acting as the liquidator. The elaborate procedure for liquidation emphasises on transparency and maximisation of the sale proceeds. The liquidators should seize this opportunity and demonstrate their ability towards furtherance of the object of the Code.

them so that they no longer continue to be a burden on the society and the financial system of the country. Asset realisation, hence, aims at maximising the value of the liquidation estate in the best interest of the creditors.

The Code does not deal elaborately with the realisation of liquidation estate. Chapter VI of The Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 (Regulations) read with Schedule I thereto contains the procedure for effecting sale of the liquidation estate.

RELEVANT DEFINITIONS

“Security interest” is a right, title or interest or a claim to property created in favour of a secured creditor or provided to him by a transaction that secures payment or performance of an obligation. It includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement that secures the payment or performance of an obligation of any person. The second part of this definition narrates the types of security interest created in favour of the secured creditor. “Secured creditor” means a creditor in whose favour security interest is created. “Property” is defined to include money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property. An agreement or arrangement in writing for the transfer of assets, or funds, goods or services from or to a corporate debtor (CD) constitutes a “Transaction”.

MEANING OF LIQUIDATION ESTATE

Section 36 of the Code mandates the liquidator to form a liquidation estate in relation to a Corporate Debtor (CD), which shall be held by him as a fiduciary for the benefit of the creditors. The liquidator is a trustee of the liquidation estate and the beneficiaries are the stakeholders of the CD. The components of liquidation estate are specified in two ways: (i) what assets constitute

it; and (ii) what assets are excluded from it. The table below sets out the composition of liquidation estate.

Assets forming liquidation estate	Assets excluded in liquidation estate
Any asset over which the CD has ownership rights including all rights and interests therein and shares held in any subsidiary of CD	Assets owned by a third party which are in possession of CD including (i) assets held in trust for any third party; (ii) bailment contracts; (iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund; (iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and (v) assets as may be notified by the Central Government.
Assets that may or may not be in possession of CD but not limited to encumbered assets	Assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions.
Tangible assets (movable and immovable)	Personal assets of any shareholder or partner of a CD provided such assets are not held on account of avoidance transactions that may be avoided under Chapter III of the Code.
Intangible assets but not limited to intellectual property, securities and financial instruments, insurance policies, contractual rights	Assets of any Indian or foreign subsidiary of CD.
Assets subject to determination of ownership by the court or authority	Any other asset as may be specified by the Insolvency and Bankruptcy Board of India (Board) including asset which could be subject to set-off on account of mutual dealing between CD and any creditor.
Any asset or its value recovered through proceedings for avoidance of transactions under the Code	
Assets of CD in respect of which a secured creditor has relinquished security interest	
Any other property belonging to or vested in the CD at the insolvency commencement date	
All proceeds of liquidation as and when they are realised	

ASSET MEMORANDUM

Within 75 days from the liquidation commencement date and after forming the liquidation estate, the liquidator is required to prepare an asset memorandum and file it along with the preliminary report to AA. Asset memorandum is not accessible to any person during liquidation process unless permitted by the AA.

The asset memorandum shall contain details in respect of each of the assets that are intended to be realised by way of sale, such as, value of the assets, intended manner of sale along with reasons therefor, intended mode of sale with reasons therefor, expected realisable amount from the sale.

PREPARATION OF LIST OF STAKEHOLDERS

The liquidator is required to prepare a list of stakeholders, category-wise based on proof of claims submitted and accepted indicating the amount of claim admitted. This list shall be filed with AA within forty-five days from the date for the receipt of claims. He is required to make a public announcement of filing such list. The list may be modified depending upon availability of additional information or order of AA arising out of appeal under section 45.

PARTIES ENTITLED TO REALISE THE LIQUIDATION ASSETS

The following persons are entitled to realise the liquidation assets under the Code: -

- (i) the liquidator; and
- (ii) A secured creditor (subject to restrictions discussed below).

POWER OF SECURED CREDITOR TO REALISE THE LIQUIDATION ASSETS

Subject to certain restrictions, the Code provides an option to the secured creditor of a CD either to relinquish its security interest in the liquidation estate and receive proceeds of the sale of assets in accordance with section 53 or realise its security interest in the manner specified in section 52. Seldom there were instances where a secured creditor had security interest over all the assets comprising the liquidation estate. Ordinarily the security interest of a creditor has been limited to a few of the assets constituting the liquidation estate. Hence a secured creditor, even though it may be the sole secured creditor to the CD, opting to realise the whole of the liquidation estate is a rare phenomenon.

Permission to realise the security interest: A secured creditor intending to realise its security interest is required to inform the liquidator of its security interest and identify that asset. Realisation of security interest is limited to the asset forming its security and does not enlarge to other assets of CD. The liquidator is called upon to verify such security interest and permit the secured creditor to realise only such security interest. The existence of security interest can be proved by the secured creditor by the records maintained by an information utility or such other means as may be specified by the Board. It is pertinent to note that secured creditor can enforce its security interest against the security held by it irrespective of the ranking of its security interest *vis-à-vis* other persons having security interest over the same asset.

When a secured creditor opts to realise its security interest and permitted to do by the liquidator, it may enforce, realise, settle, compromise or deal with the secured assets in accordance with such law as applicable to the security interest being realised. There can be no interference from the liquidator or other creditors (except those having prior charge over the same assets) or CD regarding the manner of realisation of its security interest by the secured creditor.

Time limit for exercising the option to realise the security interest: Neither the Code nor the Regulations prescribes time limit for the secured creditor to exercise the option to realise its security interest by informing the liquidator. As a matter of prudence, it is advisable to exercise the option soon after the liquidator makes a public announcement of filing the list of stakeholders with AA. The list of stakeholders will indicate the persons having charge over the property and the amount of debt admitted by him. This information is vital for taking a decision by the secured creditor.

Conditions for realisation of security interest by secured creditor: The Regulations prescribe certain additional requirements (cf. Regulation 37) when a secured creditor seeks to realise its security interest pursuant to section 52 of the Code. The secured creditor shall also intimate the price at which it proposes to realise its secured asset. Within twenty-one days of receipt of the intimation, the liquidator shall inform the secured creditor whether a person is willing to buy the secured asset before the expiry of thirty days at a price higher than the price intimated by the secured creditor. If the liquidator does so, the secured asset shall be sold to that person. If the liquidator does not inform the secured creditor within twenty-one days of the receipt of the intimation from the secured creditor or the person identified by the

liquidator does not buy the secured asset within thirty days at a price higher than the price intimated to the liquidator, the secured creditor may proceed to realise the secured asset in the manner it deems fit, but at a price not less than the price intimated to the liquidator. The cost incurred by the liquidator in identifying a person willing to buy the asset at a price higher than that intimated to him by the secured creditor shall be paid by the secured creditor to the liquidator if the asset is sold to that person identified by him and if the asset is not sold to that person, it shall be borne by the liquidator. However, the secured creditor must fulfil the requirements of the law applicable to the security interest being realised. This requirement is not applicable in case the secured creditor enforces its security interest under SARFAESI Act or Recovery Act. Consequently banks, financial institutions, NBFCs, housing finance companies, multi-state co-operative societies, asset reconstruction companies etc., can proceed under SARFAESI Act or Recovery Act to realise their security interest in the liquidation estate. However, intimating the liquidator about its intention to realise its security interest is not dispensed with. Secured creditors which cannot have recourse to SARFAESI Act or Recovery Act may have to previously identify the buyer and decide the price at which that asset would be sold, lest this option is unworkable. Dealing with the proceeds of realisation of security interest: Section 52(4) empowers the secured creditor to apply the proceeds of realisation of the security interest to recover the debts due to it. However, this is subject to its tendering to the liquidator out of the proceeds of realisation the amount of insolvency resolution process costs due from it. The secured creditor is only to share the insolvency resolution process costs (cf. section 5 (13) of the Code) and not the liquidation cost (cf. section 5 (16) of the Code). Its liability is limited to its share of the security interest *vis-à-vis* the value of the liquidation estate as can be inferred from the language of section 52 (8). Considering the nature of the security, realisable value and the time and expenses involved in realisation of the security interest, secured creditors may seriously deliberate on the exercise of this option before relinquishing their security interest.

Upon realisation of security interest by the secured creditor, there emerges two situations: - (i) where the realised value is more than the amount due to the secured creditor; and (ii) the realised value is less than the amount of debt due to the secured creditor. If the amount realised is more than the debts due to the secured creditor, it shall account for the excess and tender the amount to the liquidator. If there is deficit, the unpaid (unadjusted) debts of the secured creditor shall be paid by the liquidator in the order of priority for distribution of assets specified in section 53 of the Code.

There may be instances where a secured creditor faces resistance from the CD or any other person connected therewith in taking physical possession, or selling or otherwise disposing of, such security interest. In these circumstances, the Code has thoughtfully provided remedy to the secured creditor enabling it to make an application to the AA to facilitate the secured creditor to realise such security interest in accordance with law. AA may pass an order permitting the secured creditor to realise its security interest in accordance with law for the time being in force.

Puisne mortgagee whether can opt to realise its security interest: Section 60(5)(c) of the Code confers on the NCLT to entertain and dispose of any question of priorities or any question of law or facts arising, *inter alia*, out of liquidation proceedings of CD under the Code. If there is any ambiguity relating to priority of charges, the aggrieved secured creditor may apply to AA to determine the priorities. Ministry of Corporate Affairs has also amended Form CHG-1 and provided a column to mention the ranking of charges. It is not unusual for CD to

contract debts on the same security from diverse creditors, especially by creating a mortgage charge. Under these circumstances a secured creditor holding second or subservient charge on the assets may be concerned whether it could exercise the option to realise its security interest. The option to enforce the security interest is available to a secured creditor irrespective of the ranking of the security. There are two general principles concerning mortgages, namely: - (i) "once a mortgage always a mortgage" and (ii) "redeem up and foreclose down". A puisne mortgagee is bound to discharge the prior mortgages irrespective of the fact that such mortgagees have not opted to stand outside the liquidation proceedings. In this case the amount due under the prior mortgages shall be paid to the liquidator and not to the secured creditor. Therefore, the puisne mortgagee should consider the prior mortgage debts and the share of the insolvency resolution process costs and if it is confident that its enforcement would result in surplus proceeds or better recovery of its dues, it can exercise the option given in section 52 of the Code. The following illustration will elucidate the recoverability of the security by the puisne mortgagee. Assuming the realised/realisable value of a secured asset as Rs.100, insolvency resolution process costs Rs.5, cost of realisation on sale by secured creditor Rs. 10, liquidation costs Rs. 15, the workmen's dues Rs. 15, prior mortgagees' dues Rs. 65 and puisne mortgagee's dues Rs.20. The amount that will be recoverable by/distributable to the puisne mortgagee in the case of sale by it and sale by the liquidator is given below.

Sale by secured creditor		Sale by the liquidator	
Amount realised	100	Amount realised	100
Sale related expenses	10	Insolvency Resolution Process costs	5
Insolvency Resolution process costs	5	Liquidation costs	15
Prior mortgagees' dues	65	Workmen's dues (15 x 80%)	12
Puisne mortgagee's dues	20	Amount available to secured creditors (85 x 80%) = Rs. 68	
		Prior mortgagees' dues	65
		Puisne mortgagee's dues	3

REALISATION OF LIQUIDATION ESTATE BY THE LIQUIDATOR

The liquidator may adopt any or combination of the methods set out below to realise the liquidation estate, namely: -

- (i) public auction;
- (ii) private sale;
- (iii) distribution of unsold asset; and
- (iv) recovery of monies due including uncalled capital or unpaid capital contribution.

The sale may be accomplished by the liquidator by selling: -

- (i) an asset on a standalone basis;
- (ii) the assets in a slump sale;
- (iii) a set of assets collectively; or
- (iv) the assets in parcels.

Preparation of market strategy: When an asset is proposed to be sold through auction, the liquidator shall prepare a marketing strategy, if necessary, with the help of marketing professionals. The strategy may include (i) releasing advertisements; (ii) preparing information sheets for the asset; (iii) preparing notice for sale; and (iv) liaising with agents. The liquidator shall also prepare terms and conditions of sale including reserve price, earnest money deposit as well as pre-bid qualifications. The pre-bid qualifications and earnest money deposit are intended to weed out the non-serious bidders participating in the auction.

Fixation of reserve price: The liquidator shall appoint at least two

registered valuers to value the assets, who shall after physical verification of the assets shall independently submit to the liquidator the estimates of the realisable value of the assets computed in accordance with internationally accepted valuation standards. The average of the estimates shall be considered as the value of the asset. The method envisaged in the Regulations is at variance with the method contemplated in Regulation 35 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016, where a third valuation is stipulated if there is wide divergence in the values assessed by the two valuers.

The valuation cannot be older than six months. In case of failure of the auction, the liquidator may reduce the reserve price up to seventy-five percent of such value to conduct subsequent auctions. The regulation is silent regarding the manner of determination of earnest money deposit and hence it is in the discretion of the liquidator. It is noteworthy that the reserve price is in relation to the realisable value of the asset as opposed to market value or replacement value or guideline value.

Public announcement of auction: The liquidator is required to make a public announcement of the auction as the next step. The announcement shall be published in one English and one regional newspaper with wide circulation at the location of the registered office and principal office, if any, of the CD and any other location where the CD conducts material business operation. It shall be hosted on the website of the CD, if any, and of the website of the Board. Schedule I to the Regulation has not spelt out the language (English or regional) in which the announcement should be made in the regional newspaper. The liquidator keeping in view the value of the asset involved, may make an application to the AA for dispensing with the public announcement.

Facilitating due diligence by the prospective buyers: A buyer may like to inspect the asset to evaluate before submitting its bid. To facilitate such due diligence, the liquidator is required to extend necessary assistance to the bidder.

Auction: The liquidator shall sell assets through an electronic auction on an online portal designated by the Board where the interested buyers can register, bid and receive confirmation of the acceptance of their bid. If in the opinion of the liquidator physical auction is likely to maximise realisation for the assets and is in the best interest of creditors, he may apply to the AA for permission to sell such assets through physical auction. The liquidator may conduct multiple rounds of auctions. The auction shall be transparent and the highest bid at any given time shall be visible to the other buyers. However, this can be dispensed with if the liquidator obtains permission from the AA. The liquidator may also take the help of professionals specialising in auctioning specific assets. At the close of the auction, the highest bidder shall be informed to pay the balance consideration within fifteen days of the date when he is informed. On payment of the full amount the sale stands completed and the liquidator shall execute certificate of sale or sale deed to transfer such assets and deliver the assets in the manner specified in the terms of sale. Unlike the amendment to the Stamp Act exempting stamp duty for transfer or assignment of rights or interest in financial assets of banks or financial institutions under section 5 of SARFAESI Act in favour of securitisation company or asset reconstruction company, there is no exemption from stamp duty on sale of assets by the liquidator. The purchaser of the assets in the auction sale is required to pay the stamp duty on the immovable property purchased.

PRIVATE SALE

The liquidator can take a call on sale of the following assets by means

of private sale, namely: - (i) the asset is perishable; (ii) the asset is likely to deteriorate in value significantly, if not sold immediately; (iii) the asset is sold at a price higher than the reserve price of a failed auction; or (iv) he has obtained permission of the AA for private sale of the asset concerned. The liquidator shall obtain permission of the AA for private sale of assets to: - (i) a related party of CD; (ii) his own related party; or (iii) any professional appointed by him.

For selling assets through private sale, the liquidator is required to prepare a strategy to approach the interested buyers for the assets. Private sale may be conducted through directly liaising with the potential buyers or their agents, through retail shops or through other means. The sale shall stand completed in accordance with the terms of sale.

Whether a secured creditor can participate in the sale of liquidation assets? The Code or the Regulations does not spell out whether a secured creditor can participate in the sale and purchase of any of the liquidation asset. As there is no prohibition in this regard, it seems permissible to a secured creditor to participate in the sale of liquidation asset after obtaining the permission of AA. The ultimate object is maximisation of realisation of the liquidation assets rather than the party who bids for the asset.

Sale when may not be concluded: The liquidator may not proceed with the sale of the asset if he suspects that there is collusion between the buyers; or the CD's related parties and the buyers; or the creditors and the buyers. In these cases, the liquidator shall report the matter to the AA seeking appropriate orders against the colluding parties.

Recovery of monies due: The liquidator shall endeavour to recover and realise all the assets of, and dues to, the CD in a time bound manner. The modalities to be pursued by the liquidator have not been specified in the Code or in the Regulations.

Realisation of uncalled or unpaid capital contribution: These are the amounts to be received from the contributories to the CD. Despite a charge or encumbrance created by the CD over these receivables, the liquidator shall be entitled to call and realise the uncalled capital and collect arrears, if any, due on calls made prior to liquidation. The liquidator shall send a notice to the contributory to make the payment within fifteen days from the receipt of the notice. If a charge was created over the uncalled capital or unpaid amounts, the charge holder shall be entitled to such realisation, subject to the provisions of the Code. If a contributory fails to make payment to the liquidator pursuant to the notice, the liquidator is entitled to withhold the distribution to the contributory till he makes his contribution.

Distribution of unsold assets: It may not possible to liquidate all assets through sale. Due to peculiar nature of the assets or other special circumstances, some of the assets may remain unsold at the end of the time prescribed for completing the process of liquidation. In respect of these assets, the liquidator may after seeking permission of the AA distribute them among the stakeholders.

Asset sale report: The liquidator shall prepare an asset sale report on sale of an asset in respect of that asset and enclose it with the Progress Report to be filed with the Adjudicating Authority in terms of Regulation 15.

CONCLUSION

The Code and the Regulations contain extensive provisions regarding realisation of liquidation estate. The thrust is on transparency and maximisation of the amount received. There is time limit for conclusion of sale of the assets. The liquidators will have to rise to the occasion and demonstrate their ability towards furtherance of the objects of the Code.

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Rights of Homebuyers on Insolvency of Real Estate Developers



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Recently some of the banks have filed insolvency resolution petitions against developers of real estate and this has raised issues on the rights of allottees of apartments in residential complexes which are yet to be completed by such developers. The Insolvency and Bankruptcy Board of India (IBBI) has amended regulations to declare homebuyers in projects which are placed under insolvency resolution as financial creditors with the right to file their claims and also become members of creditors committee to be constituted under the Insolvency and Bankruptcy Code, 2016 (IBC, 2016). While the amendments to the regulations protect the rights of allottees of apartments in regard to the payments made by

Recently Insolvency Resolution Petitions have been filed against some of the large real estate Developers. Commencement of Insolvency Resolution process against such developers have raised issues and concerns for thousands of homebuyers in the incomplete Residential Complexes. This article examines rights of homebuyers in such incomplete projects facing action under IBC, 2016.

them, there is no clear recognition of the right of the allottee to demand completion of the construction of the apartment and handing over possession after obtaining occupancy certificate for the constructed premises. Whether the allottee of an apartment has such rights, needs to be examined looking to the laws relating to transfer of property and whether transfer of right to occupy a portion of a building which is yet to be constructed can be construed as right to property.

Section 3 of the Transfer of Property Act, 1882, defines immovable property as not including standing timber, growing crops or grass. The expression transfer of property is defined by section 5 as an act by which a living person conveys property in present or in future to one or more other living persons or to himself and to transfer property is to perform such act. The section further clarifies that a living person includes Association or company or group of individuals whether registered or not. Section 6 further provides that property of any kind may be transferred except as otherwise provided by the T.P. Act or by any other law for the time being in force. The law also provides that unless a different intention is expressed or necessarily implied a transfer of property passes forthwith to the transferee all the interest which the transferor has or is then capable of passing in the property and in the legal incidents thereof. It is clear from the above provisions that an apartment in a multi-storeyed building is property and is transferable property right. The practice followed by the developers in the matter of allotment of apartments to the homebuyers is to enter into an agreement for sale of apartment stipulating periodical payments required for completing the construction of the building in which the apartment is to be located. The agreement also provides for undivided interest in the land on which the building is constructed as also to avail common amenities provided for the occupants. The question therefore arises whether such an agreement for sale can be construed as transfer of property in the apartment which is yet to be constructed and completed. While the Transfer of Property Act has no clarity on this question, the recently enacted Real Estate (Regulation and Development) Act 2016 (RERA) makes specific provisions which clarify the status and the rights of an allottee of an apartment, as under:

- i) section 2(d) of the Act defines allottee in relation to a real estate project as a person to whom a plot or apartment or building as the case may be has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes a person who subsequently acquires the said allotment through sale, transfer or otherwise.
- ii) 70% of the amounts realized for the real estate project from the allottees, from time to

time, shall be deposited in a separate account to be maintained in a separate Bank account and shall be used to cover the construction and land cost and shall be used only for that purpose. (Section 4(2)(l) of RERA)

- iii) Section 15 of the Act protects rights of the allottees in the event the promoter transfers the project to any 3rd party by stipulating prior consent of two thirds of the allottees before such transfer can be effected.
- iv) The regulatory law further provides that after the promoter of the project executes an agreement for sale of any apartment he shall not mortgage or create charge on such apartment and if any such mortgage or charge is created then notwithstanding anything contained in any other law for the time being in force it shall not affect the right and interest of the allottee who has purchased or agreed to purchase such apartment.
- v) Section 13(1), further requires that all agreements for sale of apartments have to be registered under any law for the time being in force. In effect this means that all such agreements for sale of apartments have to be registered under the Registration Act, 1908.
- vi) The Law also requires that all incomplete Projects on the date of commencement of the Act, shall also be registered as Real Estate Projects and such incomplete Projects shall also be governed by the provisions of RERA.

Reading all the above provisions together it is very clear that on allotment of an apartment under an agreement for sale by the Developer Company in favour of the allottee there is a transfer of interest in immovable property which is duly registered under the provisions of the Registration Act constituting a notice to the public of such rights in favour of the allottee. The next question that arises for consideration is whether such apartments partially constructed or yet to be constructed would constitute assets of the company against whom insolvency resolution orders have been passed by the National Company Law Tribunal. Explanation below section 18 of IBC 2016, provides that assets held under trust or under contractual arrangement shall not be included in the assets to be taken over by the Interim Insolvency Professional. Similarly 70% of the monies collected from the allottees which are required to be kept in a separate bank account will not also be considered as an asset of the insolvent company and will have to be utilized for the purpose of meeting the cost of construction. If there is an order for liquidation such funds held in trust by the company will have to be returned to the beneficiaries of the trust or their lenders if so authorized by the beneficiaries. Since the law clearly recognizes that on allotment there is a transfer of right to property in favour of the allottee such apartments will not constitute a part of the assets of the company. At the same time the right to complete the construction of such apartments and demand payments of any balance, agreed to be paid by the allottees will continue to vest in the Developer company. It is also permissible that as a part of a Resolution Plan the responsibility of completing the project is taken over by a 3rd party and such plan contemplates that the allottee shall make some additional payments for the purpose of the completion of the projects. In the event of such Resolution Plan requiring further funds, the allottees as members of the creditors committee will have a right to vote on the proposed resolution plan and decide whether to opt for sale of the assets of the company and share the sale proceeds or make additional payments and eventually get the possession of the apartment when completed. In the event the resolution plan is not approved it will have to be ensured that assets in the form of the structure constructed by the developer shall have rights of the allottee to the

extent of the payments made by them and any realisations from sale of such assets will have to be shared with the allottees and if there is any borrowing against the security of such allotted apartment the realizations payable to the allottee may have to be paid to the respective lenders of the allottees holding security interest over such apartments. The aspect of the rights of the allottee as well as the lenders of allottees will need to be clearly recognized and provided for in the Insolvency and Bankruptcy Code 2016.

In conclusion it is possible to take a view that in the event of commencement of insolvency resolution process against a real estate development company, the allottees of apartments shall have following rights;

- a) right to obtain possession of apartment allotted to him if the resolution plan provides for completion of the project. If for such completion any further payments over and above the payments agreed to be made, are required to be made by the allottees, as a part of the resolution plan that allottees will have to decide whether to participate in the resolution plan and make the requisite payments and obtain possession of the apartment when constructed or decline make further payments and opt for realization of payments already made and surrender the allotment.
- b) If there any funds already paid by the allottees are kept in a separate account by the insolvent real estate developer the allottees shall have the right to demand that such funds should be utilized for the purpose of completion of the project. If the allottee declines to participate in the Plan or if for any reason resolution plan is not approved and the project is not to be completed the allottees will continue to have rights over such funds kept in separate account as beneficiaries of a trust which will be deemed to be created by virtue of separate account maintained pursuant to statutory requirements.
- c) If there is a liquidation order the partially constructed apartments will have to be valued and sale proceeds realized will have to be segregated with reference to such valuations so that the allottees can be paid the proportionate amount realized by selling the assets of the company including the funds held in trust for the benefit of the allottees.

The provisions of IBC 2016 do not have any provisions for sale of assets of an insolvent company including the assets held in trust for the benefit of 3rd parties, which cannot be segregated and sold separately. The real estate development projects are unique example of the company holding assets in which 3rd parties have rights to property. It will therefore be necessary to suitably modify the provisions of the IBC 2016 to recognize the rights of beneficiaries of trust property held by real estate development companies and similar cases if any.

The position of allottees of apartments is similar to depositors of banks and nonbanking finance companies. The financial business undertaken by such banks or NBFCs is by collecting deposits from public but when it comes to insolvency, the secured creditors of the entity and other claimants may get the priority and there is no specific provision for recognizing the rights of the depositors. When a law is to be enacted for insolvency of financial service providers it will be necessary to ensure that interest of the depositors whose funds are collected for undertaking financial business are adequately protected and due priority is given to such depositors.

Judgments under Insolvency and Bankruptcy Code by Supreme Court and NCLAT



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INTRODUCTION

The Insolvency & Bankruptcy Code 2016 (“IBC”), enacted to address the troubling shortcomings in existing staggered insolvency laws in India and to bring them under one umbrella, is set up to face a monumental challenge and equally monumental expectations. At present, according to the data available with the World Bank in 2016, insolvency resolution in India takes around 4.3 years on average, compared with United Kingdom (1 year), USA (1.5 years) and South Africa (2 years). India was ranked 135th/190 countries in the World Bank Ease of Doing Business Index 2015 on the ease of resolving insolvency. Thus it is apparent that the Code is perhaps one of the most critical legislations introduced in the recent years impacting the ease of doing business in India.

The Insolvency and Bankruptcy Code 2016, enacted to radically change the process of insolvency resolution in India, is keenly watched by economists and jurists as well as businessmen and investors, for the reason that each aspect of the implementation of law has the potential to critically impact the ease of doing business in India. For this reason, the Code is especially sensitive to interpretation and it is vital that the issues thrown up in its inaugural year of implementation be recognized and the judicial remark on the same be understood. The present article thus traces the emerging jurisprudence of the Code through judgments of the Supreme Court of India and the National Company Law Appellate Tribunal.

National Company Law Tribunal (“NCLT”) and National Company Law Appellate Tribunal (“NCLAT”) were constituted under the Companies Act, 2013 with effect from 01.06.2016. NCLT has been given power as “Adjudicating Authority” under IBC. Appellate Authority under IBC is NCLAT.

In the present article, an attempt has been made to trace the development of the various critical issues thrown from the operation of the Code in its first year of operation, though the prism of the most critical judgments passed by the Supreme Court of India and the National Company Law Appellate Tribunal.

RELEVANT JUDGMENTS BY SUPREME COURT IN APPEALS UNDER IBC

The first exhaustive judgments passed by the Supreme Court under IBC is in the matter of Innoventive Industries Ltd. which coincidentally was also the first admitted petition under IBC by NCLT. Supreme Court dismissed the appeal filed by the Corporate Debtor – Innoventive Industries Ltd. and upheld the orders passed by NCLT and NCLAT succinctly for the following reasons:

1. **Innoventive Industries Ltd. v. ICICI Bank; Supreme Court of India, Judgment dated 31.08.2017 in Civil Appeal Nos. 8337-8338 OF 2017**
 - (i) Once an insolvency professional is appointed to manage the company, the erstwhile directors who are no longer in management, obviously cannot maintain an appeal on behalf of the company. In the present case, the company is the sole appellants. This being the case, the present appeal is obviously not maintainable though it was not dismissed on this ground. It is settled law that a consolidating and amending Act like the present Central enactment forms a code complete in itself and is exhaustive of the matters dealt with therein.
 - (ii) It is clear that the earlier State law is repugnant to the later Parliamentary enactment. There is no doubt that by giving effect to the Maharashtra Relief

Undertakings (Special Provisions Act), 1958, the plan or scheme which may be adopted under the Parliamentary statute will directly be hindered and/or obstructed to that extent in that the management of the relief undertaking, which, if taken over by the State Government, would directly impede or come in the way of taking over of the management of the corporate body by the interim resolution professional. Also, the moratorium imposed under Section 4 of the Maharashtra Act would directly clash with the moratorium to be issued under Sections 13 and 14 of the Code.

- (iii) It was further held that unless the Maharashtra Act is out of the way, the Parliamentary enactment will be hindered and obstructed in such a manner that it will not be possible to go ahead with the insolvency resolution process outlined in the Code. Further, the non-obstante clause contained in Section 4 of the Maharashtra Act cannot possibly be held to apply to the Central enactment, in as much as a matter of constitutional law, the later Central enactment being repugnant to the earlier State enactment would operate to render the Maharashtra Act void *vis-à-vis* action taken under the later Central enactment.

2. Lokhandwala Kataria Construction Private Limited v. Nisus Finance and Investment Managers LLP; Supreme Court of India, Judgment dated in 24.07.2017 in Civil Appeal No. 9279 of 2017

- (i) The present appeal raised the question as to whether NCLAT could utilize the inherent power recognized by Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 to allow a compromise before it by the parties after admission of the matter, despite the provision of Rule 8 of the I&B (Application to Adjudicating Authority) Rules, 2016.
- (ii) The Supreme Court held that the view of NCLAT that the inherent power could not be so utilized *prima facie* appears to be the correct position in law. However, the Supreme Court exercised powers under Article 142 of the Constitution of India to put a *quietus* to the matter and took on record the settlement agreements and disposed of the appeal in terms of the settlement arrived at amongst the parties.

Relevant Judgments by NCLAT in appeals under IBC

3. Steel Konnect (India) Private Limited v. M/s Hero Fincorp Limited Company Appeal (AT) (Insolvency) No. 51 of 2017 dated 19.04.2017

- i) The respondent filed an application under section 7 of the IB Code, 2016 for initiation of the Corporate Insolvency Resolution Process. The appellant raised contentions that it was not served with post filing notice and record of default with the information utility or such other record or evidence of default as specified by Insolvency & Bankruptcy Board of India (IBBI) has not been filed by the respondents. The plea was rejected by NCLAT on grounds that the appellant was heard before passing the impugned order, the question of remitting the case for hearing on the ground of non-compliance of principles of natural justice does not arise.

- ii) The respondent raised a plea that the appellant company has no locus to file this appeal after appointment of Interim Resolution Professional, who has already taken over the management of the 'Corporate Debtor'. It was contended that the powers of Board of Directors, since then stands suspended in terms of Section 17(1)(a) & (b) of the 'I & B Code'. However, NCLAT was not inclined with this submission of the respondent and rejected the contention that the appellant do not have the locus to file this appeal and held as under:

"Interim Resolution Professional has not been vested with any specific power to sue any person on behalf of the 'Corporate Debtor'. However, in case of such difficulty, it is always open to the 'Interim Resolution Professional' to bring to the notice of the Adjudicating Authority for appropriate order.

Once the application under Section 7 or 9 is admitted, the 'Corporate Insolvency Resolution Process' starts in such case one of the aggrieved party being the 'Corporate Debtor' has a right to prefer an appeal under Section 61, apart from any other aggrieved person like Director(s) of the company or members, who do not cease to be Director(s) or member(s), as they are not suspended but their function as 'Board of Director(s)' is suspend.

If the matter is looked from another angle, it will be clear as to why 'Corporate Debtor' should not be represented through 'Interim Resolution Professional' for preferring an appeal under Section 61 of the 'I & B Code'. The Role of 'Interim Resolution Professional' starts after initiation of 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor'. The 'Interim Resolution Professional' once given consent to function directly or indirectly he cannot challenge his own appointment, except in case where he has not given consent. If the 'Corporate Debtor' is left in the hands of 'Interim Resolution Professional' to raise his grievance by filing an appeal under Section 61, it will be futile, as no 'Interim Resolution Professional' will challenge the initiation of 'Insolvency Resolution Process' which ultimately result into the challenge of his Appointment.

At this stage, it is desirable to notice that though pursuant to Section 17, the Board of Directors of a 'Corporate Debtor' stand suspended (for a limited period of 'Corporate Resolution Process maximum 180 days or extended period of 90 days i.e. 270 days), but they continued to remain as Directors and members of the Board of Directors for all purpose in the records of Registrar of Companies under the Companies Act 2013."

4. Ganesh Sponge Pvt. Ltd. v. Aryan Mining & Trading Corporation Pvt. Ltd. Company Appeal (AT) (Insolvency) Nos. 124 & 125 of 2017 dated 23.08.2017

- i) An appeal was preferred as the joint application by the appellants and the respondents for withdrawal of application under section 9 by respondent was rejected on the ground that the Adjudicating Authority is empowered to permit withdrawal of the application under Section 7, 9 or 10 of the I&B Code on the request made by the appellant before the admission, but such withdrawal cannot be permitted once the application is admitted and in this case the application was already admitted.

- ii) The NCLAT released the appellant company from all the rigour of law and was allowed to function independently through its Board of Directors on grounds as the application filed by the respondents under section 9 was not complete.
- 5. Achenbach Buschhütten GmbH & Co. v. Arcotech Ltd. Company Appeal (AT) (Insolvency) No. 97 of 2017 dated 31.07.2017**
Application under Section 9 filed claiming to be an 'Operational Creditor'. In this case, the order regarding initiation of Corporate Insolvency Resolution Process was challenged. The application preferred by the appellant was not maintainable in the absence of certificate granted by the 'Financial Institution' as stipulated under clause (c) of sub-Section (3) of Section 9 of the I&B Code. Only a letter relating to 'confirmation of receipt of payment' from foreign institution known as 'Sparkasse Siegen' had been enclosed.
- 6. Nikhil Mehta and Sons. v. AMR Infrastructure Ltd.; Company Appeal (AT) (Insolvency) No. 07 of 2017, Dated-21.07.17**
(i) Appellants reached different agreements/ Memorandum of Understanding with respondent M/ s AMR Infrastructures Limited (hereinafter referred to as 'Corporate Debtor') for purchase of three units being a residential flat, shop and office space in the projects, Kessel-I Valley, One Mall and One Home which were being developed by and promoted by 'Corporate Debtor'.
(ii) The money disbursed by the Financial Creditor is against the consideration for the time value of money and for all purpose and that the amount due to the appellants, come within the meaning of "debt" as defined in Section 3(11).
(iii) From the aforesaid agreement/ Memorandum of Understanding it is clear that appellants are "investors" and has chosen "committed return plan". The respondent in their turn agreed upon to pay monthly committed return to investors. Thus, the amount due to the appellants come within the meaning of 'debt' as defined in Section 3(11) of the I & B Code'.
- 7. Rubina Chadha & Anr. v. AMR Infrastructure Ltd.; Company Appeal AT Ins. No. 57/2017; dated 02.06.2017**
(i) What happened in the case of 'Rubina Chadha and Another' is that they filed a petition under Section 433(e) of the Companies Act, 1956 before the Delhi High Court, which was transferred to NCLT but they could not satisfy the Learned Adjudicating Authority that they come within the meaning of 'Financial Creditor' or 'Operational Creditor'. The petition was accordingly, dismissed giving rise to the appeal.
(ii) The Appellate Tribunal doubted the power of Central Government to frame rule under Section 239 of the I&B Code for the purpose of exercising power under Section 434 of the Companies Act, 2013 and referred the matter to the Secretary, Ministry of Corporate Affairs, Government of India, New Delhi.
(iii) The then Rule 5 has been substituted, and pursuant to which all petitions under Clause (e) of Section 433 of the Companies Act, 1956, which were pending before High Court, and where petition has not been served on the respondent as required under Rule 26 of the companies (Court) Rules, 1959 have been transferred to the Bench of the Tribunal having territorial jurisdiction, were to be considered as petitions under Part-II of the Code.
- (iv) Since another petition against the same corporate debtor (M/s AMR Infrastructure Ltd.) was already held to be admitted, the appellants in this appeal, whether they are 'Financial Creditor' or 'Operational Creditor' or 'Secured Creditor' or 'Unsecured Creditor', as claim to be creditors were made entitled to file their respective claims before the 'Interim Resolution Professional', as may be appointed and the advertisement as may be published in the newspaper calling of such application(s) with regard to resolution of 'Corporate Debtor'.
- 8. Alpha & Omega Diagnostics (India) Ltd. v. Asset Reconstruction Company of India Ltd. & Ors.; Company Appeal AT Ins. No. 116/2017; dated 31.07.2017**
(i) The applicant filed an application under Section 10 of the "I & B Code" for initiation of corporate insolvency resolution process before the adjudicating authority and the same was accepted. According to the appellant, the Moratorium should take into its recourse on the subject matters and assets relating to its matters pending before the Debt Recovery Tribunal (DRT) and under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) including the personal assets and properties of the promoters of the corporate debtor.
(ii) NCLT was not inclined to accept the submissions of the applicant as it has sought for "its" own insolvency resolution process that will include only the assets of the Corporate Debtor and not any assets, movable or immovable of a third party, like any promoter or director or other and so far as 'guarantor' is concerned, there was no expression of any opinion, as they fall within the meaning of 'Corporate Debtor individually', as distinct from principal debtor who has taken a loan. In the appeal, NCLT has upheld the view of the Ld. NCLT.
- 9. Asian Natural Resources (India) v. IDBI Bank Limited; Company Appeal AT Ins. No. 60,62/2017; dated 11.08.2017**
(i) The NCLAT observed that the Inter-se Agreement between different banks is not binding in nature, and that the 'Corporate Debtors' not being signatories cannot derive advantage of such Inter-se Agreement.
(ii) Also, the 'financial creditors' have the right to file application under Section 7 of the I&B Code, individually or jointly on behalf of other 'financial creditors', and the Inter-se Agreement between the 'financial creditors' cannot override the said provision, nor can take away the right of any Financial Institution to file application under Section 7 of the I&B Code.
- 10. Anil Mahindroo & Anr v. Earth Iconic Infrastructure (P) Ltd.; Company Appeal AT Ins. No. 74/2017; dated 02.08.2017**
(i) The NCLAT observed that the 'Corporate Debtor' in the present case treated the appellants as 'investors' and borrowed the amount pursuant to sale purchase agreement for their commercial purpose treating at par with 'loan' in their return. Thereby, the amount invested

by appellants come within the meaning of 'Financial Debt', as defined in Section 5(8)(f) of I & B Code, 2016.

- (ii) Also it was observed that the money disbursed by the Financial Creditor is against the consideration for the time value of money and for all purpose and that the amount due to the appellants, come within the meaning of "debt" as defined in Section 3(11).

11. Uttam Galva Steels Limited v. DF DeutSche Forfait AG and Anr. ;Company Appeal AT Ins. No. 39/ 2017; Dated 28.07.2017.

- (i) A joint application by one or more operational creditors under Section 9 of the I&B Code is not maintainable.
- (ii) It is mandatory to file Certificate of Recognised Financial Institution along with an application under Section 9 of the I&B Code.
- (iii) The Advocate/Lawyer or Chartered Accountant or Company secretary cannot issue any notice under Section 8 of I&B Code in absence of any authority of Board of Directors.

12. Macquarie Bank Limited v. Uttam Galva Metallic Limited ; Company Appeals (AT) (Insol) No. 96 of 2017,Dated: 17.07.2017

In the present case, as the notice has been given by an advocate/lawyer and there is nothing on the record to suggest that the lawyer was authorized by the appellant, and as there is nothing on the record to suggest that the said lawyer/advocate hold any position with or in relation to the appellant company, we hold that the notice issued by the advocate/lawyer on behalf of the appellant cannot be treated as notice under Section 8 of the 'I & B Code'. And for the said reason also the petition under Section 9 at the instance of the appellant against the respondent was not maintainable.

13. Lokhandwala Kataria Construction Pvt. Ltd. v. Nisus Finance & Investment Manager LLP; Company Appeal (AT) (Insolvency) No. 95 of 2017,Dated-13.07.17

- (i) The Adjudicating Authority may permit withdrawal of the application made under Rules 4, 6 or 7, as the case may be, on a request made by the applicant before its admission."
- (ii) Thus, before admission of an application under Section 7, it is open to the Financial Creditor to withdraw the application but once it is admitted, it cannot be withdrawn and is required to follow the procedures laid down under Sections 13, 14, 15, 16 and 17 of I&B Code, 2016.

14. Prowess International Pvt. Ltd v. Parker Hannifin India Pvt. Ltd.; Company Appeal (AT) (Insol.) No. 89 of 2017, dated-18.08.2017

- (i) The appellant-'Corporate Debtor' having come to know of order passed by Adjudicating Authority, settled the dispute with the 'Operational Creditor' and other Creditors who applied pursuant to notice and filed an Interlocutory Application for withdrawal of the petition.
- (ii) Authority rejected the application on the ground that after admission of an application, petition for withdrawal cannot be entertained.
- (iii) Thereafter, in case(s) where all creditors have been satisfied and there is no default with any other creditor, the formality of submission of resolution plan under section 30 or its approval under section 31 is required to be expedited on the basis of plan if prepared. In such

case, the Adjudicating Authority without waiting for 180 days of resolution process, may approve resolution plan under section 31, after recording its satisfaction that all creditors have been paid/ satisfied and any other creditor do not claim any amount in absence of default and required to close the Insolvency Resolution Process.

15. Era Infra Engineering Ltd. v. Prideco Commercial Projects Pvt. Ltd.; Company Appeal AT Ins. No. 31/2017; dated 03.05.2017

- (i) Admission of application under Section 9 of the Code, without notice to the corporate debtor, amounts to a violation of principles of natural justice and the order of admission merits to be set aside;
- (ii) Upon reversal of order of admission, all steps taken by the insolvency resolution professional including publication are declared illegal.

16. JK Jute Mills Company Limited v. Surendra Trading Company; Company Appeal AT No. 09/2017; dated 03.05.2017

- i. Time if of essence in the Code and the Adjudicating Authority must adhere to the timelines prescribed, be they mandatory or directory. Delay in adjudicating the petitions under the Code is against the essence of the Code.
- ii. The NCLT acts not as the company tribunal but as the Adjudicating Authority while exercising jurisdiction over matters under the Code, and hence the provisions of Section 420 of the Companies Act 2013 may not be transposed onto proceedings under the Code.
- iii. Time period of 14 days prescribed under Sections 7(4), 9(5) and 10(4) are to be counted from date of receipt of application, which is to read as the date on which the application is listed for admission/order and not when it is presented to the Registry.
- iv. Time period of 14 days prescribed under Sections 7(4), 9(5) and 10(4) are procedural in nature and are not to be treated like a mandate of law and are directory.
- v. However, the period of 7 days prescribed for curing of defects under the provisos of the provisions noted above, are held to be mandatory in nature and on failure to abide by the said time limit, the NCLT may reject the application.
- vi. The time limit for completion of insolvency resolution process under Section 12 of the Code is held to be mandatory. The term of 30 days prescribed for the interim resolution professional as prescribed under Section 16(5) is not mandatory, but is to be counted towards the 180 day period for completion of insolvency resolution process.
- vii. Time extension which may be granted under Section 64 which may not exceed 10 days cannot be further extended.

17. M/s. Della Constructions Pvt Ltd. v. M/s Rei Agro Ltd. & Anr.; Company Appeal AT Ins. No. 35/2017; dated 09.05.2017

Third party aggrieved with an order of admission of application under under Section 9 of the Code and the consequent moratorium, cannot appeal against the said order as it is a third party to the proceedings and has remedy of raising its claim before the IRP.



18. Smart Timing Steel Ltd. v. National Steel and Agro Industries Ltd.; Company Appeal AT Ins. No. 28/2017; dated 19.05.2017

- i. Provisions of Section 9(3)(c) of the Code are mandatory to be followed
- ii. Foreign Operational Creditors must also comply with Section 9(3)(c) of the Code, or in the alternative may avail of the other remedy available to them under law.

19. Innoventive Industries Ltd. v. ICICI Bank & Anr. ; Company Appeal AT Ins. No. 1&2/2017; dated 19.05.2017 (affirmed by the Sureme Court vide judgemnt dated 31.08.2017)

- i. Section 424 of the Companies Act, 2013 is applicable to the proceeding under the Code and it is mandatory for the adjudicating authority to follow the principles of rules of natural justice.
- ii. Serious civil consequences ensue due to public announcement of the initiation of corporate insolvency resolution process and appointment of an Interim Resolution Professional;
- iii. The Adjudicating Authority is bound to issue a limited notice to the corporate debtor before admitting a case for ascertainment of existence of default based on material submitted by the corporate debtor and to find out whether the application is complete and or there is any other defect required to be removed.
- iv. Adherence to principles of natural justice would not mean that in every situation the adjudicating authority is required to afford opportunity of hearing to the corporate debtor before passing its order.
- v. Apart from the statutorily prescribed aspects, the adjudicating authority is not required to look into any other factor, including the question whether permission has been obtained from any authority including the Joint Lender Forum.

20. Kirusa Software Pvt. Ltd. v. Mobilox Innovations Pvt. Ltd.; Company Appeal AT Ins. No. 6/2017; dated 24.05.2017

- i. Sub-section (2) of Section 8 of the Code cannot be read to mean that a dispute must be pending between the parties prior to issuance of notice and that too in arbitration or a civil court.

- ii. Merely a dispute giving a color of genuine dispute or an illusory dispute raised for the first time while replying to the notice under Section 8 cannot be a tool to reject an application under Section 9.
- iii. The onus to prove that there is no default or debt or that there is a dispute pending consideration before a court of law or adjudicating authority shifts from the operational creditor to corporate debtor.
- iv. Adjudicating Authority would examine whether notice of dispute in fact raises a dispute within the parameters of two definitions - 'debt' and 'default', and then it has to reject the application if it apparently finds that the notice of dispute does really raise a dispute and no other factual ascertainment is required.
- v. Sub-section (6) of Section 5 read with sub-section (2)(a) of Section 8 also cannot be confined to pending arbitration or a civil suit. It must include disputes pending before every judicial authority including mediation, conciliation etc.
- vi. While in Section 7, occurrence of default has to be ascertained and satisfaction recorded by the Adjudicating Authority, there no similar provision under Sections 9.

21. Kaliber Associates Pvt. Ltd. v. Mrs. Tripat Kaur Infra Engineering Ltd.; Company Appeal AT Ins. No. 52/2017; dated 26.05.2017

Admission of application under Section 7 of the Code, without notice to the corporate debtor, amounts to a violation of principles of natural justice and the order of admission merits to be set aside.

22. MCL Global Steel Pvt. Ltd. v. Essar Projects India Ltd. & Anr.; Company Appeal AT Ins. No. 29/2017; dated 31.05.2017

- i. Sub-section (2) of Section 8 of the Code cannot be read to mean that a dispute must be pending between the parties prior to issuance of notice and that too in arbitration or a civil court.
- ii. Admission of application under Section 9 of the Code, without notice to the corporate debtor, amounts to a violation of principles of natural justice and the order of admission merits to be set aside.

23. Agroh Infrastructure Developers Pvt Ltd v. Narmada Construction (Indore) P Ltd; Company Appeal AT Ins. No. 57/2017; dated 02.06.2017

- i. Admission of application under Section 9 of the Code, without notice to the corporate debtor, amounts to a violation of principles of natural justice and the order of admission merits to be set aside;
- ii. Upon reversal of order of admission, all steps taken by the insolvency resolution professional including publication are declared illegal.

CONCLUSION

Including the above, around 65 appeals filed under the IBC have already been disposed of by NCLAT in 2017, so far. The speed at which the appeals under IBC are considered and adjudicated is phenomenal. It is expected that in the times to come, many more loopholes under this new Insolvency Law would be plugged by the appellate tribunal. Supreme Court, so far, has only upheld the views of NCLAT and in none of the matters, the judgments of NCLAT has been reversed. CS

Impact of Limitation Act, 1963 on the Insolvency and Bankruptcy Code, 2016



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“**S**tatutes of Limitation find their justification in necessity and convenience rather than logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost”- Robert H. Jackson¹

The article aims to deal with the applicability of the Limitation Act, 1963 in the proceedings initiated under the Insolvency and Bankruptcy Code, 2016. The article further seeks to lay emphasis on the interpretation of the provisions of the Insolvency and Bankruptcy Code, 2016 together with the intention of legislature read with the specific provisions of the other special enactments.

The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “IBC”) was enacted to consolidate and amend the laws relating to insolvency of corporate persons, firms as well as individuals. The essence of the said legislation is the timely resolution/ adjudication. When the essence of legislation is to deal with the issues in a time bound manner, the question that arises for determination is whether there is any particular time frame within which a party ought to approach the Adjudicating Authority with regard to a dispute/ debt. The IBC envisages filing of Corporate Insolvency Resolution Process (hereinafter referred to as “CIRP”) by the Corporate Debtor, Financial Creditor and Operational Creditor. However, in neither of the said proceedings, time frame for filing of CIRP has been provided.

It is imperative to point out that the IBC is silent on the time period within which a petition for insolvency resolution is required to be filed. However, the National Company Law Tribunal (hereinafter referred to as the “NCLT”) Delhi has had occasion to deal with the said issue. In an Application filed under Section 9 of the IBC in matter titled *M/s. Deem Roll-Tech Limited v. M/s. R.L. Steel & Energy Ltd.*², the NCLT, Delhi has held that in the absence of any specific bar in the IBC to the applicability of the Limitation Act, 1963 read with Section 433 of the Companies Act, 1956, the provisions of Limitation Act, 1963 would apply. The NCLT, Delhi dealt with the provisions of Section 255 of IBC to say that the said provision has amended various Sections of the Companies Act, 2013. However, Section 433 of the Companies Act, 2013 remain unamended. In effect, therefore, “*The provisions of the Limitation Act, 1963 shall as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be.*”³

The aforementioned question once again came up for consideration before NCLT, Delhi in the matter titled *Sanjay Bagrodia v. Sathyam Green Power Pvt. Ltd.*⁴ The NCLT, Delhi addressed the issue whether insolvency process can be initiated even after the claim has become time barred as per the Limitation Act, 1963. While dealing with the said issue; NCLT, Delhi dealt with Section 60(6) of the IBC to state that for computing the period of limitation for any suit or application by or against a Corporate Debtor, the period of moratorium as specified in Section 14 of the IBC shall be excluded. This would mean that in case the resolution process does not go through, then the moratorium period is to be excluded. For ease of reference Section 60(6) of the IBC is being reproduced as follows: “(6) *Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.*” NCLT Delhi while interpreting Section 60(6) of the IBC has stated as follows: “*A perusal of the above quoted provision would show that for computing the period of limitation specified for any suit or application by or against a corporate debtor, the period during*

¹ Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945)

² CA No. (IB)24/PB/2017; Order dated 31.03.2017

³ Section 433 of the Companies Act, 2013

⁴ CP No. (IB) 108 /PB/2017; Order dated 25.05.2017

which such moratorium has remained in operation is to be excluded. In other words, if the resolution of insolvency has failed then in case a suit or application is filed then moratorium period has to be excluded. If an Operational Creditor has approached the NCLT after three years or prescribed period of limitation then, how his claim in the suit or application could be within the period of limitation prescribed. The simple result flowing from the plain reading of Section 60(6) IBC is that the claim made before the NCLT must also be within the period of limitation as prescribed by the Limitation Act, 1963.” The NCLT, Delhi has gone one step ahead and has stated that if that were the case, then, for triggering of any insolvency process, the claim made before NCLT ought to be within the period of limitation as prescribed under the Limitation Act, 1963. The NCLT, Delhi has further gone ahead and stated that “Then we ask learned Counsel for the Applicant whether an application under IBC would be maintainable to recover the amount which fell due 50 years ago. Mr. Mehta, learned Counsel for the Applicant lowered his eyes and was not able to propose any straight answer. We are thus of the considered view that this Tribunal cannot be flowering pot for claims which have become dead and are wholly time barred.” Thus, the NCLT, Delhi has laid emphasis on the applicability of the Limitation Act, 1963 vis-a-vis the IBC.

The National Company Law Appellate Tribunal (hereinafter referred to as “NCLAT”), has recently opined on the issue of applicability of Limitation Act, 1963 in so far as the initiation of insolvency proceedings is concerned. In the matter titled **Neelkanth Township and Construction Pvt. Ltd. v. Urban Infrastructure Trustees Limited**⁵, the NCLAT has upheld the order passed by NCLT, Mumbai in matter titled *Urban Infrastructure Trustees Limited v. Neelkanth Township and Construction Pvt. Ltd.*⁶ While dealing with the issue of applicability of Limitation Act, 1963; NCLAT has stated that no record has been placed before it to say that Limitation Act is applicable to IBC. The NCLAT has further stated that the IBC is not a recovery proceeding and instead relates to initiation of insolvency proceedings. While concluding its observation, the NCLAT has held that “There is nothing on record that Limitation Act, 2013 is applicable to I&B Code. Learned Counsel for the Appellant also failed to lay hand on any of the provision of I&B Code to suggest that the Law of Limitation Act, 1963 is applicable. The I&B Code, 2016 is not an Act for recovery of money claim, it relates to initiation of Corporate Insolvency Resolution Process. If there is a debt which includes interest and there is default of debt and having **continuous course of action**, the argument that the claim of money by Respondent is barred by Limitation cannot be accepted.” In view of the observations passed by NCLAT in the aforementioned matter, it would not be out of place to state that the intention of the NCLAT cannot be to totally oust the applicability of Limitation Act, 1963. What the NCLAT vide its order, in the aforementioned matter, seems to imply is that there has to be continuous course of action and if that is the case, the claim cannot be stated to be barred by limitation.

While studying the aspect of limitation in filing a petition under IBC to initiate insolvency proceedings, it is also imperative to have an overview of the applicability of the provisions of Limitation Act, 1963 while filing a Winding Up petition under the relevant provisions of the Companies Act, 1956. The Hon’ble High Court of Delhi in various judgments⁷ has time and again held that though no period of limitation has been prescribed under the Limitation Act, 1963 for filing of a petition for Winding Up; however, if the claim of a party to recover the amount has become barred by time, it will not be

appropriate to initiate the process of Winding Up. The Hon’ble High Court of Delhi has time and again held that no period of limitation has been prescribed under the Limitation Act for filing of a Winding Up petition. However, Section 433(e) of the Companies Act, 1956 stipulates that a Winding Up petition is maintainable when a company is unable to pay the debt which is due and payable. However, the debt should be one which is legally recoverable and is not barred under the law of limitation. It is relevant to state that the Hon’ble High Court of Delhi despite reiterating the settled legal position that Winding Up proceedings are not means to recover debt, which is also the finding of NCLAT in the matter of **Neelkanth**⁸, held that if the claim is barred by time, it will not be appropriate to initiate process of Winding Up. Therefore, it can be stated that the intention of legislature and its interpretation by Courts has been to read the provisions of Limitation Act, 1963 unless specifically stated to be inapplicable.

It is further pertinent to mention that the Provincial Insolvency Act, 1920⁹ which dealt with the issue of Insolvency until the enactment of IBC specifically provided for the fact that the provisions of Section 5 and 12 of the Limitation Act would be applicable to the applications and appeals¹⁰. Further, the Provincial Insolvency Act, 1920 provided that petition for insolvency was to be filed within 3 months from the date of act of insolvency.¹¹ Therefore, the intention of legislature has never been to grant unfettered powers to either the borrower or the creditor to initiate insolvency proceedings at any time as it deems fit. If that was the position, the same would lead to anomalous and jarring situation where any borrower or even a creditor would approach a Court for declaration as an insolvent at any stage that would not only cause filing of mischievous petitions; but would also lead to harassment of the other party.

It is relevant to state that the maxim *vigilantibus, non dormientibus, jura subveniunt*, i.e., the laws give help to those who are watchful and not to those who sleep ought to be read into while dealing with the provisions of IBC. It is also vital to state that the objective of the law of limitation is to ensure that a party exercises its rights within a reasonable time frame and to discourage and suppress stale, fake or fraudulent claims¹².

In conclusion, it can be stated that since IBC is silent on the applicability of the provisions of the Limitation Act, 1963; therefore, the same would require further judicial interpretation. Though supporting the interpretation of NCLAT in the matter of **Neelkanth**¹³ that the proceedings under IBC are not proceedings for recovery of money; however, it cannot be the intention of the legislature to open a Pandora’s Box. If it is believed that no period of limitation is prescribed to trigger the insolvency proceedings, then twofold issue will arise. Firstly, the claim which is otherwise not enforceable will be enforced by means of IBC proceedings. Secondly, the claim before the Insolvency Resolution Professional/ Resolution Professional will have to be also considered without going into the fact that the said claim was otherwise barred by the law of limitation. Thus, leading to filing of otherwise barred claims leading to harassment and injustice to the other party. CS

5 Company Appeal (AT) (Insolvency) No.44 of 2017; Order dated 21.04.2017

6 CP No.69/I&BP/NCLT/MAH/2017

7 Niyogi Offset Printing Press Ltd v. Doctor Morepen Limited [2009]149CompCas467(Delhi); Interactive Media and Communication Solution Private Limited v. GO Airlines Limited 199(2013)DLT267

8 Supra Note 3

9 The said Act has been repealed vide Section 243 of the Insolvency and Bankruptcy Code, 2016

10 Section 78 of the Provincial Insolvency Act, 1920

11 Section 8 and 9 of the Provincial Insolvency Act, 1920

12 Bharat Barrel and Drum Mfg. Company Private Ltd. and Anr. vs. The Employees’ Estate Insurance Corporation, (1971)2SCC860

13 Supra Note 3

The Role of Insolvency and Bankruptcy Board of India Under The Insolvency and Bankruptcy Code 2016



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INTRODUCTION

Insolvency and Bankruptcy Board of India (IBBI) was set up on 1st October 2016 under the Insolvency and Bankruptcy Code, 2016 (IBC). The IBBI is an institutional arrangement for the new Insolvency and Bankruptcy regime and performs multiple tasks under it. It has a regulatory oversight over the Insolvency Professionals, Insolvency Professional Agencies and Information Utilities. The IBBI plays an important role in enforcing the rules for corporate insolvency resolution, corporate liquidation, individual insolvency resolution and individual bankruptcy under the Code. It is a key pillar of the entire system responsible for implementation of the Code that consolidates and amends the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals 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.

As per the recommendation of The Bankruptcy Law Reforms Committee (BLRC), the Insolvency and Bankruptcy Board of India (IBBI) was set up under the Insolvency and Bankruptcy Code so as to achieve high recovery rates in an NPV sense, low delays from start to end, sound coverage of the widest possible class of claims e.g. bank loans, corporate bonds, etc. and to create a perception in the minds of persons in the economy that India has a swift and competent bankruptcy process. The present article is an attempt to explain the role of IBBI under The Insolvency and Bankruptcy Code 2016.

ORGANIZATIONAL STRUCTURE OF IBBI

“Board’ means the Insolvency and Bankruptcy Board of India established under sub -section (1) of section 188 of the IBC;

The IBC provides that the IBBI shall be constituted as follows:-

Total Members : 10 (Including The Chairman)

- One Chairperson (at Present Dr. M.S.Sahoo is the Chairperson of IBBI)
- Three members from amongst the officers of the Central Government not below the rank of Joint Secretary or equivalent, one each to represent the Ministry of Finance, the Ministry of Corporate Affairs and Ministry of Law, ex officio
- One member to be nominated by RBI, ex-officio
- Five other members nominated by the Central Government; of these, three shall be whole-time members

The IBBI has structured itself into three separate wings, namely,

- Research and Regulation Wing
- Registration and Monitoring Wing and
- Administrative Law Wing

and each of these wings is headed by a separate Whole Time Member (WTM).

IBBI presently has the following Advisory Committees:

1. Advisory Committee on Service Providers having members from SEBI, MCA, NSE, ICAI, ICSI, Law profession. etc.
2. Advisory Committee on Corporate Insolvency and Liquidation having members from NCLT, NCLAT, CIBIL, BSE, etc.

IBBI also has a Technical Committee having members from National Statistical Commission, IIT Bombay, IIM, Bangalore and IBA.

Here we can see that the Committees have a wide representation from various concerned professional bodies/ quasi judicial authorities/stock exchanges /statutory authorities. This will help IBBI perform its role and functions efficiently.



The Disciplinary Committee under section 220(1) of the Insolvency and Bankruptcy Code, 2016 comprises Dr. (Ms.) Mukulita Vijayawargiya, Whole Time Member, Insolvency and Bankruptcy Board of India w.e.f. 23.08.2017.

The BLRC has suggested in its report that IBBI will be funded through a mix of fees levied on the IPs and IUs and Central Government grants. However, apart from this, the involvement of the Central Government in the financial matters of the Board should be minimal.

ROLE OF INSOLVENCY AND BANKRUPTCY BOARD OF INDIA

The IBC has established an Insolvency Regulator, the Insolvency and Bankruptcy Board of India (IBBI) to exercise regulatory oversight over Insolvency Professional Agencies, the Insolvency Professionals and Information Utilities. IBBI has delegated the task of monitoring and evaluating the insolvency professionals registered with it to the Insolvency Professional Agency.

“Insolvency Professional” means a person enrolled under section 206 with an Insolvency Professional Agency as its member and registered with IBBI as an Insolvency Professional under section 207. “Insolvency Professional Agency” means any person registered with IBBI under section 201 as an Insolvency Professional Agency. “Information Utility” means a person who is registered with IBBI as an Information Utility under section 210. Hence we can see that registrations of all these agencies/ professionals with IBBI is mandatory under the Code.

POWERS AND FUNCTIONS OF INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (IBBI)

IBBI has been referred to as Board under Section 196 of the IBC .

As per Section 196 of the IBC :

- (1) The Board shall, subject to the general direction of the Central Government, perform all or any of the following functions namely:
- (a) Register insolvency professional agencies, insolvency professionals and information utilities and renew, withdraw, suspend or cancel such registrations.
 - (b) Specify the minimum eligibility requirements for

registration of insolvency professional agencies, insolvency professionals and information utilities.

- (c) Levy fee or other charges for the registration of insolvency professional agencies, insolvency professionals and information utilities.
- (d) Specify by regulations standards for the functioning of insolvency professional agencies, insolvency professionals and information utilities.
- (e) Lay down by regulations the minimum curriculum for the examination of the insolvency professionals for their enrolment as members of the insolvency professional agencies.
- (f) Carry out inspections and investigations on insolvency professional agencies, insolvency professionals and information utilities and pass such orders as may be required for compliance of the provisions of this Code and the regulations issued thereunder.
- (g) Monitor the performance of insolvency professional agencies, insolvency professionals and information utilities and pass any directions as may be required for compliance of the provisions of this Code and the regulations issued thereunder.
- (h) Call for any information and records from the insolvency professional agencies, insolvency professionals and information utilities.
- (i) Publish such information, data, research studies and other information as may be specified by regulations.
- (j) Specify by regulations the manner of collecting and storing data by the information utilities and for providing access to such data.
- (k) Collect and maintain records relating to insolvency and bankruptcy cases and disseminate information relating to such cases.
- (l) Constitute such committees as may be required including in particular the committees laid down in section 197.
- (m) Promote transparency and best practices in its governance.
- (n) Maintain websites and such other universally accessible repositories of electronic information as may be

Once the resolution professional is appointed by the Committee of Creditors, the Adjudicating Authority shall forward the name of the resolution professional to IBBI for its confirmation and shall make such appointment after confirmation by IBBI. IBBI may specify the manner in which a resolution professional will appoint accountants, legal and other professionals while carrying out the operations of the Corporate debtors.

necessary.

- (o) Enter into memorandum of understanding with any other statutory authorities.
 - (p) Issue necessary guidelines to the insolvency professional agencies, insolvency professionals and information utilities.
 - (q) Specify mechanism for redressal of grievances against insolvency professionals, insolvency professional agencies and information utilities and pass orders relating to complaints filed against the aforesaid for compliance of the provisions of this Code and the regulations issued thereunder.
 - (r) Conduct periodic study, research and audit the functioning and performance of the insolvency professional agencies, insolvency professionals and information utilities at such intervals as may be specified by the Board.
 - (s) Specify mechanisms for issuing regulations, including the conduct of public consultation processes before notification of any regulations.
 - (t) Make regulations and guidelines on matters relating to insolvency and bankruptcy as may be required under this Code, including mechanism for time bound disposal of the assets of the corporate debtor or debtor.
 - (u) Perform such other functions as may be prescribed.
- (
- 2) The Board may make model bye-laws to be adopted by insolvency professional agencies which may provide for—
 - (a) The minimum standards of professional competence of the members of insolvency professional agencies.
 - (b) The standards for professional and ethical conduct of the members of insolvency professional agencies.
 - (c) Requirements for enrolment of persons as members of insolvency professional agencies which shall be non-discriminatory. Explanation.—For the purposes of this clause, the term “non-discriminatory” means lack of discrimination on the grounds of religion, caste, gender or place of birth and such other grounds as may be specified.
 - (d) The manner of granting membership.
 - (e) Setting up of a governing board for internal governance and management of insolvency professional agency in accordance with the regulations specified by the Board.
 - (f) The information required to be submitted by members including the form and the time for submitting such

information.

- (g) The specific classes of persons to whom services shall be provided at concessional rates or for no remuneration by members.
 - (h) The grounds on which penalties may be levied upon the members of insolvency professional agencies and the manner thereof.
 - (i) A fair and transparent mechanism for redressal of grievances against the members of insolvency professional agencies.
 - (j) The grounds under which the insolvency professionals may be expelled from the membership of insolvency professional agencies.
 - (k) The quantum of fee and the manner of collecting fee for inducing persons as its members.
 - (l) The procedure for enrolment of persons as members of insolvency professional agency.
 - (m) The manner of conducting examination for enrolment of insolvency professionals.
 - (n) The manner of monitoring and reviewing the working of insolvency professionals who are members.
 - (o) The duties and other activities to be performed by members.
 - (p) The manner of conducting disciplinary proceedings against its members and imposing penalties.
 - (q) The manner of utilising the amount received as penalty imposed against any insolvency professional.
- 3) Notwithstanding anything contained in any other law for the time being in force, while exercising the powers under this Code, the Board shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:—
 - (a) The discovery and production of books of account and other documents, at such place and such time as may be specified by the Board.
 - (b) Summoning and enforcing the attendance of persons and examining them on oath.
 - (c) Inspection of any books, registers and other documents of any person at any place.
 - (d) Issuing of commissions for the examination of witnesses or documents.

In this way IBBI plays a pivotal role in the implementation of the IBC performing varied functions right from administrative nature, that of a regulator to monitoring, registration, conducting disciplinary proceedings and imposing penalties.

Below, an attempt has been made to summarise the Role played by IBBI as given under each of the Chapters of the Code.

CORPORATE INSOLVENCY RESOLUTION PROCESS (CIRP)

Where the application for corporate insolvency resolution process is made by an operational creditor and no proposal for an interim resolution professional is made, the Adjudicating Authority shall make a reference to IBBI for the recommendation of an insolvency professional who may act as an interim resolution professional. IBBI shall, within ten days of the receipt of a reference from the Adjudicating Authority recommend the name of an insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending. In case

the Financial Creditor or the Corporate Applicant has suggested the name of the resolution professional in their application, the Adjudicating Authority must, before appointing him as Interim Resolution Professional, ascertain with the IBBI that there is no disciplinary proceeding pending against the proposed resolution professional. IBBI may specify the duties to be performed by the IRP.

IBBI may specify the manner of determining the voting share of the financial creditors in case the financial debt is issued as securities-Section 21(7) of IBC.

All decisions of the committee of creditors shall be taken by a vote of not less than seventy-five per cent of voting share of the financial creditors: However where a corporate debtor does not have any financial creditors, IBBI may specify that the persons who shall constitute the committee of creditors and the functions of the committee-Section 21(8) of IBC.

Once the resolution professional is appointed by the Committee of Creditors, the Adjudicating Authority shall forward the name of the resolution professional to IBBI for its confirmation and shall make such appointment after confirmation by IBBI. IBBI may specify the manner in which a resolution professional will appoint accountants, legal and other professionals while carrying out the operations of the Corporate debtors.

The resolution professional is required to take prior approval of the Committee of Creditors while taking certain actions under the Code. Where any such action is taken by the resolution professional without seeking the approval of the committee of creditors in the manner as required in this section, such action shall be void. The committee of creditors may report the actions of the resolution professional to IBBI for taking necessary actions against him under this Code.

IBBI decides the form and manner in which information memorandum formulating the resolution plan is to be prepared by the resolution professional.

IBBI also plays a role in deciding the payment of insolvency resolution process costs to be made under the resolution plan, as per the Code.

IBBI shall maintain a database of all records forwarded by the resolution professional relating to the conduct of the CIRP.

LIQUIDATION OF CORPORATE DEBTOR

Once the Liquidation order is passed with respect to the Corporate Debtor, IBBI may

1. Recommend the replacement of a resolution professional to the Adjudicating Authority for reasons to be recorded in writing.
2. If directed by the Adjudicating Authority, propose the name of another insolvency professional to be appointed as liquidator.
3. Specify the amount of liquidation fees to be paid to the Liquidator for the conduct of the liquidation proceeding in such proportion to the liquidation assets estate.
The liquidator has to report the progress of the liquidation process to IBBI.
4. Specify assets not to be included in the liquidation estate assets and which shall not be used for recovery in the liquidation.
5. Specify form and manner and supporting documents required to be submitted by the operational creditor to the Liquidator to prove his claim.
6. Specify the circumstances in which an extortionate credit transactions shall be covered under sub-section 50 (1) of

the Code.

7. Specify such conditional and procedural requirements with respect to voluntary liquidation of a corporate person.
8. Specify the time within which the liquidator shall verify the claims submitted under section 38 of the IBC and the manner in which the claims will be valued.

IBBI shall, in case of undervaluation or non-reporting of transactions by the liquidator or resolution professional, upon receipt of orders from the Adjudicating Authority, initiate disciplinary proceedings against the liquidator or the resolution professional as the case may be.

Voluntary Liquidation of Corporate Person: The voluntary liquidation of a corporate person shall meet such conditions and procedural requirements as may be specified by IBBI. The company shall notify the Registrar of Companies and IBBI about the resolution to liquidate the company within seven days of such resolution or the subsequent approval by the creditors, as the case may be.

INSOLVENCY RESOLUTION AND BANKRUPTCY FOR INDIVIDUALS AND PARTNERSHIP FIRMS

Fresh Start Order:

In case of fresh start process of a debtor, IBBI plays an important role in recommending or nominating the resolution professional, where debtor has himself submitted an application instead of the resolution professional. It will also confirm to the Adjudicating Authority if there is any disciplinary proceeding against the resolution professional who has submitted the Fresh Start Process application on behalf of the debtor. IBBI may take action against the resolution professional, in case any application to that effect has been received from the Adjudicating Authority. The Adjudicating Authority shall pass a discharge order at the end of the moratorium period for discharge of the debtor from the qualifying debts and the same shall be forwarded to IBBI for the purpose of recording an entry in the register maintained by it.

Insolvency Resolution Process and Bankruptcy Order for Individuals and Partnership Firms

In both the above cases, the Adjudicating Authority will direct IBBI to confirm if there is any disciplinary proceeding against the resolution professional. IBBI shall within ten days of the receipt of the direction in writing either—

- (a) confirm the appointment of the proposed insolvency professional as the bankruptcy trustee for the bankruptcy process; or
- (b) reject the appointment of the proposed insolvency professional as the bankruptcy trustee and nominate another bankruptcy trustee for the bankruptcy process.

The resolution professional shall determine the voting share to be assigned to each creditor in the manner specified by IBBI. In the case of the bankruptcy proceedings, the copy of the discharge order will be forwarded to IBBI for the purpose of recording an entry in the register maintained by it .

Thus IBBI plays critical role under the IBC Code. The IBBI regulations create a complete framework for implementation of the Code and it is also vigilant that each member of the entire system at various stages, is operating efficiently. CS

Source :

- 1.) www.ibbi.gov.in
- 2.) IBC 2016
- 3.) BLRC report

Practical Issues Posing Challenges to the Insolvency Professionals – Does the Code Show the Road Ahead?



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INTRODUCTION

The Insolvency & Bankruptcy Code, 2016 (“Code”) has been a real game changer in the Indian economy’s business reform initiatives in the last twenty five years. Ease of doing business is ironically the base premise for enacting this comprehensive Code to exit from the business.

The Insolvency and Bankruptcy Code, 2016 has made spectacular progress in a short span. The Orders issued by the Adjudicating Authorities are beginning to have profound impact on defaulting business owners as the message is loud and clear: “settle dues or cede control”. However, in the process of corporate insolvency resolution, the insolvency professionals face many challenges. The authors, with the practical experience of handling a few cases, have attempted to highlight such challenges and the possible ways to overcome them.

The Code has actually set the cat among the pigeons, so to say. In the earlier regime of Companies Act, 1956, the unpaid creditor was required to file winding up petition against defaulting companies under Section 433(e) and 433(f). It took ages for the petition to come up for hearing before the High Courts. Defaulting business entities never took such attempts of creditors for winding up with a pinch of salt.

By the time the case was heard and orders were pronounced, too much of water would have already passed under the bridge and there would be nothing much left to gain out of the orders. Vexatious proceedings killed the entire business dynamics and mostly the defaulting companies had their own way to prolong the agony of the creditors.

The unleashing of the Code has really disrupted the entire scenario and the erring corporates are now running for cover. In the words of the Finance Minister Mr. Arun Jaitley, “the new norm in Indian business is that the borrowers either pay up or lose their business and the Insolvency and Bankruptcy Code provides timelines to sort out defaults and empowers the creditors in a way unseen in decades.”

It is worth noting further his remarks, “The old regime by which the creditor would get tired chasing the debtor and would end up recovering nothing is now over. If a debtor has to survive, he will have to service his debt. Or, he will have to make way for somebody else. I think this is the only correct way by which business would now be done and this message has to go out loud and clear.” (*The ET Magazine – What’s news – August 20-26, 2017*).



“Before any one gets too optimistic, this is a chart of our Company’s indebtedness !!!”

CONTEXT

Having said that the Code is a game changer, the last few months have seen frenetic activities in corporate insolvency resolution process. A lot of action has now moved to various Benches of National Company Law Tribunal. Aggrieved parties have even moved the National Company Law Appellate Tribunal and also High Courts and the Supreme Court. Reasons were many.

Did the NCLT err in admitting an application when the requirements like sending notice to the defaulting debtor and existence of dispute were not fulfilled? “Yes”, said the NCLAT and set aside the orders of NCLT (Reference: Bhash Software Labs Private Ltd. (corporate debtor) Vs. Mobme Wireless Solutions Ltd. (operational creditor)- (Company Appeal (AT) Insolvency No.79 of 2017).

In the case of “Inox Wind Ltd. Vs. Jeena & Co.”, NCLAT (Company Appeal (AT) Insolvency No.103& 108 of 2017) set aside the orders of NCLT on the premise that the principles of natural justice were not followed before admitting the application.

After an application has been admitted by the NCLT for insolvency proceedings, if both the corporate debtor and the financial creditor want to withdraw the case, is it possible? Rule 8 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016 clearly provides that the Adjudicating Authority **may** permit withdrawal of the application made by a financial creditor or operational creditor or a corporate debtor, on a request made by the applicant **before** its admission.”

In the matter of Nisus Finance & Investment Manager LLP and Lokhandwala Kataria Construction, where the NCLT Mumbai Bench had admitted the application, both the parties approached the NCLAT for withdrawal of the application submitting that they have settled the dispute and part amount had already been paid. The NCLAT (Company Appeal (AT) Insolvency No.103& 108 of 2017) promptly declined the request quoting Section 8 of the Code. The parties approached the Supreme Court. The Supreme Court, however, exercised powers under Article 142 of the Constitution to allow recording of consent terms and for withdrawal of the case and the proceedings. Though it is widely felt that such decisions under Article 142 may not acquire the character of a precedent, there could be many such cases hitting the highest court, wherein a preferential treatment could be given to the creditor who has filed the application against the corporate debtor. Time will offer more insight as to how the insolvency law might be tinkered in future.

If these instances were not adequate, the directions of RBI to the banks (financial creditors) to file applications before NCLT against the defaulting companies added further impetus and tested the efficacy of the system to handle such large corporate. Whether the Interim Resolution Professionals were competent enough to manage and supervise the operations of a corporate debtor? Will he be able to cope with the scale, size and speed of the business operations was the question lingering in the minds of all. The promoters were sceptic that such a move would bring more damage and speed up the closure of the business rather than revive it.

Well, these are the issues which have come to the fore and the stakeholders have been watching the game. The one clan which really seems to have a hey-day is the “Operational creditors” who have been quite happy with the new legislation to drag the defaulting corporates to the mat and force settlement. Large corporates, fearing shaming through public announcement in newspapers and in their own websites, have seen to be grudgingly getting into a compromise with such creditors lest they have to

deal with the painful process for six to nine months.

The Insolvency and Bankruptcy Board of India (“IBBI”) has done a tremendous job in rolling out the Regulations one after the other with meticulous care and great attention to details.

However, there have been occasions when the Interim Resolution Professionals (IRP) or the Resolution Professionals (RP) have come across challenging situations a few of which are discussed herein. While we share our concern on these matters, it has been our endeavour to suggest suitable remedies too. However, we humbly submit that not all the issues are brought out herein, that there are many more such issues and in the same breath, we would like to add that there could be different perspectives too on the matters discussed herein. Therefore, we request the readers to look at the comments and views expressed in an appropriate perspective.

PRACTICAL ISSUES POSING CHALLENGES TO THE INSOLVENCY PROFESSIONALS

1. Tenure of the Interim Resolution Professional (IRP) – When it starts? When it ends?

Section 16(5) of the IBC says that the term of the IRP shall not exceed thirty days from **the date of appointment**. Regulation 6 of the IBBI (IRCP) Regulations, 2016 (“Regulations”) states that the IRP shall make a public announcement immediately on his appointment as an IRP. The explanation to this Regulation says that “immediately” means not later than three days from **the date of his appointment**. Regulation 17 states that the IRP shall file a report certifying constitution of the committee to the Adjudicating Authority on or before the expiry of thirty days from the **date of his appointment**.

Now, a reading of all the above three statements under the Code and Regulations lead us to the date of his appointment which is the Order of the Adjudicating Authority (NCLT). In practice, the Order of the NCLT reaches the hands of the IRP well after a few days and some times, even after 10 days. How the IRP will be able to make up for the loss of time in receiving the NCLT order appointing him as IRP?

Thankfully, the NCLT orders now carry a solution in the following manner, particularly in the case of causing public announcement. “The IRP is also directed to make public announcement as stipulated under Section 15 of the IBC within three days from the date, the copy of the Order is received.” The morphing of the requirement from “immediately” to “not later than three days from **the date of his appointment**” and then to “within three days from the date, the copy of the Order is received” is a welcome relief to the IRP.

It would be well served if the tenure of the IRP is clearly stated as effective from the 7th day from the date of the Order of the NCLT appointing her as IRP. This way, the registry of the NCLT also will not be put to severe hardship especially keeping in mind the increasing number of cases being decided by the Adjudicating Authority. Also, this will give an untrimmed 30 days of time to the IRP particularly when she has to perform several tasks within the specified period of 30 days.

Interestingly, when the issue of observing strict timelines under the Code came to the fore, the NCLAT (in the Company Appeal (AT) No.09 of 2017 - JK Jute Mills Company Ltd. Vs. Surendra Trading Company) laid down that **certain** provisions in the Code were of “directory” nature (read “the time limit, if desired, can be enlarged”) and those

relating to timelines to be observed by the applicants or IRP or RP were of “mandatory” nature.

Now, coming to the end of the tenure of the IRP. Enough force is given to say that the tenure cannot be more than thirty days which is well accepted. The question of tenure arises when the period of thirty days ends and there is a vacuum until the Resolution Professional is appointed.

CONSIDER THIS EXAMPLE

Event	Date
Date of the NCLT Order appointing IRP:	1 st August 2017
End of IRP's tenure (30 days)	31 st August 2017
IRP submits his report to NCLT constituting the Committee of Creditors on	31 st August 2017
The meeting of CoC is convened on	7 th September 2017
Minutes circulated to Members	9 th September 2017
E-voting conducted (if necessary)	10 th September 2017
Effective date of appointment of IRP as RP (Scenario A)	7 th September 2017
Date on which new RP takes over (Scenario B)	20 th September 2017

Now, during this period of 1st September to 7th September or say 20th September, there is a vacuum during which period, the IRP is expected to do certain jobs like arranging for the meeting, secretarial preparations for the meeting and thereafter, even after the meeting is over, he is supposed to prepare and circulate the Minutes within 48 hours and also arrange for e-voting wherever it is required within 24 hours of the conclusion of the CoC meeting. She is also required to handover all the claim papers, documents, correspondences, valuation reports, etc. to the Resolution Professional where there is a change of guard between the IRP and the RP.

So, in such circumstances, it would be a good and healthy practice if the IRP is compensated for her efforts until the day her job ends. Please note, her job doesn't end either 2 days after the date of the CoC meeting or the day on which the e-voting is conducted. It goes until the new RP takes over from the IRP or the day prior to the date with effect from which the CoC appoints her as RP.

Therefore, it would be fair to compensate the IRP in a pro-rata basis until the date the RP takes over from the IRP (where there is change of guard) or until the date immediately prior to the date of appointment of IRP as RP.

While on this context, there is a difference of opinion prevalent amongst the insolvency professionals that when the Code clearly restricts the tenure of the IRP as thirty days, how can he convene the first meeting of the CoC to be held after the completion of his 30-day tenure, though the IRP will be well within the provisions of the Code, when she “convenes” the meeting within seven days of filing her report with NCLT under Regulation 17, certifying the constitution of the CoC.

In this context, the meaning of “convene” is quite significant. “Convene” means (Oxford dictionary – verb) come or bring together for a meeting or activity; assemble. It is not the act of just calling for the meeting but making it happen. So, the IRP is well within her powers to convene the meeting (get the people assembled) on a day which falls within seven days from the date of filing the report with NCLT (Regulation 17).

Intriguingly, the Code doesn't lay down how the first meeting of the CoC should be conducted, i.e. whether the IRP will conduct or the RP will conduct or whether the creditors themselves will conduct

the meeting and take the decisions. In all fairness, the rigour of Section 16(5) of the Code should not come in the way to restrict the term of the IRP to 30 days from the date of her appointment. It would be relevant to state here that the Code, foreseeing a situation of delay in appointing a new RP, makes a case for the Adjudicating Authority to direct the IRP to continue to function as the RP until such time the IBBI confirms the appointment of the RP as provided in Section 22(5) of the Code.

2. Participation of Operational Creditors in the CoC meetings

Section 24 of the Code, while talking about giving notice of the meeting of CoC, states that the RP shall give notice of each of the CoC to:

- Members of the committee of creditors
- Members of the suspended board of directors or the partners of the corporate persons, as the case may be;
- Operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the **debt**.

How to determine the eligibility of an operational creditor(s) or their representatives as stated in clause (c) above? It is not clear as to what the “debt” means in this clause (c). Is it total debt of the corporate debtor or only the operational debt of the corporate debtor?

If a view is taken that the debt here means total debt (which includes financial debt and operational debt), then, generally, no operational creditor will have an opportunity to participate in the CoC proceedings. It's our fair opinion that the debt here means “operational debt” and hence, any operational creditor or a class of creditors (say workmen or employees) whose aggregate value of dues is not less than ten percent of the operational debt, such creditors or their representatives should be given an opportunity to participate (though not eligible to vote) in the proceedings.

3. Only Operational creditors are there in a CoC – a few not attending – voting is made compulsory – is it not giving importance to those not present and ignoring those present?

In a corporate debtor, where there is no financial creditor, Regulation 16 provides for a committee of creditors consisting of only operational creditors. But in such a case, it is provided that eighteen largest operational creditors in terms of value would constitute the committee besides two representatives representing the other workmen and employees not included in the largest eighteen.

In such a case, the CoC generally consists of about 20 members. The authors have come across a case where out of 19 operational creditors, 16 of them having more than 92% voting share participated in the first CoC meeting but as not all members were present, (thanks to Regulation 25(5)), the decisions have to be taken through a e-voting process involving further time and cost for the exercise. When the members were physically present, the decisions were taken but due to the legislative intent to give an opportunity to those not present, the time, energy and efforts of those present were almost wasted in that they had to again spend time for exercising their e-voting options.

Incidentally, it was found that out of 19 members, only 10 of them participated in the e-voting process.

SUGGESTION

The Regulations may provide for decisions to be taken and resolutions to be passed in the meeting itself instead of providing

for e-voting if members representing more than 75% of the voting share are present in the meeting. This will save a lot of time and energy and the decision process also will be simpler instead of extending to e-voting for the benefit of those who didn't exercise their duty to be present for the meeting.

4. Information Memorandum – Confidentiality undertaking

Regulation 36 requires the IRP / RP to prepare and submit an Information Memorandum to the Members of the Committee of Creditors. It requires "at least" the information listed from (a) to (i) in Regulation 36 to be submitted to the Members at their first meeting. Regulation 36(2) requires a confidentiality undertaking to be obtained before circulating the information memorandum. In the case of financial creditors, it is quite practical for them to get the confidentiality undertaking but in the case of operational creditors, particularly, employees, the requirement of the Regulation actually limits the discussion during the CoC meeting as not all the members would have given a confidentiality undertaking.

OBSERVATION

This requirement of confidentiality undertaking becomes quite relevant in the case of a CoC consisting only of operational creditors. In such a case, the creditors would either be suppliers or employees or statutory authorities. It would be right to limit access to confidential information about the corporate debtor particularly when a large group of operational creditors are going to be involved in the decision making process. If an operational creditor needs information, he would rather give the confidentiality undertaking and take informed decisions.

5. Claims determination – a tedious process

The claims from creditors are to be handled in a proper manner. Regulations 7 to 15 provide the methods by which the proof of claims should be submitted, the verification and determination process. The provisions are benevolent to the creditors in the sense that even those who did not submit the proof of claims within the due date specified in the public announcement, they can still submit their proof of claims until a resolution plan is approved by the CoC. (Regulation 12).

This makes the claim determination process a continuous one and requiring updation on a regular basis. In many cases, there is difference between the amounts claimed and the amounts appearing in the books of account of the Corporate debtor. Where the accounts are not audited for several years, the situation gets murkier and the IRP is often left wondering how to proceed.

SUGGESTION

Within the period of 30 days given to the IRP, it would be inappropriate to expect to him to come out with a properly reconciled claim determination. Instead, he should be allowed to submit a provisional claim admission statement based on which the committee of creditors should be provisionally constituted subject to revision when the RP takes over and conducts the next meeting of the CoC. This will give a sense of relief to those whose claims have not been admitted by the IRP for various reasons. While there is a specific requirement by Regulation 17 to constitute the CoC, apparently, there is no provision in the Code enabling a constitution of CoC on a provisional basis, excepting as provided in Regulation 12(3) that in the case of a financial creditor who failed to submit proof of claims within the time stipulated in the public announcement, his claim may be considered and he shall

be included in the committee from the date of admission of such claim. A question may arise as to why this privilege is given only to a financial creditor and why not for an operational creditor. Surely, the question begs an answer!!!

6. Directors of the corporate debtor not cooperating

The authors have experienced a case where the directors of the Company were not available in India for quite some time and they were not participating in the process. Critical information required for the process was not available to the IRP. Section 149(3) of the Companies Act, 2013 requires that every company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year. Clearly this provision was violated. Though remedy may be available under Section 19(3) of the Code, it is not that easy to secure the presence of the directors.

SUGGESTION

The Regulation could insist on the presence of the directors at the 1st meeting of the CoC as a mandatory requirement failing which their absence could be taken as disowning their responsibility and they should be made answerable for such dereliction of their duty and responsibility. It could be a welcome measure if the directors (if they are also shareholders) in such a case are debarred from acting as directors in any other company and their shareholding is also forfeited.

What is the role of shareholders?

In the entire scheme of the Code, there is no mention about the role the shareholders of the corporate debtor are expected to play other than the provision under Section 19 requiring, *inter alia*, the promoters to extend all assistance and cooperation to the IRP or RP in managing the affairs of the corporate debtor. Other than their right to seek information from the Company about the status of the insolvency proceedings, what is expected of them? Particularly in a case where the directors are not cooperating and not presenting themselves to provide the important information like purchase or sale of immovable or movable properties, financial transactions, etc., the role of the shareholders is very relevant and significant.

SUGGESTION

Should the shareholders, at least top 5 of them, be invited to the CoC meeting for them to understand the gravity of the situation and know what's going on in the Company? A thought on this line seems fair and equitable lest they are left out from the entire process.

7. Newspaper advertisements – challenges

IRP is given just three days' time to cause a public announcement in newspapers. Regulation 6 requires the IRP to publish the advertisements in newspapers circulating widely in the place where the registered office and principal office, if any, of the corporate debtor and any other location where in the opinion of the IRP, the corporate debtor conducts material business operations. It is very difficult to have an idea, leave alone assessment, of the material business operations of the corporate debtor. In many cases, the company is non-existent, the directors are not there to contact, the address of the registered office is deserted and no whereabouts of the corporate debtor.

In one of the insolvency resolution process, a financial creditor made a strong objection that the IRP has not caused a wide publicity of the public announcement in various places where the

corporate debtor had offices alleging that there were many creditors who were not aware of the insolvency resolution process the corporate debtor was undergoing.

SUGGESTION

Therefore, it would be reasonable if the public announcement is caused within 7 days of the appointment of IRP.

It may be argued that when an IRP gives his written communication in Form 2 of I&B (Application to Adjudicating Authority) Rules, 2016, does he not have an idea of the corporate debtor. The fact is that such consent statements are given quite some time before the order is issued by the NCLT and also the information at that time available either with the applicant creditor or the IRP is limited to the information available in public domain and in many cases, the corporate debtor would not have filed the annual returns and financial statements. The first casualty of the sickness is compliances and hence one cannot expect the corporate debtor to have been upto-date in filing the returns.

8. Valuation exercise and payments for registered valuers

Regulation 27 requires the IRP to appoint two registered valuers to appoint within 7 days of the IRP's appointment. This is a tall order as the IRP would not be able to lay his fingers on the assets of the Corporate debtor. In most of the cases he does the investigative role to find out what were the assets of the Company and are they still intact somewhere. The accounts of the company would be in shambles and even to get an idea of the existing assets location would be an uphill task.

The authors in one such case encountered a situation of a charge existing in favour of a financial creditor as per the MCA records whereas the assets of the corporate debtor were sold off and the dues to the financial creditor (fortunately) were settled and the whole episode came to light only after full three weeks of appointment as IRP. In such a case, the valuation exercise to be initiated is bereft of practicality.

SUGGESTION

The appointment of registered valuer should be made within 14 days of the appointment of IRP as this would enable the IRP to have a clear idea of the location and details of the assets and appropriate valuers could be engaged for this purpose. In any case, the valuation reports are required for the purpose of determination of liquidation value and this has to be reported within 14 days of the first meeting of the Committee of Creditors. So, there may not be any big impact on the resolution process due to such elongation of the period to appoint valuers.

9. Liquidation value due to operational creditors and dissenting creditors

This aspect deserves special mention here. When the corporate debtor shows any signs of revival and requires to prepare a resolution plan, Section 30(2)(b) of the Code and Regulation 38 require that the operational creditors shall have priority in the payments which shall not be less than the payments due to them if the corporate debtor were to be liquidated and that the payments to them shall in any event be made before the expiry of thirty days after approval of the resolution plan by the NCLT and that the secured creditors shall not recover their dues prior to the payment of dissenting financial creditors.

In reality, one could not be sure if the resolution plan approved, though in a very few cases, these criteria have been met. For example, in the case of "Synergies Dooray

Automotive Limited" the resolution plan provided for payment of operational creditors (particularly government authorities) a deferred payment ranging from three to five years. It needs to be seen in reality as to how the operational creditors, who are providing the supplies of goods and services for the regular operations of the Company, are taken care under the Code if the corporate debtor were to be revived under a resolution plan.

10. Payment of IRP fees, public announcement costs, valuation fees etc. by operational creditors

There are several instances coming to light where the operational creditors having filed an application under Section 9 of the Code hoping that they have stumbled upon a god-sent opportunity to see the colour of money, suddenly discover that they have to cough up more for the IRP, for the newspapers for the public announcement to be made and for the registered valuers for doing the valuation exercise.

Already saddled with the overdues from the corporate debtor, the operational creditor laments further to pay for the above expenses. At this point of time, the corporate debtor is already under sickness and someone having dragged them to the Insolvency process, they are not required to foot the bill though at the end of the process, all the resolution process costs are to be borne by the Company through a mechanism of the Committee of Creditors ratifying such expenses.

At least for the expenses during the thirty-days tenure of the IRP, some provision for the expenses should be made upfront which should be made well-known to the parties at the time of admission of the application itself. This will at least kick-start the process rather than waiting for the reluctant creditor to open his wallet.


11. Other issues

If the above-listed issues aren't adequate, we have further lot of items cropping up throwing up further challenges to the IRP and RP during the process of determining / admitting claims. We have listed some of them for recognition though not discussed in detail at this point of time as things are evolving and would require some more time to get stabilized:

- i) Proceeding against the personal guarantors
- ii) Application of Law of Limitation to the claims
- iii) Absence of Information Utilities

CONCLUSION

Any legislation takes some time to settle down in terms of compliance and time-frame. Where the insolvency laws in the country have time immemorial seen decades to reach a logical conclusion, the requirement to move forward in terms of days and weeks is sure to meet several challenges and obstacles but there is absolutely no doubt that a good beginning has already been made. Some fine tuning is the need of the hour and it is hoped the IBBI, Adjudicating Authorities and the Government would be looking at the practical difficulties and challenges in the right perspective and give a thumbs up to such requirements.

The Authors strongly believe that the insolvency resolution process is on the right track. Surprisingly, the information utilities are yet to get established which were designed to play a significant role to decide if there is a default in payment of debt by a corporate debtor. While things will evolve over a period of time to lend more credibility and practical orientation to the process, the speed with which things are moving ahead is the silver lining in the whole process. And the creditors seem to be welcoming this new weapon in their hands to force a good credit behavior by the corporates. 

Insolvency Resolution Professionals' Predicament against Difficult "Corporate Debtors"



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The Supreme Court of India in its detailed judgement dated 31st August 2017, in *Innoventive Industries Ltd. vs. ICICI Bank & Anr.*, perhaps for the first time, has analysed the object and provisions of the Insolvency & Bankruptcy Code, 2016 ("Code") and has also highlighted the critical role and powers of the Insolvency Resolution Professional who is appointed upon admission of the application filed under Sections 7, 9 or 10 of the Code. This article highlights how the IRP faces resistance from the erstwhile management and promoters of the Corporate Debtor (CD) and also highlights the directions issued by the Principal Bench of the National Company Law Tribunal (NCLT) as Adjudicating Authority ("AA") in this regard.

The article discusses NCLT's Orders against the recalcitrant attitude of erstwhile promoters-directors of debtor company who repeatedly thwarted the insolvency resolution professional from carrying out his statutory duties prescribed under the IBC.

It may briefly be mentioned that the Code is enacted to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals alike, in a time-bound manner for maximisation of value of the assets of such persons taking into account the interest of all the stakeholders. The Code separates commercial aspects of insolvency and bankruptcy proceedings from judicial aspects.

The Code creates a time bound corporate insolvency resolution process (CIRP) for companies and individuals and these processes are to be completed within 180 days from the date of admission of application filed under the Code, extendable by another 90 days. In the event insolvency cannot be resolved within the allowed timeframe, the assets of the borrowers may be sold to repay the creditors. The Code further provides that the CIRP shall be conducted by licensed Insolvency Professionals, who will be members of the Insolvency Professional Agencies and their functions shall be regulated by the Insolvency & Bankruptcy Board of India (IBBI).

Upon the occurrence of default of payment of debt by the corporate debtor (CD), the AA, under Section 7(4) (in the case of application filed by Financial Creditor (FC) and/or Section 9(5) (in the case of application filed by Operational Creditor (OC) shall admit or reject application within 14 days and the CIRP shall commence from the date of such admission. Upon admission of the petition initiating CIRP, the AA shall appoint a Resolution Professional if there is no disciplinary proceeding pending against such professional and the AA shall also declare moratorium in respect of the assets/properties of the CD, as contemplated under Section 13(a) read with Section 14 of the Code, with the exception that supply of essential goods/services to the CD shall continue. The AA also directs the IRP to make public announcement of the initiation of CIRP and inviting claims from creditors within a period of 14 days under Section 15. As per Section 14(4), the order of moratorium shall have effect from the date of such order till the completion of the CIRP.

Section 16 of the Code provides for the appointment and tenure of IRP. The party filing the CIRP application has option to nominate name of person to be appointed as IRP, failing which law mandates the IBBI to nominate such person within 10 days of receipt of reference from AA.

In the context of this article, the most important provision is Section 17 of the Code, which elucidates that from the date of appointment of IRP, the management of the affairs of the CD shall vest with the IRP and the powers of the Board of Directors or the partners of the CD shall stand suspended and be exercised by the IRP and the the officers and managers of CD shall report to the IRP and provide access to such documents and records of the CD

as may be required by the IRP. Also, the financial institutions maintaining accounts of the CD shall act on the IRP's instructions and shall furnish to the IRP all information relating to the CD.

Section 17(2) of the Code details the powers of the IRP with regard to the management of the CD, including *inter-alia* the power to take such actions, in the manner and subject to such restrictions, as may be specified by the appointing authority.

Section 18 of the Code elaborates duties of the IRP, which broadly are:

- (1) to collect all information relating to assets, finances and operations of the CD for determining the financial position of the CD including the information relating to the business operations, financial and operational payments for the previous 2 years, list of assets and liabilities of the CD as on the date of initiation of CIRP;
- (2) to receive and collate all claims submitted by the creditors to him pursuant to public announcements made under Sections 13 and 15 of the Code;
- (3) to constitute a Committee of Creditors (COC);
- (4) monitor the assets of the Corporate Debtor and manage its operations until a Resolution Professional (RP) is appointed by the said COC;
- (5) The IRP is empowered by the Code to take control and custody of any assets over which the Corporate Debtor has ownership rights as recorded in the balance sheet of the Corporate Debtor.

As per Section 19, the promoters and erstwhile management of the CD are mandated to extend all assistance and cooperation to the IRP as may be required by him in managing the affairs of the CD, failing which the IRP can approach the AA for necessary directions for compliance with the IRP's instructions and to cooperate with him in collection of information and management of the CD as a going-concern. Section 20 of the Code further mandates that the IRP shall make every endeavour to protect and preserve the value of the property of the CD and manage its operations as a going-concern.

However, despite such clear mandate, how the IRP/RP faces severe resistance from the promoters/directors/erstwhile management of the CD can be understood from the orders of the Principal Bench of the NCLT in the case of *Alchemist Asset Reconstruction Company Ltd. (Alchemist) vs. M/s Hotel Gaudavan Pvt. Ltd., Jaipur (Corporate Debtor)* (ref: www.nclat.gov.in), wherein vide its Order dated 31st March 2017, the NCLT Principal Bench had admitted the petition filed by the FC against the CD and issued orders under Section 13(a) read with 14 and 15 and also appointed IRP. However, the IRP represented by his counsel, filed applications with the NCLT, stressing the need for issuance of directions in view of the recalcitrant attitude of the respondent CD and the personnel in charge of its management, namely, its General Manager and the Managing Director. The IRP also stated that he had made efforts to take over the possession of the assets of the CD and that he had reached Hotel Fort Rajwada, situated at Jaisalmer, Rajasthan on 3rd April 2017 after due intimation to the management of the CD. The IRP also disclosed that a communication was also addressed to the auditors of the CD, seeking information of CD's bank accounts which was furnished by the auditors.

However, efforts made by the said IRP to contact the persons in the CD's management for taking over assets, proved futile. The



GM of the CD, being the key person running the hotel of the CD, even though apprised of the NCLT's order dated 31st March 2017, refused cooperation stating he had no instructions from the MD of the company to divulge any details to the IRP. Further, the said GM refused to call the MD on the plea that he was not authorized to do so. The IRP stated in his application to the NCLT that on 3rd April 2017 he received an e-mail from the MD of the CD that he was travelling and would be out-of-station for another week. Thus, it was evident that the management of the CD was not cooperating in relation to the discharge of the functions of the IRP as contemplated under the Code, that too, not in an expeditious manner. The NCLT also noted that the CD had approached the High Court of Rajasthan at Jaipur by filing a Writ Petition for stay of the NCLT Order dated 31.03.2017, which the High Court declined.

The NCLT in its order dated 13th April 2017 reiterated the provisions of Sections 17 and 18 of the Code and in relation to the duties of the IRP, the NCLT noted that Section 18(1)(d) of the Code mandates the IRP to monitor the assets of the CD and to manage its operations until a RP is appointed by the COC and as per provisions of Section 18(1)(f), the IRP is duty-bound to take over the control of any assets over which the CD has ownership rights as recorded in CD's last balance sheet, including all tangible assets whether movable or immovable. The NCLT further highlighted that Section 19 of the Code mandated the promoters or any other person associated with the management of the CD to extend all assistance and cooperation to the IRP as may be required by him in managing the affairs of the CD and under Section 19(3) of the Code the AA give appropriate directions to such personnel who are found to be not cooperating, to comply with the instructions of the IRP. The NCLT also noted that any failure by the management, promoters and officials of the CD to fully cooperate with the IRP would attract the exercise of contempt power vested with the AA which, the AA will not hesitate to exercise in the present instance.

The NCLT further made it clear that the banks where the CD had

6 The NCLT highlighted that Section 19 of the Code mandated the promoters or any other person associated with the management of the CD to extend all assistance and cooperation to the IRP as may be required by him in managing the affairs of the CD and under Section 19(3) of the Code the AA give appropriate directions to such personnel who are found to be not cooperating, to comply with the instructions of the IRP. The Hon'ble NCLT also noted that any failure by the management, promoters and officials of the CD to fully cooperate with the IRP would attract the exercise of contempt power vested with the AA which, the AA will not hesitate to exercise in the present instance.

its accounts, are also required to cooperate with the IRP's instructions, including that of freezing debit transactions for the accounts of the CD.

It was further made clear by the NCLT that if the learned IRP confronts any obstructions or violence, the Director General of Police (DGP)/ Superintendent of Police (SP), as applicable, stationed at Jaipur/Jaisalmer, shall be contacted by the IRP and the NCLT requested the DGP/SP to depute sufficient Police force to enable the IRP to function in accordance with the directions issued by the NCLT in its order dated 31st March, 2017, and the provisions of the I&B Code. The NCLT directed that a copy of its order be also sent to the DGP/SP, as may be having their office in Jaipur/Jaisalmer. It was also directed by the NCLT that in relation to the bank accounts of the Corporate Debtor, further operations of the said bank accounts will be carried out only under the signature of the IRP and that the IRP shall be authorized to operate the said bank accounts.

Incidentally, the CD, through its promoters, created further impediments by way of filing interim application under Section 60(5) of the Code about assuming of jurisdiction by an arbitrator to which, the NCLT in its order dated 29.06.2017, noted that there was no stand taken by the CD with regard to the pendency of any arbitration proceedings or appointment of any arbitrator and therefore, how, somebody who was totally a stranger to the insolvency process could assume jurisdiction, was a baffling proposition before the NCLT. The NCLT thus, declared it as illegal and unlawful and restrained holding of any arbitration with regard to the respondent CD which was already under CIRP, wherein an IRP had already been appointed by the AA vide its order dated 31st March 2017 and the NCLT further directed its Registry to send a copy of its order to the respondent for compliance.

In its order dated 31st May 2017, the NCLT stated that the IRP had its his application disclosed that after the issuance of the insolvency process on 31st March, 2017, the amounts had been

withdrawn from the bank account of the CD in the month of April. The NCLT noted that the counsels of respondents Nos.1, 3 & 4 disclosed that they had withdrawn an amount of Rs.30 lakhs from the CD's bank account and they undertook to deposit the said sum within one week thereof. They also disclosed that the further sum of Rs.9.7 lakhs withdrawn thereafter by the respondents would also be forthrightly deposited back. Further, respondents Nos.5, 6, 7 and 8 disclosed that the sum of Rs.40 lakhs was withdrawn by them from the CD's bank accounts and the same would be deposited back within one week. However, the NCLT, before parting with its order dated 31st May 2017, made it clear that the erstwhile management, directors and all others were to strictly comply with the provisions of the Code so as to avoid any adverse, penal action at the hands of the NCLT. The NCLT in its aforesaid order dated 31st May 2017, also felt it necessary to make the aforesaid observations because some instructions were required to apprise the management of companies against which CIRP had been initiated that, once IRP takes over, the role of the erstwhile manager/directors becomes subordinate to the orders of the IRP as contemplated under Sections 17 and 19 of the Code. It was further observed by the NCLT that:

"If we find any malice in the conduct of any person belonging to erstwhile management or any other person, we may be compelled to take extreme steps of initiating prosecution/penalty and issuance of contempt proceedings as per law."

In its aforesaid order, the NCLT noted that the learned IRP had pointed out that a sum of Rs.3 lakhs had been withdrawn on 3rd April 2017 from the respondent CD's account by a Chartered Accountant and further that a sum of Rs.2.50 lakhs was withdrawn by a supplier and a sum of Rs.4.50 lakhs was withdrawn by an advocate. The NCLT issued Show-Cause-Notices to the aforesaid three entities and advised them to deposit back the amounts in the accounts of the CD within seven days and that if the said amounts were deposited, no action would be taken against them and the NCLT be informed about the refund. It further ordered that if the amounts were not deposited, then all the aforesaid persons were to remain present at the next date of hearing on 29th June 2017.

In its order dated 29th June 2017, the NCLT also while disposing of interim applications filed by the respondents, noted that after the affairs of the company shifted to the hands of the IRP, if any application has to be filed to the NCLT, the same can be filed only by the IRP and that applications filed by the erstwhile directors/promoters are not maintainable and hence, the NCLT dismissed the said applications as they were a complete misuse of the process of the court. The NCLT also noted that respondents Nos.1, 3 & 4 had deposited back the amount withdrawn by them and that other respondents Nos.5, 6 and 7 had also returned the amounts withdrawn by them while respondent No.8 had issued a post-dated cheque which was subject to clearance.

Further, in its order dated 7th July 2017, the NCLT noted that despite its earlier orders, the respondent directors of the CD were not physically present and the Tribunal took a very serious note of their absence despite issuing directions for their presence. However, in the interest of justice, the NCLT gave another opportunity for the said persons to be present on 13th July 2017, failing which the law will take its course.

It was made clear by the NCLT that if the learned IRP confronts any obstructions or violence, the Director General of Police (DGP)/ Superintendent of Police (SP), as applicable, stationed at Jaipur/Jaisalmer, shall be contacted by the IRP and the NCLT requested the DGP/SP to depute sufficient Police force to enable the IRP to function in accordance with the directions issued by the NCLT in its order dated 31st March, 2017, and the provisions of the I&B Code. The NCLT directed that a copy of its order be also sent to the DGP/SP, as may be having their office in Jaipur/Jaisalmer. It was also directed by the NCLT that in relation to the bank accounts of the Corporate Debtor, further operations of the said bank accounts will be carried out only under the signature of the IRP and that the IRP shall be authorized to operate the said bank accounts.

In the meantime, the respondent CD filed an appeal against the NCLT's order dated 31st March 2017, before the NCLAT where at the hearing of the said appeal on 17th July 2017, the appeal was dismissed as withdrawn without any liberty to the appellant to challenge the said very order before the appellate tribunal.

It is evident from the NCLT's order dated 16th August 2017 that one of the Directors of the CD filed an application under section 60(5) read with section 74(2) and section 65 of the Code seeking punishment against the IRP which prescribes maximum fine of Rs.1 crore against the wrong-doer and for maximum punishment of imprisonment, for the alleged dereliction in his duties as IRP of the debtor company, alleging that the application filed by the IRP before the AA was motivated and cooked up maliciously against the CD and its directors and that the IRP was acting more as a "recovery agent" of the financial creditor than balancing the interest of the stakeholders. It was also alleged that the IRP had filed CA No.182/2-17 on the false pleas particularly in relation to 3 vehicles alleged to have been not disclosed by the CD and its directors and that in relation to the said vehicles, there was no concealment and hence it did not warrant filing of the application by the IRP. It was also alleged that certain FC's had not been included in the COC, as well that certain OC's had also not been included, all of which vitiates the decision of the COC. The applicant director also alleged certain discrepancies in the public notice issued by the IRP inviting claims from the creditors.

In the reply by the IRP it was brought to the notice of the AA that the efforts of the CD and its directors had been to thwart

the insolvency resolution process by repeatedly approaching several forums and which had also met with failure. Even the appeal filed by the directors of the CD against the AA's order dated 31.3.2017 admitting the petition, was dismissed as withdrawn with no liberty granted whatsoever to the CD to assail the AA's order dated 31.3.2017. The IRP therefore submitted that the CD and its directors have met with failure in relation to challenging the insolvency resolution process, including the one filed in the Supreme Court of India. IRP further pointed out the acts perpetuated by the erstwhile management of the CD in trying to circumvent the order passed by the AA. Their attempt to approach an Arbitrator and also approaching the District Court at Jaisalmer had also been stayed by the order dated 21.7.2017 of the Supreme Court. The present application filed by the director of the CD was only a counter-blast to avoid the contempt proceedings as sought by the IRP for wilful disobedience of orders of the AA passed on various dates against the CD and its directors and further that the Application was nothing but an attempt to delay and obstruct the insolvency process as is *prima-facie* evident from the frivolous allegations made by the erstwhile directors of the CD by initiating multiple proceedings.

The AA, after detailed arguments and upon perusal of the documents/orders found no merit in the application filed by the erstwhile director and noted that the multiplicity of proceedings perpetuated by the erstwhile management of the CD evidences that there is a constant effort to undermine the orders passed by the AA as well as the authority of the IRP as conferred under the Code. The AA therefore held that filing of such applications exposes the fallacy of the applicant's moves and the abuse of process of the Court. Rejecting the application, the AA imposed a cost of Rs.2 lakhs on the applicant director and made it clear that it was to be paid personally by the applicant-director from his own account without debiting the CD company's accounts.

CONCLUSION

The aforesaid orders of the AA in *Hotel Gaudavan* (supra) clearly shows the repeated attempts made by erstwhile management of the debtor company to somehow thwart the attempts of the insolvency resolution process and to undermine the authority of the Resolution Professional. The AA had been forthcoming in giving favourable orders for the IRP to effectively carry out its duties and obligations under the Code. In this regard, it is pertinent to note that in a recent seminar, the Hon'ble Finance Minister of the Government of India had sent a strong signal to loan defaulters saying that either they pay up or get out to make way for new entrepreneurs as the new bankruptcy law has reversed the debtor-creditor relationship. He also made it clear that the message of the Code is now clear that the debtors will have to make sure that their debts are serviced and in the alternative, the debtor exits by taking in a new partner or a new entrepreneur comes in and protects the assets. He also said that the law has been in place for one year and the government would wait and watch the judicial pronouncements under the Code and as and when further improvements are needed, the same would be taken to adhere to the timelines provided in the Code, where speed is the essence and that for succession implementation of the Code, mandatory provisions need to be followed strictly (ref: The Times of India dated 20.08.2017).

CS

Special Powers of Supreme Court against Inherent Powers of NCLAT under IBC, 2016

Insolvency application allowed to be withdrawn post admission



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INTRODUCTION

The Supreme Court of India vide its order dated July 24, 2017, in the case of *Lokhandwala Kataria Construction Private Limited v. Nisus Finance and Investment Managers LLP*¹ (Civil Appeal No. 9279 of 2017), used its special powers under Article 142 of Constitution of India to allow the two organisations to withdraw from insolvency proceedings and settle their loan dispute despite the case having been admitted by the National Company Law Tribunal, Mumbai (NCLT-Mumbai) vide its order² dated June 15, 2017 as well as being denied by the National Company Law Appellate Tribunal (NCLAT) vide its order³ dated July 13, 2017. The judgment pronounced by Supreme Court is an important one in the course of development of the Insolvency and Bankruptcy Code, 2016 (**hereinafter referred to as the “IBC 2016” or “the Code”**) in which the inherent powers of the Tribunals’ were prayed to be invoked by the parties to the suit for settlement of their disputes, which were denied both by the NCLT and NCLAT but the Apex Court used its extraordinary powers to serve justice.

The article talks about the order of Supreme Court of India dated 24.7.2017, in the case of *Lokhandwala Kataria Construction Private Limited v. Nisus Finance and Investment Managers LLP* (Civil Appeal No. 9279 Of 2017), wherein SC used its special powers under Article 142 of Constitution of India to allow the two organisations to withdraw from insolvency proceedings and settle their loan dispute despite the case having been admitted by the National Company Law Tribunal, Mumbai (NCLT-Mumbai) vide its order dated 15.6.2017 as well as being denied by the National Company Law Appellate Tribunal (NCLAT) vide its order dated 13.7.2017.

FACTS OF THE CASE

In the present case, Nisus Finance and Investment Managers LLP (**hereinafter referred to as NFIM or the Appellant**) filed a petition under section 7 of IBC 2016 before the Mumbai Bench of NCLT against Lokhandwala Kataria Constructions Private Limited (**hereinafter referred to as LKCPL or the Corporate Debtor**) as LKCPL failed to honor its guarantee to redeem the debentures issued by its group company namely Vista Homes Private Limited (**hereinafter referred to as Vista Homes**). Vista Homes borrowed Rs.27.86 crores against issue of debentures and the Appellant being the facility agent on behalf of the pool of debenture holders, initiated the insolvency proceedings upon such default of repayment by the Corporate Debtor. Based on the petition filed by NFIM, NCLT affirmed that as to the petition, two points are complied with – (i) availing funds, (ii) default in repayment; and hence, the petition under section 7 was admitted. However, the Petitioner and Defendant agreed to settle their dispute between themselves and applied to NCLT for withdrawal of application filed under Section 7 of IBC, 2016 but NCLT declined their request as Rule 8 of I&B (Application to Adjudication Authority) Rules, 2016 (**hereinafter referred to as “IBC Rules”**) allows the application to be withdrawn before its admission. The Appellant reached to the Appellate Tribunal i.e. NCLAT and sought relief of withdrawal of application by requesting the Bench to exercise its inherent power, under Rule 11 of the National

1 http://supremecourtindia.nic.in/supremecourt/2017/21226/21226_2017_Order_24-Jul-2017.pdf

2 http://nclt.c2k.in/OtherNCLT/Publication/Mumbai_Bench/2017/Other/355.pdf

3 http://nclat.nic.in/final_orders/Principal_Bench/2017/insolvency/13072017AT952017.pdf

Company Law Appellate Tribunal Rules, 2016 (**hereinafter referred to as “NCLAT Rules”**). However, NCLAT observed that said Rule 11 has not been adopted for the purpose of IBC 2016 and only Rules 20 to 26 have been adopted. Therefore, the Bench in the absence of any specific inherent power and claiming it to be a case with no merits to invoke such powers declined the request of the Appellant for exercising inherent power and consequently refused to allow withdrawal of application filed upon the Corporate Debtor. The matter was further appealed at the Supreme Court wherein the relief was finally granted to the Appellant and application was allowed to be withdrawn.

PROVISIONS OF LAW

Section 7 of the IBC 2016, which deals with application by financial creditor reads as follows:

7. (1) A financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

Rule 8 of I&B (Application to Adjudicating Authority) Rules, 2016, which reads as follows:

8. Withdrawal of Application - The Adjudicating Authority may permit withdrawal of the application made under Rules 4, 6 or 7, as the case may be, on a request made by the applicant before its admission.

Rule 11 of the National Company Law Appellate Tribunal Rules, 2016 which reads as follows:

11. Inherent powers - Noting in these rules shall be deemed to limit or otherwise affect the inherent powers of the Appellate Tribunal to make such orders or give such directions as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Appellate Tribunal.

Article 142 of the Constitution of India

142. Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc:

(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision

It is a clear precedent which was sent long by the Supreme Court that inherent powers cannot be invoked in cases to override provisions of law which expressly prohibit for any remedy. If provision has been made for every contingency, it stands to reason that there is no scope for, the invocation of the inherent powers of the Court to make an order necessary for meeting the ends of justice.

in that behalf is so made, in such manner as the President may by order prescribe xxx

OBSERVATIONS OF SUPREME COURT

The Supreme Court while adjudicating the matter observed that the the view of NCLAT for not invoking its inherent powers, *prima facie*, appears to be the correct position in law but yet the Supreme Court, using its own special powers allowed the parties a second chance to settle their dispute by invoking Article 142 of the Constitution of India to serve justice to the parties.

JUDGMENT OF SUPREME COURT

The Supreme Court despite acknowledging the fact that the correct position of law does not allow the application to be withdrawn considered the fact that the parties have agreed to some consent terms amongst them outside the court and have submitted the undertaking to abide by such terms. In view of such submissions by the parties the apex court exercised its powers under Article 142 to serve justice by allowing the parties a second chance to settle their disputes and thereby setting aside the order of the NCLAT which refused to invoke its inherent powers to allow the application to be withdrawn.

OUR ANALYSIS

It is clearly laid down under the IBC 2016 that before admission of any application under Section 7, it is open to the financial creditor to withdraw the application under Rule 8 of IBC Rules but the same can only be exercised before its admission as once it is admitted, it cannot be withdrawn and is required to



follow the procedures laid down under Sections 13, 14, 15, 16 and 17 of IBC 2016 for the revival of the entity. As stated by NCLAT, even the financial creditor who filed the application cannot be allowed to withdraw the application once admitted, until claims of all the creditors are satisfied by the corporate debtor. The view pronounced by the NCLAT goes with the spirit of the IBC 2016 which provides remedy for all the creditors at large instead of one to one recovery or settlements of the companies with its creditors. It has to be kept in mind that once the process of insolvency is commenced against any company, the remaining course of action is set to an auto-pilot mode and even the NCLT or NCLAT are left with very limited powers and they are to largely oversee the implementation of the provisions of the Code. Unfortunately, the apex court has missed on this particular occasion to give an eye to details and exercised its special powers which the NCLAT refused to invoke as it found no merits for invoking the same due to presence of specific provisions under the Code, 2016.

Inherent powers means powers which are not, expressly or impliedly, specified in law. These exist as an age-old and well-established principle that every court has power to act *ex debito justitiae* to do that real and substantial justice for the administration of which alone it exists and to prevent the abuse of the process of the court. Though, it is pertinent to note that the inherent power of the Court cannot be invoked to nullify a statutory provision. Supreme Court in *Arjun Singh vs. Mohindra Kumar and others*⁴ 1963 stated that –

“It is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words, if there are specific provisions of the Code⁵ dealing with a Particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter the inherent power of the Court cannot be invoked in order to cut across the powers conferred by the Code. The prohibition contained in the Code need not be express but may be implied or be implicit from the very nature of the provisions that it makes for covering the contingencies to which it relates.”

From the above, it is a clear precedent which was sent long by the Supreme Court that inherent powers cannot be invoked in cases to override provisions of law which expressly prohibit for any remedy. If provision has been made for every contingency, it stands to reason that there is no scope for, the invocation of the inherent powers of the Court to make an order necessary for meeting the ends of justice. In the instant case, Rule 8 clearly lays down that application cannot be withdrawn once the same has been admitted by the Tribunal but Supreme Court has set a wrong foot by overlooking such express prohibition and allowing the entity to withdraw its application. While exercising the inherent power, there is no such legislative guidance to deal with those special situations of the case and so the exercise of power depends upon the discretion and wisdom of the court exercising it, and also upon the facts and circumstances of the case. However, the same should not be treated as a *carte blanche* to grant any relief by overlooking the express or implied provisions contained in the law and



therefore the inherent powers of the court being complementary to the powers specifically conferred, are free to be exercised by the court subject to its exercise being in a way that it should not be **in conflict with what has been expressly provided in the law.**

IMPACT OF JUDGMENT

Article 142 of the Constitution in our view has been provided to supplement the powers of the apex court to serve justice and it is justified to exercise this power if there is any gap in law which creates an unknown walkout from justice, and hence Article 142 is to serve justice to the parties by supplementing those gaps. However, under the provisions of the IBC 2016 there is a reasoning for not allowing withdrawal of an application after its admission as the aim is not to resolve dispute of merely two parties but an overall revival of the entity by devising a suitable resolution plan so that the economy at large does not have to face the issues of increasing NPAs. Once the application is admitted by the NCLT, it triggers the whole process of insolvency resolution which is an *auto-pilot* procedure as all the steps and actions are pre-definitive and time bound. The intent of the IBC 2016 is to provide every creditor a chance to participate in this process to safeguard the interest of all of them together instead on individual basis and which is why NCLAT could not use its inherent powers to allow the Appellant to withdraw his application. The verdict of Supreme Court has not be seen as against the provisions of the Code 2016 but an exceptional case, where the parties were allowed a second chance. This however, should not be used as a precedent to seek relief for withdrawal of applications under IBC 2016 because the use of special powers by Supreme Court and inherent powers by NCLAT can only be done in cases where it is required to meet the ends of justice. To sum up, it can be said that the verdict shall go a long way in the history of the Code and assure justice to be served to parties in the rarest cases where justice is being prejudiced under the stringent provisions of the Code, 2016. CS

DISCLAIMER

This write up is intended to initiate academic debate on a pertinent question. It is not intended to be a professional advice and should not be relied upon for real life facts.

⁴ <https://indiankanoon.org/doc/1608703/> Citation - (1964 AIR 993 SCR(5) 946)

⁵ Code here refers to Civil Procedure Code

Insolvency and Bankruptcy Code, 2016: A Sustainable Structuring of Stressed Assets



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INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 is a significant reform which received assent of the President on 28th May, 2016 after overcoming various hassles and hurdles. It had been a welcome overhaul to all the existing legal system for dealing with insolvency and bankruptcy of not only corporates but also Individuals, partnership firms and other entities.

The Insolvency and Bankruptcy Code, 2016 is a welcome overhaul which has directly addressed in resolving the insolvency and bankruptcy issues of corporates and simultaneously serving creditors and public financial institutions by helping them in recovery of bad and distress loans and ultimately tackling Non Performing Assets. The Main objective of Code is distribution of the effects of a debtor in the most expeditious, equal and economical mode. The Code lays down the complete procedure of Insolvency Resolution process which involves collating claims and reviewing the requisite financial and other relevant records of the company. The introduction of this Code has brought in ample opportunities for professionals ranging from being appointed as official liquidator to managing the financial health of corporates in case of distressed assets.

The principal focus of modern insolvency legislation and business debt restructuring practices is not the liquidation and elimination of insolvent entities but on the remodeling of the financial and organizational structure of debtors experiencing financial distress so as to permit the rehabilitation and continuation of their business. In some jurisdictions, it is an offence under the insolvency laws for a corporation to continue in business while insolvent. Ultimately the basic objective of insolvency laws is the distribution of the effects of a debtor in the most expeditious, equal and economical mode and liberation of his person from the demands of his creditors when he has made a full surrender of his property.

ORIGIN AND BACKGROUND OF INSOLVENCY AND BANKRUPTCY

The Statute of Bankrupts of 1542 was the first statute under English law dealing with bankruptcy or insolvency. Bankruptcy is also documented in East Asia. According to al-Maqrizi, the Yassa of Genghis Khan contained a provision that mandated the death penalty for anyone who became bankrupt three times.

In India, the need was prominently felt in the year 1981 when the Reserve Bank of India was deeply concerned over the issue of alarming increase in the incidence of industrial sickness which was resulting in loss of production, loss of employment, loss of government revenue and unnecessary blocking of huge funds advanced by the banks and financial institutions to the industrial undertakings. This led Government of India to constitute various Committees like Shri T. Tiwari Committee, Justice V.B. Balakrishna Eradi Committee, N L Mitra Committee, JJ Irani Committee, etc.

The Code was introduced with the primary objective of increasing lender's confidence and facilitating expansion of the credit market in India. The main objective of the new

law is 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.

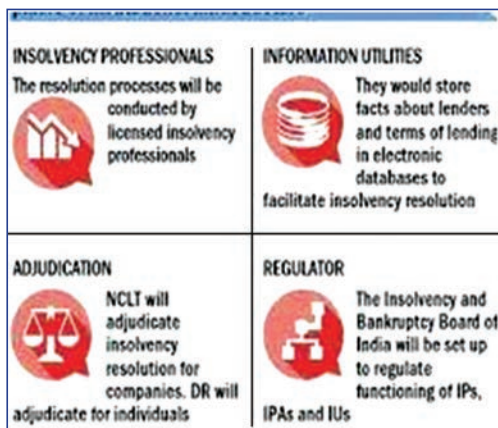


The law of insolvency is a social legislation which has been enacted to provide respite and relief to the honest debtors who due to any unfortunate or unforeseen circumstances become incapable of paying back their debts. Its object is also of securing distribution of a debtor's estate among his creditors equitably and thereafter to release him under certain conditions from liability in respect of his debts and obligations. Under the Constitution of India 'Bankruptcy & Insolvency' is Entry 9 in List III - Concurrent List, (Article 246 –Seventh Schedule to the Constitution) i.e. both Center and State Governments can make laws relating to this subject.

FIVE MAIN PILLARS/ CONSTITUENTS OF CODE

1. Insolvency professionals

Insolvency professional is a professional endowed with specialized knowledge, training and recognized by Insolvency Professional Agency and Insolvency and Bankruptcy Board of India for undertaking insolvency proceedings. The Code has specifically prescribed Appointment, Qualification and Registration of professionals for acting as an intermediary to play a vital role in insolvency process. It further provides that no person is allowed to render service as an IP except as a member of the Insolvency Professional Agency. Such member is also required to register with the board.



6 The law of insolvency is a social legislation which has been enacted to provide respite and relief to the honest debtors who due to any unfortunate or unforeseen circumstances become incapable of paying back their debts. Its object is also of securing distribution of a debtor's estate among his creditors equitably and thereafter to release him under certain conditions from liability in respect of his debts and obligations.

It shall be duty of professionals to abide by all the duties and functions like making public announcement, to take immediate custody and control of all the assets of the corporate debtor, managing the affairs of debtors, collecting the information, preparing the list of claims, intimating the creditors and other stake holders, to hold and attend the meetings, to prepare information memorandum and resolution plans etc.

The primary objective of an Insolvency professional is to find a resolution plan. The professionals can act in two ways: Interim Resolution Professional, who are appointed by the borrower for the first 30 days of proceedings at the National Company Law Board; and Resolution Professionals, who are usually appointed by the committee of creditors for the next 150-240 days of the stipulated period.

2. Insolvency professional Agency

Insolvency professional Agency means any person registered with the Board under section 201 as an insolvency professional agency. In simple terms, Agency is a section 8 Company registered with Board of Insolvency & Bankruptcy of India fulfilling the following conditions :

- has sole object to carry on the functions of an insolvency professional agency under the Code;
- has a minimum net worth of ten crore rupees;
- has a paid-up share capital of five crore rupees,
- it is not under the control of person(s) resident outside India,
- not more than 49% of its share capital is held, directly or indirectly, by persons resident outside India; and
- it is not a subsidiary of a body corporate through more than one layer:
- itself, its promoters, its directors and persons holding more than 10% of its share capital are fit and proper persons.

The insolvency agency has been envisaged to discharge the following functions as specified under The Insolvency and Bankruptcy Code, 2016:

- Grant membership to Insolvency Professionals who wants to be its member and fulfil all requirements set out in its byelaws on payment of membership fee.
- Lay down standards of professional conduct for its members.
- Monitor the performance of its members.
- Safeguard the rights, privileges and interests of insolvency professionals who are its members.
- Suspend or cancel the membership of insolvency professionals who are its members on the grounds set out

- in its bye-laws.
- Redress the grievances of consumers against insolvency professionals who are its members.
- publish information about its functions, list of its members, performance of its members and such other information as may be specified by regulations

The Code has laid down registration framework for Professional Agency as provided under section 199 to 201 & Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016. Section 199 makes it mandatory for every person who desires to carry on the business of Insolvency Professional Agency to obtain the registration certificate from the Board before starting the business and section 200 provides the principles to be observed by the Board while granting the registration certificate to the Insolvency Professional Agency. Section 201 Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016 provides for the procedure of applying to the Board for the registration of Insolvency Professional Agency and the manner in which same shall be dealt by the Board, method of surrendering the registration certificate and the provisions for suspension and cancelation of Registration Certificate.

The Code has laid down registration procedure for agency, stating an application for the registration of Company as an Insolvency Professional Agency shall be made to the Board in the Form A of Schedule to the Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016.



Application for registration shall state the following:

- Name, Address of Registered office and Principal place of business.
- CIN and PAN details
- Name, address, designation and contact Details of the person authorized to make application.
- Declaration/ confirmation that memorandum & Articles of association and bye-laws are consistent with the Regulations.
- Stating the clause number of the provisions of the bye-laws which are in additionally applicable as per Regulations, 2016
- Details of the persons holding more than 10%, directly or indirectly, of the share capital of the applicant.
- Who exercises the control of Applicant Company.

- Details of the Board of Directors of the applicant Company.
- Details of persons resident outside India holding more than 49% of the share capital of the applicant?
- Details of the infrastructure of the Company like number and location of offices, IT and other computer facilities.

Application for registration shall be enclosed/supported by the following documents:

- Board Resolution authorizing the director of the Company to make the application.
- Copies of Memorandum and Articles of Association
- Audited financial statements for last 3 years or form the date of incorporation whichever is less if in case promoters or person who is in control of the Applicant Company or person holding more than 10% of shares in Applicant Company is a Company.

After proper inspection and satisfaction, board may grant registration to professional insolvency agency in form B of the schedule to regulations within period of sixty days of receipt of application. However, board also has powers to reject the application on reasonable grounds after giving opportunity of being heard.

3. Insolvency and Bankruptcy Board of India

India's corporate regulatory system for the resolution or reconstruction of failing companies and their liquidation were done with the aid of some fragmented laws previously. In the absence of a well-tailored corporate insolvency and bankruptcy regulation, remaking of failing companies became a difficult task. This has adversely affected the interest of the both creditors and the affected corporate. Sick companies never got an opportunity to exit their business by compensating their creditors. In this context, to change the situation, the government enacted Insolvency and Bankruptcy Code 2016. The Insolvency and Bankruptcy Board of India (IBBI) is the most important institutional arrangement for the new insolvency and bankruptcy regime. It was created as the refereeing institution with multiple tasks including creation of regulations and control of agencies and professionals involved in the insolvency and bankruptcy business.

The IBBI was established on October 1, 2016 in accordance with the provisions of the Code and has been constituted as a Technical Committee under the IBBI regulations 2017.

The IBBI has a ten-member board including a Chairman. Following is the structure of the IBBI.

- One Chairperson
- Three members from Central Government officers not below the rank of Joint Secretary or equivalent.
- One nominated member from the RBI.
- Five members nominated by the Central Government; of these, three shall be whole-time members. More than half of the directors of its board shall be independent directors.

4. Insolvency Information utility

The information utility stores financial information that helps to establish defaults as well as verify claims expeditiously. Having such a system would facilitate completion of transactions under Code within the time period. It shall have compliance officer who shall ensure compliance of all provisions of Code.

Under Code, Regulator Insolvency and Bankruptcy Board of India (IBBI) registers and regulates Information Utilities that receive and store financial information in a universally accessible format duly authenticated by borrowers or creditors. An Information Utility will have authenticated, and verified financial information and the obligation will be on all financial creditors, operational creditors and corporate debtors to provide information to the entity.

National e-Governance Services Ltd. (NeSL), a government entity, has received the in-principle approval for establishing an Information Utility (IU) in India - the first under the Insolvency & Bankruptcy Code (IBC). NeSL is owned and promoted by leading public institutions like State Bank of India, Life Insurance Corporation, Canara Bank, Bank of Baroda, ICICI Bank, CDSL, HDFC, Axis Bank, Union Bank of India and NABARD among others.



The Code mandates that any entity who intends to carry business of information utility needs to procure a certificate of registration from the Board. The Regulations read with the Code provide that only public companies with a minimum net worth of INR 50.00 crore are eligible to be registered as IUs. Certain other eligibility criteria are as under:

- The sole object of the public company should be to provide core services
- not more than 49% of its total voting power or its paid up-equity capital can be held by persons resident outside India.
- Information Utility, its promoters, its directors, its key managerial persons and persons holding more than 5% of its paid-up equity share capital or its total voting power, are fit and proper persons as per the Regulations.

The certificate of registration issued to Information Utility be valid for a period of five years from the date of its issue. Any application for renewal of registration is required to be made by an Information Utility at least six months prior to the expiry of its registration.

The Regulations provide for an in-principle approval to be obtained by any person seeking to establish an IU which shall be valid for a maximum period of one year. Such in-principle approval may be granted subject to the satisfaction of the

Board that the applicant is a fit and proper person and it would be able to meet the registration criteria prescribed under Regulations. During the validity of the in-principle approval, an application for obtaining a certificate of registration may be made to the Board.

5. Insolvency Adjudicating and Appellate Authorities

For expeditious disposal of insolvency application and settlement of claims, the Code has established and constituted Adjudicating and Appellate Authorities.

Adjudicating Authorities

(a) For Corporate Persons (Companies & LLPs)- National Company Law Tribunal (NCLT) having territorial jurisdiction over the place where the registered office of the corporate person is located.

(b) For Individuals and Partnership Firms- Debt Recovery Tribunal (DRT) having territorial jurisdiction over the place where the individual debtor actually and voluntarily resides or carries on business or personally works for gain and can entertain an application under IBC 2016 regarding such person.

Appellate Authorities

(a) For Corporate Persons (Companies & LLPs)- National Company Law Appellate Tribunal (NCLAT), any person aggrieved by order of NCLT may file appeal to NCLAT within 30 days of such order.

(b) For Individuals and Partnership Firms- Debt Recovery Appellate Tribunal (DRAT), any person aggrieved by order of DRT may file appeal to DRAT within 30 days of such order.

No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter of NCLT, NCLAT. Any person aggrieved by an order of the National Company Law Appellate Tribunal or Debt Recovery Appellate Tribunal as the case may be, may file an appeal to the Supreme Court on a question of law arising out of such order under this Code within forty-five days from the date of receipt of such order.

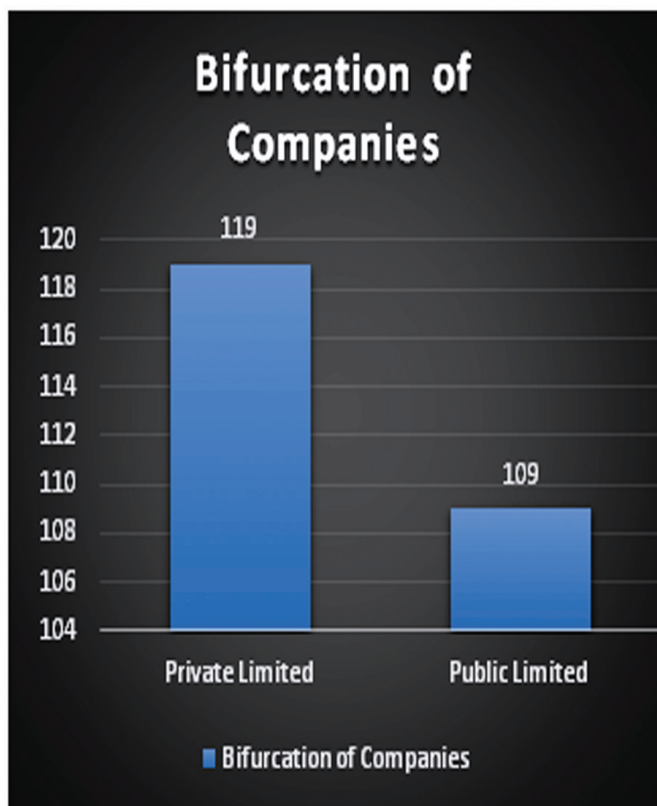
IMPLEMENTATION CHALLENGES

Although the Code offers a time-bound resolution process aimed at maximising the value of a distressed business, but despite all the benefits, board is still facing certain challenges like NCLT and Court intervention as there are only 11 benches all over India with 16 judicial and 7 technical members compared to as many as 228 cases of application for insolvency, limited availability of professionals as Code has laid down stringent qualification and experience criteria, lack of Insolvency information utility infrastructure, failure of creditors and management to hand over the assets to insolvency professionals, cross border insolvency, establishment of infrastructure at offices, etc.

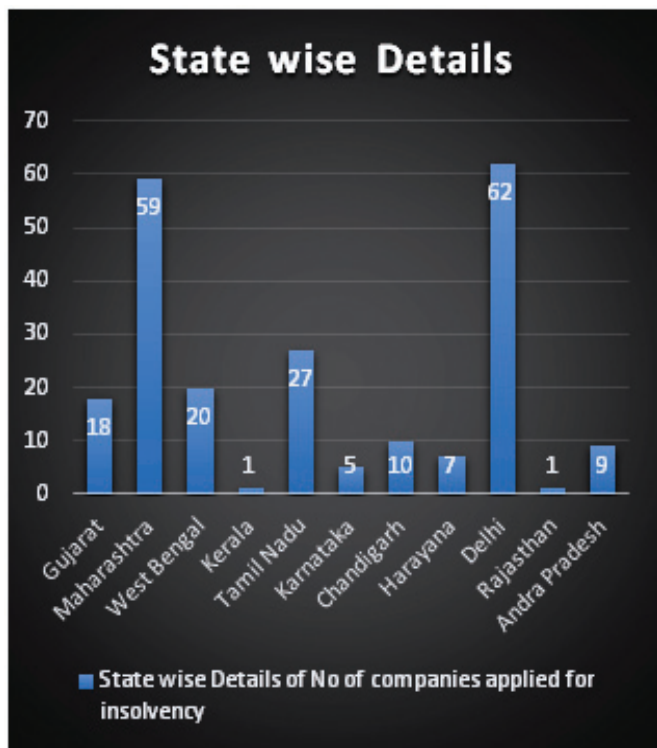
STATISTICAL FACTS AND FINDINGS

So far as many as 228 Companies have made public announcements for Insolvency and also had appointed Insolvency professionals in India.

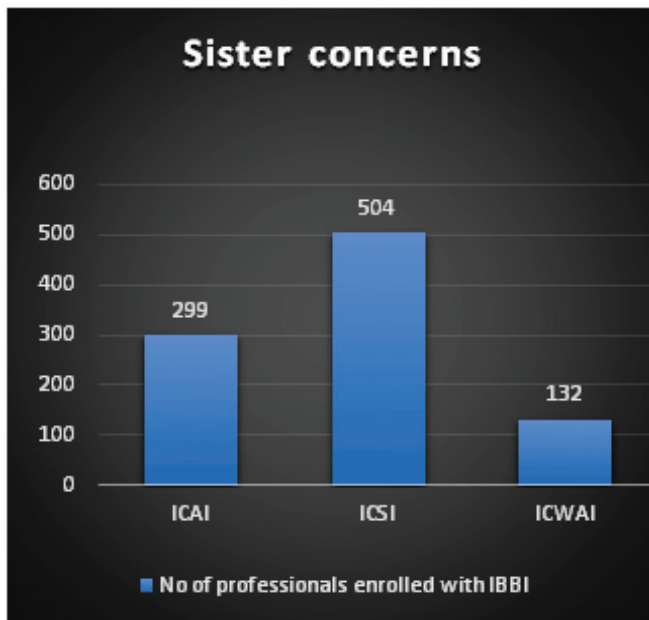
1. Private vs. public limited companies:



2. State wise details of companies :



3. Details of Insolvency Professionals of sister concerns:



4. Global Recovery Rate

The recovery rate is recorded as cents on the dollar recovered by secured creditors through judicial reorganization, liquidation or debt enforcement (foreclosure or receivership) proceedings. The calculation takes into account the outcome: whether the business emerges from the proceedings as a going concern or the assets are sold piecemeal. Then the costs of the proceedings are deducted (1 cent for each percentage point of the value of the debtor's estate). The recovery rate is the present value of the remaining proceeds, based on end-2015 lending rates from the International Monetary Fund's International Financial Statistics, supplemented with data from central banks and the Economist Intelligence Unit.

Keeping viable businesses operating is among the most important goals of bankruptcy systems. A good insolvency regime should inhibit premature liquidation of sustainable businesses. It should also discourage lenders from issuing high-risk loans—and managers and shareholders from taking imprudent loans and making other reckless financial decisions. A firm suffering from bad management choices or a temporary economic downturn may still be turned around. When it is, all stakeholders benefit. Creditors can recover a larger part of their investment, more employees keep their jobs, and the network of suppliers and customers is preserved.

According to World Bank Survey, there were about 220 economies being ranked for insolvency regime. The below mentioned are some of them:

Economy	Resolving insolvency DTF	Resolving insolvency Rank	Recovery Rate (Cents in Dollar)	Time (Years)	Cost (% of estate)
Bangladesh	27.02	151	27.0	4.0	8.0
Belgium	84.32	10	89.90	0.9	3.5
Brazil	49.15	67	15.8	4.0	12.0

Canada	81.43	15	87.4	0.8	7.0
Chile	55.51	55	33.5	3.2	14.5
China	55.82	53	36.9	1.7	22.0
Germany	92.28	3	84.4	1.2	8.0
India	32.75	136	26.0	4.3	9.0
Japan	93.34	2	92.1	0.6	4.2
United States	89.19	5	78.6	1.5	10
United Kingdom	82.04	13	88.6	1.0	6.0
Finland	93.89	1	90.3	0.09	3.5

Secretaries but for all the professionals despite requisite qualification and experience. For Company Secretaries, the scope for IBBI has been divided into two categories viz. 1. To act as Liquidators for Banks, Financial Institutions and NBFCs. 2. To act as Insolvency Professionals for corporate persons and individuals.



The wide range of opportunities for Insolvency professionals commence from identifying and screening the sick companies which require restructuring, evaluating the risk involved and accordingly planning to mitigate the risks, preparing the list of claims, valuing the properties and assets, negotiating with creditors, debtors, Adjudicating authorities and other government bodies, holding meetings, supervision and implementation of repayment plan, advising management, creditors on utilization of resources, drafting petitions and making public announcement and appearing before NCLT and DRT etc.

CONCLUSION

This Code is indeed a vital reform, the rapid enactment and implementation of the legislation has surprised many. This Code expressly addresses the termination of insolvency proceedings deriving from lack of assets to satisfy the creditors against distressed assets. Corporate stress needs urgent and decisive revival plan, if proper plans and strategies are prepared and implemented then there would be optimum utilization of resources. Important development of Insolvency Law argues that the most important development in contemporary insolvency law and practice is the shift towards a rescue culture rather than full creditor satisfaction and greater emphasis being placed on company rescue and going-concern value preservation and creates the frameworks and processes for helping honest enterprises and individuals to get a fresh start from the problems of insolvency.



Opportunities for professionals

Insolvency and Bankruptcy Code, 2016 has bought in widespread, ample and abundant scope for not only Company

We being professionals will have to manage insolvency processes in true letter and spirit in time bound manner as scope of the Code is wide spread and far reaching. Hence, the success of the Code will depend on how we implement it. **CS**

Information Utility – A New Home for Digital India



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INTRODUCTION

Information Utility, as seen from different aspects of its requirement, is a data base maintenance bureau for providing authentic information. The bureau collects information, preserves them and provides the recipient when needed. The need for such a house is essential for ensuring authentic information. Information Utilities receive and store financial information in a universally accessible format duly authenticated by borrowers or creditors. The data base of the Information utility is managed by authenticated and verified financial information provided by financial creditors, operational creditors and corporate debtors.

Under the Insolvency and Bankruptcy Code, 2016 a new concept 'Information Utility' has been introduced. The National Company Law Tribunal recognizes financial information of any corporate debtor provided by the Information Utility. Various corporate entities may submit financial information to the Information Utility or access the information from the Information Utility. This is a single window for maintaining digital information in secured and authentic manner.

INFORMATION UTILITY UNDER INDIAN LAW

The concept of information utility has derived its significance with enactment of the Insolvency and Bankruptcy Code, 2016 ('the Code') by the Government of India. The Code provides provisions for establishment and registration of information utilities for providing authenticated financial information which the adjudicating authorities i.e. the National Company Law Tribunal accepts as proof in documents. The Central Government prescribed the Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017 ('the regulation') for regulation of, and matter connected with, the Information Utilities.

Section 3(21) of the Code defined the term and accordingly 'information utility means a person who is registered with the Board as an information utility under section 210'. Section 210 of the Code provides for registration of Information Utility with the Insolvency and Bankruptcy Board of India (IBBI or the Board) to be recognized as an authentic entity for the purpose of the Code. Chapter V of the Code provides provisions with respect to Information Utilities.

ELIGIBILITY FOR FUNCTIONING AS INFORMATION UTILITY

No person shall carry on its business as information utility without a certificate of registration issued in that behalf by the IBBI. Any entity desirous of forming as an Information Utility has to obtain specific registration from the IBBI.

ELIGIBILITY FOR REGISTRATION

No person shall be eligible to be registered as an information utility unless it is a public company and its sole object is to provide core services and other services. It should have a minimum net worth of fifty crore rupees. It should not be under the control of persons resident outside India.

Further, not more than 49% of its total voting power or its paid-up equity share capital is to be held, directly or indirectly, by persons resident outside India.

The person itself, its promoters, its directors, its key managerial personnel, and persons holding more than 5%, directly or indirectly, of its paid-up equity share capital or its total voting power, are to be fit and proper persons. For determining whether a person is fit and proper person, the IBBI may take account of relevant considerations, including (i) integrity, reputation and character, (ii) absence of conviction by a court for an offence; (iii) absence of restraint order, in force, issued by a financial sector regulator or the Adjudicating Authority,

6 An information utility, for the conduct of its operations, shall have bye-laws consistent with the Code. The bye-laws shall be consistent with and provide for all matters contained in the Technical Standards, if any. Without prejudice to the generality, the bye-laws shall provide for (a) the manner and process of providing core services and other services under these Regulations; (b) risk management; (c) rights of users; and (d) grievance redressal.

and (iv) financial solvency.

A person may be considered 'fit and proper' if he has been sentenced to imprisonment for a period of less than six months. A person shall not be considered 'fit and proper' if he has been sentenced to imprisonment for a period (a) of not less than six months, but less than seven years and a period of five years has not elapsed from the date of expiry of the sentence, or (b) of seven years or more.

IN-PRINCIPLE APPROVAL FOR REGISTRATION

Any person who seeks to establish an information utility may make an application for an in-principle approval along with a non-refundable application fee of five lakh rupees. If the IBBI is satisfied that the applicant is a fit and proper person and the proposed or existing company which may receive registration would be able to meet the eligibility criteria, it may grant in-principle approval which shall be valid for a period not exceeding one year and be subject to such conditions as it deems fit. During the validity of in-principle approval, the company may make an application for a certificate of registration as an information utility to the IBBI without further payment of application fee.

REGISTRATION OF INFORMATION UTILITY

Section 210 of the Code provides provisions for registration of the Information Utility. Regulation 4 provides that a person eligible for registration as an information utility may make an application to the Board in Form A of the Schedule, along with a non-refundable application fee of five lakh rupees. The Board shall acknowledge an application within seven days of its receipt.

SHAREHOLDING OF INFORMATION UTILITY

According to Regulation 8, no person shall at any time, directly or indirectly, either by itself or together with persons acting in concert, acquire or hold more than ten per cent of the paid-up equity share capital or total voting power of an information utility. However, the following persons may, directly or indirectly, either by themselves or together in concert, acquire or hold up to twenty-five percent of the paid-up equity share capital or total voting power of an information utility :-

- (a) government company;
- (b) stock exchange;
- (c) depository;
- (d) bank;
- (e) insurance company; and

- (f) public financial institution.

A person resident in India may, directly or indirectly, either by itself or together with persons acting in concert, hold up to fifty-one percent of the paid-up equity share capital or total voting power of an information utility till the expiry of three years from the date of its registration, or such period as may be extended by the Board. The above provisions shall not however apply to the holding of shares or voting power by the Central Government or a State Government.

CONDITIONS FOR REGISTRATION

The certificate of registration shall be valid for a period of five years from the date of issue. The certificate of registration shall be subject to the conditions that the information utility shall–

- (a) abide by the Code;
- (b) abide by its bye-laws;
- (c) at all times after the grant of the certificate continue to satisfy the requirements under regulation 5(4);
- (d) pay a fee of fifty lakh rupees to the Board, within fifteen days of receipt of intimation of registration or renewal from the Board, as applicable;
- (e) pay an annual fee of fifty lakh rupees to the Board, within fifteen days from the end of every year from the date of grant or renewal of the certificate of registration, as applicable;
- (f) seek prior approval of the Board for-
 - (i) the acquisition of shares or voting power by a person, which taken together with paid-up equity shares or voting power, if any, held by such person, entitles him to hold more than five per cent, directly or indirectly, of the paid-up equity share capital or total voting power;
 - (ii) a change of control;
 - (iii) a merger, amalgamation or restructuring;
 - (iv) sale, disposal, or acquisition of the whole, or substantially the whole, of its undertaking;
 - (v) voluntary liquidation, dissolution, or any similar action involving the discontinuation of its business.
- (g) intimate the Board if a person holding more than five per cent, directly or indirectly, of its paid-up equity share capital or total voting power ceases to hold at least five per cent, directly or indirectly, of its paid-up equity share capital or total voting power, within fifteen days from such cessation;
- (h) take adequate steps for redressal of grievances;
- (i) take over information stored with other information utilities on the directions of and in the manner directed by the Board, and provide core services to their users; and
- (j) abide by such other conditions as may be stipulated by the Board.

POWER OF BOARD FOR REGISTRATION

On receipt of the application, the Board may, on being satisfied that the application conforms to all requirements, grant a certificate of registration to the applicant or else, reject, by order, such application.

The Board may require the applicant to submit, within reasonable time, additional documents or clarification that it deems fit. The Board may also require the applicant to appear, within reasonable time, before the Board in person, or through its authorised representative for clarifications required for processing the application. If the Board is satisfied, after such inspection or inquiry as it deems necessary, may grant a certificate of registration to the applicant as an information utility in Form B of the Schedule, within

6 National e-Governance Services Ltd. (NeSL), a Government entity, has received the in-principle approval for establishing an Information Utility in India, the first under the Insolvency & Bankruptcy Code. Once the information utility is set up, it will help the National Company Law Tribunal (NCLT) in taking decisions and implementation of Code. Within a year, it is expected to be fully functional benefiting borrowers and creditors.

sixty days of receipt of the application, excluding the time given by the Board for removing the deficiencies, or presenting additional documents or clarifications, or appearing in person, as the case may be.

If, after considering an application, the Board is of the *prima facie* opinion that the registration ought not to be granted or ought not to be renewed, or be granted or renewed with additional conditions, it shall communicate the reasons for forming such an opinion within forty-five days of receipt of the application, excluding the time given by the Board for removing the deficiencies, presenting additional documents or clarifications, or appearing in person, as the case may be. The applicant shall submit an explanation as to why its application should be accepted within fifteen days of the receipt of the communication to enable the Board to form a final opinion.

After considering the explanation, if any, the Board shall communicate its decision to accept the application, along with the certificate of registration; or reject the application by an order, giving reasons thereof within thirty days of receipt of explanation.

RENEWAL OF CERTIFICATE

The Board may renew the certificate of registration from time to time. An information utility seeking renewal of registration shall, at least six months before the expiry of its registration, make an application for renewal in Form A of the Schedule, along with a non-refundable application fee of five lakh rupees.

SUSPENSION OF CERTIFICATE

The Board may, by order, suspend or cancel the certificate of registration granted to an information utility on any of the following grounds:

- (a) If it has obtained registration by making a false statement or misrepresentation or any other unlawful means;
- (b) If it has failed to comply with the requirements of the regulations made by the Board;
- (c) If it has contravened any of the provisions of the Act or the rules or the regulations made thereunder;
- (d) on any other ground as may be specified by regulations.

No order shall however be made unless the information utility concerned has been given a reasonable opportunity of being heard.

SURRENDER OF REGISTRATION

An information utility may submit an application for surrender of its certificate of registration. The Board shall within seven days of

receipt of the application, publish a notice of receipt of such application on its website and invite objections to the surrender of registration to be submitted within fourteen days of the publication of the notice. After considering the application and the objections received, if any, the Board may, within thirty days from the last date for submission of objections, approve the application for surrender of registration subject to such conditions as it deems fit.

DISCIPLINARY PROCEEDING

The IBBI may make inspection or investigation of the affairs of the information utility. Based on the findings if it is of the *prima facie* opinion that sufficient cause exists to take actions permissible under the Code, it shall issue a show-cause notice to the information utility. The Disciplinary Committee shall endeavor to dispose of the show-cause notice within a period of six months of the issue of the show-cause notice. The order shall not become effective until thirty days have elapsed from the date of issue of the order, unless the Disciplinary Committee states otherwise in the order along with the reasons for the same. The order shall be issued to the information utility immediately, and be published on the website of the Board.

APPEAL TO NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Any information utility which is aggrieved by the order of the Board may prefer an appeal to the National Company Law Appellate Tribunal within a period of thirty days of receipt of the order.

MANAGEMENT OF THE INFORMATION UTILITY

The Board may require every information utility to set up a governing board. More than half of the directors of an information utility shall be independent directors at the time of their appointment, and at all times during their tenure as directors. Any fraction contained in 'more than half' shall be rounded off to the next higher number. No meeting of the Governing Board shall be held without the presence of at least one independent director. The directors shall elect an independent director as the Chairperson of the Governing Board.

REGULATORY COMMITTEE

An information utility may constitute a Regulatory Committee from amongst the independent directors. The Regulatory Committee, if constituted, shall oversee the information utility's compliance with the Code. The compliance officer shall report to the Regulatory Committee, wherever constituted.

COMPLIANCE OFFICER

An information utility shall designate or appoint a compliance officer who shall be responsible for ensuring compliance with the provisions of the Code applicable to the information utility, in letter and spirit. The compliance officer shall, immediately and independently, report to the Board any non-compliance of any provision of the Code observed by him. The compliance officer shall submit a compliance certificate to the Board annually, verifying that the information utility has complied with the requirements of the Code, and has redressed customer grievances.

GRIEVANCE REDRESSAL POLICY

An information utility shall have a Grievance Redressal Policy to deal with any grievance from any user; or any other person or class of persons as may be provided by the Governing Board in respect of its services.

TECHNICAL STANDARDS

The Board may lay down Technical Standards, through guidelines, for the performance of core services and other services under these Regulations.

TECHNICAL COMMITTEE

The Board shall lay down the Technical Standards based on the recommendations of a Technical Committee constituted by it. The Technical Committee shall comprise of at least three members who have special knowledge and experience in the field of law, finance, economics, information technology or data management. The Board may invite the Chief Executive Officers or managing directors of information utilities to attend the meetings of the Technical Committee.

BYE- LAWS

An information utility, for the conduct of its operations, shall have bye-laws consistent with the Code. The bye-laws shall be consistent with and provide for all matters contained in the Technical Standards, if any. Without prejudice to the generality, the bye-laws shall provide for (a) the manner and process of providing core services and other services under these Regulations; (b) risk management; (c) rights of users; and (d) grievance redressal. The bye-laws of the information utility, as amended from time to time, shall be published on its website.

OBLIGATIONS OF INFORMATION UTILITY

For the purposes of providing core services to any person, every information utility shall have the following obligations:

- (i) To create and store financial information in a universally accessible format;
- (ii) To accept electronic submissions of financial information from persons who are under obligations to submit financial information under sub-section (1) of section 215, in such form and manner as may be specified by regulations;
- (iii) To accept, in specified form and manner, electronic submissions of financial information from persons who intend to submit such information;
- (iv) To meet such minimum service quality standards as may be specified by regulations;
- (v) To get the information received from various persons authenticated by all concerned parties before storing such information;
- (vi) To provide access to the financial information stored by it to any person who intends to access such information in such manner as may be specified by regulations;
- (vii) To publish such statistical information as may be specified by regulations;
- (viii) To have inter-operability with other information utilities.

SERVICES TO BE PROVIDED BY THE INFORMATION UTILITY

An information utility shall provide such services as may be specified including core services to any person if such person complies with the terms and conditions as may be specified by regulations. An information utility may provide incidental services with the permission of the Board. An information utility shall comply with the applicable Technical Standards, while providing services.

Core service as referred to above, means services rendered by an information utility for—

- (a) accepting electronic submission of financial information in such form and manner as may be specified;
- (b) safe and accurate recording of financial information;
- (c) authenticating and verifying the financial information submitted by a person; and
- (d) providing access to information stored with the information utility to persons as may be specified.

SOURCE OF INFORMATION

Any person who intends to submit financial information to the information utility or access the information from the information utility shall pay such fee and submit information in such form and manner as may be specified by regulations.

A financial creditor shall submit financial information and information relating to assets in relation to which any security interest has been created, in such form and manner as may be specified by regulations.

An operational creditor may submit financial information to the information utility in such form and manner as may be specified.

RIGHTS AND OBLIGATIONS OF PERSONS SUBMITTING FINANCIAL INFORMATION

A person who intends to update or modify or rectify errors in the financial information submitted by it may make an application to the information utility for such purpose stating reasons therefor, in such manner and within such time, as may be specified.

A person who submits financial information to an information utility shall not provide such information to any other person, except to such extent, under such circumstances, and in such manner, as may be specified.

REGISTERED USERS

A person shall register itself with an information utility for—

- (a) submitting information to; or
- (b) accessing information stored with any of the information utilities.

The information utility shall verify the identity of the person and grant registration.

Upon registration, the information utility shall intimate it of its unique identifier.

A person registered once with an information utility shall not register itself with any information utility again.

An information utility shall provide a registered user a functionality to enable its authorised representatives to carry on the activities on its behalf.

USE OF DIFFERENT INFORMATION UTILITIES

A registered user may submit information to any information utility. Different parties to the same transaction may use different information utilities to submit, or access information in respect of the same transaction. For example, A debt transaction has creditor A and debtor B. A may submit information about the debt to information utility X, while B may submit information about the same debt to information utility Y. A user may access information stored with an information utility through any information utility.

INFORMATION DEFAULT

On receipt of information of default, an information utility shall expeditiously undertake the processes of authentication and verification of the information. On completion of the processes, the information utility shall communicate the information of default, and the status of authentication to registered users who are (a)

creditors of the debtor who has defaulted; and (b) parties and sureties, if any, to the debt in respect of which the information of default has been received.

STORAGE OF INFORMATION

An information utility shall store all information in a facility located in India. The facility shall be governed by the laws of India.

ACCESS TO INFORMATION

An information utility shall allow the following persons to access information stored with it:

- (a) The user which has submitted the information;
- (b) All the parties to the debt and the host bank under certain circumstances;
- (c) The corporate person and its auditor, under certain circumstances;
- (d) The insolvency professional, to the extent provided in the Code;
- (e) The Adjudicating Authority;
- (f) The Board;
- (g) Any person authorised to access the information under any other law; and
- (h) Any other person who the persons referred to in (a), (b) or (c) have consented to share the information with.

An information utility shall in all cases enable the user to view-

- (a) the date the information was last updated;
- (b) the status of authentication; and
- (c) the status of verification while providing access to the information.

An information utility shall provide information to the Adjudicating Authority and Board free of charge.

ANNUAL STATEMENT

An information utility shall provide every user an annual statement of all information pertaining to the user, free of charge. An information utility shall provide the user a functionality to mark information as erroneous and correct it.

DUTIES OF THE USER

A user shall expeditiously update the information submitted by it to an information utility. A user shall expeditiously correct information as soon as it finds it erroneous, stating the reasons, if any. An information utility shall provide services with due and reasonable care, skill and diligence. An information utility shall hold the information as a custodian. An information utility shall provide services without discrimination in any manner.

An information utility shall not deny its services to any person on the basis of (a) place of residence or business; or (b) type of personality, whether natural or artificial.

An information utility shall-

- (a) provide services to a user based on its explicit consent;
- (b) guarantee protection of the rights of users;
- (c) establish adequate procedures and facilities to ensure that its records are protected against loss or destruction;
- (d) adopt secure systems for information flows;
- (e) protect its data processing systems against unauthorised access, alteration, destruction, disclosure or dissemination of information; and
- (f) transfer all the information submitted by a user, and stored with it to another information utility on the request of the user.

An information utility shall not-

- (a) outsource the provision of core services to a third-party service provider;
- (b) use the information stored with it for any purpose other than providing services under these Regulations, without the prior approval of the Board;
- (c) seek data or details of users except as required for the provision of the services under these Regulations.

INSURANCE

An information utility shall make adequate arrangements, including insurance, for indemnifying the users for losses that may be caused to them by any wrongful act, negligence or default of the information utility, its employees or any other person whose services are used for the provision of services under these Regulations.

FEE

The information utility shall charge uniform fee for providing the same service to different users. It shall disclose the fee structure for provision of services on its website and disclose any proposed increase in the fees for the provision of services on its website at least three months before the increase in fees is effected.

The fee charged for providing services shall be a reasonable reflection of the service provided and providing access to information shall not exceed the fee charged for submission of information to the information utility.

INFORMATION BY INSOLVENCY RESOLUTION PROFESSIONAL

An insolvency professional may submit reports, registers and minutes in respect of any insolvency resolution, liquidation or bankruptcy proceedings to an information utility for storage. The information utility shall not provide access to the reports, registers and minutes submitted to any person other than the concerned insolvency professional, the Board or the Adjudicating Authority.

ESTABLISHMENT OF FIRST INFORMATION UTILITY IN INDIA

National e-Governance Services Ltd. (NeSL), a Government entity, has received the in-principle approval for establishing an Information Utility in India, the first under the Insolvency & Bankruptcy Code. Once the information utility is set up, it will help the National Company Law Tribunal (NCLT) in taking decisions and implementation of Code. Within a year, it is expected to be fully functional benefiting borrowers and creditors.

BACKGROUND OF NESL

Mr. N. Rangachary, Chairman, Central Depository Services Ltd, and Mr. K.V Kamath, Chairman, ICICI Bank Ltd. felt the need for a national project that will serve the citizens with single view of various assets like Financial (bank deposits, insurance policies, etc); Real (Vehicles, Property) and Personal (caste Certificate, academic certificate, etc) and also use digital technology for citizen centric services like Self-Certification, Electronic Entitlements Accounting, etc. The project, christened as National Assets Depository Ltd. was co-authored by large institutions like SBI, LIC, ICICI Bank and HDFC. The core operating principles are Consent based data sourcing delivered digitally from the data storage entity in a secured environment with full audit trails by using Authorised service providers such as banks and without conflict of commercial interest. The digital document dispatch service intends to ride on the Digital India platform.

With the growth of Non-Performing Assets in the banking system a need was felt to have an aggregated view of Assets apart from readily available knowledge of the liabilities. The Bankruptcy Legislative Reforms Commission recommended set up of Information Utility as a competitive industry so that evidence could be presented enabling resolution of credit/investment delinquencies. RBI also felt the need for Account Aggregation and have since codified the regulations under NBFC directions enabling asset aggregation across asset classes.

Under the circumstances, National E-Governance Services Limited (NESL) was incorporated to augment the Information Infrastructure of India with a focus on delivering services for the public, government and public financial institutions. It was incorporated on 24th June 2016 as a Union Government Company with an Authorized Paid up capital of Rs. 30 Crore and special permission from Ministry of Corporate Affairs permitting the use of the word NATIONAL upon complying with the criteria of maintaining 51% of its shareholding with Banks and Public Sector Undertakings at all times. NeSL is now owned and promoted by leading public institutions like State Bank of India, Life Insurance Corporation, Canara Bank, Bank of Baroda, ICICI Bank, CDSL, HDFC, Axis Bank, Union Bank of India and NABARD among others.

REQUIREMENT OF INFORMATION UTILITY UNDER THE CODE

Introduction of the Insolvency and Bankruptcy Code, 2016 usurped the need and utilisation of the Information utilities. Provisions have been provided for information from the information utility which have been accepted as proof of the material facts stated in those information.

- In terms of section 7(3) of the Code, the financial creditor shall, along with the application for initiating resolution plan of any corporate debtor shall furnish, among other documents, record of the default recorded with the information utility. Section 9(5) provides that the Adjudicating Authority shall, within fourteen days of the receipt of the application by an order admit the application if among other compliances, there is no record of dispute in the information utility.
- Section 17(2) provides that the interim resolution professional vested with the management of the corporate debtor shall have the authority to access the electronic records of corporate debtor from information utility having financial information of the corporate debtor.
- Section 18 provides that the interim resolution professional shall file information collected with the information utility, if necessary and take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets .
- As per section 36, the liquidation estate shall comprise all liquidation estate assets which shall include any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor.
- Section 37 provides that, the liquidator shall have the power to access any information systems for the purpose of admission and proof of claims and identification of the liquidation estate assets relating to the corporate debtor from an information utility.



- As per section 38 a financial creditor may submit a claim to the liquidator by providing a record of such claim with an information utility.
- Section 52(3) provides that before any security interest is realised by the secured creditor, the liquidator shall verify such security interest and permit the secured creditor to realize only such security interest, the existence of which may be proved either by the records of such security interest maintained by an information utility or by such other means as may be specified by the Board.
- According to section 57 an application for fast track corporate insolvency resolution process may be filed by a creditor or corporate debtor alongwith the proof of the existence of default as evidenced by records available with an information utility.
- Section 99(3) stipulates that where the debt for which an application has been filed by a creditor is registered with the information utility, the debtor shall not be entitled to dispute the validity of such debt.
- Section 218 provides provisions for investigation of Information utilities. Where the Board, on receipt of a complaint or has reasonable grounds to believe that an information utility has contravened any of the provisions of the Code or the rules or regulations made or directions issued by the Board thereunder, it may, at any time by an order in writing, direct any person or persons to act as an investigating authority to conduct an inspection or investigation of the information utility.
- As per section 220(2) on the examination of the report of the Investigating Authority, if the disciplinary committee is satisfied that sufficient cause exists, it may impose penalty or suspend or cancel the registration of the information utility.

CONCLUSION

Establishment of information utilities with strategic data collection and management will provide authentic source for evidence of information required by various authorities in addition to the NCLT. A broad framework is needed for compilation of data collected and security provided in its maintenance. Though, the concept of information utility is in right direction, its utilization on different fields in addition to insolvency matter may open strongest possible home of digital information. In future, it may support the RTI matter as a single window.

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Corporate Liquidation and IBC 2016



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INTRODUCTION

Corporate Liquidation refers to the various regulated processes to close down an insolvent company. Corporate Liquidation may include both insolvent company and solvent company liquidations. Insolvency of a company is most often shown by the inability of a company to pay those who it owes money to when they are due for payment. A worsening of this position can be evidence of insolvency.

The Insolvency and Bankruptcy Code, 2016 aims to consolidate and amend the laws relating to insolvency resolution of companies and limited liability entities, partnerships and individuals, which are contained in various enactments, into a single legislation.

A liquidation of a corporation occurs when all its assets have been sold. In the context of a corporate dissolution, the liquidation of corporate assets involves the distribution of the assets in the form of cash or property -- to the shareholders in exchange for their shares of stock in the corporation. This distribution of assets to the shareholders is the final step in the process of dissolving the corporation. If the corporation's debts and obligations were properly resolved, the shareholders are free of any liability for corporate debts. State law will generally hold each shareholder liable for any unpaid corporate debts up to the value of the assets distributed to the shareholder.

A corporation is a complex form of legal business entity that requires adhering to state law requirements to remain in good standing and continued existence. For example, corporations are subject to ongoing reporting requirements by the state that involves filing an annual informational report. Corporations that fail to file the required report are initially suspended by the state, and if the failure is not rectified in a timely manner, the corporation can be administratively dissolved by the state, thereby terminating its existence. Depending on state law, the dissolution may be treated as a liquidation and distribution of the corporation's assets to its shareholders. This unintended dissolution and liquidation may result in adverse tax consequences for the shareholders.

ELIGIBILITY CRITERIA

Under the Insolvency and Bankruptcy Code, liquidation procedures cannot be initiated by creditors in case of default by company. Instead, the code prescribes that a financial or operational creditor can initiate the corporate insolvency resolution process in case of failure by the corporate debtor to pay at least Rs.100, 000.

Voluntary liquidation Procedure: Any corporate entity may initiate a voluntary liquidation proceeding if:

1. It has not committed any default;
2. a majority of the directors or designated partners of the corporate person make a declaration verified by an affidavit to the effect that:
 - the corporate person has no debt or can pay its debts in full out of the sale proceeds of the assets under the proposed liquidation; and
 - liquidation is not initiated to defraud any person;
3. such declaration is accompanied by the audited financial statements and valuation report of the corporate person;
4. within four weeks of such declaration, a special resolution (an ordinary resolution would suffice in cases of voluntary liquidation by reason of expiry of its duration or occurrence of any dissolution event) is passed by the contributories requiring the corporate person to be liquidated and appointing an insolvency professional as liquidator; and
5. Creditors representing two-thirds of the total debt (in value) owed by the corporate person approve the resolution within seven days of its passage.

Voluntary liquidation is largely an out-of-court process. Only once the affairs of the corporate person have been completely wound up and its assets fully liquidated then liquidator apply to

the National Company Law Tribunal for its dissolution along with a final report. Pursuant to this application, the tribunal must pass an order for dissolution and the entity will be dissolved from the date of the order.

A financial or operational creditor or a corporate debtor may apply to the National Company Law Tribunal for the initiation of the insolvency resolution process following the default by the corporate debtor to pay dues of at least Rs100, 000.

The code prescribes a timeframe of 180 days for the insolvency resolution process, which begins from the date that the application is admitted by the tribunal (and may be extended a further 90 days). During this time, no suits, proceedings, recovery or enforcement action can be commenced or continued against the corporate debtor. The committee of creditors shall consider and approve resolution plans which are placed before it for evaluation and viability determination.

In the event of a liquidation trigger, the following may occur:

1. The committee of creditors cannot agree on a workable resolution plan within 180 days (which can be extended once by 90 days);
2. The committee of creditors decides to liquidate the company;
3. The tribunal rejects the resolution plan;
4. The corporate debtor contravenes resolution plan provisions; or
5. The tribunal passes an order for the company's compulsory liquidation.

Assets are distributed based on the priority of various parties' claims, with a trustee appointed by the Department of Justice overseeing the process. The most senior claims belong to secured creditors, who have collateral on loans to the business. These lenders will seize the collateral and sell it—often at a significant discount, due to the short time frames involved. If that does not cover the debt, they will recoup the balance from the company's remaining liquid assets, if any.

Next in line are unsecured creditors. These include bondholders, the government (if it is owed taxes) and employees (if they are owed unpaid wages or other obligations). Finally, shareholders receive any remaining assets, in the unlikely event that there are any. In such cases, investors in preferred stock have priority over holders of common stock.

LIQUIDATION: OTHER CONSIDERATIONS

Liquidation is the final step in the formal process of dissolving a corporation, regardless of how many shareholders it has. It specifically relates to how a corporation distributes assets that remain after clearing outstanding debts. Internal Revenue Service regulations that apply to all corporations, as well as rules in the corporation's home state, determine how liquidation takes place. Although state rules share similarities, it's best to contact the secretary of state for the corporation's home state to get state-specific information on corporate liquidation rules and regulations.

DRAFTING A LIQUIDATION PLAN

State requirements specify the information a liquidation plan must include. In general, a liquidation plan outlines a corporation's promise to return excess assets to shareholders as specified in state regulations and identifies the date shareholders cease to

6 Liquidation is the final step in the formal process of dissolving a corporation, regardless of how many shareholders it has. It specifically relates to how a corporation distributes assets that remain after clearing outstanding debts. Internal Revenue Service regulations that apply to all corporations, as well as rules in the corporation's home state, determine how liquidation takes place.

have rights beyond receiving a final distribution. In addition, a liquidation plan outlines procedures for dealing with distributions when the shareholder cannot be located. This most often involves transferring funds to the state for safekeeping until the shareholder comes forward.

SHAREHOLDER DISTRIBUTIONS

State laws require corporations that have any degree of liquidity after paying creditors and satisfying tax obligations to return excess funds to shareholders. Because leftover liquidity includes cash and capital or other assets the corporation has the legal right to sell, most distributions are completed in a series of increments. Regardless, the amount available is totaled and divided proportionately among shareholders according to the number of shares each shareholder owns. In exchange, the shareholder must return her outstanding shares to the corporation.

TAX CLEARANCE RULES

Some states require a corporation to verify that final state taxes have been paid before liquidation can be considered complete. Until and unless the corporation submits a letter or certificate obtained from the state tax agency stating the business has no outstanding tax liability, the secretary of state will typically not allow the corporation to formally dissolve. This can mean the corporation will remain responsible for paying annual fees and complying with annual reporting requirements.

INSOLVENCY AND BANKRUPTCY CODE

Central Government on 30th November 2016 enacted the Insolvency and Bankruptcy Code, 2016. This Code has radically changed and simplified the entire procedure for the liquidation of corporate persons. This code also provides for the insolvency and bankruptcy of individuals and the partnerships firms. A new option of fresh start is also provided for those small partnership firms and businessmen who would want to pay their debts and start afresh.

The Insolvency and Bankruptcy Code, 2016 has shifted the entire load from the shoulder of creditors to a new entity called Resolution Professional. It is his duty, under the statute, to conduct the entire process of insolvency and liquidation of corporate person. Since the entire procedure has changed and the code has made significant changes in Companies Act, 2013 it is required that we look into the code and understand the technicalities. Insolvency is when an individual or organization is unable to meet its outstanding financial debt towards its lender as it become due.

Insolvency can be resolved by way of changing the repayment plan of the loans or writing off a part thereof. If it cannot be resolved, then a legal action may lie against the insolvent and its assets will be sold to pay off the outstanding debts. Generally, an official assignee/liquidator appointed by the Government of India, realizes the assets and allocates it among the creditors of the insolvent. Bankruptcy is a concept slightly different from insolvency, which is rather amicable. AØ bankruptcy is when a person voluntarily declares himself as an insolvent and goes to the court. On declaring him as 'bankrupt', the court is responsible to liquidate the personal property of the insolvent and hand it out to its creditors. It provides a fresh lease of life to the insolvent.

The Code offers a uniform, comprehensive insolvency legislation encompassing all companies, partnerships and individuals (other than financial firms). The Government is proposing a separate framework for bankruptcy resolution in failing banks and financial sector entities. One of the fundamental features of the Code is that it allows creditors to assess the viability of a debtor as a business decision, and agree upon a plan for its revival or a speedy liquidation. The Code creates a new institutional framework, consisting of a regulator, insolvency professionals, information utilities and adjudicatory mechanisms, that will facilitate a formal and time bound insolvency resolution process and liquidation.

To avoid any further litigation in insolvency proceedings, the Code will have an overriding effect over all other laws. It is specifically provided that civil courts or authority not to have jurisdiction and also cannot grant any injunction. The Code as a new law, replacing over a dozen laws, when implemented post the infrastructure being put in place, will prove to be the most important step in evolving the regimen of recovery of bad debts. Moreover, there will be a definite surge in economic growth in view of the rigid timeframe prescribed in the Code for resolution of insolvency and liquidation proceedings.

The business failure affects all the stakeholders of a corporate including its lenders, shareholders, creditors, suppliers, customers, workers and central and state governments very adversely. It is, therefore, essential that the valuable resources including capital, manpower, machinery and management, are pulled out of the failed / unviable businesses at the earliest and are deployed in other profitable ventures. The viable businesses are, however, required to be re-organized at the earliest. Need for an effective Insolvency and Bankruptcy Regime.

A CORPORATE INSOLVENCY REGIME HAS THE FOLLOWING FUNCTIONS

- (i) It identifies the signs of insolvency at the earliest.
- (ii) Initiates the insolvency process quickly.
- (iii) Creates a collective platform of the stakeholders to enable them to take decisions about the future of the distressed entity.
- (iv) Helps reorganization of the viable businesses.
- (v) Sends the unviable businesses to liquidation at the earliest to arrest any substantial loss in value.

INITIATING PROCEEDINGS FOR INSOLVENCY RESOLUTION AND LIQUIDATION UNDER BANKRUPTCY CODE

The Code empowers both financial and operational creditors with the right to initiate the proceedings by filing application before the adjudicating authority. In case of Corporate Persons, the adjudicating authority is National Company Law Tribunal. A financial Creditor is one to whom financial debt is owed or to whom



such debt is legally assigned. An operational creditor is one to whom operational debt is owed. Operational Debt includes any debt in respect of provisions of goods and services.

This means that Operational Creditors generally arise from import-export dealings. Any person, other than financial creditor or operational creditor can initiate the proceedings provided he submits the required documents like book of accounts etc. Such person is called Corporate Applicant.

The resolution will start only after the admission of this application. The entire process of resolution and liquidation needs to be finished with a period of 180 days. However, the Adjudicating Authority, if it thinks fit, can extend this period with a maximum period of 90 days. Hence the maximum time that can be taken in 180+90 days.

ADMISSION OF APPLICATION FOR RESOLUTION AND LIQUIDATION

Once the application is accepted, a notice will be issued in public regarding such application. Along with this notice, an interim resolution for appointment of a professional will be submitted whose primary task will be to collect all the relevant information and constitute a committee of creditors.

From the date of admission of application or also called the date of commencement, a moratorium period will begin during which the assets of the debtor cannot be interfered with in any way. Even the execution of any judgments, decrees or orders will not take place against such assets during moratorium period.

Once the interim resolution professional creates the committee of creditors his part of job is done. However, the committee may continue with the interim resolution professional or may appoint new resolution professional. The newly appointed resolution professional has a larger responsibility.

He will have to conduct, manage and supervise the entire resolution process till the debtor is discharged. The Resolution Professional shall make information memorandum which will contain all the relevant information required to make resolution plan.

Based upon this memorandum he shall submit a resolution plan to the committee. This resolution can be submitted to resolution professional by anyone. The committee of creditors then decide

whether to admit or reject the resolution plan.

LIQUIDATION OF A COMPANY OR OTHER BODIES INCORPORATED UNDER THE ACT: THE PROCESS

After the admission of resolution plan by the committee, Official Liquidator is appointed and the process of liquidation commences. Official Liquidator creates Liquidation estate which includes all the attachable assets of the corporate person. Official Liquidator shall consolidate, verify, admit, determine and evaluate the claims of the creditors.

In the meantime, certain transactions that are detrimental to the creditors or which were entered into for the purpose of deceiving creditors are avoided. These transactions are preferred transactions, undervalued transaction, defrauding transactions and Extortionate Credit Transaction.

These kinds of transactions are avoided mainly because such transactions were entered into in order to deceive the creditor and deny them their share.

After the Official Liquidator is thorough with the claims of the creditors, he distributes the assets according to the list of priority of creditors. The Insolvency and Bankruptcy Code, 2016 has entire changed the priority list of creditors.

THE PRIORITY OF CREDITOR LIST IS AS FOLLOWS

1. The insolvency resolution process costs and the liquidation costs to be paid in full.
2. Workmen's Dues and Secured Creditor.
3. Wages and dues to employees (other than workmen)
4. Financial debts to unsecured creditors.
5. Central and state governments and debts owed to a secured creditors for any amount unpaid following the enforcement of security interests
6. Any remaining debts and dues.
7. Preference Shareholders
8. Equity Shareholders or partners

After the distribution of assets to the satisfaction of the amount of debts, dissolution of Corporate Person takes place. This order can be appealed to National Company Law Appellate Tribunal. The final adjudicating authority is Supreme Court.

APPEALS

An appeal can be made against the order of the adjudicating authority to National Company Law Appellate Tribunal (NCLAT). The application needs to be filed within 30 days of the order. However, the tribunal may allow to file after the expiry of this term provided it believes that there was sufficient cause for the delay. Appeal can be made on the following grounds –

1. The approved resolution plan is in contravention of the provisions of any law for the time being in force.
2. There has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period.
3. The debts owed to Operational Creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board.
4. The Insolvency resolution process costs have not been provided for repayment in priority to all other debts.

5. The resolution plan does not comply with any other criteria specified by the Board.
6. An appeal against a liquidation order passed may be filed on grounds of material irregularity or fraud committed in relation to such a liquidation order.

The highest adjudicating authority up to which appeals will lie is Supreme Court. The code also talks about fast track resolution which will get completed within a period of 90 days. However, the same has not been notified and central government is yet to form rules for the same.

CONCLUSION

Liquidation is the process of bringing a business to an end and distributing its assets to claimants. Once the process is complete, the business is dissolved.

The Insolvency and Bankruptcy Code, 2016 aims to consolidate and amend the laws relating to insolvency resolution of companies and limited liability entities, partnerships and individuals, which are contained in various enactments, into a single legislation. The Insolvency and Bankruptcy Code, 2016 has no doubt strengthened the grip of creditors over the assets of corporate debtors. It would be difficult for the debtor to escape liquidation or defraud creditors by entering into Extortionate Transactions. However the Code shall face certain hiccups during implementation since it will be difficult to find so many resolution professionals and also NCLT will be bombarded with enormous number of cases since the earlier applications are also transferred to NCLT now. All in all, the Code has eased the recovery process for the creditors.

Another important feature of the Code is that it does not make any distinction between the rights of international and domestic creditors or between classes of financial institutions. The Code has sought to balance the interest of all the stakeholders including alteration in the order of priority of payment of Government dues. The legislators have sought to bring in a law analogous to international standards which is guided by the broad philosophy that insolvency resolution must be commercially and professionally driven (rather than court driven). As such, the role of adjudicating authorities is limited to ensuring due process rather than adjudicating on the merits of the insolvency resolution. Perhaps, the Code has brought far too many changes at the same time, which has caused apprehensions. In India, where any change in the legal system are hard to enforce, this Code has proposed a massive overhaul of laws, procedures and infrastructure, which is bound to be subjected to hangovers of previous regimen, resistance to rapid enforcement from the fraternity and ultimately dilution in its effectiveness. But, all this on one side, there is no doubt that once the Code is fully implemented, it is going to be one of the best initiatives by the legislatures and a boon to the economy in the broader sense. CS

REFERENCES

1. www.lawrato.com
2. www.khaitanco.com
3. www.aishmghrana
4. www.indiafilings.com
5. www.nsolvency.com/corporate-liquidation
6. www.mondaq.com
7. www.indianeconomy.net
8. www.ibbi.gov.in
9. www.ey.com

Corporate Insolvency Process under the Insolvency and Bankruptcy Code 2016 – New Area of Practice for Company Secretary & other Professionals



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INTRODUCTION AND BACKGROUND

The Fund of the Limited Liability Company is divided into owners' fund and borrowed fund. Owners fund is also known as Equity capital contributed by the Promoter and other Shareholders of the Company and the Borrowed funds are known as fund contributed other than in form of Equity Capital e.g. Debt (both secured and unsecured) contributed by the Bankers, supplier, Debenture holders etc.

Recently, the Insolvency and Bankruptcy Board of India amended IBBI (CIRP) Regulation for the purpose of widening the scope of claim by those creditors, who are neither financial creditor nor operational creditor and introduced form F for submission of claim in person or by post or by electronic means to the Interim resolution professional or Resolution Professional, which shall facilitate the collection and collation of the claim by the IRP or RP from those who are neither coming under the ambit of Financial Creditor nor Operational Creditor. The IBC, 2016 has opened new door of opportunities for professionals such as Company Secretaries, Chartered Accountants, Cost Accountants and Advocates. The scope of the Insolvency Professionals, under IBC, 2016 is very bright, and ample professional opportunities present in the market. The main quest is that the Professionals have to make themselves ready for grabbing the opportunities created under the IBC, 2016.

So far as no default in repayment of Debt is concerned, the Creditors do not have any control on the functioning of management of the Company. As we know that the Company is managed by the promoter and other shareholders as per their wish. Thus, if any default is made to the creditors, then the management of the Company should be managed as per wish of the Creditors.

However, this was not happening in India. Promoters stay in control of the Company even after default. The only recourse available was to crystallize the charges created in favour of the Banker, who can recover their dues by taking the recourses under the applicable provisions of the SARFAESI, 2002 through Debt Recovery Tribunal (DRT).

THE GIST OF RECOMMENDATION OF BLRC ARE AS UNDER

- *Establishment of Institutional framework for regulation of Insolvency and Bankruptcy*
- *Provide for Adjudication Authority for adjudication of the matters under the IBC*
- *Provide for time bound Insolvency resolution process and Bankruptcy*
- *Insolvency Professionals*

IBC was passed by the Lok Sabha on May 05, 2016, by the Rajya Sabha on May 11, 2016 and assent of the President of India was obtained on May 28, 2016 and it is known as Insolvency and Bankruptcy Code, 2016 (IBC, 2016) w.e.f. May 28, 2016.

The Insolvency and Bankruptcy Code 2016 creates a new institutional framework, consisting of a regulator, insolvency professionals, information utilities and adjudicatory mechanisms, that will facilitate a formal and time bound insolvency resolution process and liquidation. The IBC, 2016 also provide for Fast Track Insolvency Resolution



Process, which shall take half of the time to be taken under normal insolvency resolution process.

IBC, 2016 provides for ample of professional opportunities for the Company Secretaries, Chartered Accountants and Cost Accountants, Advocates and other professionals.

OBJECTIVE OF THE IBC, 2016

The main purpose of the IBC, 2016 is :

- to consolidate and amend the laws relating to reorganization and insolvency resolution of :
 - corporate persons (Company & Limited Liability Partnership)
 - partnership firms and individuals

In a time bound manner for maximisation of value of assets of above persons

- to promote entrepreneurship,
- to promote 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 Board of India, and for matters connected therewith or incidental thereto.

SCOPE OF THE IBC, 2016

The IBC, 2016 shall extend to whole of India and Part III of the IBC, 2016 which dealt with Individual Bankruptcy, shall not apply in the state of Jammu & Kashmir.

APPLICABILITY OF THE IBC, 2016

The provisions of the IBC, 2016 shall apply, in relation to Insolvency, Liquidation, Voluntary Liquidation, Bankruptcy as the case may be, on:

- I. **The Company** incorporated under the provisions of the Companies Act, 2013 or any other previous Companies Act;
- II. **Limited Liability Partnership (LLP)** incorporated under the provisions of LLP Act 2008;
- III. **Other body corporate as specified by the Central Government;**
- IV. **Partnership Firm; and**
- V. **Individual.**

REPEAL OF CERTAIN LAWS ON PASSING OF THE IBC, 2016

The multiplicity of laws were dealing with insolvency and bankruptcy of the corporate person. After passing of the IBC,

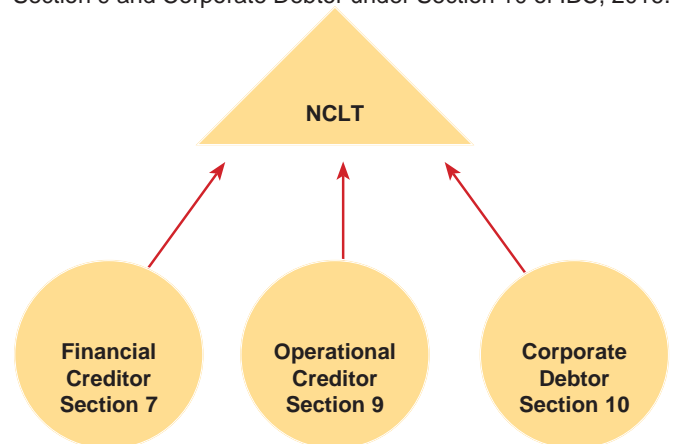
6 The IBC, 2016 has opened plethora of the new opportunities for professionals such as Company Secretaries, Chartered Accountants, and Cost Accountants and other Professionals, who has experience of 10 years or more and for graduate who has Management experience of 15 years or more eligible for enrolling for Limited Insolvency Examination, which is conducted electronically.

2016, the following major laws dealing with insolvency and bankruptcy were repealed/suitably amended:

- ✓ The Provincial Insolvency Act, 1920 (**repealed**)
- ✓ The Presidency Towns Insolvency Act, 1909 (**repealed**)
- ✓ The Sick Industrial Companies (Special Provisions) Act, 1985, (**repealed**)
- ✓ the Recovery of Debt Due to Banks and Financial Institutions Act, 1993 (**Amended**)
- ✓ The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**Amended**)
- ✓ The Companies Act, 2013 (amended the provision related to Voluntary winding up, Liquidation of the Company, now will be dealt under IBC, 2016).
- ✓ Individual Bankruptcy and Insolvency which was dealt with by the Courts, now shall be dealt as per IBC, 2016 by Adjudicating Authority namely Debt Recovery Tribunal (DRT) and Debt Recovery Appellate Tribunal (DRAT).

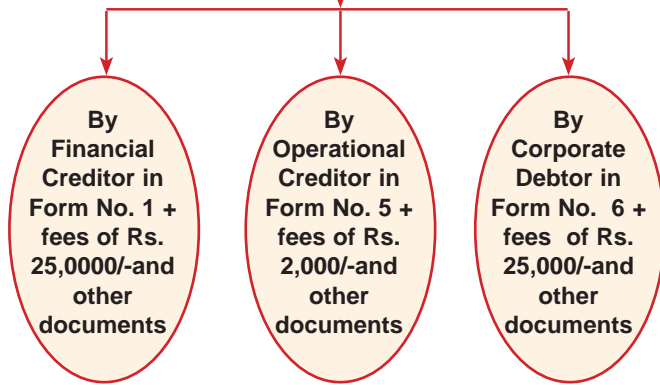
CORPORATE INSOLVENCY RESOLUTION PROCESS UNDER THE PROVISIONS OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

Insolvency resolution process of corporate person (*i.e.* Company, Limited Liability Partnership) can be initiated by the Financial Creditor under Section 7, Operational Creditor under Section 9 and Corporate Debtor under Section 10 of IBC, 2016.



Pic.: Applicants for initiation of Corporate Insolvency resolution process

Application for initiation of Corporate Insolvency resolution process



THE COMPARATIVE AND DETAILED ANALYSIS OF THE SUBSTANTIVE AND PROCEDURAL PROVISIONS FOR CORPORATE INSOLVENCY RESOLUTION PROCESS (CIRP) UNDER IBC, 2016, ARE EXPLAINED AS UNDER:

Purpose	For Financial Creditors	For Operational Creditors	For Corporate Applicants
Applicable provisions and statutes	Sec 7 of IBC, 2016 read with Rule 6 of the Insolvency Board (Application to Adjudicating Authority) Rules 2016 and Insolvency and Bankruptcy Board Of India (CIRP) Regulation 2016 along with the rules 20 to 26 of the NCLT Rules 2016.	Sec 9 of IBC, 2016 read with Rule 7 of the Insolvency Board (Application to Adjudicating Authority) Insolvency and Bankruptcy Board Of India (CIRP) Regulation 2016 the rules 20 to 26 of the NCLT Rules 2016.	Sec 10 IBC, 2016 read with Rule 7 of the Insolvency Board (Application to Adjudicating Authority) Rules 2016 and the Insolvency and Bankruptcy Board of India (CIRP) Regulation 2016 the rules 20 to 26 of the NCLT Rules 2016.
Eligible applicant for Corporate Insolvency Resolution Process (CIRP)	If Financial Debt owed to the Financial Creditor is exceeded with Rupees One lakh or such higher amount not exceeding Rupees one crore as may be prescribed, can file application for CIRP under the IBC, 2016. Note: For the purpose of avoiding misuse of the CIRP process or for ensuring that only genuine applicants file the application under CIRP, the GOI may increase the limit of Rupees One lakh very soon.	If debt other than financial debt owed to the Operational Creditor is exceeded with Rupees One lakh or such higher amount not exceeding Rupees one crore as may be prescribed, can file application for CIRP under the IBC, 2016. Note: for the purpose of avoiding misuse of the CIRP process or for ensuring that only genuine applicants file the application under CIRP, the GOI may increase the limit of Rupees One lakh very soon.	If default is made of Rupees One lakhs or such higher amount not exceeding Rupees one crore as may be prescribed. Note: for the purpose of avoiding misuse of the CIRP process or for ensuring that only genuine applicants file the application under CIRP, the GOI may increase the limit of Rupees One lakh very soon.

Procedure for Application to Adjudicating Authority (National Company Law Tribunal-NCLT)	Application to NCLT by FC in Form no. 1 in triplicate in English language along with prescribed fees	Application to NCLT by OC in Form no. 5 in triplicate in English language along with prescribed fees	Application to NCLT by CA in Form no. 6 triplicate in English language along with prescribed fees.
	<ul style="list-style-type: none"> Attachment with Form No. 1 Consent/communication letter from Interim resolution Professional - IRP in Form no. 2 Proof of amount due as financial creditor are record maintained with Information Utility, Financial Statement of the Company showing amount due as financial debt to applicant, Loan Agreement etc). The applicant immediately after filing of application must send a copy of whole set of application filed with NCLT at Registered office of the Corporate Debtor. 	<ul style="list-style-type: none"> Attachment with Form No. 1 Consent/communication letter from IRP in Form no. 2 Proof of amount due as Operational Debt Acknowledgment of sending notice by OC in Form no. 3 & 4, Contract for supply of goods or service, Financial Statement of the Corporate Debtor showing applicant as OC, record maintained with Information Utility Procedure followed by OC before making above application to NCLT Form no. 3- Notice of demand and Form No. 4 Invoice of demand by the operational Creditor to be served by operational Creditor to the Corporate Debtor at its registered office through personal delivery, registered post, speed post and through electronic means as well sending of a copy of the same to the Information Utility. If no reply is received within 10 days of serving of above notice or no dispute exists at any court of law or Arbitration, then application for insolvency process can be made by OC to NCLT. The applicant immediately after filing of application must send a copy of whole set of application filed with NCLT at Registered office of the Corporate Debtor. 	<ul style="list-style-type: none"> Attachment with Form No. 1 Consent/communication letter from IRP in Form no. 2 Authorization letter, if application is made by the authorized person of the company. Proof of default: Books of Accounts of last three years from the date of application, if Corporate Debtor is incorporated in less than three years then the Books of Accounts and other records from the date of incorporation of the Corporate Debtor. The applicant immediately after filing of application must send a whole set of application filed with NCLT at Registered office of the Corporate Debtor.

<p>Admission/rejection of Application by the NCLT</p>	<ul style="list-style-type: none"> ➤ If the application is complete in all respect and IRP is qualified to be appointed as Resolution professional, then NCLT will accept the application for CIRP within 14 days from the date of application by the FC. ➤ However, if application is incomplete or IRP is not qualified to be appointed as RP then NCLT will reject the application for CIRP. ➤ Before rejecting the application, NCLT shall give opportunity of being heard in form for removing the incompleteness of application within 7 days of the issue of notice of incompleteness. ➤ If within 7 days from receipt of notice from NCLT, the applicant made the application complete then NCLT will accept the application. ➤ Procedure post acceptance of application CIRP: <ul style="list-style-type: none"> (i) Public announcement in Form No. A by IRP inviting claim within 14 days of his appointment <i>i.e.</i> Insolvency commencement date. (ii) Application for claim shall be filed by the FCs in Form No. C, OCs other than Workmen & Employee in Form no. B and Application for claim by Workmen or employee in Form no. D, and in Form no. E, if application for claim is made by the representative of the employees/workmen. 	<ul style="list-style-type: none"> ➤ If the application is complete in all respect and IRP is qualified to be appointed as Resolution professional, then NCLT will accept the application for CIRP within 14 days from the date of application by the FC. ➤ However, if application is incomplete or IRP is not qualified to be appointed as RP then NCLT will reject the application for CIRP. ➤ Before rejecting the application, NCLT shall give opportunity of being heard in form for removing the incompleteness of application within 7 days of the issue of notice of incompleteness. ➤ If within 7 days from receipt of notice from NCLT, the applicant made the application complete then NCLT will accept the application. ➤ Procedure post acceptance of application CIRP: <ul style="list-style-type: none"> (i) Public announcement in Form No. A by IRP inviting claim within 14 days of his appointment <i>i.e.</i> Insolvency commencement date. (ii) Application for claim shall be filed by the FCs in Form No. C, OCs other than Workmen & Employee in Form no. B and Application for claim by Workmen or employee in Form no. D, and in Form no. E, if application for claim is made by the representative of the employees/workmen. 	<ul style="list-style-type: none"> ➤ If the application is complete in all respect and IRP is qualified to be appointed as Resolution professional, then NCLT will accept the application for CIRP within 14 days from the date of application by the FC. ➤ However, if application is incomplete or IRP is not qualified to be appointed as RP then NCLT will reject the application for CIRP. ➤ Before rejecting the application, NCLT shall give opportunity of being heard in form for removing the incompleteness of application within 7 days of the issue of notice of incompleteness. ➤ If within 7 days from receipt of notice from NCLT, the applicant made the application complete then NCLT will accept the application. ➤ Procedure post acceptance of application CIRP: <ul style="list-style-type: none"> (i) Public announcement in Form No. A by IRP inviting claim within 14 days of his appointment <i>i.e.</i> Insolvency commencement date. (ii) Application for claim shall be filed by the FCs in Form No. C, OCs other than Workmen & Employee in Form no. B and Application for claim by Workmen or employee in Form no. D, and in Form no. E, if application for claim is made by the representative of the employees/workmen. 		<ul style="list-style-type: none"> (iii) After expiry of last date mentioned in the application, verification of claim must be completed within 7 days of the last date of receipt of claim and shall be filed NCLT, made available to creditors, uploaded at website of the Company, made available for inspection of Shareholders, Directors and partners of the Corporate Debtor AND shall be presented in the first meeting of Committee of Creditors (COC). (iv) First Meeting of COC shall be held within 7 days of its constitution. (v) Decision in the COC shall be taken with 75% of voting in favour. (vi) Insolvency Resolution plan must be approved and submitted to NCLT 30 days before expiry of 180 days from insolvency Commencement date or such extended period of not exceeding next 90 days. (vii) If Resolution plan is approved by the COC with Majority and by NCLT within 180 days or such extended period of not exceeding 90 days, then it must be implemented as such. (viii) If COC did not approve Resolution plan or No resolution plan is made within 180 days of insolvency commencement date or such extended period not exceeding 90 days as may be approved, the NCLT may approve the Liquidation of the Company. 	<ul style="list-style-type: none"> (iii) After expiry of last date mentioned in the application, verification of claim must be completed within 7 days of the last date of receipt of claim and shall be filed NCLT, made available to creditors, uploaded at website of the Company, made available for inspection of Shareholders, Directors and partners of the Corporate Debtor AND shall be presented in the first meeting of Committee of Creditors (COC). (iv) First Meeting of COC shall be held within 7 days of its constitution. (v) Decision in the COC shall be taken with 75% of voting in favour. 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<p>Meaning of FC, OC and CA</p>	<p>Section 5 (7) of IBC, 2016 : Financial Creditor means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.</p> <p>Examples of Financial Creditor: Bankers, Financial institution who has given Financial Debt or other financial assistance not being in form of guarantee etc.</p>	<p>Section 5(20) of IBC, 2016: Operational creditor means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.</p> <p>Examples of Operational Creditor: Suppliers, Bankers, who has given operational debt like LC, Employees, workers, Government dues like tax, fees etc.</p>	<p>Section 5(5) of IBC "Corporate Applicant" means— (a) corporate debtor; or (b) a member or partner of the corporate debtor who is authorized to make an application corporate insolvency resolution process (CIRP) ; or (c) Managing Director, Whole Time Director or (d) a person who has the control and supervision over the financial affairs of the corporate debtor;</p> <p>Examples of Operational Creditor: The Company or LLP itself, any Shareholders, who has authorized to make application for CIRP, MD, WTD etc.</p>
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Recently, on August 16, 2017 The Insolvency and Bankruptcy Board of India has amended IBBI (CIRP) Regulation for the purpose of widening the scope of claim by those creditors, who are neither financial creditor nor operational creditor and introduced form F for submission of claim in person or by post or by electronic means to the Interim resolution professional or Resolution Professional, which shall facilitate the collection and collation of the claim by the IRP or RP from those who are neither coming under the ambit of Financial Creditor nor Operational Creditor. This Amendment has come after the acceptance of insolvency application in case of Jaypee Infratech Ltd. by NCLT on August 06, 2017.

ADJUDICATING AUTHORITY FOR CORPORATE INSOLVENCY PROCESS

- (i) The Adjudicating Authority (AA) for Insolvency of Corporate person (Company and LLP) is NCLT and appellate authority is NCLAT.
- (ii) The Adjudicating Authority (AA) for Insolvency and Bankruptcy of Partnership Firms and Individuals is DRT and Appellate Authority is DRAT.

RESOLUTION OF INSOLVENCY PROCESS THROUGH FAST TRACK CIRP

The application for fast track CIRP can be made to the Adjudicating Authority under IBC, 2016, which shall take half of the time required for Corporate Insolvency process i.e. 90 days from the date of Commencement of Insolvency process. The application for Fast track Insolvency process shall be filed by eligible applicant only.

APPEAL AGAINST THE ORDER OF NCLAT

Appeal against order of NCLAT shall lie to the Supreme Court of India.

BECOME INSOLVENCY RESOLUTION PROFESSIONAL

The IBC, 2016 has opened plethora of the new opportunities for



professionals such as Company Secretaries, Chartered Accountants, and Cost Accountants and other Professionals, who has experience of 10 years or more and for graduate who has Management experience of 15 years or more eligible for enrolling for Limited Insolvency Examination, which is conducted electronically. For this purpose the IBBI has tied up with NISM and examination is being conducted in English medium with objective type questions as per syllabus notified by the IBBI.

After clearing the online examination, the concerned person has to register with any one of the following Insolvency Professional Agency namely:

- (i) ICSI Insolvency Professional Agency;
- (ii) Indian Institute of Insolvency Professionals of ICAI; or
- (iii) Insolvency Professional Agency of Institute of Cost Accountants of India.

Upon registration as member of any one of Insolvency Professional Agency, the above named professionals must apply in prescribed form along with prescribed fees to IBBI for registering as Insolvency Resolution Professional.

Note : Only those professionals, who are self employed can enroll themselves as Insolvency Resolution Professional.

After Registering as Resolution professional, the above named professionals are eligible:

- To be appointed as Interim Resolution Professional
- To be appointed as Resolution Professional
- To be appointed as Liquidator
- To be appointed as Bankruptcy Trustee in case of Individual Bankruptcy

Apart from above, the Insolvency Professionals can incorporate Insolvency Professional Entities (IPE) in the form of Limited Company or LLP.

As on August 25, 2017 as per the record available at website of the IBBI, Total 27 IPE are registered with IBBI and only 904 Insolvency Professionals are registered with IBBI.



In a nutshell it is pertinent to say that the scope under IBC, 2016 for practice is very wide as total sum of debt dues in the market are approx. more than Rs. 8,00,000 crores, and recently RBI had approved for initiation of Corporate Insolvency process for twelve Corporate borrowers.

Presently, due to lack of awareness amongst the Professionals, less numbers of Insolvency Professional are registered with IBBI.

Apart from above, the large number of cases for Individual Insolvency and Bankruptcy will come in near future for which, the professionals are lesser than the demand in the market. Further, the persons who are in employment in the Company and having knowledge about provisions of IBC, 2016, then they can also advise to their employer (management) regarding how to handle the cases under IBC, 2016 properly for ensuring maximum gain.

OFFENCES, FINES & PENALTIES UNDER IBC

Particulars of Offences	Penalties
Initiation of fraudulent or malicious proceedings under IBC (Sec 65)	Penalty: Min. of Rs. 1 Lakh to max. of Rs. 1 Crore
Punishment for false application u/s 7 by the Financial Creditors (Sec 75)	
Punishment for concealment of Property by the Officer of the Corporate Debtor (Sec 68)	Imprisonment: min. 3 years to 5 years or Penalty: Rs. 1 Lakh to 1 Crore or Both
Punishment for non disclosures of all property, documents, books of accounts, not allowing entry in the premises of the Company by any officer of the Corporate Debtor to Resolution Professional (Sec 70(1))	
Punishment for falsification of books of Corporate Debtor (Sec 71)	
False representation to creditors by the Officer of the Corporate Debtor (sec 73)	
Punishment for false application made u/s 10 by the Corporate Debtor (Sec 77)	

Contravention of Moratorium period by the Corporate Debtor or its Officers (sec 74(1))	Imprisonment: min. 3 years to 5 years or Penalty: Rs. 1 Lakh to 3 Lakh or Both
Contravention of Moratorium period by the Corporate Debtor or its Officers (Sec 74(2))	Imprisonment: min. 1 years to 5 years or Penalty: Rs. 1 Lakh to 1 Crore or Both
Contravention of Resolution Plan by the Corporate Debtor or its Officers or by the Creditors (Sec 74(3))	
Punishment for undertaking transaction to defraud the Creditors	
Non Disclosure of dispute or repayment of debt in application filed u/s 9 by the Operational Creditor (Sec 76)	Imprisonment: Maximum 6 Months or Penalty: Rs. 1 Lakh to 5 Lakhs or Both
Punishment for misconduct by resolution professionals (CS, CA, CMA, Advocates registered as RP)	

CONCLUSION

It is concluded that IBC, 2016 is complete code on Insolvency, Liquidation, and Bankruptcy of the Corporate Person, Individual and firm for the purpose for promoting entrepreneurship, ease of doing business, maximizing the wealth of the Corporate Debtor, Individual and Firm for ensuring maximum wealth to all stakeholders, changing the priority of Government dues at last, after the workmen and employees dues.

IBC, 2016 ensures that the every creditor whether financial or operating shall have to say in the management of the Company and their interest is being protected.

Further, the author is of the view that scope of the Insolvency Professionals (CS, CA, CMA, Advocates or graduates, who are registered as Insolvency Professional under IBC with IPA and IBBI) under IBC, 2016 has very bright, and ample of professional opportunities present in the market in both employment as well as in practice. The main mission is the Professional has to make themselves groom and ready for grabbing the professional opportunities created under the Insolvency and Bankruptcy Code-2016.

REFERENCES

1. *Insolvency and bankruptcy Code 2016 and rules and regulations made there under;*
2. *Report of the Bankruptcy Law Reform Committee (BLRC),*
3. *Report of Joint Committee on Insolvency Code 2015*
4. *Information's available at website of Insolvency and Bankruptcy Board of India at <http://www.ibbi.gov.in/>*
5. *News published in the newspapers.* CS

Disclaimer:

The views expressed in this article are the author's personal views based upon interpretation of various provisions of IBC, 2016 read with Rules, Regulations made thereunder and Report of the various committees and shall be for academic purposes only and shall be acted upon after obtaining professional written opinion. The author shall not be responsible for any loss caused to anyone on relying upon the opinion of the author without obtaining written Professional Opinion.

The IBC 2016 route to Industrial Revival

Corporate Insolvency Resolution through Revival Packages



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A change of name can be very telling. The earlier statutory body was Board for Industrial and Financial Reconstruction (BIFR). An orientation towards revival. Today, we have an Insolvency and Bankruptcy Code with a focus on smooth exit of failed businesses. The creditor-led model of resolution under IBC gives short shrift to unsecured creditors including, as an example, homebuyers in the lakhs who face the prospect of all their down payments and stage payments going down the drain. That matter is in the Supreme Court. We need resolution of these issues in a manner fair to all, while we firm up IBC as the mode for resolution of defaulting firms. To be fair, the focus is on improving allocative efficiency, by facilitating businesses to be bought and sold more easily and putting resources to better use.

While, apparently, the Insolvency and Bankruptcy Code, 2016 (IBC, 2016) is oriented towards quick exit of failing businesses, in fact, IBC, 2016 provisions allow successful creation of Resolution Plans for reviving companies to meet challenges of job creation and MSME sector survival.

The larger challenge for India, lies in job creation and sustaining the ecosystem that exists of a multitude of diverse medium/small/large industrial concerns instead of a future structure coming about of a limited number of corporate monopolies dominating the economic landscape. Reviving firms will yield huge gains in protecting employment. It is also important for our democracy, that we sustain the enormous social plurality of crores of enterprises distributed with a presence in every region. These goals are even more important than the institution of a “freedom to exit” for failing firms and of resolving the NPA burdens of banks and of corporate balance sheets.

There are valid reasons for the government to try out the new approach enshrined in the IBC 2016. I know of an instance where an engineering unit, a veritable traditional smokestack plant is occupying land close to the heart of an urban centre. The company is in default, and it is genuinely worthwhile to consider relocation of the plant and putting the prime urban land to alternative uses like software or garment units with a locational convenience for areas which are concentrations of educated workforce of both genders. There would be better use of the land by restructuring and, perhaps, a sale of the business/assets. Except that such redeployment of businesses and assets is easier said than done. Only in a very dynamic business environment can the new policy actually stimulate such quick sale of businesses and assets. Such a dynamic environment is currently, in many geographies within India, the exception, not the rule. In another instance, an MSME unit, again in an urban area has struggled to find a buyer for its industrial plot. A buyer has now come, in the logistics function of a trading firm, but it has taken 2 years for accomplishing the sale. Fortunately, the Bank waited for its dues to be repaid. But the lesson is that our major agenda has to be working with existing promoters wherever feasible in order to revive manufacturing firms.

Corporate Insolvency Resolution Process (CIRP) works to a tight timeframe, and at the end of a 180-day tunnel, the light you see would be that of liquidation if, by that time, NCLT has not approved a Resolution Plan (R Plan). The resolution professional who worked on CIRP without it bearing fruit, is then expected to become a Liquidator. However, there is little enthusiasm for this latter role among the Chartered Accountants or Company Secretaries or Cost Accountants or other professionals. There is, thus, some predisposition of the professionals in favour of the revival effort.

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The Resolution Professional is expected to maximise the value of the firm's assets for the economy as a whole. The Bankruptcy law Reforms Committee, in its report, also recognised that many defaulting units possessed valuable organisational capital, which would evaporate if they were merely wound up. Many aspects of IBC, 2016 offer advantages to the sort of R Plan, which secures revival of a company rather than its liquidation. A revival strategy can have any one of the following aims:

- (a) Revival of the same industrial activity it is already engaged in or in a related line.
- (b) Restructuring the enterprise to hive off non-viable activities and continuation of the remaining activities which are found to be viable. This could include sale of unproductive assets and use of funds realised for the revival.
- (c) Merger with a more profitable company which could potentially yield tax benefits and add value if there are exploitable synergies.

All revival schemes should be designed, inter alia, to protect workmen interests to harmonise with constitutional objectives of social justice.

However, it must be remembered, that only those companies which have a basic viability can be revived. There must be a value addition available in the costs of inputs and sale prices realisable, and these must be reasonably estimated. Depending on the surplus that can be generated, we can arrive at the sustainable debt. That gives a basis for the company to negotiate with the secured financial creditors to reach a settlement around the level of the figure for sustainable debt.

IBC, 2016 and CIRP regulations provide a framework that can be used to drive forward an R Plan for corporate revival of viable companies :

- (a) At inception of a CIRP, the Resolution Professional (R Proffl) is required to ascertain Liquidation Value (LV) of the company through registered values. This is a base figure, and any R Plan that envisages repayment of sustainable debt over a period of time must give to the Financial Creditors better value than they would get by liquidating the company. Under CIRP Regulation 35, the LV is to be arrived at in the manner prescribed therein and under Regulation 36, the essential data relevant to the CIRP for the Corporate Debtor (CD), including LV is to be compiled in the Information Memorandum (IM) which is to be made available to any interested Resolution Applicant who can then prepare an R Plan and propose it to the R Proffl who would place it before the Committee of Creditors (CoC) for a decision to approve it or otherwise.
- (b) Regulation 37 enumerates all the measures for revival that can be a part of the R Plan. These include:
 - (i) Transfer or sale of all or part of the assets of the CD to any person
 - (ii) Reduction in dues to creditors. (This allows for the scaling down of debt, often necessary but which was not easy to do under the RBI Guidelines on Rehabilitation and BIFR Guidelines that held force as the Policy Framework earlier. That policy envisaged restructuring and rephasing, but not scale-down of debt). Often, LV lies well below the up-to-date dues of the Financial Creditors (FCs), and the R Plan would be acceptable to the FCs if it offers more than the LV, even if this offer is a steep discount on the nominal dues of FCs.
 - (iii) Changes in the terms of the debt, including "curing or waiving of any breach by the CD of terms", changes in

interest rates or debt maturities or other terms, satisfaction /modification of security interest and others

- (iv) Acquisition of shares of the CD, or merger with other person(s), and change in constitutional documents of the CD, as also issuance of securities of the CD for cash/property/securities or in exchange for claims/interests.
 - (v) Obtention of approvals from State/Central Govts. (The CIRP regulation makes only a terse reference to this. However, policies on reliefs and concessions have been formulated by virtually every State Government and by different departments of Central Government, including Income Tax Department. There is, in some of these policy documents, reference to BIFR and SICA, but SICA Repeal Act need not imply a sunset for all these measures of relief. There is a substantive continuity between BIFR processes and CIRP through the provisions of Sec 252 of IBC 2016. Due diligence in preparing an R Plan must include, wherever possible, inclusion of such reliefs and concessions. Of course, the availability of the reliefs is subject to actual grant by the concerned agencies. Here, the point to note is that the R Plan can include as a measure, obtention of such reliefs. And once NCLT approves the R Plan, the NCLT-approved R Plan can be forwarded to the respective agencies/State Governments for a favourable decision. CIRP and NCLT are public instrumentalities for maximising value in Debt Resolution, and an approved R Plan would be given appropriate weight by the departments and governments concerned when taking their decision.)
 - (vi) A significant feature in IBC, 2016 is that if the LV available for unsecured creditors/operational creditors (OCs)/ statutory dues is Nil, then these can be written down fully in the R Plan. Even so, wisdom lies in making adequate provision for workmen whose morale and hard work are vital to revival. Likewise, it is wise to make some provision for suppliers and such OCs even if LV for them is Nil. They need to be kept in good relationship for future operations. Statutory dues are also operational creditors and they can be eliminated or trimmed.
 - (vii) Although Regulation 37 does not make it explicit, in reality, there is a need for sizable infusion of interest-free funds or equity for any chance of success of a revival plan. These could come from promoters or from strategic investors. BIFR Guidelines stipulated that at least 30% of the Cost of Scheme has to be brought in as promoters' contribution. This can still be taken as a benchmark.
- Never forget that CIRP under IBC 2016 is a creditor-driven process and the R Plan must be acceptable to the FCs. They must see value in it relative to the liquidation alternative. The following tips may be useful for those ICSI members who face the challenge of entering in to CIRP with a possibility of reviving the company:
- At the outset, when accepting the assignment, carefully scrutinise the company and its transaction history to check for any conflicts of interest that you may find apply to you. Sec 5(24) of IBC on related parties, Code of conduct for IRPs in First Schedule of CIRP Regulations, Sec 49 of Cos. Act, Ind-AS 28 on associate companies. are all relevant for



determining any conflicted situation in our assignments.

- If there is any hint of an interest in the CD , for M&A or strategic alliance or takeover or a “white knight” ready to rescue the CD , or a new co-promoter, then your strategy immediately steers into another direction. The due diligence by the new entrant into the company will drive the Resolution Process.
- In most cases you would have to work with both the FCs and the existing promoters. Consider possibility of assignment of debt to an Asset Reconstruction Company (ARC) as this is likely to scale down the debt , which banks ordinarily find difficulty in doing. However, at a later stage, the ARC may play hardball in negotiations, much more than a Bank . That’s part of the game. Win some, lose some!
- It is best to get ready a “prepack”, a settlement of debt whose terms are agreed with FCs even before filing an application under IBC with NCLT. The IRP appointed by NCLT for the CD need not prepare the R Plan. That exercise can be done in a non-conflicted way by another professional, maybe another IRP.
- When you take charge as an IRP, the first task is to see if there is a viable way out of insolvency for the company. The CD’s CFO and MD are good first sources of information. Within a week of appointment you would appoint two registered valuers to arrive at LV of the CD. Valuers need to realise that LV is a far cry from valuation of the CD as a going concern. LV is about distress valuation and that too further discounted for inevitable delay of two to five years in realisation even of the distress value. This LV is what you have to emphasise to the FCs when you present to them the R Plan with staggered payment but better value than LV.
- Develop a checklist for viability. The application forms of financial institutions are themselves copious checklists. Use your contacts to get information on industry scenario, on checklists and so on. Company Secretaries have unique advantages in the range of contacts that come about naturally in their profession.

- Accounts/finance people are, often pejoratively , described as “bean-counters” and checklists are pejoratively described as “box-ticking exercises”. That notwithstanding, doing these jobs meticulously makes the difference between success and failure in this profession for numbers always tell a story.
- Think out of the box, especially as regards selling off non-core businesses and so on. Insist on access to all files of the CD. The files will offer clues as to what challenges the CD faced and also the responses of the management to these challenges. The latter would give a clue as to managerial competence. Assess if the CD is hostile or cooperative. “Hostility” is usually subtle, exhibited by slow supply of information or by instigated third parties who create trouble. Where the CD has filed application on Form A, this problem should not arise (2/3 ds of applications have been filed in last 9 months by CDs). As IRP, you can also appoint professional management.
- The examination of viability is an intensive exercise. Typically, the FCs in a CIRP exercise would expect amortisation of the scaled-down debt in three to four years. (The private sector has always been sceptical of the feasibility of achieving forecasts of profits in later years beyond the fourth year, even though the RBI Guidelines envisaged settlement over 10 years , with concessions limited to 7 years.) The feasibility of projected profits is multi-dimensional and depends on factors including market trend for the company’s products, technology trends, industry structure and the CD’s place therein, SWOT Analysis for the CD/proposed merged firm., adequacy of working capital, managerial capability (including supervision of R Plan implementation) , labour relations, breakeven analysis and sensitivity to economic factors , expected to be volatile. In complex cases, a consultancy organisation with a variety of skills may be required to assess viability.
- Sometimes, there are pleasant surprises. Valuation can throw up unexpected values in unusual places.
- The bad news is that you need plenty of cash infusion to keep things going during CIRP. The good news is that the timeframe is dramatically shorter under IBC, and so the cash outgo is also less than it would be in a multi-year unfolding of procedures under BIFR. IBC also has provisions to raise interim finance with the approval of the FCs. But that will depend on convincing the FCs that they stand to gain from preserving or enhancing value through Interim Finance.

The hard-ball negotiation begins once the CoC is constituted. Creditors too feel that they cannot know either the resources or the mind of the CD unless they apply pressure and see the responses. IRP has a definite role to play here. He plays the role similar to the Operating Agency under BIFR. IRP can definitely cajole the creditors and can record in the minutes, any extreme stances taken by the creditors.

Troubled companies do have a future, and at least 25% of the companies can be revived even in their existing line. The State Governments have a vital interest in protecting the medium-scale units and lower quartiles (size-wise) units in the large-scale sector , as also in protecting employment. IBC 2016 is the legal framework today and it does have provisions that facilitate revival . We need to rise to this challenge. CS

Voluntary Liquidation made easy under IBC



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BACKGROUND

Closing the loop on corporate liquidation, the Central Government has, on 30 March 2017, notified, inter alia, Section 59 of the Insolvency and Bankruptcy Code, 2016 (Code) which deals with voluntary liquidation of corporate entities with effect from 1 April 2017. On the following day, the Insolvency and Bankruptcy Board of India (Board) has also, *vide* its notification dated 31 March 2017, notified the Insolvency and Bankruptcy

Voluntary liquidation was governed by the provisions of the Companies Act, 1956 (1956 Act) as neither the relevant sections of the Companies Act, 2013 (2013 Act) nor the Code were in force. This article explains Section 59 of the Insolvency and Bankruptcy Code, 2016 (Code) which deals with voluntary liquidation of corporate entities with effect from 1 April 2017.

Board of India (Voluntary Liquidation Process) Regulations, 2017 (Regulations) with effect from 1 April 2017. This has set the ball rolling for the voluntary liquidation of a corporate person under the Code, which includes companies, limited liability partnerships and any other persons incorporated with limited liability.

To put things into perspective, prior to the aforesaid notifications, voluntary liquidation was governed by the provisions of the Companies Act, 1956 (1956 Act) as neither the relevant sections of the Companies Act, 2013 (2013 Act) nor the Code were in force. Further, by virtue of the notification of the Eleventh Schedule of the Code (notified with effect from 15 November 2016), various winding up provisions of the 2013 Act had been amended and voluntary winding up sections under the 2013 Act were omitted. Accordingly, under the previous voluntary liquidation regime, the provisions of the 1956 Act continued to apply in relation to voluntary winding up proceedings before the High Courts.

To analyse the effect of the notification of the relevant provisions of the Code as well as the Regulations on voluntary liquidation proceedings, we have segregated our analysis for the proceedings already pending and those which will be initiated on and from 1 April 2017.

PENDING VOLUNTARY WINDING UP PROCEEDINGS

Rule 4 of the Companies (Transfer of Pending Proceedings) Rules, 2016 (Transfer Rules), which has been notified on 7 December 2016 and brought into force from 1 April 2017, prescribes that all applications and petitions relating to voluntary winding up of companies pending before a High Court prior to 1 April 2017, shall continue to be dealt with by the High Court in accordance with the provisions of the 1956 Act.

It has further been amended and clarified as under:

Pending proceeding relating to voluntary winding up All proceedings relating to voluntary winding up of a company where notice of the resolution by advertisement has been given under sub-section (1) of section 485 of the Act but the company has not been dissolved before the 1st day of April, 2017 shall continue to be dealt with in accordance with provisions of the Act.”

FRESH VOLUNTARY WINDING UP PROCEEDINGS TO BE INSTITUTED UNDER THE CODE

On a conjoint reading of Section 59 of the Code, Sections 434 (1) (c) and 465 of the 2013 Act and Rule 4 of the Transfer Rules, all fresh proceedings for voluntary winding up on and from 1 April 2017 shall be instituted before the NCLT and shall be governed as per the provisions of the Code and the Regulations.

Some of the important aspects of the voluntary liquidation process under the Code and the Regulations have been set out below:

INITIATION OF THE PROCESS

As per Section 59 of the Code read with the Regulations, any corporate person (excluding any financial service provider) may initiate a voluntary liquidation proceeding if it satisfies the following conditions:

- it has not committed any default;
- if majority of the directors or designated partners of the corporate person make a declaration verified by an affidavit to the effect that (i) the corporate person has no debt or it will be able to pay its debts in full out of the sale proceeds of its assets under the proposed liquidation; and (ii) liquidation is not initiated to defraud any person;
- such declaration is accompanied by the audited financial statements and valuation report of the corporate person;
- within 4 (four) weeks of such declaration, a special resolution (an ordinary resolution would suffice in cases of voluntary liquidation by reason of expiry of its duration or occurrence of any dissolution event) is passed by the contributories* requiring the corporate person to be liquidated and appointing an insolvency professional as a liquidator (Contributories' Resolution); and
- creditor(s) representing two-thirds in value of the total debt owed by the corporate person, approve the Contributories' Resolution within 7 (seven) days of its passage (Creditors' Approval).

* As per the Regulations, a 'contributory' means a member of a company, partner of a limited liability partnership, and any other person liable to contribute towards the assets of the corporate person in the event of its liquidation.

LIQUIDATION COMMENCEMENT DATE

Subject to the Creditors' Approval (if required), the voluntary liquidation proceedings in respect of a corporate person shall be deemed to have commenced from the date of passing of the Contributories' Resolution (Liquidation Commencement Date). On and from the Liquidation Commencement Date, the corporate person shall cease to carry on its business except as far as required for the beneficial winding up of its business.

PUBLIC ANNOUNCEMENT AND COLLATION OF CLAIMS

The Regulations prescribe that immediately (and not later than 5 (five) days) upon his appointment, the liquidator shall make a public announcement for calling upon operational creditors, financial creditors, workmen, employees and any other stakeholders of the corporate person to submit their claims as on the Liquidation Commencement Date within 30 (thirty) days of the Liquidation Commencement Date. The liquidator is required to verify the claims within 30 (thirty) days of the last date of receipt of the claims. The liquidator may either admit or reject a claim, in whole or in part, and prepare a list of stakeholders, on the basis of proof of the claims accepted.

PRIMARY FUNCTIONS OF THE LIQUIDATOR

- To value, sell, recover and realize all assets of and monies due to such corporate person in a time-bound manner;
- Opening a bank account for the purpose of receiving all moneys due to the corporate person;
- Distribution of proceeds to the stakeholders within a period of 6 (six) months of receipt of the proceeds; and
- To preserve a physical or an electronic copy of the reports,

Earlier, starting a business in India was easier, but their closure was a cumbersome and time-consuming process. The issue of voluntary winding up regulations is a step forward for easy closure of solvent businesses in India. The regulation aims at speedy winding up and protecting/balancing the interest of all the stakeholders of the company. Voluntary liquidation can also happen if a vital member of the organization leaves the company and the shareholders decide not to continue operations.

registers and books of account for at least 8 (eight) years after the dissolution of the corporate person, either with himself or with an information utility.

COMPLETION OF LIQUIDATION

Once the affairs of the corporate person have been completely wound up and its assets fully liquidated, an application shall be made by the liquidator to the NCLT for its dissolution along with a final report (*inter alia* consisting of audited liquidation accounts, statement(s) demonstrating details of the disposed assets and their manner of sale, and statement(s) that all debt has been discharged and sufficient provision has been made in case of any adverse outcome of a pending litigation). Pursuant to this application by the liquidator, the NCLT shall pass an order for dissolution and the entity shall stand dissolved from the date of NCLT's order.

With the above notification, winding up the proceedings of solvent companies are omitted from the Companies Act, 2013 and are now governed by the Code. The forum to deal with the process will be the respective NCLT Benches from now on instead of the High Court. Winding up of insolvent companies is already being governed by the provisions of the Code. The IP who acts as the liquidator for the process of voluntary winding up assumes a key role in the process since the Code has given the authority to the liquidator for completely driving the process of winding up. Hence, the efficiency of the winding up process would be largely dependent upon the person who is appointed as the liquidator of the company.

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Voluntary liquidation can also happen if a vital member of the organization leaves the company and the shareholders decide not to continue operations.

The Insolvency and Bankruptcy Board of India has notified the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017 ("**New Regulations**") on March 31, 2017. The New Regulations provides the process for



initiating voluntary liquidation by a corporate person i.e. companies, limited liability partnerships and any other persons incorporated with limited liability.

Before introduction of New Regulations, voluntary liquidation of the companies was governed by the Companies Act, 1956 ("CA 1956") since the provisions as mentioned in the Companies Act, 2013 ("CA 2013") had never been notified. Now, the Government has repealed / omitted the provisions of voluntary liquidation as mentioned in CA 1956 as well as CA 2013 vide notification dated March 31, 2017 and May 28, 2016, respectively.

The erstwhile CA 1956 and CA 2013 had 38 and 20 sections dealing with voluntary liquidation, respectively. Chapter V of Part II of the IBC consist of only one section, i.e. Section 59, which deals with voluntary liquidation.

Another key point to be noted that, voluntary winding up under the CA 1956 had been segregated into two types, i.e. members' voluntary winding up and creditors' voluntary winding up. This distinction has now been eliminated under the IBC.

In terms of Section 59 of the IBC, only a corporate person is allowed to initiate voluntary liquidation process, which has not committed any default. It is imperative to understand, whether the word 'default' includes past default or existing default of a corporate person? While analysing the definition of a default which is defined under the IBC to mean – "*non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be*", we observed that it contains those debts which have become due and payable and are not repaid. It seems that default, which occurred in past and had been cured, is not intended to be covered hereunder. Hence, the word 'default' will include the existing debts of a corporate person. The aforesaid condition did not exist in CA 1956.

New regulations require the compliance of the following additional requirements, which were not mentioned earlier in CA 1956:

1. Additional declaration by the directors that company is not wound up to defraud any person;
2. Only insolvency professional can, who meets the eligibility criteria as specified under New Regulations, be appointed

- as liquidator;
3. Maintenance and preservation of various registers in the prescribed manner;
4. Preparation of various reports by the liquidator as to be submitted to a corporate person, Registrar of Companies ("ROC"); and the Insolvency and Bankruptcy Board of India ("Board");
5. Receipt of stakeholders claims by liquidator only in specified forms;
6. The liquidator shall endeavour to wind up the affairs of the corporate person within 12 (twelve) months from the voluntary liquidation commencement date;

Under New Regulations, the Government has also reduced the time period of various compliances. Below is the brief procedure of voluntary liquidation of a corporate person under IBC:

Step I:Submission of declaration(s) to ROC, stating that the company will be able to pay its dues and is not being liquidated to defraud any person;

Step II:Passing of special resolution for approving the proposal of voluntary liquidation and appointment of liquidator ("**Approval**"), within 4 (four) weeks of the aforesaid declaration(s). If a corporate person owes debts, approval of two-third majority creditors would also be required;

Step III:Public announcement inviting claims of all stakeholders, within 5 (five) days of such Approval, in newspaper as well as on website of the corporate person;

Step IV:Intimation to the ROC and the Board about the Approval, within 7 (seven) days of such Approval;

Step V:Preparation of preliminary report about the capital structure, estimates of assets and liabilities, proposed plan of action etc., and submission of the same to a corporate person within 45 (forty-five) days of such Approval;

Step VI:Verification of claims, within 30 (thirty) days from the last date for receipt of claims and preparation of list of stakeholders, within 45 (forty-five) days from the last date for receipt of claims;

Step VII:Opening of a bank account in the name of the corporate person followed by the words 'in voluntary liquidation', in a scheduled bank, for the receipt of all moneys due to the corporate person;

Step VIII:Sale of assets, recovery of monies due to corporate person, realization of uncalled capital or unpaid capital contribution;

Step IX:Distribution of the proceeds from realization within 6 (six) months from the receipt of the amount to the stakeholders;

Step X:Submission of final report by the liquidator to the corporate person, ROC and the Board and application to the National Company Law Tribunal ("**NCLT**") for the dissolution;

Step XI:Submission of NCLT order regarding the dissolution, to the concerned ROC within 14 (fourteen) days of the receipt of order.

In view of the above, it is evident that the Government intends to expedite the process of voluntary winding up in a time bound manner by introducing the New Regulations. Such move of the Government is welcome by the corporates as well as professionals, since, the voluntary winding up under CA 1956 was a time-consuming process and there was no qualification for appointment of the liquidator. Now, only the insolvency professionals, who are experts on the subject, are allowed to be appointed as liquidators which will expedite the completion of voluntary winding up including resolution of all issues in a time bound manner.

CS

Decoding the Major Challenges of the Insolvency and Bankruptcy Code, 2016



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The introduction of the Insolvency and Bankruptcy Code 2016 (IBC) is a landmark step in the history of our country's Banking Credit culture. Before the enforcement of IBC, several legislations were implemented to handle diverse aspects of corporate revival/insolvency process. All stakeholders had clamored for the need to introduce a single legal framework that would address the emerging issues pertaining to insolvency and expedite recovery of dues. The IBC 2016 addressed all these concerns and manifested significant structural changes. It is a comprehensive law that offered time bound solution to revive a company under stress with a mechanism to hasten the

By implementing a time-bound resolution process that hopes to optimize the value of a distressed business, IBC has been designed to benefit the interests of everyone connected with the Corporate. It has helped revive the general economic investment sentiment of the nation. There has been a marked increase in FDI across various sectors of the economy with numerous new announcements in Stressed Assets space by Global & Domestic PE Funds over past few months.

liquidation process in case of its non-revival. Aiming towards addressing the interests of all stakeholders, the Act has been created on grounds of equity, asset-maximisation and promoting entrepreneurial spirit.

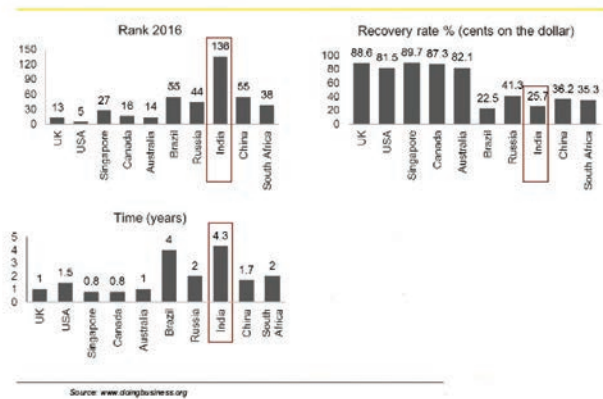
The IBC Code was prepared pursuant to great deliberation and thought process over the past decade culminating in the report of the Bankruptcy Reform Law Committee prepared by Dr. T K Vishwanathan finalized in November 2015. Given below is a brief extract of the report highlighting the major objectives behind the Act.

"The existing framework for insolvency and bankruptcy is inadequate, ineffective and results in undue delays in resolution, therefore, the proposed legislation. The objective of the Insolvency and Bankruptcy Code, 2015 is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the priority of payment of government dues and to establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto. An effective legal framework for timely resolution of insolvency and bankruptcy would support development of credit markets and encourage entrepreneurship. It would also improve Ease of Doing Business, and facilitate more investments leading to higher economic growth and development".

As per the World Bank data, insolvency resolution in India took 4.3 years on an average, which was much higher when compared with the United Kingdom (1 year), USA (1.5 years) and South Africa (2 years). The World Bank's Ease of Doing Business Index, 2015, ranked India as country number 136 out of total 190 countries on the ease of resolving insolvency based on various indicia. Among several requisites of an effective insolvency regime, recovery is one of the most important parameters at 25.7 cents per dollar. India is ahead of only Brazil among BRICS nation. This has been a sense of great concern to the present Government. Introduction of IBC is a remedial stop targeted to improve the ranking of the country.

The ballooning Non-performing assets (NPAs) in the balance sheets of the top PSU banks also hastened the introduction of the IBC 2016. Total NPAs of the country's

Ease of Doing Business' ranking as per World Bank



banking system stand at over INR 8 trillion of which INR 6 trillion, (accounting for 75%) are with public sector banks. The gross NPA (GNPA) ratio of the banking system stood at 9.6 per cent and the stressed advances ratio at 12 per cent, as of March 31, 2017 as per RBI data. These numbers on the back of persistently high ratios in the past few years has been, a matter of huge concern to RBI. 86.5 per cent of these GNPA's are accounted for by large borrowers (i.e. borrowers with aggregate exposure of INR 5 crores and above). The Reserve Bank of India identified twelve large corporate accounts totaling approximately INR 2,53,700 crores (i.e. borrowers with aggregate exposure of Fund and non-based limits in excess of INR 5,000 crores and above) for action, earlier this year. These cases account for about 25% of the current GNPA's of the banking system. This is the first batch of 60 delinquencies RBI wants to clean up in a time span of 90 days. Reports suggest that RBI has come up with the second list of 35-40 Defaulters, having a GNPA in excess of approximately INR 2,00,000 crores. Directives have been issued to the Banks to either seek remedy under any of the existing revival schemes or to usher these under IBC. Together with the first lot the shortlisted cases account for 60-65% of the bad loans clogging the banking system.

By implementing a time-bound resolution process that hopes to optimize the value of a distressed business, IBC has been designed to benefit the interests of everyone connected with the Corporate. It has helped revive the general economic investment sentiment of the nation. There has been a marked increase in FDI across various sectors of the economy with numerous new announcements in Stressed Assets space by Global & Domestic PE Funds over past few months.

The principal player in the IBC has been, the National Company Law Tribunal (NCLT). It has ensured the effective monitoring of the Corporate Insolvency Resolution Process (CIRP). The NCLT has also played a critical role in overcoming preliminary hurdles and has managed harmonious cooperation by all stakeholders.

A concern related to the NCLT is regarding the case law/jurisprudence that develops under the IBC. The lawyers, valuers, creditors, debtors, auditors, liquidators are emerging out of the old regime governed by the Companies Act 1956, the

Sick Industrial Companies Act 1985 (SICA), the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) and the like to get a grip on the IBC 2016. The institutional infrastructure is also evolving to uphold the objectives of the IBC. There is a need to augment the regulatory framework to fit the special challenges, which arise in managing financial stress and defaults. NCLT is facing a similar situation in the process of resolving existing cases under the IBC. The NCLT currently has eleven benches with sixteen judicial members and nine technical members among them. There is a need for opening more centers and courts in the metros and other major cities to dispose the mounting pile of cases.

The role of the Insolvency Professional (IPs) has also been under the scanner. The IPs have a diversified role to play as a finance consultant, management professional, legal consultant, advisor etc. The role of the IP has evolved and is extremely challenging. The functions of the IPs are also supervised by the IBBI, being the Regulator. It is imperative to train the IPs to face the challenges of the profession. IPs form the backbone of the IBC. Their role requires a fine balancing act, given that they are in charge of managing the debtor company and are accountable to the committee of creditors and the adjudicating authority for their actions.

The lack of Information Utility (IU) infrastructure is another challenge. Under the IBC, a CIRP can be triggered only when a default by the debtor company has taken place. The presence of IU enables a quicker initiation of cases by providing access to irrefutable and transparent evidence of the default. In absence of IUs, the IBBI is required to specify the evidence of default that can be used to trigger an IBC case. This can cause inordinate delays especially if the NCLT gets involved in evaluating whether a default has indeed taken place. Under the IBC design, IUs also facilitate the formation of the creditors' committee within 14 days from the date of registration of a case. All information regarding the creditors' claims needed by an IP to form the committee can be easily collected from the IUs. It is therefore likely that in absence of IUs, initiating a case as well as forming the creditors' committee will take far longer than envisaged in the IBC design. This will make it difficult to meet the 180-day timeline for completing the CIRP, giving rise to two possible outcomes. First, the delay in forming the creditors' committee will reduce the time available to agree on a resolution plan. If the committee cannot agree on a resolution plan within the specified time limit, the NCLT will order the liquidation of the company. Secondly, the NCLT may exercise its judicial discretion and extend the CIRP beyond the time limit specified in the law. Both these outcomes have negative consequences. The former creates a liquidation bias in CIRP while the latter compromises the fundamental design of time-bound resolution in the IBC.

Some of the major legal issues causing concern are :-

- **The overriding nature, if any, of the provisions of an approved resolution plan.**
 - In terms of Section 31 of IBC, if the Adjudicating Authority is satisfied that the Resolution Plan as approved by the Committee of Creditors under Section 30(4) of the IBC meets the requirements of Section 30(2), the same shall be approved and the said

Resolution Plan shall be binding on the Corporate Debtor, its employees, members, creditors, guarantors and other stake holders. Under Section 61 of the IBC, the said Resolution Plan can be challenged only on certain limited grounds as mentioned in Section 61(3). It is quite interesting to note that Section 61(3) specifically provides that an approved Resolution Plan can be challenged on the premise that the said Resolution Plan is in contravention of the provisions of any law for the time being in force. The said language of “contravention of the provisions of any law” is of very wide import and can lead to a situation of anomaly, wherein any of the stakeholders of the Corporate Debtor i.e. either the shareholders, creditors, employees etc. can challenge the scheme on the premise that in absence of any specific statutory provision under the IBC wherein the claim or rights of any of the stakeholders can be diluted or reduced, any such treatment in the Resolution Plan would be barred in terms of Section 30(2) of the IBC. Section 238 of the IBC provides for overriding effect to be given to the provisions of the IBC over any other inconsistent law. However, in absence of any specific statutory power to override the provisions of any other law through a Resolution Plan, the future of Resolution Plans would be ultimately subject to the judicial interpretation adopted by the courts in India.

➤ **Applicability of Limitation Act**

- Another issue which would be of great significance in the initiation of proceedings under IBC pertains to the applicability of the Limitation Act in determining the existence of a claim. IBC provides for initiation of CIRP process in case of default being in existence. Default is defined u/s. 3(12) which provides for non-payment of the debt which has become due and payable. The said definition of default accordingly has to be read with the definition of the term “debt” as provided in Section 3(11) of the IBC. Now if we come to the definition of the term “debt”, it deals with liability or obligation in respect of a claim which is due from the Corporate Debtor and includes both financial debt and operational debt. Claim is defined in Section 3(6) of the IBC which specifically states that a claim is a right to payment including a right to remedy for breach of contract therefore for any debt to be legally due and payable, the right of payment is an important component which needs to be there in existence. The object and purpose of the IBC clearly states that IBC is not an act for recovery of any money claims but is a process initiated for reorganization and insolvency resolution of corporate entities which is in interests of all stakeholders. The National Company Law Appellate Tribunal recently in the matter of Neelkanth Township and Constructions Pvt. Ltd. Vs. Urban Infrastructure Trustees Ltd., Company Appeal (AT) No.44 of 2017 vide its order dated 11.08.2017 while specifically coming to a conclusion that the Limitation Act 2013 is not applicable to the IBC held as follows:

“24..... If there is a debt which includes interest and there is default of debt and having continuous

course of action, the argument that the claim of money by Respondent is barred by limitation cannot be accepted.”

The Appellate Tribunal accordingly recognized the claim of the creditor despite the contention of the claim being barred by the law of limitation raised by the Corporate Debtor. However, the operative part of the said order, also uses the words “and having continuous course of action”, the import of which can be looked into by the Tribunal on a case to case basis. Thus, the ultimate fate of whether time barred claims can be now recovered under the ambit of the IBC proceedings can be still said to be a subject matter of judicial interpretation.

➤ **“Dispute” in existence for the purpose of rejection of an application u/s. 9 by the Operational Creditor**

- The existence of the dispute, if any, in the case of the claim of an operational creditor is of significance for the process to be initiated under the IBC. The Appellate Tribunal in the matter of Kirusa Software Pvt. Ltd. Vs. Mobilox Innovations Pvt. Ltd., Company Appeal (AT) No.6 of 2017 vide its order dated 24.05.2017 held that dispute under IBC will include genuine disputes as to repayment of debt and the scope of such disputes cannot be limited and confined to pending suit and arbitration proceedings. In case of existence of a dispute, the application of an operational creditor u/s. 9 is liable to be rejected. The said order of the Appellate Tribunal has been challenged before the Hon’ble Supreme Court and is pending adjudication before the Hon’ble Supreme Court as on date. Therefore, till the time the Hon’ble Supreme Court takes a contrary view as to the ambit of the term “dispute”, all such disputes will result in rejection of an application filed u/s. 9 of the IBC.

➤ **Scope and jurisdiction to be exercised by NCLT under section 60(5) of the IBC**

- Section 60(5) of the IBC provides that National Company Law Tribunal (NCLT) shall have the jurisdiction to entertain or dispose of any application or proceeding or claim by or against the Corporate Debtor including any question of priorities or question of law or facts arising out of or in relation to insolvency resolution of the Corporate Debtor. The language of the said section is very wide as any application proceeding, claim, issue of priorities etc. can be adjudicated by the NCLT. For the purpose of exercising such powers, the NCLT will have to look into an assume jurisdiction which is ordinarily vested with a civil court. In the said background, the judicial interpretation in the course of time will actually determine and decide what all issues will be adjudicated and looked into by the NCLT in the case of a Corporate Debtor while exercising jurisdiction under section 60(5) of the IBC.

Expedition resolution of the above issues shall strengthen the IBC which is already at a transformational phase. It will pave the way for critical structural changes in the economic landscape. CS

Impact of GST on Hotels & Restaurants



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In the Indirect Tax Regime prior to 1.7.2017, the Hospitality Industry used to pay multiple taxes in the form of Service Tax, VAT, Luxury Tax etc. If we take room in a hotel with a room tariff in excess of Rs. 1000, it was subjected to service tax of 15% which upon 40% abatement was down to 9%. In addition, VAT ranging from 5.5%- 14.5% and luxury tax was also payable. In case of restaurant, an abatement of 60% was available whereby effective rate of service tax was brought down to 6%. Upon which, VAT at the appropriate rate and luxury tax was also payable.

The Indian Hospitality Industry is one of the key drivers of growth in the service sector. Apart from hotels, lodges and restaurants, it includes tourism services as well. Tourism and Hospitality Sector's direct contribution to GDP in 2016 was estimated to be \$47 billion. In fact, the National Restaurant Association of India (NRAI) in the Indian Food Services Resort (IFSR) 2016 estimated the total contribution of the restaurant industry would alone contribute 2.1% of GDP by 2021. Since hospitality market is quite big, the introduction of GST is going to have far reaching implications in this industry.

Similarly, for a bundle of services like social functions, marriage functions, seminars etc., abatement of 30% was available. However, for restaurants and hotel owners, the main drawbacks were:

- **No input tax credit was available on the taxes paid by them. The main reason being the central tax like service tax could not be set off against state taxes.**
- Compliance required to be done under the various tax laws
- From the point of view of the end user, the cascading effect of VAT lead to increased prices of products.

COMPONENTS OF RESTAURANT BILL - PRE-GST

As a consumer, we do not pay much attention to the bill received by us at the dinner table. However, if we look closely, there were usually three components of bill:

- SERVICE TAX
- VAT
- SERVICE CHARGES

The Service Tax is payable for the services rendered by the restaurant. Vat is payable on the food portion of the bill. Service Charge is not a tax but a fee (without any authority of law) levied by the restaurant sector for the services provided by them. It amounts to income of such restaurant and distributed among staff as it claims to be tips.

While in the case of VAT and service tax, the amount collected by restaurant from customers were deposited to the credit of the State Government and Central Government respectively. The same is not the case with the service charges, which directly go to the hotel or restaurant owner's kitty.

VAT+ SERVICE TAX → GOVERNMENT
SERVICE CHARGE → HOTEL OWNER

The difference between the service tax and service charge is that service tax is a tax that the service provider has to pay to the government, while the service charge is an additional tip charged by the provider and is not in the nature of tax. Service Tax is mandatory and recovered from the end consumers, while government has issued advisory that consumers can refuse to pay the service charge if they are dissatisfied with

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the service. As per clarification issued by Ministry of Consumer Affairs, service charges are voluntary in nature and if the consumer is not happy with the services he may decline to pay.

GST IMPACT ON RESTAURANT BILL

Under GST, the taxes namely Service Tax, VAT and Entertainment Tax (if levied by State Government) have been merged into a single levy. GST will be levied into two parts i.e. CGST and SGST. For example, if GST to be levied at 18%, then it will be charged 9% CGST and 9% SGST.

GST RATES FOR RESTAURANT WHO ARE UNDER COMPOSITION SCHEME

The restaurants, whose aggregate turnover is less than Rs 75 lakhs, can avail the benefits of "Composition Scheme" under Section 10 of CGST Act. Under this Scheme, 5% GST will be levied. i.e. 2.5% CGST and 2.5% SGST and interestingly, this is to be paid out of pocket of restaurants own kitty as the owner is neither entitled to avail Input Tax Credit of taxes so paid on raw materials nor on Services and at same time, nor the restaurants owner can recover the tax i.e. 5% from the customers visiting the Restaurant.

In other words, they cannot charge any tax in their bills. They cannot pass their burden on to their consumers because of the inherent design of the composition scheme. They cannot avail input tax credit. However, they have the liberty to join the mainstream GST and pay full tax and avail credit.

NON AC RESTAURANT WITH LIQUOR LICENCE – 12%

In the pre-GST era, non-AC restaurant in your local market serving snacks and providing takeaway service were exempt from paying service tax and were liable to pay only VAT as per the state laws. However, post GST, GST is charged at 12% on the bill, i.e. 6% CGST and 6% SGST. In this case, full input tax credit is available on the inputs, services, capital goods i.e. inputs purchased and input services availed for providing output service i.e. restaurant service.

AC RESTAURANT – GST 18%

These restaurants are primarily dining out places with proper sitting and air conditioning facilities. At the same time, such restaurants also possess license to serve liquor. Hence, tax rate of 18% is applicable even if only part of the restaurant is air-conditioned while the remaining part is non-AC. Even if the customer does not dine in the AC portion, still he will be subjected to the same tax rate of 18%. Further, if a restaurant is non-AC and yet it possess a license to serve liquor, the applicable rate of GST is 18% and not 12%.

5 STAR AND ABOVE RATED RESTAURANT -18%

These days mostly all 5 star and above rated hotels have restaurants at their premises. Before the implementation of GST, such restaurants were liable to pay service tax at 6% after availing abatement. Thereupon, VAT was chargeable as per the State law. However, no input tax credit was available. However, post GST regime, the taxability has significantly increased. Now, the customer availing facilities at the restaurant would be liable to GST @18% i.e. 14% CGST and 14% SGST. Full input tax credit (on inputs, input services and capital goods) shall be available while providing "output service" i.e. restaurant service.

OUTDOOR CATERING

Besides restaurants, another "service" comes to our mind is "Outdoor Catering Services". Such "Outdoor Catering" may be for pre-marriage, marriages, social, religious, cultural and sports events and also services provided to corporate entities. In the pre-GST scenario, outdoor catering were liable to service tax @9% after providing benefit of abatement. Thereupon, VAT, as per the provisions of the respective State VAT laws, was leviable. However, post GST, the "Outdoor Catering Service" would be subject to tax @18%. Though rate of tax may be 18% but service providers shall now be entitled to avail full "Input Tax Credit" on (i) inputs (ii) input services (iii) capital goods.

GST RATE FOR HOTEL, LODGE, INS, RESORT, CAMPSITE, CLUB, ETC. ETC. WITH ROOM DECLARED TARIFF LESS THAN RS.1000/- NIL

Budget hotels providing cheap accommodation and food usually have room tariff less than Rs. 1000/- per night. On such hotels and lodges, no GST is payable.

ROOM TARIFFS BETWEEN RS. 1000/- TO RS. 2500/- GST RATE IS 12%.

The rooms which have declared tariff between Rs.1000/- to Rs. 2500/- per night were in the pre-GST scenario liable to service tax @ 9% after receiving abatement of 40% on the tariff value. Such amount was subjected to VAT between 12%- 14%. Under the GST regime, for availing the facilities of such hotel the customer has to pay GST at 12% i.e. 6% CGST and 6% SGST. The hotels will be able to claim full input tax credit of (i) inputs (ii) input services (iii) capital goods.

Upon comparison of both pre-GST and post GST scenarios, it can be seen that in the pre-GST scenario, the "aggregate tax rate" was higher. Under the GST regime, it is merely 12 % with further benefit of ITC.

ROOM TARIFF BETWEEN RS.2500/- TO RS. 5000/- - 18%

Taking the case of pre-GST scenario, such hotels were liable to service tax @ 9% (post abatement of 40% on the tariff value), thereupon VAT @ 5%- 14.5% together with the luxury tax was levied. However, in the post GST period, services of such hotels shall be liable to 18% i.e. 9% CGST and 9% SGST. The net effect is that the tax liability has been significantly reduced plus such hotels are now eligible for full input tax credit benefit.

ROOM TARIFF EXCEEDING RS. 5000/- -28%

These are usually 4 star or 5 star hotels where average room per room per night exceeds Rs. 5000/-. Such hotels were in the pre-GST regime were liable to service tax @ 9% (post abatement of 40% on the tariff value), thereupon VAT @5.5%-14.5% together with the luxury tax was charged. However, in the GST era, now such hotels are liable to pay GST @ 28% (14% CGST + 14% SGST). Additionally, they will be able to claim input tax credit in respect of the services rendered. The Ministry of Finance, Government of India, has a Circular No.139/8/2011-TRU dated 10.05.11 as follows:-

- i) **Relevance of Declared Tariff**
It has been clarified that Declared tariff includes charges for all amenities provided in the unit of accommodation like furniture, air-conditioner, refrigerators etc., but does not include any discount offered on the published charges for such unit. The relevance of 'declared tariff' is in determining the liability to pay service tax as far as short term accommodation is concerned. However, the actual tax will be liable to be paid on the amount charged i.e. declared tariff minus any discount offered. Thus if the declared tariff is Rs. 1100/-, but actual room rent charged is Rs. 800/- tax will be required to be paid @ 5% on Rs. 800/-
- ii) **Levy of differential tariff for the same accommodation**
It is possible to levy separate tariff for the same accommodation in respect of a class of customers which can be recognized as a distinct class on an intelligible criterion. However, it is not applicable for a single or few corporate entities.
- iii) **Inclusion of cost of meals of beverages in the declared tariff.**
Where the declared tariff includes the cost of food or beverages, Service Tax will be charged on the total value of declared tariff. But where the bill is separately raised for food or beverages, and the amount is charged in the bill, such amount is not considered as part of declared tariff.
- iv) **Whether of season prices will be considered as declared tariff**
When the declared tariff is revised as per the tourist season, the liability to pay Service Tax shall be only on the declared tariff for the accommodation where the published/printed tariff is above Rupees 1000/-. However, the revision in tariff should be made uniformly applicable to all customers and declared when such change takes place.
- v) **Inclusion of luxury tax imposed by states in the declared tariff or actual room rent**
For the purpose of service tax luxury tax has to be calculated from the taxable value.

Although there is no circulars/clarification about the meaning of word "Declared Tariff" in the GST Regime, but, in my view, the aforesaid circular issued by the Ministry of Finance, Government of India, in relation to levy of Service Tax, shall be squarely applicable in the GST regime as well. The Supreme Court in the following cases has held that Circulars issued by the Department are binding and Department cannot take a contrary view: -

- (i) Collector of CE, Guntur v. Andhra Sugar Ltd. reported in MANU/SC/0079/1988 : 1988 (38) ELT 564;
- (ii) State of Tamilnadu v. Mahi Traders reported in MANU/SC/0561/1989 : 1989 (40) ELT 266;
- (iii) UCO Bank, Calcutta v. Commissioner of Income Tax, W.B. reported in MANU/SC/0389/1999 : (1999) 4 SCC 599;
- (iv) Collector Central Excise, Vadodara v. Dhiren Chemical Industries reported in MANU/SC/0787/2001 : 2002 (139) ELT3

INPUT TAX CREDIT – SECTION 16 OF CGST ACT, 2017

Section 16 of CGST Act provides that every registered person

shall be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business. In other words, this Section 16 virtually permits taking credit all taxes paid on procuring (i) inputs (ii) input services (iii) capital goods and used in the course of or furtherance of business. Now, we need to consider the meaning of "in the course of" or "furtherance of business".

The meaning of 'furtherance', as per Black's Law Dictionary, 6th Edition, 11th reprint, 1997, is "act of furthering, help forward, promotion, advancement or progress". **Furtherance of business will, thus mean, act of furthering business, helping forward business, promotion of business, advancement of business or progress of business.** Therefore, if a service provider is renting the property in the course of or for furtherance of business or commerce, it will amount to an activity in favour of service recipient for helping forward business, promotion of business, advancement of business and progress of business. It automatically generates value addition and comes within the meaning of 'service tax' as defined under Sec.65[105][zzzz].

Section 17 (5) of CGST Act, inter-alia, speak of blocked credit, which is, as is relevant for our purpose, is reproduced below:-

(5) Notwithstanding anything contained in sub-section (1) of Section 16 and sub-section (1) of Section 18, input tax credit shall not be available in respect of the following, namely:-

- (a)
- (b) **the following supply of goods or services or both:**
(i) **food and beverages, outdoor catering, beauty treatment, health service, cosmetic and plastic surgery except where an inward supply of goods or service or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of taxable composite or mixed supply**
By virtue of Section 17(5), no input tax credit shall be permissible on "food and beverages" and/or "outdoor catering" unless the same is used for making outward supply. Therefore, the input tax paid on "food and beverages and outdoor catering" shall be allowable only if the same are used for making taxable "outward supply"

©: **works contract services when supplied for construction of an immoveable property (other than plant and machinery) except where it is an input service for further supply of works contract service.**

Plainly speaking Section 17(5)(c) of CGST Act, bars inputs tax credit on works contract services used for construction of an immoveable property unless the same is used as a "plant and machinery" and also where "works contract service" is an input for further supply of "works contract service. Now, the question arises as to what does "plant and machinery" mean? Does it mean what is fabricated out of steel items, some bought-out items of steel and brought to site and erected, installed and commissioned at the Works/Factory Site or could it be something else? In order to find answer, we have to look to the following judgments of Apex Court and that of different High Courts.

The Supreme Court in the case of Scientific Engineering House



Private Limited v. Commissioner of Income Tax, Andhra Pradesh, (1986) 157 ITR 0086 (SC), held as under:

"10. In deciding whether a 'building' or a structure is a plant, the functional test has to be applied as indicated in the said decisions. If the 'building' is an apparatus or tool used by the Assessee for carrying on the business or manufacturing activity, then it would be part of the 'plant'.

11. Therefore, the word 'installed' is used in connection with the words 'plant and machinery', can also refer to 'installation' of a factory building. Therefore, the mere use of the word 'installed' with reference to 'plant and Machinery' is not sufficient to exclude the factory building, from the scope of the 'plant and machinery' used in the Notification dated 15.10.1981.

The Supreme Court in the case of CIT vs. Taj Mahal Hotel, Secunderabad (12.08.1971 - SC) : MANU/SC/0239/1971 Land, buildings, machinery, apparatus and fixtures employed in carrying on trade or other industrial business....

The Supreme Court in the case of CIT vs. Dr. B.Venkata Rao MANU/SC/1284/1999 : [2000] 243 ITR 81, has held that if it was found that the 'building' or structure constituted an apparatus or a tool of the taxpayer by means of which business activities were carried on, amounted to a 'plant' but where the structure played no part in the carrying on these activities but merely constituted a place where they were carried on, 'building' could not be regarded as a 'plant'.

The Supreme Court in the case of Anand Theatres MANU/SC/0409/2000 : [2000] 244 ITR 192 (SC), has observed that where a building that was used as a hotel or a cinema theatre could be given depreciation on the basis that it was a 'plant' and it was in relation to that question that the court considered a host of authorities of this country and England and came to the conclusion that a building which was used as a hotel or a cinema theatre could not be given depreciation on the basis that it was a plant. We must add that the court said: "To differentiate

a building for grant of additional depreciation by holding it to be a 'plant' in one case where a building is specially designed and constructed with some special features to attract the customers and the building not so constructed but used for the same purpose, namely, as a hotel or theatre would be unreasonable." This observation is, in our view, limited to buildings that are used for the purposes of hotels or cinema theatres and will not always apply otherwise.

The above judgment of the Supreme Court in the case of Anand Theatre would greatly help the Hospitality Industry (Hotel, Resorts, Inn, Campsite, Club and Restaurants) that the Input Tax Credit (input, service, capital goods) could be allowed for construction of building, complex, civil structure etc.etc. since these would be held to be "plant and machinery" for the Hospitality Sector.

RECORDS TO BE MAINTAINED UNDER GST

Under GST, the activities of manufacture, provision of taxable service and sale of goods have a common law and hence, businesses can now maintain consolidated information which was maintained separately earlier. Under GST, every registered taxable person is required to maintain the following accounts:

1. **Purchase Register** should be maintained for all purchases made within a tax period for manufacturing of goods or provision of services.
2. **Sales Register** should be maintained for all the sales made within the the tax period.
3. **Stock Register** containing correct stock of inventory available at any given point of time should be maintained.
4. **Register for input tax credit availed** should be maintained to mention the details of input tax credit availed for a given period.
5. **Output Tax Liability Register** which should mention the details of GST liability outstanding to be adjusted against input credit or paid out directly.
6. **Output tax paid Register** which should mention the details of GST paid for a particular tax period.
7. **Register of goods produced** which contains the details of goods manufactured in a factory or production house. It should be maintained by every assessee carrying out manufacturing activity.

In addition to maintaining the accounts specified above, a registered person whose turnover during the financial year exceeds Rs. 1 crore is required to get the accounts audited by a chartered accountant or cost accountant and submit a copy of the audited annual accounts and a reconciliation statement in Form GSTR-9B while filing the annual return in Form GSTR-9.

Every registered person is required to retain account for five years from the due date of filing annual returns for the year to which the account and records pertain.

In view of the enormous potential in the Hospitality Sector and also in view of the ever increasing size of the foreign tourists of various categories viz. (i) industry (ii) business (ii) medical (iv) pilgrimage (v) government business (vi) political business. Therefore, it is absolutely imperative that the Government must, by their policies, give philip to this Sector and tap the enormous opportunities coming soon. CS

How SMEs and Industries can maximize benefits under GST



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Goods and Services Tax (GST), has been introduced in the country effective from 1st July, 2017 on an all India basis and we have just two months practical experience. Small and Medium Enterprises (SMEs) are the ones most directly impacted by GST implementation. Its impact is constructive as well as unfavorable in a few cases. It will bring with itself a sea change in the way we file taxes, and also how we conduct business. Many have called it a 'behavioural change' more than a tax change because its successful implementation depends largely on how quickly businesses adapt to the digital format of taxation.

In the background of the above, let us see how the SMEs are expected to leverage the benefits of GST to be a cost competitive industry;

- 1. Compulsory Registration under GST:** It is advised that the SMEs should opt for regular registration even when the total value of supply in a year is less than threshold limit (Normal Dealer- 20 Lacs- Composition dealer- Rs. 75 lacs) . This will allow the industry to get full input tax credit on its capital goods, raw materials and services failing which all these taxes will be part of its cost.
- 2. Become a reliable and responsible Vendor to the Customer as a registered (GST) Vendor :** In a GST regime most of the registered manufacturers (small or big) will always opt to source its inputs (both goods or services) from the registered vendors only to avoid payment of tax under Reverse Charge Mechanism. Further, the cost of product of an unregistered vendor (including Composition Dealer) will always be higher than a registered Vendor by at least 18-20% because of non-availability of input tax credit as explained in (1) above. Many big industries have already taken a corporate decision to completely stop buying materials from unregistered dealers.
- 3. Multiple units/branches/Depots in a State with single compliance:** Unlike previous system, there is a single compliance for all units located in one state. In other words, GST believes one state, one compliance concept. Hence, if you have multiple branches, show rooms etc, you will always go for a single compliance. Hence, you may go for multiple show rooms, godowns etc. without having the liability to have multiple compliance obligations in a state.
- 4. Reduction of Input cost at least by 2-3%-** Under GST, full input tax credit will be available on all inter state purchases of goods and services which were not available under the previous tax system. Further concept of Entry tax and Octroi payment are now in the history. Furthermore, tax on almost all services for business purpose will be available as credit unlike previous system. These themselves would help to reduce input cost by at least 2-3%. The industry in West Bengal will be mostly benefitted since most of the units in the state source at least 80-90% of its inputs on inter state basis i.e. from other states. Other than Coal, Tea and Jute, there are no other major raw materials available in the state.
- 5. Go for complete revamping of supply chain management including Godowns, C&F Agents, Branches:** Under previous tax system the Corporates were required to maintain local branches, depots, godowns at various places and more particularly nearer to its customer for better tax management and to meet the requirement of its customer. For example under previous tax regime, a Customer Y at Delhi would not ordinarily be inclined to purchase material directly from X's manufacturing unit at West Bengal. He would rather advise X to open a Branch at Delhi and to supply the material from its Delhi Branch. This would help him (Y) to avoid making payment of CST which was not available as input tax credit under previous tax regime.
Now under GST regime, full credit is available on inter state supplies of goods and

services. Hence, now customer will have no issue to buy materials directly from the manufacturer from any of its points. Therefore, a close review is now necessary to find out whether there is any need to have such branches apart from customer's specific requirement. One branch means additional cost of personnel, real estate, stock loss, high inventory, pilferage, security cost, borrowing cost, non-moving stock IT system etc. Go for centralised Godown facility at strategic centres to service all India customers.

6. Do strict re-negotiations with the Suppliers of raw materials: in respect of orders/contracts already awarded

This is a very important and critical job for all manufacturers to re-negotiate prices of all contracts already awarded to the Vendors towards passing of GST benefits. As per the Anti profiteering provision in the GST law, the dealers are supposed to pass on the GST Benefit to the customers. Hence, a cost analysis may be necessary to ascertain the cost of product for the pre-GST and post GST period. Probably a cost accountant may be helpful to derive the Pre- GST and Post-Gost cost and then to re-negotiate the price with the Vendors.

7. Re-negotiation of Transportation charges for all incoming and outgoing carriages

In view of the withdrawal of Check post, Entry tax, Octroi and introduction of E-Way bill, the transporters are expected to reduce their time period for carrying goods to different destinations. Previously, a truck used to run approx 250 kms/day in our country (against 500- 800 Km/day in a developed country). Under GST regime, it is expected that Trucks run at least 400 Km/day and thereby to reduce time period by at least 30%. This saving should be translated in the reduction of transportation cost. The corporate should now watch what is the time period being taken by the Trucks to reach its products to its various destinations and to compare the same with the previous history. This analysis will help to do better negotiation with the Transporter. Further under new system, the cost of detention and demurrage should reduce drastically.

- 8. Advise GTA to go for compulsory registration under GSTN :** Under GST Law, the GTA has the option to charge Transportation charges without charging any GST under forward tax but at the same time it cant avail any input tax credit. However, in such case, the service receiver is to pay GST under RCM @ 5%. However, although the service receiver gets RCM credit, there will be a reasonable amount of financial loss if they go with this system and rather advise its GTA to take registration under GST and charge forward tax @ 12% to service receiver. This is because of the reason, that if GTA goes with tax exemption (i.e. tax under RCM), they can not get any GST credit in respect of its inputs like Trucks, Tyre , Spares , mobiles etc. etc. and these taxes will be a part of its overall cost which will be included in the form Transportation Charges. On the other hand if they go for forward charge, they can get credit in respect of its all inputs under GST and would be in a position to reduce its transportation cost to a great extent. Forward tax will not be an additional cost to the service receiver, since it will get full credit. Hence, it will be

a win win situation if the GTA charges tax under Forward cover.

9. Go for Complete centralized compliance system

The GST system is run through IT system including its compliances. Under previous system, the companies were required to maintain local compliance centres in view of local compliance under VAT, CST, Excise, Service, etc. Further collection of C Forms, local Assessments etc were required. Under GST system, compliances of all units located in various states may be done sitting from one place. This will help to strengthen the compliance team and to maintain standard policy towards compliance. It is also a cost friendly exercise.

10. Verification of Rate Tax with correct HSN Code

The rate of Tax under GST is linked with products having its own HSN Code. Therefore, correct classification of HSN code of both its inputs and outputs is necessary to determine the correct rate of tax. Any wrong classification particularly of outputs may give rise for payment of differential tax at a later stage.

11. Providing GSTN to all the service providers /suppliers of goods

Almost tax on all inputs of goods and services required for furtherance of business is available as credit. Therefore, the supplier must have the GSTN of the customer/user of services so that they can mention the GSTN of the customer in their Tax Invoice which would help the customer to get the credit automatically. Therefore, GSTN to be provided in advance to mainly all major service providers like Hotel, Advertisement Agency, Travel Agent, Airlines, Banks, etc.

12. Hotel booking through Local Branches/Depots/Unit by providing local GSTN

As per place of service rule, Hotels/Restaurants etc. would always charge local SGST and CGST in the Hotel Bill. However, if the outstation boarder does not provide the local GSTN of its local office to the Hotel company, the credit will not be available. For example, a marketing Manager of Kolkata visits its clients or office located at Delhi and stays at a Delhi Hotel. The Hotel company will raise Delhi SGST and CGST. Such credit will not be available in West Bengal but would be available at their Delhi office, if any. Hence, GSTN of the local office, if any to be provided to the Hotel Company in advance for the purpose of raising Hotel Bill. However, if there is no local office with GSTN, such credit is likely to be lost and it will be a cost to the company.

13. Continuous training to the employees and also Vendors (mostly SMEs)

GST laws are dynamic and it is fast changing. Further, it is not basically a taxation issue. It takes care of the operation, logistics, IT, accounts and of course taxation. Hence, periodical training is necessary to the employees- they should know how company can take the benefits of GST for its operational improvements. They should also train the small vendors and customers so that the entire team can work in seamless manner. CS

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RESEARCH CORNER



■ ICSI – CCGRT ANNOUNCES UNIQUE CRITICAL RESEARCH ANALYSIS OF INDIAN COMPANIES ACT, 2013



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ICSI-CCGRT is pleased to announce unique Critical Research Analysis of Companies Act, 2013 with an objective of creating knowledge reserve among its Members, both in employment and practice, students pursuing Company Secretary and other professional courses, academicians, corporate professionals and other interested folk in order to make them as epitome of knowledge and useful to corporate world

The purpose of this competition is to identify significant concepts and try to find out a comprehensive and definitive solutions. Since research in all disciplines and subjects, must begin with a clearly defined goal, this activity is also designed keeping those objectives in mind.

Prologue

Indian Company Law is a procedural law, emerging out with various critical issues in its implementation and operation. Since 01-04-2014, being the notification date for various sections, industry professionals, corporates have been facing various critical issues which are of utmost importance in the field of law as well as in the execution. Further, the Companies Act, 2013 have provided robust base to Corporate Governance. As it can be observed from the corporate history, that there have been lot of financial fiascos which have taken place, and in turn have created the need for effective corporate governance. The Companies Act, 2013 has espoused the tenets of corporate governance, thereby, played a pivotal role in protecting the interest of stakeholders. Embracing the concepts like, Independent Director, Woman Director, Secretarial Audit,

Internal Audit, CSR, Class Action Suit, Related Party Transaction etc. all goes a long way in ensuring the best governance practices on the part of the management of corporate houses. In light of this, it generates substantial interest to delve deep into the critical dimensions of Indian Companies Act, 2013. These critical research analyses will help the members and others in identifying the gaps and also providing the solutions to the industry and regulators etc.

Objectives:

- To comprehend the implications of critical aspects covered under Companies Act, 2013.
- To analyze the different school of thoughts on the critical issues.
- To find out probable solution based on National / International Practices, Principles, procedures and Judicial Pronouncements.
- To understand the probable hurdles that are being witnessed by corporate houses in embracing the sections covered under Companies Act, 2013.

Coverage-

Section 230 of the Companies Act, 2013 provides for Compromise and Arrangements. For the purpose of approval of such Schemes, it also provides for sending notices to the members and creditors or any class of them, conducting their meetings and voting by them, amongst other things.

Sub-section (4) of the said section states that

"A notice under sub-section (3) shall provide that the persons

to whom the notice is sent may vote in the meeting either themselves or through proxies or by postal ballot to the adoption of the compromise or arrangement within one month from the date of receipt of such notice:

Provided that any objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent. of the shareholding or having outstanding debt amounting to not less than five per cent of the total outstanding debt as per the latest audited financial statement.”

Precursor to the Problem

The proviso to sub-section 4 states that objection to the compromise or arrangement shall be made only by persons holding not less than 10% of shareholding or having outstanding debt amounting to not less than 5% of total outstanding debt.

Therefore, the said proviso entitles the shareholders and creditors to make objection only when they satisfy the following criterion applicable to them:

- In case of shareholder, he should hold atleast 10% of shareholding
- In case of Creditors, he should hold atleast 5% of total outstanding debt.

The Problem

1. What is the meaning of 'Object' in the proviso? Is it same or different from 'voting against'?
2. Is a shareholder prohibited from voting against the resolution if he holds less than 10% of the shareholding?
3. Is a creditor prohibited from voting against the resolution if he holds less than 5% of total outstanding debt?

Views Invited on the following

1. What is the meaning of 'Object' in the proviso? Is it same or different from 'voting against'?
2. Can a shareholder vote against the resolution if he holds less than 10% of the shareholding?
3. Can a creditor vote against the resolution if he holds less than 5% of total outstanding debt?

How to present the Significant Aspects

Answers of the critical issues needs to be presented in the format appended below-

- ➔ S.NO.
- ➔ Issue (heads)
- ➔ Details of issue with justification
- ➔ Different School of Thoughts
- ➔ Interpretation issues
- ➔ Relevant Sections of Indian Companies Act, 2013 as well as Indian Companies Act, 1956.
- ➔ Relevant provisions of any other Indian Corporate Laws and international Corporate Laws.

Research Paper / Manuscript Guidelines

- ➔ Original papers are invited from Company Secretaries in employment & practice, Chartered Accountants, Advocates, Academicians, merchant bankers, doyens from industry and interested folk.
- ➔ The paper must be accompanied with the author's name(s), affiliations(s), full postal address, email ID, and telephone/ fax number along with the title of the paper on the front page and membership details of professional bodies, if any.

- ➔ Full text of the paper should be submitted in MS Word using Times New Roman, font size 12 on A4 size paper in 1.5 spacing, with a maximum of 5000 words.
- ➔ The text should be typed in MS-Word.
- ➔ The author/s' name should not appear anywhere else on the body of the manuscript to facilitate the blind review process. The research paper should be in clear, coherent and concise English.
- ➔ Tables / Exhibits should be numbered consecutively in Arabic numerals and should be referred to in the text as Table 1, Table 2 / Exhibit 1, Exhibit 2 etc.
- ➔ All notes must be serially numbered. These should be given at the bottom of the page as footnotes.
- ➔ The following should also accompany the manuscripts on separate sheets: (i) A brief biographical sketch (60-80 words) of the author/s describing current designation and affiliation, specialization, number of books and articles in refereed journals, membership number of ICSI, if any, and other membership on editorial boards and companies, etc.
- ➔ The research papers should reach the Competition Committee on or before 30th of October 2017 by 12 noon (IST).
- ➔ Participants should email their research papers on the following email id: ccgrt@icsi.edu & research.icsi@gmail.com
- ➔ The paper may be presented either in single section of any chapter or multiple sections after chapters.
- ➔ There is no restriction on number of entries. One participant can submit more than one entries.

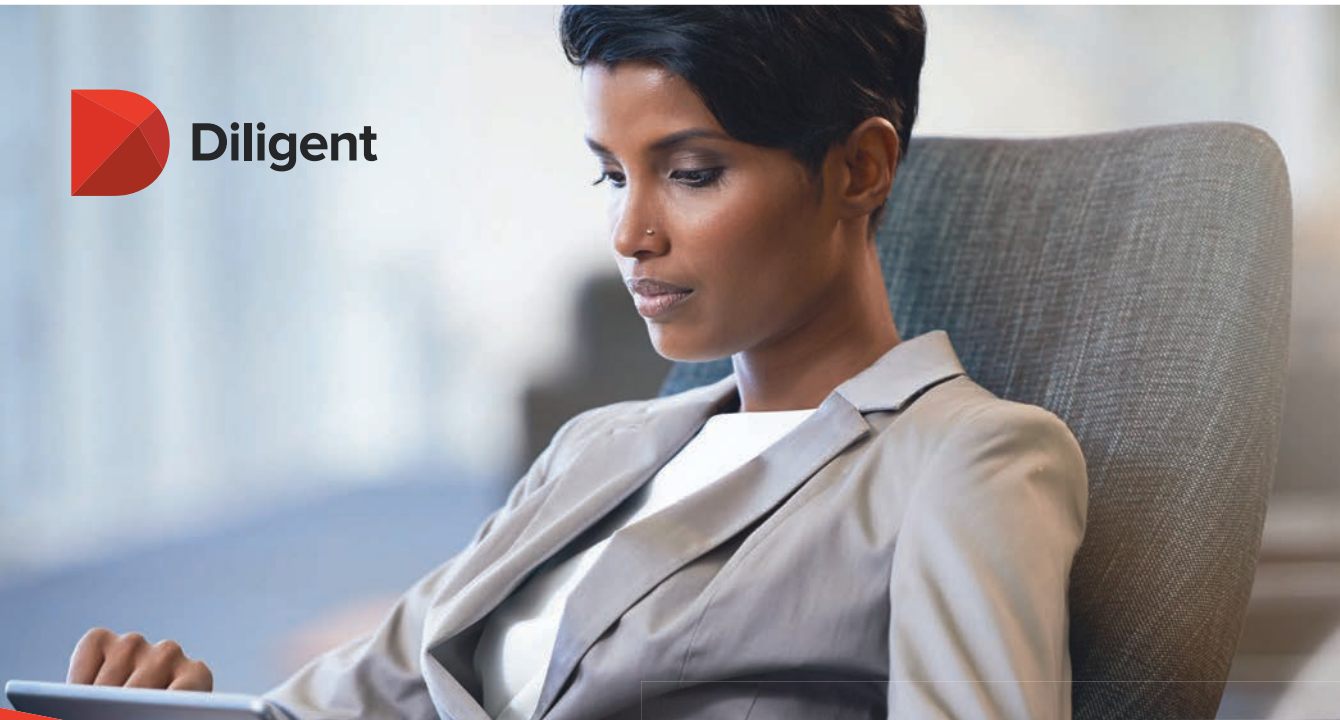
Further Information for Authors / Participants

- ➔ The decision of the Reviewing Committee will be final and binding on the participants.
- ➔ The Institute of Company Secretaries of India reserves the right to publish or refer the selected papers for various publications viz; Souvenirs, Books, Study materials published by the institute or in any seminar / conference / workshop / Research Programs conducted by institute either on its own or jointly with other organizations and also in regular course of activities of ICSI.
- ➔ The papers will be scrutinized by an Expert Committee.
- ➔ For any query / assistance, kindly contact at: ccgrt@icsi.edu
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3

LEGAL WORLD



- S.V. KONDASKAR, OFFICIAL LIQUIDATOR V. V.M. DESHPANDE, ITO & ANR [SC]
- THE ENFORCEMENT OFFICER V. MOHAMMED AKRAM [SC]
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- UNITECH WIRELESS (TAMIL NADU) PVT. LTD V. PRINCIPAL COMMISSIONER OF INCOME TAX [DEL]
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- XYZ V. HYUNDAI MOTOR INDIA LTD & ANR [CCI]
- COCHIN PORT TRUST V. CONTAINER TRAILER OWNERS COORDINATION COMMITTEE [CCI]
- APOLLO TYRES LTD V. PIONEER TRADING CORPORATION & ANR [DEL]



Corporate Laws

LMJ 23:09:2017

S.V. KONDASKAR, OFFICIAL LIQUIDATOR v. V.M. DESHPANDE,
ITO & ANR [SC]

Civil appeal No.1650 of 1970

S.M.Sikri, J.M. Shelat, I.D.Dua, H.R.Khanna & G.K.Mitter, JJ.[Decided on
04/01/1972]

Equivalent citations: AIR 1972 SC 878; (1972) 42 Comp Cas 168 SC; (1972) 83
ITR 685 SC; (1972) 1 SCC 438; (1972) 2 SCR 965.

Companies Act,1956- section 446- company under liquidation- income tax
proceedings initiated against the OL- whether leave of the winding up court is
required-Held,No.

Brief facts:

The Colaba Land & Mills Co., Ltd., (in liquidation) was ordered to be wound up and the Official Liquidator was appointed its liquidator. The Income-tax Officer (Companies Circle) concerned issued six different notices proposing to reopen the assessment of the Company and to re-assess it. Certain negotiations followed between the Official Liquidator and the Inspecting Assistant Commissioner of Income-tax but they were infructuous. On an application made by the Official Liquidator, the Company Court stayed the proceedings on the ground that income tax officer has no jurisdiction to issue the said notices or to proceed with the re-assessment of the Company without the leave of the court. On appeal the Division Bench reversed the above stay order passed by the company court. Hence the appeal by the OL to the Supreme Court.

The only question which required the consideration of the Supreme Court was, whether it is necessary for the Income-tax Officer to obtain leave of the liquidation court, when he wants to re-assess the company for escaped income in respect of past years.

Decision: Appeal dismissed.

Reason:

Turning now to the Income-tax Act it is noteworthy that Section 148 occurs in Chapter XIV which beginning with Section 139 prescribes the procedure for assessment and Section 147 provides for assessment or re-assessment of income escaping assessment. This section empowers the Income-tax Officer concerned subject to the provisions of Sections 148 to 153 to assess or re-assess escaped income. While holding these assessment proceedings the Income-tax Officer does not, in our view, perform the functions of a court as contemplated by Section 446(2) of the Act. Looking at the legislative history and the scheme of the Indian Companies Act, particularly the language of Section 446 read as a whole, it appears to us that the expression "other" legal proceeding" in Sub-section (1) and the expression

"legal proceeding" in Sub-section (2) convey the same sense and the proceedings in both the sub-sections must be such as can appropriately be dealt with by the winding up court. The Income-tax Act is, in our opinion, a complete code and it is particularly so with respect to the assessment and re-assessment of income-tax with which alone we are concerned in the present case. The fact that after the amount of tax payable by an assessee has been determined or quantified its realisation from a company in liquidation is governed by the Act because the income-tax payable also being a debt has to rank pari passu with other debts due from the company does not mean that the assessment proceedings for computing the amount of tax must be held to be such other legal proceedings as can only be started or continued with the leave of the liquidation court under Section 446 of the Act. The liquidation court, in our opinion, cannot perform the functions of Income-tax Officers while assessing the amount of tax payable by the assessee even if the assessee be the company which is being wound up by the court. The orders made by the Income-tax Officer in the course of assessment or re-assessment proceedings are subject to appeal to the higher hierarchy under the Income-tax Act. There are also provisions for reference to the High Court and for appeals from the decisions of the High Court to the Supreme Court and then there are provisions for revision by the Commissioner of Income-tax. It would lead to anomalous consequences if the winding up court were to be held empowered to transfer the assessment proceedings to itself and assess the company to income-tax. The argument on behalf of the appellant by Shri Desai is that the winding up court is empowered in its discretion to decline to transfer the assessment proceedings in a given case but the power on the plain language of Section 446 of the Act must be held to vest in that court to be exercised only if considered expedient. We are not impressed by this argument. The language of Section 446 must be so construed as to eliminate such startling consequences as investing the winding up court with the powers of an Income-tax Officer conferred on him by the Income-tax Act, because in our view the legislature could not have intended such a result.

The argument that the proceedings for assessment or reassessment of a company which is being wound up can only be started or continued with the leave of the liquidation court is also, on the scheme both of the Act and of the Income-tax Act, unacceptable. We have not been shown any principle on which the liquidation court should be vested with the power to stop assessment proceedings for determining the amount of tax payable by the company which is being wound up. The liquidation court would have full power to scrutinise the claim of the revenue after income-tax has been determined and its payment demanded from the liquidator. It would be open to the liquidation court then to decide how far under the law, the amount of Income-tax determined by the department should be accepted as a lawful liability on the funds of the company in liquidation. At that stage the winding up court can fully safeguard the interests of the company and its creditors under the Act. Incidentally, it may be pointed out that at the bar no English decision was brought to our notice under which the assessment proceedings were held to be controlled by the winding up court. On the view that we have taken, the decisions in the case of Seth Spinning Mills Ltd., (In Liquidation) 46 I.T.R. 193 and the Mysore Spun Silk Mills Ltd., (In Liquidation) 68 I.T.R. 695 do not seem to lay down the correct rule of law that the Income-tax Officers must obtain leave of the winding up court for commencing or continuing assessment or reassessment proceedings. For the foregoing reasons we have no hesitation in dismissing the appeal with costs.

LW 63:09:2017

THE ENFORCEMENT OFFICER v. MOHAMMED AKRAM [SC]

Criminal Appeal Nos. 1422-1423 of 2017 (Arising out of SLP (Cri) Nos.6824-6825 of 2012)

S.A.Bobde & I. Nageswara Rao, JJ. [Decided on 17/08/2017]

FERA- notice to appear in proceedings – respondent did not appear- conviction order passed- whether tenable-Held,No.

Brief facts:

The petitioner initiated criminal proceedings against the Respondent, who was a Money changer who alleged to have indulged in releasing substantial foreign exchange in contravention of the laws i.e. FERA. The Respondent did not appear during the proceedings and notices were said to have been affixed on his premises. The petitioner passed conviction order against the Respondent which was set aside on appeal preferred by him. The revision petition and appeals preferred by the petitioner were dismissed. Hence the present appeal before the Supreme Court.

Decision: Appeal allowed.

Reason:

The sole point that arises for our consideration in this case is whether disobedience to respond to the summons issued Under Section 40(3) FERA would amount to an offence under Section 56 of FERA, 1973. This point has come up for consideration before this Court in Enforcement Director & Anr v. M.Samba Siva Rao & Ors, (2000) 5 SCC 431. Due to the divergence of opinion of the High Courts of Kerala, Madras on one hand and High Court of Andhra Pradesh on the other, a three Judge Bench of this Court considered the matter and held as follows:

"4. A learned Single Judge of the Kerala High Court considered this question in the case of Itty v. Asstt. Director [(1992) 58 ELT 172 (Ker)]. On a conjoint reading of Sections 40 and 56 of the Act, the learned Judge came to the conclusion that the failure to obey the summons issued under Section 40(1) cannot be held to be a contravention of the provisions of the Act, rule, direction or order inasmuch as it is only when directions pertaining to some money value involved are disobeyed, such disobedience is punishable under Section 56 of the Act. The learned Judge applied the ordinary rules of construction that penal statutes should receive a strict construction and the person to be penalised must come squarely within the plain words of the enactment.

We are unable to accept the constructions put in the aforesaid judgment as in our view clauses (i) and (ii) of Section 56(1) are material for deciding the quantum of punishment and further, there is no reason why the expression "in any other case" in Section 56(1) (ii) should be given any restrictive meaning to the effect that it must be in relation to the money value involved, as has been done by the Kerala High Court. The summons issued under Section 40, if not obeyed, must be held to be a contravention of the provisions of the Act and at any rate, a contravention of a direction issued under the Act, and therefore, such contravention would squarely come within the ambit of Section 56 of the Act.

The question came up for consideration before a learned Single Judge of the Madras High Court in the case of C.Sampath Kumar v. A.N.Dyaneswaran [Criminal OPs Nos.5468 and 5629 of 1996 dated 1-8-1997] and was disposed of by the learned Judge of the Madras

High Court by judgment dated 1-8-1997. The Madras High Court also came to the conclusion that the entire Section 56 of the Act is identified and substantiated only in terms of the extent and value of the money involved in the offence, and therefore, violation or contravention of summons, issued under Section 40 of the Act unrelated to the money involved in the investigation cannot be held to be punishable under Section 56. Against the aforesaid judgment of the Madras High Court, the department had preferred appeals to this Court, which were registered as Criminal Appeals Nos. 143-44 of 1998, but the question raised was not necessary to be answered as the persons concerned appeared before the Enforcement Authorities and were arrested by the said Enforcement Authorities and, therefore, this Court kept the questions of law open by its order dated 20-7-1998.

In yet another case, the question arose for consideration before the Madras High Court in Criminal OP No. 5718 of 1996 and a learned Single Judge did not agree with the earlier decision of the said High Court in Criminal OPs Nos. 5468 and 5629 of 1996 and referred the matter to a Division Bench by his order dated 13-8-1997 and it was submitted at the Bar that the Division Bench has not yet disposed of the matter. The question came up for consideration before the Andhra Pradesh High Court in the case of P.V. Prabhakara Rao v. Enforcement Directorate, Hyderabad [1998 Cri LJ 2507 (AP)] and the said High Court has taken the view that failure to attend and give statement in pursuance of summons issued under Section 40 of the Act, clearly amounts to disobedience of the directions given by the authority concerned and therefore, provisions of sub-section (1) of Section 56 apply. The learned Judge of the Andhra Pradesh High Court interpreted the expression "in any other case" in clause (ii) of Section 56(1) to mean that the said provision would get attracted even though no amount or value is involved in the contravention in question. The aforesaid view of the Andhra Pradesh High Court appears to us, is the correct interpretation of the provisions contained in Sections 40 and 56 of the Act."

The question of service under Section 40(3) of FERA, 1973 not being effected on the Respondent is irrelevant at this point of time as he was represented by an Advocate before the Trial Court. It appears that the Respondent is not interested in these proceedings. In any event, the judgment of the High Court cannot be sustained as it is contrary to the law laid down by this Court in Enforcement Director & Anr. v. M. Samba Siva Rao & Ors (supra). For the aforementioned reasons, the judgment of the High Court is set aside and the appeals are allowed.



LW 64:09:2017

COMMISSIONER OF INCOME TAX v. HINDUSTAN PETROLEUM CORPORATION LTD [SC]

Civil Appeal No. 9295 of 2017 [Batch of appeals]
 A.Bhushan & A.Sikri,JJ. [Decided on 03/08/2017]
 Income tax Act, 1961- sections 80HH, 80I and 80IA- whether bottling of LPG
 cylinder is 'production'- Held, Yes.

Brief facts:

The respondents-assesseees in these appeals are engaged in the process of bottling Liquefied Petroleum Gas (LPG) Cylinders meant for domestic use. They are claiming benefit of Sections 80HH, 80-I and 80-IA of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). Admissibility of benefit under the aforesaid provision depends upon the question as to whether bottling of LPG is an activity which amounts to 'production' or 'manufacturing' for the purposes of the aforesaid provisions of the Act.

The Assessing Officers (AOs) had disallowed the deduction claimed by the assesseees holding that they did not engage in the production or manufacture activity because of the reason that LPG was produced and manufactured in refineries and thereafter there was no change in the chemical composition or other properties of the Gas in the activity of filling the cylinder. This view was affirmed by Commissioner of Income Tax (Appeals). The Income Tax Appellate Tribunal (ITAT), however, upset the aforesaid view of the AOs. The High Court has concurred with the view of the ITAT. This is how the Department is before the Supreme Court and insists that the process of bottling LPG cylinder in domestic use does not amount to manufacture.

Decision: Appeal dismissed.

Reason:

We have given adequate consideration to the respective submissions of both the parties, which they deserve. As is clear from the facts and arguments noted above, the question of law which is involved (already mentioned) is:

Whether bottling of LPG, as undertaken by the assessee, is a process which amounts to 'production' or 'manufacture' for the purposes of Sections 80HH, 80-I and 80-IA of the Act?; and if so, whether the respondents/assesseees are entitled to claim the benefit of deduction under the aforesaid provisions while computing their taxable income?

Let us take note of the process of LPG bottling that is undertaken by the assesseees herein and about which there is no dispute. It has come on record that specific activities at assesseees' plant include receiving bulk LPG vapour from the oil refinery, unloading the LPG vapour, compression of the LPG vapour, loading of the LPG in liquefied form into bullets, followed by cylinder filling operations.

Thus, after the bottling activities at the assesseees' plants, LPG is stored in cylinders in liquefied form under pressure. When the cylinder valve is opened and the gas is withdrawn from the cylinder, the pressure falls and the liquid boils to return to gaseous state. This is how LPG is made suitable for domestic use by customers who will not be able to use LPG in its vapour form as produced in the oil refinery. It, therefore, becomes apparent that the LPG obtained from the refinery undergoes a complex technical process in the assesseees' plants and is clearly distinguishable from the LPG bottled in cylinders and cleared from these plants for domestic use by customers.

It may be relevant to point out that keeping in view the aforesaid process, the ITAT arrived at the specific findings in support of its

decision, which are as under:

- (a) There is no dispute that the LPG produced in the refinery cannot be directly supplied to the consumer for domestic use because of various reasons of handling, storage and safety.
- (b) LPG bottling is a highly technical and complex activity which requires precise functions of machines operated by technically expert personnel.
- (c) Bottling of LPG is an essential process for rendering the product marketable and usable for the end customer.
- (d) The word 'production' has a wider connotation in comparison to 'manufacture', and any activity which brings a commercially new product into existence constitutes production. The process of bottling of LPG renders it capable of being marketed as a domestic kitchen fuel and, thereby, makes it a viable commercial product.

In the considered opinion of this Court, the aforesaid activity would definitely fall within the expression 'production'. We agree with the submission of the learned counsels for the assesseees that the definition of 'manufacture of gas' in Rule 2 (xxxii) of the Gas Cylinders Rules, 2004 also supports the case of the assesseees inasmuch as gas distribution and bottling is treated as manufacturing or producing gas.

We are also inclined to accept the submission of the learned counsel for the assesseees that various High Courts have, from time to time, decided that bottling of gas into cylinder amounts to production and, therefore, claim of deduction under Sections 80HH, 80-I and 80-IA would be admissible. We, thus, find that the view of the ITAT as affirmed by the High Court is correct and, therefore, there is no merit in these appeals which are accordingly dismissed.

LW 65:09:2017

UNITECH WIRELESS (TAMIL NADU) PVT. LTD v. PRINCIPAL COMMISSIONER OF INCOME TAX [DEL]

W.P.(C) 11256/2016

S. Muralidhar & Prathiba M. Singh, JJ. [Decided on 11/08/ 2017]

Income tax Act, 1961- section 245C- settlement of case- assessee offered to give up certain income- AO assessed that the income has not been declared- whether tenable-Held,No.

Brief facts:

For Assessment Year ('AY') 2012-13, the Petitioner filed its return of income which was picked up for scrutiny and a notice under Section 143(2) of the Act was issued to the Petitioner by the AO. A reference was made to the Transfer Pricing Officer ('TPO') who passed an order proposing a transfer pricing adjustment on account of Guarantee Fees. Thereafter, the AO passed a draft assessment order. The Petitioner went before the Dispute Resolution Panel ('DRP'). It is stated that those proceedings are pending. Likewise, for AYs 2013-14 to 2016-17, the Petitioner's returns were picked up for scrutiny and those proceedings are also stated to be pending.

During the pendency of the aforesaid proceedings the Petitioner, on 28th October 2016, filed a settlement application before the ITSC for AYs 2012-13 to 2016-17 and notice was issued by the ITSC on said application.

It is stated that, thereafter, the impugned order was passed by the ITSC, holding that the Petitioner had failed to fulfil the requirement

of Section 245C relating to making a full and true disclosure of its income "which has not been disclosed" before the AO.

Decision: Petition allowed.

Reason:

A perusal of the impugned order of the ITSC reveals that in the Statement of Facts (SoF) filed before the ITSC, the Petitioner had offered to give up its claim for depreciation on Assets Retirement Obligation ('ARO') provision. It also proposed to offer the unearned revenue to tax for the relevant AY, which was earlier not offered to tax. It also proposed to withdraw the deduction claimed for legal expenses on prosecution proceedings and in respect of which deduction was earlier claimed. Fourthly, the Petitioner offered the finance charges for obtaining the Bank Guarantee ('BG') to tax, which was earlier claimed as deduction. It also stated in its SoF that the deduction of penalty imposed by the DOT, expenses on account of the prior period guarantee fee, etc. had earlier been inadvertently claimed in the returns. However, in respect of certain other issues like disallowance of roaming charges, amalgamated license fee and depreciation of finance costs, etc. the Assessee maintained the position taken in the original returns filed.

The ITSC was of the view that since what was being offered by the Petitioner to tax before it were the amounts which were earlier claimed in the returns filed before the AO as deductions but were now sought to be withdrawn, "there are no fresh issues or incomes being offered for tax which have not been declared before the AO." In the considered view of the Court, the above approach of the ITSC appears to be erroneous. No doubt, Section 245C (1) of the Act requires the applicant to make a full and true disclosure of the income which has not been disclosed before the AO and the manner in which said income has been earned but this, by no means, requires to the applicant to demonstrate that there is a fresh source of income which was not earlier disclosed by the Assessee. It can happen that an income which was not earlier offered to tax, like an excessive claim for depreciation, is now withdrawn and, as a result, income is offered to tax before the ITSC. This will satisfy the requirement of Section 245C (1) of that Act that what was not earlier disclosed before the AO is now offered to tax. This view of the Court finds support from the decisions of the Bombay High Court in Director of Income Tax (International Taxation) v. Income Tax Settlement Commission [2014] 365 ITR 108 (Bom) and of the Karnataka High Court in CIT v. Vysya Bank Ltd [2012] 344 ITR 658 (Kar).

Consequently, the Court sets aside the order dated 4th November, 2016 passed by the ITSC and restores the Petitioner's application to the file of the ITSC. The said application will be taken as having been proceeded with by the ITSC in terms of Section 245D (1) of the Act. For the further stages in the application, it will be listed before the ITSC on 20th September, 2017.

LW 66:09:2017

NEW DELHI TELEVISION LTD v. DY. COMMISSIONER OF INCOME TAX [DEL]

W.P.(C) 9120/2015 & W.P.(C) 11638/2015

S. Ravindra Bhat & Najmi Waziri, JJ. [Decided on 10/08/2017]

Income tax Act, 1961- section 281B- assessee showing consistent decline in networth- attachment orders passed- whether tenable-Held, Yes.

Brief facts:

The present writ petitions have been filed by NDTV Ltd. against the notice proposing reassessment proceedings initiated by the Commissioner of Income Tax under Section 147/148 of the Income Tax Act, 1961 (hereinafter, "Act") and the order of provisional attachment of Petitioner's assets under Section 281B of the Act.

Decision: Petitions dismissed.

Reason:

In this case, the reasons provided are to be viewed in the background of the tax evasion allegedly conducted by NDTV by floating paper companies to raise approximately Rs.1,100 crore and later dissolving them. Owing to these transactions, the investors in these companies have suffered significant losses within a short span of time. In addition to this, NDTV has also issued guarantees to obtain a term loan for its subsidiary NDTV Convergence.

The revenue states that the annual reports and financial statements of the assessee show that its net worth has constantly declined over the years and has in fact declined to Rs.339.42 crore, as on 31.03.2015 from Rs. 421.06 crore as on 31.03.2012. In addition, it also urges that NDTV has created further charge on its assets without taking previous permission from the AO. In terms of Para 10 of the provisional attachment order dated 14.09.2015, NDTV issued unconditional and irrevocable guarantee to the extent of Rs. 3.5 crore and Rs. 5 crore for obtaining a term loan from Yes Bank by its subsidiary NDTV Convergence Limited. However, while pledging these assets, NDTV failed to seek permission from the Department as per the provisions of section 281 of the Act read with CBDT's Circular No. 4 of 2011 dated 19.07.2011. It is submitted that NDTV is aware of the Circular, because the AO had issued an advisory to the petitioner by letter no. 529 dated 01.08.2014. This Court is of the view that a reasonable apprehension that NDTV may liquidate the assets thwarting the recovery of tax liability is not unwarranted. This court further notes the AO's decision not to attach the bank accounts and other trade receivables of NDTV so as to ensure unhampered operation of its business. This decision is in line with the judgment of the Bombay High Court in Gandhi Trading v. Assistant Commissioner of Income Tax & Ors [1999] 239 ITR 337 (Bom) wherein the Court held that the action taken under Section 281B must not hamper the business activities of the assessee and accordingly, attachment of bank accounts must be the last resort.

For these reasons, this Court is of the opinion that the impugned order under Section 281B does not suffer from any infirmities and is valid under the Act. The Writ Petition No. 9120/2015 has to therefore, fail.

In view of the foregoing analysis, both petitions WP Nos. No. 9120/2015 and 11638/2015 have to be and are dismissed, without any order as to costs.

LW 67:09:2017

BATHLA TELETECH PVT. LTD. VS COMMISSIONER OF TRADE & TAXES [DEL]

W.P. (C) 5021/2017

S.Muralidhar & Prathiba M. Singh, JJ. [Decided on 10/08/2017]
Delhi VAT Act- assessee located in ward 69- AO of ward 72 initiated proceedings- whether he has jurisdiction to do so-Held, No.

Brief facts:

The Petitioner was located in Ward No.69, while the Assessing officer of Ward No72 issued notice of tax demand and penalty on the Petitioner. The notice was challenged in the present petition.

Decision: Petition allowed.

Reason:

The question that arose in the present writ petition is as to whether notices of default assessment of the tax and interest have been issued by the concerned VATO exercising jurisdiction on the Petitioner.

In the present case, the submission of the Respondent that this Court had, in its order dated 15th March, 2017, agreed with its stand as contained in the counter affidavit, is bereft of merit, inasmuch as, in the said order, there is no discussion as to whether the AVATO Ward-72 has jurisdiction or not. The Court merely directed that the OHA shall decide the objections of the Petitioner after "the concerned VATO" has passed the order in respect of the 1st and 2nd quarters of 2015-16 within a period of two months from 15th March, 2017. The presumption by the Respondent that this direction should be deemed to be considered as acceptance by this Court that the AVATO Ward-72 had jurisdiction, is not borne out from the order. In any event, the question of jurisdiction goes to the root of the matter specifically when the imposition of tax and penalty thereupon are concerned, and hence the issue of jurisdiction ought to have been decided by the Respondent before proceeding further.

The stand of the Respondent that it could not have waited for a decision on jurisdiction first before passing the assessment orders, as the time period fixed as per the order dated 15th March 2017, also appears to be clearly an attempt to cover up its own delay, inasmuch as, after the said order which prescribed two months for the entire exercise to be completed, the Respondent waited till 9th May, 2017 to issue even the first notice under Section 59 of the Act. There is no reason, whatsoever, as to why the Section 59 (2) notice was issued so belatedly i.e. almost at the fag end of the expiry of two month period as directed by this Court. Thereafter, for the Respondent not to consider the objection to the jurisdiction of the AVATO Ward-72, and to pass the impugned order, by simply assuming that its stand of jurisdiction already stands confirmed by this Court, is completely unacceptable.

The jurisdiction of the two Wards is clearly captured in the circular relied upon by the Petitioner, the relevant clauses of which read as under:

"069 Vijay Nagar, Gurmandi, Rana Pratap Bagh, C.C. Colony, Gujrawalan Town, Derawal Nagar, Mahindra Enclave, G.T. Karnal Road, Indl.Area Azad Pur.

072 Timarpur, Kingsway Camp, Mukherjee Nagar, Tagore Park, Nirankari Colony, Parmanand Colony, Dhaka, Nehru Vihar, Gandhi Vihar. Burari, Salempur, Gharonda, Hakikat Nagar"

Ward No.69 being the correct Ward from where the Petitioner

carries on its business, and this fact already being well within the knowledge of the authorities since 22nd January, 2016, the AVATO Ward-72 clearly lacked the jurisdiction to pass the impugned orders.

The present writ petition is allowed and the impugned orders dated 15th May, 2017 for the 1st and 2nd quarters of 2015-16 are, thus, set aside. This shall, however, not preclude the Respondent from issuing fresh notices by the 'concerned VATO' who exercises jurisdiction over the Petitioner, within a period of four weeks, which if issued, shall be decided in accordance with law. It is clarified that this Court has not gone into the merits of the issues raised.



LW 68:09:2017

XYZ v. HYUNDAI MOTOR INDIA LTD & ANR [CC]

Case No. 34 of 2017

D.K.Sikri, Bunker, Sudhir Mital, Augustine Peter, U.C. Nahta & G. P. Mittal [Decided on 17/08/2017]

Competition Act, 2002- complaint against violation of FTDR Act- complaint not maintainable.

Brief facts:

HMIL is a manufacturer of cars of various models and is catering to both domestic and export markets. For this purpose, HMIL avails various schemes such as Export Promotion Capital Goods (EPCG), Target Plus, Focus Product Scheme (FPS), etc., announced by DGFT, Ministry of Commerce, Government of India (GOI). EPCG scheme is an initiative of DGFT to promote exports out of India.

According to the Informant, HMIL is allegedly misusing the EPCG Policy framed by DGFT for promotion of exports out of India. HMIL is alleged to be importing the CG for manufacture of different models of cars that are meant for exports but selling them domestically. As the CG imported under the EPCG scheme are exempted from customs duty, it is alleged that the same are purchased by HMIL at cheaper rates - reducing its cost of production viz-a-viz its competitors. As per the allegations, HMIL is in fact not using the imported CG to meet even 50% of the Export Obligation, which is mandatory for it to do.

Decision: Complaint dismissed.

Reason:

The Commission has perused the information/ additional submissions and the documents filed therewith.

The allegations made by the Informant raise issues relating to the Foreign Trade (Development and Regulation) Act, 1992 and the Customs Act, 1962. No competition issue arises out of the

information presented or is otherwise made out. The reliefs sought by the Informant (including seeking investigation into the impugned conduct through direction to DRI) do not fall within the ambit of the Commission as provided under the Act.

In the result, the Commission is of considered opinion that no case of contravention of the provisions of either Section 3 or Section 4 of the Act is made out against OPs in the instant case.

The Informant has sought protection from disclosure of his/ her identity in terms of Regulation 35(1) of the General Regulations, 2009. The Commission is of opinion that identity of the Informant may be protected from disclosure, as prayed for.

In view of the above, the Commission is of the opinion that no case of contravention of the provisions of the Act is made out against the Opposite Parties and the information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.

LW 69:09:2017

COCHIN PORT TRUST v. CONTAINER TRAILER OWNERS COORDINATION COMMITTEE [CCI]

Case No. 06 of 2014

D.K. Sikri, Sudhir Mital, U. C. Nahta, G.P. Mittal. [Decided on 01/08/2017]

Competition Act, 2002- section 3- unilateral fixation of price through Turn Up system- constitutes anti-competitive practice - cease and desist order passed.

Brief facts:

The main issue before the Commission in this case was whether there was any collusive/anti-competitive conduct on the part of the OPs which amounted to a contravention of the provisions of Section 3(3) read with Section 3(1) of the Act. The DG, on the basis of the observations recorded earlier, has found that OP-1, along with its four participating association (i.e. OP-13 to OP-16), introduced and implemented a 'Turn System' under which they not only unilaterally fixed the prices for coastal container services, but also led to limiting and controlling of such services at the Informant Port.

Decision: Cease and desist order passed.

Reason:

The Commission has perused the investigation report, the suggestions/objections filed by the OPs and the oral submissions made by the respective learned counsel for the parties.

The allegation in the present case is regarding anti-competitive understanding between various sub-associations under the aegis of OP-1. All these associations are operating in the same market or at the same level. The members of all these associations, some of which are also arraigned as OPs, are container trailer transporters and are similarly placed in the market in which they are ideally expected to compete for obtaining bookings from the prospective users/consumers. During the year 2014, from January 2014 till September 2014, the members of these associations (i.e. OP-13 to OP-16) were admittedly providing their services to the users of the container trailer services through a Turn System.

There is enough evidence on record to establish the existence of the Turn System e.g. Circular dated 13th January, 2014 letter dated 25th April, 2014 sent by OP-1 in response to the notice dated 21st April, 2014 sent by the Informant Port justifying the imposition of the Turn System etc. Further, there are emails on record (emails dated 7th February, 2014 and 8th February, 2014) which were sent by OP-1 to

the members asking for their cooperation for the implementation of the Turn System. Moreover, this Turn System was admittedly followed by the members of the participating associations. All the OPs have admitted the existence of the Turn System from January 2014 to September 2014. Thus, it can be safely inferred that this arrangement was agreed upon by them through their respective associations. This Turn System, being in nature of a horizontal arrangement, needs to be assessed under the provisions of Section 3(3) read with Section 3(1) of the Act.

The present case before us is peculiar, in the sense that the existence of the agreement i.e. the Turn System or the fixation of price, vide a rate list, is not challenged by any of the OPs. Rather they have admitted the existence of the Turn System and have sought to justify it by citing the prevailing circumstances at the time when such Turn System came into existence and also by citing various reasons why the adoption or implementation of such system should not be considered as an anti-competitive arrangement under the Act. Thus, what is relevant in the present case is to see whether the burden of proof, which has now shifted on the OPs, to prove that their arrangement/agreement had no AAEC on the markets in India, has been successfully discharged or not.

In the present case, it has already been highlighted above that OP-1 and its participating four associations were indulging in anti-competitive conduct. The platform of the OP-1 association was apparently used to conclude anti-competitive arrangement. Thus, the contention of the OPs that right to form an association is a fundamental right, is acknowledged but found to be an inadequate defense in light of the facts and circumstances of the present case.

Further with regard to the legality of the Turn System, suffice to say that though there can be efficiency justifications for introducing a turn system in a particular trade, the OPs have failed to demonstrate any such efficiency or redeeming virtue which could have come to their rescue and would have helped them to rebut the presumption of AAEC in the market. Neither they were able to appropriately justify why they resorted to unilateral price fixation for dealing with issues prevailing during the relevant time when the Turn System was imposed nor were they able to sufficiently explain the reasons for increased rates during the Turn System as compared to the pre/post Turn System period.

Thus, in the event of the OPs not being able to rebut the presumption of AAEC that has arisen because of the price fixation under the Turn System being in the nature of a horizontal agreement/arrangement specifically recognised under Section 3(3) of the Act, the Commission has no hesitation in holding that OP-1, along with its four participating associations (namely, OP-13 to OP-16), indulged in the anti-competitive conduct of unilateral price fixation during the Turn System, in contravention of Section 3(3)(a) read with Section 3(1) of the Act.

For the reasons recorded herein above, there was no rebuttal of presumption to hold otherwise. Thus, the OP associations (OP-1 OP-13, OP-14, OP-15 and OP-16) are held to be in contravention of the provisions of Section 3(3)(a) read with Section 3(1) of the Act.

In view of the above and having regard to the fact that the OPs have already ceased the anti-competitive conduct, the Commission directs the erring OPs to desist from indulging in the anti-competitive conduct in future which has been found to be in contravention of the provisions of the Act.

With regard to the imposition of penalty, the Commission is of the

view that there are certain mitigating circumstances which exist in favour of the OPs in the present case. The Turn System, during which the alleged rate list was followed by the OP associations and their members, was in operation for a very limited time period, i.e. from January 2014 to September 2014 and the Turn System was discontinued even before the investigation was ordered in this case. The purpose of imposing monetary penalties can be two-fold--first, for disciplining the erring party for its anti-competitive conduct and, second, for creating deterrence to stall future contraventions. Considering that the contravention discontinued long-back and the parties are not indulging in such behaviour any more, the Commission does not find it appropriate to impose any monetary penalty in the present case. The direction of the Commission to desist from indulging in such anti-competitive conduct, in future, would meet the ends of justice.



LW 70:09:2017

APOLLO TYRES LTD v. PIONEER TRADING CORPORATION & ANR [DEL]

CS (OS) 2802/2015

Vipin Sanghi, J. [Decided on 17/08/2017]

Designs Act- tread pattern of truck tyre- whether entitled to copyright protection- Held, Yes.

Brief facts:

The Plaintiff manufactures truck tyre Endurance LD 10.00 R20, with a peculiar tread patterns over which it had claimed proprietary rights. The defendant also manufactures truck tyre HI FLY with similar tread pattern of the Plaintiff.

Plaintiff filed a suit against the Defendant for infringement of its proprietary rights and an interim injunction was granted in favour of the Plaintiff. Defendant moved an application to vacate the stay.

Decision: Interim stay confirmed.

Reason:

I have set out hereinabove the manner in which the tyres of the plaintiff and the other manufacturers are displayed in the course of marketing, advertisement etc. They clearly show that the tread patterns are utilized by the manufacturers including by the plaintiff, in respect of its tyre in question, as a source identifier, i.e. as a trademark.

No doubt, the tread pattern adopted by the plaintiff in respect of its tyre also serves the purpose which the treads on any tyre serve. However, if the same function can be achieved through numerous

different forms of tread patterns, then the defence of functionality must fail. It was essential for the defendant to, at least, *prima facie*, establish that the tread pattern of the plaintiff was the only mode/ option, or one of the only few options, which was possible to achieve the functional requirements of the tyre. The position which emerges on a perusal of the documents placed on record by the plaintiff is that there are innumerable different and unique tread patterns in existence, adopted by different manufacturers of tyres, which achieve the same objective.

It cannot be said that the unique tread pattern adopted by the plaintiff is attributable only to the technical result, namely, of providing grip and stability to the vehicle on which the tyre of the plaintiff is used. The same function can be performed by any other tyre with a different tread pattern.

The manner in which the tyres of different manufacturers are advertised and marketed leaves no manner of doubt that the tread pattern on the tyre of the manufacturer is prominently displayed, apart from the brand name of the manufacturer. It is also not uncommon to see the customer - interested in buying a tyre, being shown the tyres by the vendor with the tread pattern in a vertical position i.e. by showing the "face" of the tyre, such that the tread pattern is the first thing that strikes and appeals to the eye of the customer. It is also not uncommon to see that even when tyres are wrapped in covering, the vendor removes the covering while displaying his tyres to the customers. Pertinently, the defendant does not display its tyres in question under the brand "HI FLY" in a wrapped condition in its advertisements. The defendant is displaying its tyre in question under the brand "HI FLY" in an unwrapped condition, and prominently showing the tread pattern on the tyre. This itself shows that the wrapping of the tyre does not inhibit the display and marketing of the tyre, by prominently displaying the tread pattern on the tyres.

Thus the submission that the tread pattern adopted by the plaintiff is functional and, therefore, not capable of protection, cannot be accepted. This submission is rejected.

The tread pattern on a tyre, in my view, is such a prominent feature - and is so prominently displayed and advertised, that the added matter, namely the brand name on the sides of the tyre, is not sufficient to distinguish the goods of the defendant from those of the plaintiff. Similarly, the inclusion of the tyre-tube and flap in the plaintiff's tyre, and only the flap along with the tyre in the defendant's tyre - minus the tube, is not sufficient to distinguish the plaintiff's tyre from that of the defendant. It is not in dispute that both tyres of the plaintiff and the defendant in question are tyres meant for trucks. Therefore, some change of specifications between the two is of no consequence, when it comes to the aspect of confusion in the mind of the customer. I may also observe that the customers of the truck tyres, by and large, are semi-literate middle class truck owners, operators and drivers, from whom it is difficult to expect a detailed examination, threadbare, of all the differences in the tyres of the plaintiff and that of the defendant before the purchase of the tyre is made.

In view of the aforesaid, I am inclined to confirm the injunction granted in favour of the plaintiff till the disposal of the suit. Accordingly, the plaintiff's application, i.e. I.A. No. 19350/2015 is allowed and the ex- parte ad interim order of injunction dated 15.09.2015 is confirmed till the disposal of the suit.

4

FROM THE GOVERNMENT



- NATIONAL COMPANY LAW APPELLATE TRIBUNAL RULES, 2016.
- COMPANIES (INCORPORATION) SECOND AMENDMENT RULES, 2017
- COMPANIES (ARRESTS IN CONNECTION WITH INVESTIGATION BY SERIOUS FRAUD INVESTIGATION OFFICE) RULES, 2017.
- DATE OF COMING INTO FORCE OF SECTION 212 (8), (9) & (10) OF THE COMPANIES ACT, 2013
- CLARIFICATION ON EXCHANGE TRADED OPTION CONTRACTS ON EUR-INR, GBP-INR AND JPY-INR CURRENCY PAIRS
- ISSUANCE, LISTING AND TRADING OF DEBT SECURITIES ON EXCHANGES IN INTERNATIONAL FINANCIAL SERVICES CENTRES (IFSC)
- SECURITIES AND EXCHANGE BOARD OF INDIA (INTERNATIONAL FINANCIAL SERVICES CENTRES) GUIDELINES, 2015 – AMENDMENTS
- ONLINE REGISTRATION MECHANISM FOR CUSTODIAN OF SECURITIES
- DISCLOSURES BY LISTED ENTITIES OF DEFAULTS ON PAYMENT OF INTEREST/ REPAYMENT OF PRINCIPAL AMOUNT ON LOANS FROM BANKS / FINANCIAL INSTITUTIONS, DEBT SECURITIES, ETC.
- MARGIN TRADING FACILITY- CLARIFICATION



Corporate Laws

01 National Company Law Appellate Tribunal Rules, 2016,

[Issued by the Ministry of Corporate Affairs vide [[F. No. 1/30/2013-CL-V] dated 23.08.2017. To be published in the Gazette of India, Extraordinary, Part-II, Section(3) Sub-section(i)

In exercise of the powers conferred by sub-section (1) and sub-section (2) of section 469 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules further to amend the National Company Law Appellate Tribunal Rules, 2016, namely:-

1. Short title and commencement. - (1) These rules may be called the National Company Law Appellate Tribunal (Amendment) Rules, 2017.
(2) They shall come into force on the date of their publication in the official Gazette.
2. In the National Company Law Appellate Tribunal Rules, 2016, for rule 63, the following rule shall be substituted, namely:-
"63. Appearance of authorised representative.- (1) Subject to provisions of section 432 of the Act, a party to any proceedings or appeal before the Appellate Tribunal may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any other person to present his case before the Appellate Tribunal.

(2) The Central Government, the Regional Director or the Registrar of Companies or Official Liquidator may authorise an officer or an Advocate to represent in the proceedings before the Appellate Tribunal.
(3) The officer authorised by the Central Government or the Regional Director or the Registrar of Companies or the Official Liquidator shall be an officer not below the rank of Junior Time Scale or company prosecutor."

AMARDEEP SINGH BHATIA

Joint Secretary

02 Companies (Incorporation) Second Amendment Rules, 2017

[Issued by the Ministry of Corporate Affairs vide [[F. No. 1/13/2013 CL-V] dated 27.07.2017. Published in the Gazette

of India, Extraordinary, Part-II, Section(3) Sub-section(i) vide G.S.R. 955(E) dated 27.07.2017]

In exercise of the powers conferred by sub-sections (1) and (2) of section 469 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules further to amend the

Companies (Incorporation) Rules, 2014, namely: —

1. (1) These rules may be called the Companies (Incorporation) Second Amendment Rules, 2017.
(2) They shall come into force on the date of their publication in the official gazette.
2. In the Companies (Incorporation) Rules, 2014 (hereinafter referred to as the principal rules), for rule 28, the following rule shall be substituted, namely:—

"28. Shifting of registered office within the same State.

—(1) An application seeking confirmation from the Regional Director for shifting the registered office within the same State from the jurisdiction of one Registrar of Companies to the jurisdiction of another Registrar of Companies, shall be filed by the company with the Regional Director in **Form No. INC.23** along with the fee and following documents, —

- (a) Board Resolution for shifting of registered office;
- (b) Special Resolution of the members of the company approving the shifting of registered office;
- (c) a declaration given by the Key Managerial Personnel or any two directors authorised by the Board, that the company has not defaulted in payment of dues to its workmen and has either the consent of its creditors for the proposed shifting or has made necessary provision for the payment thereof;
- (d) a declaration not to seek change in the jurisdiction of the Court where cases for prosecution are pending;
- (e) acknowledged copy of intimation to the Chief Secretary of the State as to the proposed shifting and that the employees interest is not adversely affected consequent to proposed shifting".

3. In the principal rules, for rule 30, the following rule shall be substituted, namely: —

"30. Shifting of Registered Office from one State or Union Territory to another State

(1) An application under sub-section (4) of section 13, for the purpose of seeking approval for alteration of memorandum with regard to the change of place of the registered office from one State Government or Union territory to another, shall be filed with the Central Government in **Form No. INC.23** along with the fee and shall be accompanied by the following documents, namely: —

- (a) a copy of Memorandum of Association, with proposed alterations;
- (b) a copy of the minutes of the general meeting at which the resolution authorising such alteration was passed, giving details of the number of votes cast in favour or against the resolution;
- (c) a copy of Board Resolution or Power of Attorney or the executed Vakalatnama, as the case may be.

(2) There shall be attached to the application, a list of creditors and debenture holders, drawn up to the latest

practicable date preceding the date of filing of application by not more than one month, setting forth the following details, namely:-

- (a) the names and address of every creditor and debenture holder of the company;
- (b) the nature and respective amounts due to them in respect of debts, claims or liabilities:

Provided that the list of creditors and debenture holders, accompanied by declaration signed by the Company Secretary of the company, if any, and not less than two directors of the company, one of whom shall be a managing director, where there is one, stating that (i) they have made a full enquiry into the affairs of the company and, having done so, have concluded that the list of creditors are correct, and that the estimated value as given in the list of the debts or claims payable on a contingency or not ascertained are proper estimates of the values of such debts and claims and that there are no other debts of or claims against the company to their knowledge, and (ii) no employee shall be retrenched as a consequence of shifting of the registered office from one state to another state and also there shall be an application filed by the company to the Chief Secretary of the concerned State Government or the Union territory.

(3) A duly authenticated copy of the list of creditors shall be kept at the registered office of the company and any person desirous of inspecting the same may, at any time during the ordinary hours of business, inspect and take extracts from the same on payment of a sum not exceeding ten rupees per page to the company.

(4) There shall also be attached to the application a copy of the acknowledgment of service of a copy of the application with complete annexures to the Registrar and Chief Secretary of the State Government or Union territory where the registered office is situated at the time of filing the application.

(5) The company shall, not more than thirty days before the date of filing the application in **Form No. INC-23** -

- (a) advertise in the Form No. INC.26 in the vernacular newspaper in the principal vernacular language in the district and in English language in an English newspaper with the widest circulation in the state in which the registered office of the company is situated: Provided that a copy of advertisement shall be served on the Central Government immediately on its publication.
- (b) serve, by registered post with acknowledgement due, individual notice, to the effect set out in clause (a) on each debenture-holder and creditor of the company; and
- (c) serve, by registered post with acknowledgement due, a notice together with the copy of the application to the Registrar and to the Securities and Exchange Board of India, in the case of listed companies and to the regulatory body, if the company is regulated under any special Act or law for the time being in force.

(6) There shall be attached to the application a duly authenticated copy of the advertisement and notices issued under sub-rule (5), a copy each of the objection received by the applicant, and tabulated details of responses along with the counter-response from the company received either in

the electronic mode or in physical mode in response to the advertisements and notices issued under sub-rule (5).

(7) Where no objection has been received from any person in response to the advertisement or notice under sub-rule (5) or otherwise, the application may be put up for orders without hearing and the order either approving or rejecting the application shall be passed within fifteen days of the receipt of the application.

(8) Where an objection has been received,


- (i) the Central Government shall hold a hearing or hearings, as required and direct the company to file an affidavit to record the consensus reached at the hearing, upon executing which, the Central Government shall pass an order approving the shifting, within sixty days of filing the application.
- (ii) where no consensus is reached at the hearings the company shall file an affidavit specifying the manner in which objection is to be resolved within a definite time frame, duly reserving the original jurisdiction to the objector for pursuing its legal remedies, even after the registered office is shifted, upon execution of which the Central Government shall pass an order confirming or rejecting the alteration within sixty days of the filing of application.

(9) The order passed by the Central Government confirming the alteration may be on such terms and conditions, if any, as it thinks fit, and may include such order as to costs as it thinks proper:

Provided that the shifting of registered office shall not be allowed if any inquiry, inspection or investigation has been initiated against the company or any prosecution is pending against the company under the Act.

(10) On completion of such inquiry, inspection or investigation as a consequence of which no prosecution is envisaged or no prosecution is pending, shifting of registered office shall be allowed”.

4. In the principal rules, for Form No. INC-23, the following form shall be substituted, namely:-

FORM NO. INC-23 [Pursuant to section 12(5) and 13(4) of the Companies Act, 2013 and rule 28 and 30 of the Companies Rules, 2014]	 सत्यमेव जयते	Application to the Regional Director for approval to shift the Registered Office from one state to another state or from jurisdiction of one Registrar to another Registrar within the same State
Form language <input type="radio"/> English <input type="radio"/> Hindi Refer the instruction kit for filing the form.		
1. *Application is for shifting the Registered Office from		
<input type="radio"/> One state to another state <input type="radio"/> One registrar to another registrar within the State		
2. (a) *Corporate identity number (CIN) of company <input type="text"/>		Pre-fill
(b) Global location number (GLN) of company <input type="text"/>		
3. (a) Name of the company <input type="text"/>		
(b) Address of the registered office of the company <input type="text"/>		
(c) Name of the existing ROC <input type="text"/>		
4. *(a) Name of the state/Union territory where the new registered office of the company would be situated <input type="text"/>		
*(b) Name of the office of new ROC where the new proposed registered office of the company would be situated <input type="text"/>		

* (c) Reasons for shifting the registered office

5. * (a) Service request number of Form MGT-14

* (b) Date of filing Form MGT-14

* (c) Date of passing the special resolution

6. (a) Details of members present at the meeting where the decision of shifting was taken and number of shares held by them

(i) Number of members

(ii) Number of shares held by them

(b) Details of the members who voted in favour of the proposal and number of shares held by them

(i) * Number of members

(ii) Number of shares held by them

(c) Details of the members who voted against the proposal and number of shares held by them

(i) * Number of members

(ii) Number of shares held by them

(d) Details of members who abstained from voting and number of shares held by them

(i) * Number of members

(ii) Number of shares held by them

7. * (a) Total Number of creditors

* (b) Total Number of depositors

* (c) Total Number of debenture holders

(d) Brief details of the objections, if received any in response to the advertisement

8. * Whether any prosecution is pending against the company under the Act

Yes No

If yes, Give brief details of the prosecution

9. * Whether any of the following is initiated against the company under the Act

inquiry inspection investigation

If yes, Give brief details of the inquiry, inspection, investigation

10. * Whether the company has serviced the copy of the application with complete annexures with the Registrar and the chief secretary of the state

Yes No

If yes, specify the date of service

11. Facts of the case are given below

(Give a concise statement of facts in a chronological order, each paragraph containing as nearly as possible a separate issue, fact or otherwise)

Attachments

1. Copy of Memorandum of Association;	<input type="button" value="Attach"/>
2. * Copy of special resolution sanctioning alteration;	<input type="button" value="Attach"/>
3. * Copy of the minutes of the general meeting authorizing such alteration;	<input type="button" value="Attach"/>
4. * Power of attorney/vakalatnama/Board resolution;	<input type="button" value="Attach"/>
5. Declaration by directors about no retrenchment of employees;	<input type="button" value="Attach"/>
6. Copy of newspaper advertisement for notice of shifting the registered office;	<input type="button" value="Attach"/>
7. * Proof of service of the application to the Registrar, Chief secretary of the state, SEBI or any other regulatory authority (if applicable);	<input type="button" value="Attach"/>

8. List of creditors or debentureholders duly verified, as per proviso to sub rule (2) to Rule 30

9. Copy of objections (if received any);

10. Optional attachment(s), if any including those filed in MCA portal (investors complaint form).

Declaration

I am authorized by the Board of Directors of the Company vide resolution no. Dated to sign this form and declare that all the requirements of Companies Act, 2013 and the Rules made thereunder in respect of the subject matter of this form and matters incidental thereto have been complied with. I further declare that:

Whatever is stated in this form and in the attachments thereto is true, correct and complete and no information material to the subject matter of this form has been suppressed or concealed and is as per the original records maintained by the company.

All the required attachments have been completely and legibly attached to this form

Any application, writ petition or suit had not been filed regarding the matter in respect of which this petition/application has been made, before any court of law or any other authority or any other Bench or the Board and not any such application, writ petition or suit is pending before any of them.

the company has not defaulted in payment of dues to its workmen and has either the consent of its creditors for the proposed shifting or has made necessary provision for the payment thereof.

the company shall not seek change in the jurisdiction of the Court where cases for prosecution are pending.

* To be digitally signed by

* Designation

* Director identification number of the director; or DIN or PAN of the manager or CEO or CFO; or Membership number of the Company secretary

Note: Attention is drawn to provisions of Section 448 and 449 which provide for punishment for false statement / certificate and punishment for false evidence respectively.

For office use only:

eForm Service request number (SRN) eForm filing date (DD/MM/YYYY)

Digital signature of the authorising officer

This e-Form is hereby approved

This e-Form is hereby rejected

Date of signing (DD/MM/YYYY)

5. In the principal rules, for Form No. INC-26, the following form shall be substituted, namely:-

“Form No. INC-26

[Pursuant to rule 30 of the Companies (Incorporation) Rules, 2014]

Advertisement to be published in the newspaper for change of registered office of the company from one state to another

Before the Central Government
_____ Region

In the matter of sub-section (4) of Section 13 of Companies Act, 2013 and clause (a) of sub-rule (5) of rule 30 of the Companies (Incorporation) Rules, 2014

AND

In the matter of _____ Limited having its registered office at _____, Petitioner

Notice is hereby given to the General Public that the company proposes to make application to the Central Government under section 13 of the Companies Act, 2013 seeking confirmation of alteration of the Memorandum of Association of the Company in terms of the special resolution passed at the Annual General Meeting/ Extra ordinary general meeting held on _____ to enable the company to change its Registered Office from “State of _____” to “State of _____”.

Any person whose interest is likely to be affected by the proposed change of the registered office of the company may deliver **either on the MCA-21 portal (www.mca.gov.in) by filing investor complaint form** or cause to be delivered or send by registered post of his/her objections supported by an affidavit stating the nature of his/her interest and grounds of opposition to the the Regional Director at the address _____ within fourteen days of the date of publication of this notice with a copy to the applicant company with a copy of the applicant company at its registered office at the address mentioned below:

For and on behalf of the Applicant

.....
 Director
 Date.....
 Place.....

Note:— Strike off whichever is not applicable..

AMARDEEP SINGH BHATIA
 Joint Secretary

03 Companies (Arrests in connection with Investigation by serious Fraud Investigation Office) Rules, 2017.

[Issued by the Ministry of Corporate Affairs vide [F. No. 01/12/2013 CL-V] dated 24.08.2017. To be published in the Gazette of India, Extraordinary, Part-II, Section(3) Sub-section(i)

In exercise of the powers conferred under sub-section (1) of section 469 read with section 212 of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules namely:-

1. **Short title and commencement.**- (1) These rules may be called the Companies (Arrests in connection with Investigation by Serious Fraud Investigation Office) Rules, 2017.
 (2) They shall come into force on the date of their publication in the OfficialGazette.
2. (1) where the Director, Additional Director or Assistant Director of the serious Fraud Investigation office (herein after referred to as SFIO) investigating into the affairs of a company other than a Government company or foreign company has, on the basis of material in his possession, reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of any offence punishable under section 212of the Act, he may arrest such person;

Provided that in case of an arrest being made by Additional Director or Assistant Director, the prior written approval of the Director SFIO shall be obtained.

(2) The Director SFIO shall be the competent authority for all decisions pertaining to arrest.

3. Where an arrest of a person is to be made in connection with a Government company or a foreign company under investigation, such arrest shall be made with prior written approval of the Central Government.
 Provided that the intimation of such arrest shall also be given to the Managing Director or the person in-charge of the affairs of the Government Company and where the person arrested is the Managing Director or person in-charge of the Government Company, to the Secretary of the administrative ministry concerned, by the arresting officer.
4. The Director, Additional Director or Assistant Director, while exercising powers under sub-section (8) of section 212 of the Act, shall sign the arrest order together with personal search memo in the Form appended to these rules and shall serve it on the arrestee and obtain written acknowledgement of service.
5. The Director, Additional Director or Assistant Director shall

forward a copy of the arrest order along with the material in his possession and all the other documents including personal search memo to the office of Director, SFIO in a sealed envelope with a forwarding letter after signing on each page of these documents, so as to reach the office of the Director, SFIO within twenty four hours through the quickest possible means.

6. An arrest register shall be maintained in the office of Director, SFIO and the Director or any officer nominated by Director shall ensure that entries with regard to particulars of the arrestee, date and time of arrest and other relevant information pertaining to the arrest are made in the arrest register in respect of all arrests made by the arresting officers.
7. The entry regarding arrest of the person and information given to such person shall be made in the arrest register immediately on receipt of the documents as specified under rule 5 in the arrest register maintained by the SFIO office.
8. The office of Director, SFIO shall preserve the copy of arrest order together with supporting materials for a period of five years
 - a) from the date of judgment or final order of the Trial Court, in cases where the said judgment has not been impugned in the appellate court; or
 - b) from the date of disposal of the matter before the final appellate court, in cases where the said judgment or final order has been impugned, whichever is later.
9. The provisions of the Code of Criminal Procedure, 1973(2 of 1974), relating to arrest shall be applied mutatis mutandis to every arrest made under this Act.

FORM.

ARREST ORDER

(see rule 4 and 5 of the Companies(Arrests in connection with investigation by Serious Fraud Investigation Office) Rules, 2017)

Whereas, I.....Director/
 Additional
 Director/Assistant Director authorised in this behalf by the Central Government, have reason to believe that[name of the person arrested] resident of has been guilty of an offence punishable under the provisions of the Companies Act, 2013 (18 of 2013).
 Now, THEREFORE, in exercise of the powers conferred on me under section 212 of the Companies Act, 2013 (18 of 2013), I hereby
 arrest the said [name of the person arrested]
 at hours on.....and he has been informed of the grounds for such arrest.

PARTICIARS OF ARREST MADE		
1	SFIO Office at	
2	MCA order for investigation No. and Date	
3	Title of the case	

4	Name with alias of the arrestee, if any	
5	Date of Birth/known age	
6	Sex	
7	Parentage of the Arrestee	
8	Distinguishing marks of identification, if any	
9	Permanent address of the Arrestee	
10	Present address of the Arrestee	
11	Place of arrest	
12	Date and time of arrest	
13	Name, Address and Telephone No. of person whom intimation of arrest is to be conveyed	
14	Name and Designation of the Officer making the arrest	
15	Grounds of arrest along with sections under which arrested.	

(Signahre of arrestee)/(thumb impresslon)

Witnessed by :

1.		Arrested by
2.		(Signature of arresting officer with name and designation)

To,

.....

[Name and complete address of the Person arrested]

PERSONAL SEARCH MEMO	
1	SFIO Office at
2	RoC Office at
3	Ministry of Corporate Affairs order for investigation No. and Date
4	Title of the case
In the presence of the following witnesses, the personal search of Sh. (Name with Alias of the Arrestee) S/o (Parentage of the arrestee) R/o (Address of the Arrestee) was conducted as per law (as per the provision of section 51 of Cr.P.C) and following articles have been taken into possession, through this memo. 1..... 2..... 3..... (Signature of Arrestee)	
Witnessed by:	
1.	Seized by:(.....)
2.	(Signature of arresting officer with name and designation and date)

AMARDEEP SINGH BHATIA
 Joint Secretary

04 Date of coming into force of section 212 (8), (9) & (10) of the Companies Act, 2013

[Issued by the Ministry of Corporate Affairs vide [F. No. 1/12/2013 CL-V] dated 24.08.2017. To be published in the Gazette of India, Extraordinary, Part-II, Section(3) Sub-section(ii)]

In exercise of the powers conferred by sub-section (3) of section 1 of the Companies Act, 2013 (18 of 2013), the Central Government hereby appoints the **24th day of August,2017** as the date on which the provisions of sub-sections (8), (9) and sub-

section (10) of section 212 of the said Act shall come into force.

AMARDEEP SINGH BHATIA

Joint Secretary

05 Clarification on Exchange Traded Option contracts on EUR-INR, GBP-INR and JPY-INR currency pairs

[Issued by the Securities And Exchange Board of India vide Circular No. SEBI/HO/MRD/DP/CIR/P/2017/98 dated 31.08.2017.]

- SEBI vide circular SEBI/HO/MRD/CP/CIR/P/2016/38 dated March 9, 2016 laid down the detailed framework for introduction of cross-currency futures and option contracts in the EUR-USD, GBP-USD and USD-JPY currency pairs and introduction of currency option contracts in EUR-INR, GBP-INR and JPY-INR currency pairs. The said framework inter-alia specified product design, risk management & dynamic price bands etc for cross currency options and currency options.
- In this regard in order to bring uniformity in the computation and relaxation of dynamic price bands, it has been decided to modify para 9 (ii) of SEBI circular dated March 9, 2016 as under:
Dynamic Price Bands for currency options contracts (including cross-currency options contracts)
 - Stock exchanges shall implement a dynamic price band mechanism based on theoretical price of contracts to determine price bands for currency options.
 - Stock exchanges shall implement uniform mechanism for computation and relaxation of dynamic price bands for currency options contracts.
 - Stock exchanges shall take into consideration factors such as movement in the underlying price, volatility in the price of the underlying, any news on concerned foreign currency and its likely impact, movement of the price of the underlying at other stock exchanges, etc while relaxing such price bands.
 - Stock exchanges shall ensure that the mechanism for relaxation of dynamic price bands are not misused by market participants for manipulation in options contracts.
- Stock exchange / clearing corporation shall submit proposal to SEBI for approval for the launch of the currency options on EUR-INR, GBP-INR and JPY-INR currency pairs. Such proposal shall inter-alia includes the details of contract specifications, risk management framework, surveillance systems, and other requirements specified in this circular and earlier SEBI circular dated March 09, 2016.
- Accordingly, para 9 (ii) of SEBI circular SEBI/HO/MRD/CP/CIR/P/2016/38 dated March 9, 2016 shall stand modified and all other conditions specified in the said circular shall remain unchanged.
- Stock exchanges and Clearing corporations are directed to:
 - take necessary steps to put in place necessary systems for implementation of the circular, including necessary amendments to the relevant bye-laws, rules and regulations,
 - bring the provisions of this circular to the notice of the

stock brokers and also disseminate the same on their website, and

- (iii) communicate to SEBI the status of implementation of the provisions of this circular.
6. This circular is being issued in exercise of powers conferred under Section 11 (1) of the Securities and Exchange Board of India Act, 1992 to protect the interests of investors in securities and to promote the development of, and to regulate the securities market.

SUSANTA KUMAR DAS
Deputy General Manager

06 Issuance, listing and trading of debt securities on exchanges in International Financial Services Centres (IFSC)

[Issued by the Securities And Exchange Board of India vide Circular No. SEBI/HO/MRD/DRMNP/CIR/P/2017/96 dated 31.08.2017.]

- In continuation of guidelines on debt securities contained in Chapter V 'Issue of Debt Securities' of SEBI (IFSC) Guidelines, 2015 and based on the representations received from stock exchanges and market participants in IFSC, it has been decided that for issuing debt securities in IFSC, stock exchanges shall evolve a detailed framework prescribing
 - the eligibility criteria for the issuers, and
 - the issue requirements to be complied with by such eligible issuers for issuing debt securities in IFSC.
 The above framework, and the subsequent changes made thereto, if any, shall be submitted to SEBI for approval.
- Listing:** In addition to the mandatory listing of debt securities that are issued in IFSC, it has also been decided to permit listing of those debt securities on stock exchanges in IFSC, which are issued outside IFSC. However, listing of only those debt securities shall be permitted which are issued in, and by issuers resident in Financial Action Task Force (FATF) member jurisdictions. The issuer of debt securities shall enter into a listing agreement with the stock exchange(s) where such securities are intended to be listed. Further, it has been decided that the stock exchanges in IFSC shall evolve a detailed framework prescribing the initial and continuous listing requirements including corporate governance to be complied with by the issuers whose securities are listed/proposed to be listed on stock exchanges in IFSC. Stock exchanges shall submit the listing framework, and the subsequent changes made thereto, if any, to SEBI for approval.
- Trading:** Guideline 21 of SEBI (IFSC) Guidelines, 2015 provides that the debt securities listed in stock exchanges shall be traded on the platform of the stock exchange and such trades shall be cleared and settled through clearing corporation set up in IFSC as specified. It has now been decided to permit over the counter trading of debt securities in IFSC subject to clearing and settlement through clearing corporations in IFSC. It is advised that all OTC trades in debt securities shall be reported on the reporting platform of any one of the recognized stock exchanges in IFSC

within 15 minutes of the trade. To ensure that the data is not duplicated, the trades shall be reported on reporting platform of one of the stock exchanges only. The reporting for a trade must be done by the buyer and the seller on the same platform to ensure matching of both sides of the trades. Clearing Corporations shall submit the clearing and settlement framework, and the subsequent changes made thereto, for debt securities to SEBI for approval.

- 'Person resident in India' shall not invest or trade in Rupee denominated bonds issued and/or listed in IFSC, except to the extent as permitted by Reserve Bank of India. Further, 'Person resident in India' shall also not invest or trade in other debt securities, issued and/or listed in IFSC, by Indian entities.
- This circular is being issued in exercise of powers conferred under Section 11 (1) of the Securities and Exchange Board of India Act, 1992 to protect the interests of investors in securities and to promote the development of, and to regulate the securities market.

SANJAY PURAO
General Manager

07 Securities and Exchange Board of India (International Financial Services Centres) Guidelines, 2015 – Amendments

[Issued by the Securities And Exchange Board of India vide Circular No. SEBI/HO/MRD/DRMNP/CIR/P/2017/97 dated 31.08.2017.]

- Kindly refer to SEBI (IFSC) Guidelines, 2015 notified by SEBI on March 27, 2015 and various amendments made thereto from time to time.
- In order to further streamline the operations at IFSC, based on the internal discussions and consultations held with the stakeholders, it has been decided to amend provisions of the aforesaid guidelines as follows:
 - Credit rating requirement**
Guideline 17 of SEBI (IFSC) Guidelines, 2015 is being amended to read as follows:
17. For debt securities listed on stock exchanges in IFSC, the credit rating shall be obtained either from a credit rating agency registered with the Board or from any other credit rating agency registered in a Financial Action Task Force (FATF) member jurisdiction.
 - Agreement with depository or custodian**
Guideline 18 of SEBI (IFSC) Guidelines, 2015 is being amended to read as follows:
18. (1) An issuer of debt securities shall enter into an agreement with a depository or custodian, registered in a Financial Action Task Force (FATF) member jurisdiction, for issue of the debt securities, for the purpose of holding and safekeeping of such securities and also to facilitate transfer, redemption and other corporate actions in respect of such debt securities.
(2) Necessary disclosures regarding appointment of depository or custodian shall be made in the information memorandum.
 - Reporting of Financial Statements**

Guideline 19 of SEBI (IFSC) Guidelines, 2015 is being amended to read as follows:

19. The entities issuing and/or listing their debt securities in IFSC shall prepare their statement of accounts in accordance with IFRS/US GAAP or accounting standards as applicable to them in their place of incorporation. In case an entity does not prepare its statement of accounts in accordance with IFRS/US GAAP, a quantitative summary of significant differences between national accounting standards and IFRS shall be prepared by such entity and incorporated in the relevant disclosure documents to be filed with the exchange.

3. This circular is being issued in exercise of powers conferred under Section 11 (1) of the Securities and Exchange Board of India Act, 1992 to protect the interests of investors in securities and to promote the development of, and to regulate the securities market.

SANJAY PURAO
General Manager

08 Online Registration Mechanism for Custodian of Securities

[Issued by the Securities And Exchange Board of India vide Circular No. CIR/IMD/FPIC/094/2017 dated 09.08.2017.]

1. Hon'ble Minister of Finance, Government of India, in his speech while presenting the Budget for FY 2017-18 on February 01, 2017, announced that the process of registration of financial market intermediaries will be made fully online by SEBI.
2. It has now been decided to operationalize SEBI Intermediary Portal (<https://siportal.sebi.gov.in>) for the applicants to submit the applications for registration as a Custodian of Securities under the provisions of SEBI (Custodian of Securities) Regulations, 1996 (hereinafter referred to as 'Custodian Regulations') online. Link for SEBI Intermediary Portal is also available on SEBI website - www.sebi.gov.in.
3. All applicants desirous of seeking registration as a Custodian of Securities are now required to submit their applications online only, through SEBI Intermediary Portal at <https://siportal.sebi.gov.in>. The Custodian of Securities seeking approval as Designated Depository Participant (DDP) in terms of Regulation 11 of SEBI (FPI) Regulations, 2014 shall also apply through this portal. The aforesaid online registration system for Custodians of Securities and approval as DDP has been made operational with immediate effect.
4. In case of any queries and clarifications with regard to the SEBI Intermediary Portal, intermediaries may contact SEBI portal helpline on 022-26449364 or may write at portalhelp@sebi.gov.in.
5. This circular is issued in exercise of powers conferred under Section 11(1) of the Securities and Exchange Board of India Act, 1992 to protect the interests of investors in securities and to promote the development of, and to regulate the securities market.

6. A copy of this circular is available at the links "Legal Circulars" on our website www.sebi.gov.in.

ACHAL SINGH
Deputy General Manager

09 Disclosures by listed entities of defaults on payment of interest/ repayment of principal amount on loans from banks / financial institutions, debt securities, etc.

[Issued by the Securities And Exchange Board of India vide Circular No. CIR/CFD/CMD/93/2017 dated 04.08.2017.]

1. SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("SEBI LODR Regulations") currently require disclosure of material events / information by listed entities to stock exchanges. Specific disclosures are required under the SEBI LODR Regulations in certain matters such as delay / default in payment of interest / principal on debt securities, including listed Non-Convertible Debentures, listed Non-Convertible Redeemable Preference Shares, Foreign Currency Convertible Bonds (FCCBs) etc. Similar disclosures are presently not stipulated with respect to loans from banks and financial institutions.
2. Corporates in India are even today primarily reliant on loans from the banking sector. Many banks are presently under considerable stress on account of large loans to the corporate sector turning into stressed assets / Non performing Assets (NPAs). Some companies have also been taken up for initiation of insolvency and bankruptcy proceedings.
3. In order to address this critical gap in the availability of information to investors, listed entities shall comply with the requirements of this circular.
 - A. Applicability:**
 - i. The circular shall be applicable to all listed entities which have listed any of the following: specified securities (equity and convertible securities), non-convertible debt securities and non-convertible and redeemable preference shares.
 - ii. The disclosures shall be made to the stock exchanges when the entity has defaulted in payment of interest / instalment obligations on debt securities (including commercial paper), Medium Term Notes (MTNs), Foreign Currency Convertible Bonds (FCCBs), loans from banks and financial institutions, External Commercial Borrowings (ECBs) etc.
 - iii. 'Default' for the purpose of this circular shall mean non-payment of interest or principal amount in full on the pre-agreed date.
 - B. Timing of disclosures:**
The entities shall make disclosures within one working day from the date of default at the first instance of default in the format specified in Clause C1 below.
 - C. List of disclosures:**
C1. The following details shall be disclosed by listed entities at the first instance of default:
 - a. **For Debt securities (including Commercial Paper),/**

MTNs, FCCBs etc.:

Sr. No.	Type of disclosure	Details
1.	Name of the Listed entity	
2.	Date of making the disclosure	
3.	Nature of obligation / Type of instrument (Listed debt securities, MTNs, FCCBs etc. with ISIN as applicable)	
4.	Number of investors in the security as on date of default	
5.	Date of default	
6.	Details of the obligation (tenure, coupon, secured/unsecured etc.)	
7.	Current default amount (Amount in Rs.crore) (Please provide the break up of instalment and interest)	
8.	Gross Principal amount on which the default above has occurred (in Rs. crore):	
9.	Total amount of securities issued (in Rs.crore)	
10.	Any other details	

b. For Loans from banks and financial institutions, including ECBs:

Sr. No.	Type of disclosure	Details
1.	Name of the Listed entity	
2.	Date of making the disclosure	
3.	Nature of obligation (E.g. Term loan, ECB etc.)	
4.	Name of the Lender(s)	
5.	Date of default	
6.	Current default amount (Amount in Rs.crore) (Please provide the break up of instalment and interest)	
7.	Gross Principal amount on which the default above has occurred (in Rs.crore):	
8.	Details of the obligation (tenure, coupon rate, secured / unsecured etc.)	
9.	Total amount of borrowings from Banks / financial institutions	
10.	Any other details	

C2. The following details shall be disclosed by listed entities if there is any outstanding amount under default as on the last date of any quarter within 7 days from the end of such quarter:

Nature of obligation	Total amount outstanding as on date (In Rs. crore)	Of the total amount outstanding, cumulative amount of default as on date (In Rs. crore)
Debt securities (including Commercial Paper, MTNs etc.) and FCCBs		
Loans from banks, and financial institutions, including ECBs		

- Listed entities shall also separately provide information pertaining to defaults to the concerned Credit Rating Agencies in a timely manner and as may be specified by SEBI from time to time.
- This circular shall come into effect with effect from October 1, 2017. This is to enable listed companies to put appropriate systems in place for prompt submission of disclosures as stipulated in this circular.

- Stock Exchanges are advised to bring the provisions of this circular to the notice of listed entities and to disseminate the same on their websites.
- This circular is issued under Regulation 101 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.
- This circular is available on the SEBI website at www.sebi.gov.in under the category "Legal Framework/Circulars".

PRADEEP RAMAKRISHNAN

Deputy General Manager

10

Margin Trading Facility- Clarification

[Issued by the Securities And Exchange Board of India vide Circular No. CIR/MRD/DP/ 86/2017 dated 01.08.2017.]

- SEBI vide circular CIR/MRD/DP/54/2017 dated June 13, 2017 prescribed comprehensive framework for permitting stock brokers to provide margin trading facility to their clients.
- Representations have been received from the Stock brokers and their Association requesting to enable them to utilize funds from sources other than Banks and Non-Banking Financial Company (NBFCs) for extending margin trading facility. Stock brokers have further represented that currently various sources of borrowing by way of issuance of Commercial Paper (CP) & unsecured loans from directors & promoters are available for brokers in the normal course of business. Therefore Stock brokers have requested that for the purpose of providing Margin Trading facility also, they may be allowed to borrow funds from these sources.
- Accordingly, it is clarified that Stock brokers may borrow funds by way of issuance of CP and by way of unsecured long term loans from their promoters and directors. The borrowing by way of issuance of CPs shall be subject to compliance with appropriate RBI Guidelines. The borrowing by way of unsecured long term loans from the promoters and directors shall be subject to the appropriate provisions of Companies Act.
- A stock broker shall not be permitted to borrow funds from any other source, except the sources stated at para 3 above.
- The conditions stated at para 14 of circular dated June 13, 2017 shall stand modified as above. All other conditions stated in the circular CIR/MRD/DP/54/2017 dated June 13, 2017 remain unchanged.
- The Stock Exchanges are advised to:-
 - take necessary steps and put in place necessary systems for implementation of this circular.
 - make necessary amendments to the relevant bye-laws, rules and regulations for the implementation of the above decision.
 - bring the provisions of this circular to the notice of the member brokers of the stock exchange and also disseminate the circular on the website.
- This circular is being issued in exercise of the powers conferred by Section 11 (1) of Securities and Exchange Board of India Act, 1992 to protect the interest of investors in securities and to promote the development of, and to regulate the securities market.

SUSANTA KUMAR DAS

Deputy General Manager



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"To develop high calibre professionals facilitating good corporate governance"



'ICSI Quest-eAssist'

An Online platform for ICSI's members

As a knowledge building initiative, ICSI has launched 'ICSI Quest-eAssist', which is an online platform for members of ICSI where they can seek responses on the queries and difficulties pertaining to the Companies Act, 2013 and Rules and Notifications thereunder as well as issues related to e-filing.

This initiative would eventually be extended to other laws like Securities laws, Insolvency and Bankruptcy and GST etc.

The queries may be raised at

<http://www.icsi.in/QAS/MemberLogin.aspx>

Any suggestion in this regard may be forwarded to dheeraj.gupta@icsi.edu

 ACADEMIC HELPLINE NO. 011-6675 7777 (Monday - Friday 7 a.m. to 11 p.m. & Saturday 9 a.m. to 9 p.m.)

5

NEWS FROM THE INSTITUTE



- MEMBERS RESTORED
- CERTIFICATE OF PRACTICE CANCELLED
- EXTENSION IN THE LAST DATE FOR PAYMENT OF ANNUAL MEMBERSHIP AND CERTIFICATE OF PRACTICE FEE FOR THE YEAR 2017-18
- EXTENSION OF LAST DATE OF PAYMENT OF THE ANNUAL SUBSCRIPTION FOR LICENTIATE FOR 2017-18
- ANNOUNCEMENT QUALITY REVIEW BOARD OF ICSI INVITES APPLICATIONS FOR EMPANELMENT OF "QUALITY REVIEWERS"
- EXPOSURE DRAFTS OF ICSI AUDITING STANDARDS FOR PUBLIC COMMENTS

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The Rt Hon Priti Patel MP
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International Development



H. E. Mr. Y. K. Sinha
High Commissioner of
India to U.K.



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S. No.	A/F	MEM. No.	MEM. NAME	PLACE
1	A	23901	FOUZIA AHMED	F/WIRC
2	A	38607	NIKI VINODKUMAR KIRI	WIRC
3	A	20510	ANUJA ATUL KUMAR SHAH	WIRC
4	A	31392	ARCHANA S	SIRC
5	A	5915	VISHWAS B PANSE	WIRC
6	A	17007	IRA SHUKLA	NIRC
7	A	19373	ARVIND AGARWAL	WIRC
8	A	18552	GEETA KALYANDAS FULWADAYA	WIRC
9	A	22690	ELAINE FRANCISCA DSOUZA	WIRC
10	A	35723	SWAPNEIL DINESH TIWARI	WIRC
11	F	6354	BIBEK AGARWALA	WIRC
12	A	19321	EMANI V REDDY	SIRC
13	A	24185	SANJAY MANTRY	EIRC
14	A	29190	PARIDHI BHARGAVA	SIRC
15	A	42918	BABLADI SHAILAJA	SIRC

CERTIFICATE OF PRACTICE CANCELLED DURING THE MONTH OF JULY, 2017

SL. No.	NAME	MEMB No.	COP No.	REGN
1	MR. MAHENDRA DILIP SHINE	ACS-33011	13537	WIRC
2	MS. SHIVANGI PRADHAN	ACS-39889	18261	NIRC
3	MR. ARVIND KUMAR JAIN	ACS-11577	16501	NIRC
4	MR. VIVEK KANWAR	ACS-48785	18035	WIRC
5	MR. GURPREET SINGH SIAL	ACS-40569	15501	NIRC
6	MS. ANSHITA JAIN	ACS-35239	14255	NIRC
7	MS. TEJASWAITA KISHOR DHEMBARE	ACS-45833	16855	WIRC
8	MR. NARESH KUMAR SEJVANI	ACS-37538	14076	NIRC
9	MS. AKSHADA KASLAY	ACS-23278	10358	WIRC
10	MR. DEVENDRA KUMAR MEENA	FCS-6102	5976	WIRC
11	MS. SEJAL YADAV	ACS-43059	16968	NIRC
12	MS. SONALI ANIL GUPTA	ACS-36266	16007	NIRC
13	MR. SHARATH H P	ACS-50560	18384	SIRC
14	MR. YAYAVARAM SRINIWAS ARUN	FCS-6940	16622	SIRC
15	MR. TAPAN KUMAR RAY	ACS-3999	3669	EIRC
16	MR. UMESH VIDYADHAR CHINCHAWADE	ACS-45289	18454	WIRC
17	MR. KRISHNAN UNNI	ACS-38770	16081	SIRC
18	MR. RUPESH VATANAPALLY HARIDAS	ACS-43769	17815	SIRC
19	MS. VAISHALI RISHABH UPADHYAY	ACS-45291	16605	WIRC
20	MR. MANISH KUMAR PANDEY	FCS-5848	6044	NIRC
21	MS. JIMISHA PARTHDAWDA	ACS-43853	18621	WIRC
22	MR. UPENDER KUMAR	FCS-8713	18210	NIRC
23	MR. D G MEHTA	FCS-571	3350	WIRC
24	MRS. HARSHITA BHUTORIA	ACS-31959	12191	WIRC
25	MS. SHASHI SONTHALIA	ACS-25358	9046	WIRC
26	MS. AMRUTA PRANESH JAHAGIRDAR	ACS-21502	14311	SIRC

27	MR. RAJEEV KUMAR VARMA	ACS-40439	15089	SIRC
28	MS. RIYA JAGDISH GUJRATI	ACS-35063	12992	WIRC
29	MS. RAVEENA MADHUKAR CHOUBE	ACS-37488	17925	WIRC
30	MR. SATYENDU PATNAIK	FCS-7736	185528	NIRC
31	MR. ADARASH KUMAR	ACS-42764	16494	WIRC
32	MS. SUCHITA TIWARI	ACS-36229	13787	EIRC
33	MS. NEHA BANSAL	ACS-38848	16654	NIRC
34	MS. SURABHI JAIN	ACS-31754	16879	WIRC
35	MS. RAJVI SHAH	ACS-22576	17567	WIRC
36	MR. DIVYA DUTT AGARWAL	ACS-20572	7517	NIRC
37	MS. PRITI JAIN	ACS-30944	12209	NIRC
38	MR. SRIKANT RAGHAVENDRAGUDI	FCS-8499	7820	SIRC
39	MR. SACHIN KUMAR KADD	ACS 34305	14442	NIRC
40	MS. VANDANA PERIWAL	ACS 33565	17454	WIRC
41	MR. UDAYAN CHAKRABARTI	ACS 2417	12937	EIRC
42	MR. RAVINDER KUMAR	ACS 14490	15543	NIRC
43	MS. MANDEEP GUJRAL	FCS 5491	3516	NIRC
44	MR. KALIDAS RAMASWAMI	FCS 2440	18895	WIRC
45	MS. SALONI NAGPAL	ACS 36995	14706	NIRC
46	MR. SUNIL KUMAR	ACS 41521	15851	NIRC

THE LAST DATE FOR PAYMENT OF CERTIFICATE OF PRACTICE FEE FOR THE YEAR 2017-18

The certificate of practice fee for the year 2017-2018 has become due for payment w.e.f. 1st April, 2017. The last date for the payment of fee is 30th September, 2017.

The certificate of practice fee payable is as follows:

Particulars	Associate (admitted till 31.03.2015)	Associate (admitted on or after 01.04.2015)	Fellow
Certificate of Practice fee	Rs. 2000	Rs. 1500	Rs. 2000

The certificate of practice fee must be accompanied by a declaration in form D duly completed in all respects and signed. The requisite form 'D' is available on the website of Institute www.icsi.edu

MODE OF REMITTANCE OF FEE

The fee can be remitted by way of:
Online (through payment gateway of the Institute's website (www.icsi.edu))

Cash/Cheque at par/Demand draft/Pay order payable at New Delhi (indicating on the reverse name and membership number) drawn in favour of 'The Institute of Company Secretaries of India' at the Institute's Headquarter or Regional/Chapter offices.

For queries, if any, the members may please write to Mr. Rajeshwar Singh, Executive Admin at email id rajeshwar.singh@icsi.edu or contact at telephone no. 0120-4082133



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ANNOUNCEMENT

QUALITY REVIEW BOARD OF ICSI INVITES APPLICATIONS FOR EMPANELMENT OF “QUALITY REVIEWERS”

The Ministry of Corporate Affairs has constituted the Quality Review Board of ICSI to make recommendations to the Council with regard to the quality of services provided by the members of the Institute; to review the quality of services provided by the members of the Institute including secretarial services; and to guide the members of the Institute to improve the quality of services and adherence to the various statutory and other regulatory requirements.

With a view to carry out the abovementioned functions, the Quality Review Board contemplates to avail the services of senior members of the profession to assess the quality of services being rendered by Company Secretaries both in practice and in employment.

Revised Eligibility criterion for Quality Reviewers-

A Quality Reviewer shall fulfil the criteria mentioned in para I or para II:-

- I. An individual desiring to be empanelled:
 - a) Be a Fellow member of ICSI; and
 - b) Possess at least fifteen years of post-membership experience as Company Secretary in Practice or employment in the Secretarial Department of a Company or as a combination of practice and employment in the Secretarial Department of a Company; and
 - c) Not be less than 40 years of age; and
 - d) Be currently in practice of the profession of company secretaries.”

- II. An individual desiring to be empanelled
 - a) Empanelled Peer Reviewers who has completed minimum 2 assignments of Peer Review

Provided that the term of Quality Reviewer shall be three years subject to maximum six (6) months from the date of surrender of Certificate of Practice.

Provided further that existing empanelled Quality Reviewers are requested to re-empanel themselves by giving their consent as per new criteria as mentioned above within 6 months w.e.f. April 10, 2017 to remain continue on the Panel of Quality Reviewers.

The Quality Review Board shall pay to the Quality Reviewer a fee of Rs. 25,000/- per quality review assignment to cover the cost of travel, local transport, accommodation and food, taxes, communications, printing, cost of submission of report etc. subject to submission of Final Report to the satisfaction of the Board.

Interested persons may kindly apply in the format available at goo.gl/CT1MNb and send it to Director, Directorate of Professional Development, Perspective Planning & Studies, The Institute of Company Secretaries of India, C-36, Sector-62, Noida-201 301.

CHARTERED SECRETARY

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

Website : www.icsi.edu



EXPOSURE DRAFTS OF ICSI AUDITING STANDARDS FOR PUBLIC COMMENTS

(Last date for submission of comments: 30th September, 2017)

The Institute of Company Secretaries of India (ICSI), recognising the need to provide support to its members to develop the auditing acumen, techniques and tools and for inculcation of best auditing practices among its members constituted Auditing Standards Board (ASB) with the objective of formulating Auditing Standards of the ICSI.

Accordingly, the Board has brought out Exposure Drafts of the following Auditing Standards:

- CSAS-1 : Auditing Standard on the Audit Engagement
- CSAS-2 : Auditing Standard on Audit Process and Documentation
- CSAS-3 : Auditing Standard on Forming of Opinion
- CSAS-4: Auditing Standard on Secretarial Audit

The text of the exposure drafts of the above mentioned proposed Auditing Standards is hereby placed for the public comments.

The comments should be given in the following format:

Para No.	Name of the Standard	Text of the Standard	Suggested Text of the Standard	Rationale for suggestion

The comments on the exposure drafts may be sent in the above format at asb@icsi.edu on or before 30th September, 2017. In case you require Auditing Standards in MS Word format for giving suggestions in track mode, kindly request for the same by e-mail at the above mentioned e-mail id.

CS Vineet K. Chaudhary
Council Member & Chairman
Auditing Standards Board

CS (Dr.) Shyam Agrawal
President, The ICSI

Issue Date: 07 September, 2017

CSAS-1

Auditing Standard on Audit Engagement

Contents

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- i. Auditor
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 - 1.2 Appointing Authority
 - 1.3 Audit Engagement Letter
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 - 1.7 Audit fees and expenses
2. Limits on Audit Engagements

3. Independence and Disclosure on Conflict of Interest by an Auditor
4. Confidentiality
5. Limitations of Audit
6. Changes in Engagement terms

CSAS-1

Auditing Standard on Audit Engagement

Scope

This Auditing Standard ('the Standard') is applicable to Auditor undertaking any audit engagement under the Companies Act, 2013 or SEBI Act, 1992 or any other law for the time being in force. The Standard deals with Auditor's roles and responsibilities in agreeing to the terms of audit engagement and entering into an understanding/agreement with the Management for the purpose of audit.

Effective Date

The Standard is effective for audit engagements accepted by the Auditor on or after.....

Objective

The objective of this Standard is to prescribe for an Auditor, principles to accept or continue with an Audit Engagement by agreeing to the terms of engagement

with the Management or any changes therein and matters related thereto.

Definitions

For the purpose of this Standard, the following terms have the meaning attributed below:

i. Auditor

Auditor means a Member of the Institute of Company Secretaries of India undertaking the Audit.

ii. Auditee

An Auditee includes a person subject to audit under any law for the time being in force.

iii. Management

Management includes the Board of Directors, those charged with governance and compliances, KMPs or any other person authorised by the Auditee.

iv. Predecessor or Previous Auditor

The term means an Auditor who has reported on the most recent audit assignment or was engaged to perform, but did not complete an audit assignment and has resigned, declined to stand for reappointment, or otherwise his services as such Auditor have been terminated.

Requirements

1. Audit Engagement Process

An Auditor shall undertake the following steps with respect to his engagement as an Auditor:

1.1 Overview

An Auditor may be appointed either as a result of one to one communication between the Auditor and the Auditee or through a tendering process. The provision of this Standard shall apply mutatis mutandis to offer for services of technical and financial bids to the extent applicable.

The following steps shall be taken care of by the Auditor:

1.1.1 Conducting a pre-engagement meeting with the Auditee, in case the Auditor is to be appointed by the Auditee on one to one basis or participating in a pre-bid meeting with the Auditee in case of tendering, to discuss about the terms of engagement, prior year audit results, appropriateness of reporting framework, understanding Auditee's business and environment including internal control system, design & operation, audit process, periodicity of audit, determining nature and conflict of interest.

1.1.2 Selection or screening of prospective Auditee based on following risk / assessment:

- a. Client acceptance and engagement risk, e.g., highly leveraged client, habitually litigant client, in the media for wrong reason, pledging of shares by the promoter group, PE involvement.
- b. Performance Risk – capacity and resources
- c. Engagement Contract Risk
- d. Reputation Risk
- e. Commercials

1.1.3 Communication of the willingness to take up the audit assignment after considering the aforesaid underlying process, periodicity and nature of audit including commercials, if any.

1.1.4 Signing the engagement letter with the Management.

1.2. Appointing Authority

1.2.1 The appointment of Auditor shall be made in a manner prescribed in the applicable Act, Rules, Regulations and Guidelines or in case where no such manner has been prescribed, it shall be made under the authority of the Auditee.

Rule 8 of the Companies (Meetings of Board and its Powers) Rules, 2014 provides that that the appointment of Auditor for undertaking Secretarial Audit shall be done by means of resolution passed at a duly convened Board meeting. Similarly, Company Secretaries in Practice are authorised to conduct the internal Audit of credit rating agencies (CRAs) on half yearly basis and are also authorised to conduct internal audit of stock brokers/ trading members/ clearing members on half yearly basis. Company Secretaries in Practice are authorised to conduct internal audit of Portfolio managers under SEBI (Portfolio Managers) Regulations, 1993.

National Securities Depository Ltd. (NSDL) and Central Depository Services (India) Limited (CDSL) have authorised Practising Company Secretary to undertake internal audit of the operations of Depository Participants. Both Depositories have also authorised Practising Company Secretary to carry out concurrent audit of Depository Participants which covers audit of the process of demat account opening, control and verification of Delivery Instruction Slips (DIS)

1.2.2 The Auditor shall ensure that the Auditee files the resolution appointing the Auditor with the prescribed authority, if law requires for the same.

1.2.3 The Auditor shall obtain engagement letter and a copy of the resolution, if any, of the appointing authority and keep the same in his audit file for record and reference.

1.3. Audit Engagement Letter

1.3.1 The Auditor shall obtain an audit engagement letter before the commencement of the audit clearly specifying the terms of engagement. Wherever the objective and scope of the audit and responsibilities of Management and of the Auditor have been sufficiently established by law, the engagement letter may give a reference of the provisions of the relevant law and also a statement that the Management acknowledges and understands its responsibilities for preparation and maintenance of records and for devising proper systems to ensure compliance with the provisions of applicable laws, Rules Regulations and Standards.

1.3.2 The terms and conditions of the engagement letter may be reviewed to meet the requirements of the Auditor, Auditee or subsequent changes in applicable law. The Auditor in such case shall obtain a supplementary/ revised engagement letter.

1.4. Communication to Predecessor or Previous Auditor

The Auditor shall accept the assignment only after communicating with the Predecessor or Previous Auditor, if any, in writing atleast seven days in advance.

1.5. Acceptance of the Engagement

The Auditor shall give his formal written acceptance for audit engagement.

1.6. Audit Engagement Terms

The principal terms of the audit engagement shall be documented in writing in the audit engagement letter or in other suitable form in writing and shall include the following:

- a. The objective and scope of the audit
- b. The responsibilities of the Auditor
- c. The responsibilities of Auditee and its Management
- d. A statement that because of the inherent limitations of an audit, together with the inherent limitations of internal control, an unavoidable risk exists that some material non-compliance may

- not be detected, even though the audit is properly planned and performed in accordance with Standards.
- e. Reference to the expected form and content of any reports to be issued by the Auditor and a statement that circumstance may arise in which a report may differ from its expected form and content.
 - f. Written representations to be provided by the Management to the Auditor.
 - g. The responsibility of the Management to make available to the Auditor adequate records, reports and other information in timely manner to allow the Auditor to complete the audit in accordance with the proposed time schedule.
 - h. Period within which (with Milestones) audit report shall be submitted by the Auditor.
 - i. Commercial terms regarding audit fees and reimbursements for expenses in connection of the audit.

1.7. Audit fees and expenses

1.7.1 Audit Engagement Letter shall clearly specify commercial terms regarding audit fees and reimbursements in connection with the audit.

1.7.2 Audit Fees and expenses may depend on several factors including:

1. Size of the organization
2. Location of Business and its branches
3. Type of company (Listed/Unlisted)
4. Nature of business
5. Internal Controls mechanism
6. Scope of audit engagement
7. Frequency of audit, whether monthly, quarterly, yearly or concurrent audit
8. Estimated man hours required to complete the assignment

1.7.3 Audit fees shall not be contingent or dependent on a particular finding or outcome. However, any fees prescribed by any court or judicial or quasi-judicial body or any other competent authority shall not be considered as success or contingent fees.

1.7.4 Auditor is not permitted to charge or accept a fee for professional work which is calculated on a percentage basis except where that course is authorized by statute or has been approved by a member body as generally accepted practice for certain work.

1.7.5 Auditor shall not pay a commission to obtain a client nor should he accept a commission for referral of a client to a third party.

2. Limits on Audit Engagements

An Auditor shall not accept audit engagement beyond the limits of number of audits, if any, as may be specified under applicable laws or by ICSI.

3. Independence and Disclosure on Conflict of Interest by an Auditor

An Auditor shall be independent in his role as Auditor and there shall not be any actual or even perception of conflict of interest. Any potential perception of conflict of interest must be disclosed by the Auditor before accepting the audit assignment or as soon as he becomes aware of the same, as the case may be.

Conflict of Interest may arise in the following situations:

- a) Ownership: where an Auditor holds more than 2% in the paid-up share capital or ownership capital of the Auditee, there may be a perception of conflict of interest. In such cases, the Auditor shall make disclosure before accepting the audit assignment or as soon as he becomes aware of the same, as the case may be. There may also be a situation where the

Auditor holds more than 10% in the paid-up share capital or ownership capital of the Auditee, which may seriously impair the independence of the Auditor. In such cases, the Auditor shall not accept the Audit Engagement.

- b) Financial Interest: where an Auditor is indebted to the Auditee for an amount, as may be prescribed by ICSI, the Auditor shall disclose the same before accepting the audit assignment or as soon as he becomes aware of the same, as the case may be. There may also be a situation where the indebtedness may seriously impair the independence of the Auditor. In such cases, the Auditor shall not accept the Audit Engagement.
- c) Relationships: where a Relative (as defined under the Companies Act, 2013) of the Auditor is the Owner, Director or KMP of the Auditee, the independence of the Auditor may be perceived to be seriously impaired. In such cases, the Auditor shall not accept the Audit Engagement.
- d) Past Employment Relationship: where an Auditor was in employment of the Auditee during the immediately past 3 (three) years, there may be a perception of impairment of Auditor's independence. An Auditor shall not accept any Audit assignment unless 3 (three) years have lapsed from the date of acceptance of Audit Assignment.

4. Confidentiality

- i. The Auditor shall not disclose to outsiders, the information acquired as a result of audit engagement without proper and specific authority or unless there is a legal or professional right or duty to disclose;
- ii. The Auditor shall refrain from using information acquired as a result of audit engagement to their personal advantage or the advantage of third parties.
- iii. The Auditor shall maintain confidentiality even in a social environment. The Auditor should be alert to the possibility of inadvertent disclosure, particularly in circumstances involving long association with a business associate or a relative.
- iv. The Auditor shall also maintain confidentiality of information disclosed by a prospective Auditee.
- v. The Auditor shall also consider the need to maintain confidentiality of information within the firm or employing organization.
- vi. The Auditor shall take all reasonable steps to ensure that employees, staff and other team members under the Auditor's control and persons, from whom advice and assistance is obtained, shall adhere to the Auditor's duty of confidentiality.

5. Limitations of Audit

5.1 The fact that because of the inherent limitations of an audit, together with the inherent limitations of internal control, there is an unavoidable risk that some material misstatements or material non-compliances may not be detected, even though the audit is properly planned and performed in accordance with the Standards.

5.2 Internal control, no matter how effective, can provide an Auditee with only reasonable assurance about achieving the entity's reporting objectives or compliance objectives due to the inherent limitations of internal control. Such Internal control systems and processes are responsibility of the Management. Accordingly an engagement letter shall include a statement that because of the inherent limitations of an audit, together with the inherent limitations of internal control, an unavoidable risk exists that some material non-compliance may not be detected, even though the audit is properly planned and performed in accordance with Standards.

5.3. An independent audit conducted in accordance with the standards does not act as a substitute for the maintenance of internal control mechanism in the organisation which is the primary responsibility of the Management.

6. Changes in Engagement terms

- 6.1 An Auditor who, before the completion of the engagement, is requested by the Management to change the engagement to one which provides a lower level of assurance, shall consider the appropriateness of doing so. Besides, the reason or rationale behind the request for revisions must be thoroughly scrutinised.
- 6.2 Any request from the Auditee to the Auditor to change the terms of engagement may result from a change in circumstances affecting the need for the service originally requested or a restriction on the terms of the engagement, whether imposed by Management or caused by circumstances. The Auditor shall consider carefully the reason given for the request, particularly the implications of a restriction on the scope of the engagement.
- 6.3 A change in circumstances that affects the Auditee's requirements

or a misunderstanding concerning the nature of service originally requested shall ordinarily be considered a reasonable basis for requesting a change in the engagement. In contrast a change shall not be considered reasonable if it appeared that the change relates to information that is incorrect, incomplete or otherwise unsatisfactory.

- 6.4 Before agreeing to change an audit engagement to a related service, the Auditor who was engaged to perform an audit in accordance with the Standard shall consider, in addition to the above matters, any legal or contractual implications of the change.

If the Auditor concludes that there is reasonable justification to change the engagement and if the audit work performed complies with the Standards applicable to the changed engagement, the report issued would be as per the revised terms of engagement.

CSAS-2

Auditing Standard on Audit Process and Documentation

Contents

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- ii. Auditee
- iii. Auditee Units
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2. Risk Profiling
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4. Audit Checklists
5. Verification, scrutiny of documents & records, collection & evaluation of Audit Evidence
6. Analysis of Audit Evidence
7. Documentation
8. Materiality
9. Confirmation
10. Record Keeping

CSAS-2

Auditing Standard on Audit Process and Documentation

Scope

This Auditing Standard ('the Standard') is applicable to the Auditor undertaking any audit assignment under the Companies Act, 2013 or SEBI Act, 1992 or any other law for the time being in force. The Standard deals with responsibilities, duties and powers of the Auditor with respect to Audit Process to be followed by him in performing the audit function and maintaining proper documentation with respect to the audit.

Effective Date

This Standard is effective for audit engagements accepted by the Auditor on or after.....

Objective

The objective of this Standard is to prescribe principles for an Auditor:

- (i) to perform the audit function as per the specified audit process;
- (ii) to prepare the documentation that provides:
 - (a) a sufficient and appropriate record to form the basis for the Auditor's report; and
 - (b) evidence that the audit was planned and performed in accordance with Standards and applicable legal and regulatory requirements.

Definitions

For the purpose of this Standard, the following terms have the meaning attributed below:

- i. **Auditor**
Auditor means a Member of the Institute of Company Secretaries of India undertaking the Audit.
- ii. **Auditee**
An Auditee includes a person subject to audit under any law for the time being in force.
- iii. **Auditee Unit**
An Audit Unit includes a unit, which has one or more of the following attributes:
 - substantial devolution of administrative and financial powers;
 - functional autonomy; and
 - operational significance with reference to achievement of objectives of the Auditee.
- iv. **Management**
Management includes the Board of Directors, those charged with governance and compliances, KMPs or any other person authorised by the Auditee.

Requirements

1. Audit Planning

- 1.1. The Auditor shall make the audit plan to conduct the audit as per

audit engagement terms.

- 1.2. Audit planning includes establishing and developing the overall audit process, which includes but not limited to:
 - Identification of broad audit areas;
 - Allocation of audit resources for the audits to be undertaken
 - Risk profiling;
 - Preparation of audit Schedule;
 - Selection of Auditee units for audit ;
 - Determination of specific subject matter/Audit areas requiring special attention, where considered necessary.
- 1.3. Audit shall be planned in a manner which ensures that a qualitative audit is carried out in an efficient and effective way and in a timely manner. Adequate planning will ensure that appropriate attention is accorded to crucial areas of audit and that potential problems are identified in a timely manner. The Auditor shall plan the audit with an attitude of professional scepticism and exercise professional judgment.
- 1.4. The audit plan shall be adhered to the extent possible; however, it may be modified in circumstances like unexpected events, changes in conditions, or as a result of the audit evidence obtained during the course of audit.

2. Risk Profiling

- 2.1 Risk profiling of the Auditee and their Audit Units shall be done considering their structures, roles they are expected to perform and compliance requirements. The Auditor shall apply the risk assessment methodology by evaluating high risk areas/activities of Auditee relating to:
 - Internal control environment, systems and processes of the Auditee for adherence to the constitutional documents, applicable laws, Rules, Regulations and standards, Compliance level of applicable laws, Rules, Regulations and standards, etc.; and
 - Transparency, prudence and probity.
- 2.2 The risk assessment methodology shall include a review of the following:
 - Major policy initiatives of Government impacting the Auditee;
 - Reports of Legislative Committees impacting the Auditee;
 - Changes in any laws impacting the Auditee;
 - Changes in economic environment impacting the Auditee;
 - Finance & Appropriation Accounts;
 - Geographical location;
 - Past audit coverage;
 - Past Audit findings/ Inspection Reports /Internal Audit Reports;
 - Court orders, litigation history and prosecutions, if any;
 - Audit Committee suggestions/recommendations, if any;
 - Number of notices received and replies to questions given to the statutory authorities;
 - Media reports and visibility of topics;
 - Trend of expenditure and /or receipts with Industry benchmark;
 - Volume and value of Related party transaction;
 - Contingent liability and its likely impact on Auditee.

3. Information about Auditee

Auditor shall obtain sufficient information which is necessary for conduct of audit and expression of opinion.

4. Audit Checklists

The Auditor shall use thorough, systematic and comprehensive

checklist for performance of Audit ensure that no compliance point is missed from verification while conducting audit.

5. Verification, scrutiny of documents & records, collection & evaluation of Audit Evidence

- 5.1 The Auditor shall verify compliance with applicable laws, Rules and Regulations and highlight deviations, if any. Further, the Auditor shall obtain competent, relevant and reasonable evidence to support his judgment as well as conclusions regarding the organisation, programme, activity or function under audit.
- 5.2 The evidence collection and evaluation is a simultaneous, systematic and an iterative process and involves:
 - collection of evidence by performing appropriate audit procedures;
 - Evaluating the evidence obtained as to its sufficiency (quantity) and appropriateness (quality);
 - Re-assessing risk and gathering further evidence, if necessary.
- 5.3 The evidence gathering and evaluation process shall continue until the Auditor is satisfied that sufficient and appropriate evidence exists to provide a basis for formation of the audit conclusions.
- 5.4 Audit evidence may be gathered using a variety of techniques such as the following:
 - Sampling
 - Document scrutiny
 - Physical inspection/site visits
 - Observation
 - Questionnaires
 - Confirmation
 - Analytical procedures

6. Analysis of Audit Evidence

- 6.1 After evaluating the evidence and considering its materiality, the Auditor shall decide how best to conclude in the light of the evidence collected and which would be the supporting key documents to arrive at audit conclusions.
- 6.2 While evaluating evidence Auditor shall find that audit evidence is conflicting i.e. while some evidence supports the subject matter information other evidences seem to contradict it. In such situations the Auditor shall weigh the extent and credibility of conflicting evidence in order to reach a conclusion or collect more evidence to resolve the conflict.

7. Documentation

- 7.1 Documentation of audit evidence supports audit conclusions and confirms that the audit was carried out in accordance with relevant standards.
- 7.2 Auditor shall adequately document the audit evidence in working papers, including the basis and extent of planning, work performed and the findings of audit. Working papers shall contain sufficient information to enable the Auditor, having no previous connection with the audit, to ascertain from those evidence that supports the Auditor's significant findings and conclusions.
- 7.3 Adequate documentation is important for several reasons which inter alia includes:
 - confirm and support the Auditor's opinion and report;

- increase the efficiency and effectiveness of audit;
 - evidence that the audit was planned and performed in accordance with Standards and applicable legal and regulatory requirements;
 - serve as a source of information for preparing reports or answering any; enquiries from the Auditee or from any other party;
 - serve as evidence of the Auditor's compliance with Auditing Standards;
 - facilitate planning and supervision;
 - records for peer review; and
 - provide evidence of work done for future reference
- 7.4** Audit Documentation shall take place throughout the entire audit process. The confidentiality of documentation shall be maintained and shall be retained for a period sufficient to meet the professional, legal and statutory requirement, if any.
- 7.5** Audit Documentation shall comprise of audit file and working papers
- 7.6** Audit file shall be maintained in one or more folders or other storage media in physical or electronic form, therefore contains documents that summarize the specific audit engagement. Audit file shall be properly indexed, referenced with and supplemented by the set of working papers.
- 7.7** Working papers for each audit comprise of all documents collected during the audit process. It shall include the documents relating to the nature, timing and extent of audit procedures that were performed by individual members of the audit team, details of contracts/ agreements that were examined, etc., evidences that were gathered, evaluation of evidences, consideration of written responses from concerned officers /agents of the Auditee supporting key documents and the process of arriving at the results of audit procedures – audit findings and conclusions. The working papers could be in one or more folders, but shall be properly indexed, referenced and retrievable.
- 7.8** Working papers serve as a link between the field work and the audit report and shall, therefore, be complete and appropriately detailed to provide a clear trail of audit.
- 7.9** Some of the broad characteristics of working papers are set out below:
- Completeness and accuracy: Provide support to audit conclusions.
 - Clarity and conciseness: Facilitates understanding the entire audit process without need for any supplementary examination.
 - Legibility and neatness: Applies particularly to photocopies.
 - Relevance: Working papers shall be restricted to matters, which are important, pertinent and useful for the intended purpose.
 - Ease of reference: Working papers shall be organised in volumes in a manner that facilitates easy reference. An omnibus, easy to follow, index may be created for all the volumes with a proper narration to broadly explain their contents. Each of the volumes may further be internally indexed.
 - Ease of review: Working papers should contain cross references to discussion papers, audit observations, etc. (including note issued to management and their response for discussion)and the audit report as the case may be to enable Auditor to link the working papers to audit findings and conclusions.
 - Complete audit trail of analysis: Working papers should provide a complete trail of the audit procedures performed, evidence that were gathered and evaluated, audit findings

and conclusions that were drawn. This should contain evidence for positive findings as well.

- Documentation of significant audit findings.

8. Materiality

- 8.1** Auditor may consider materiality throughout the audit process. However, if Audit engagement requires/demands thorough verification of each event/aspect, the Auditor shall make appropriate verification of non-material events/aspects also.
- 8.2** Determining materiality is a matter of professional judgment and depends on the Auditor's interpretation of the users' needs. A matter can be judged material if knowledge of it would be likely to influence the decisions of the intended users. This judgment may relate to an individual item or to a group of items taken together.
- 8.3** Materiality consists of both quantitative and qualitative factors.
- 8.4** Issues that may be considered material even if the monetary value is not significant would include the following:
- Fraud;
 - Intentional unlawful acts or non-compliance;
 - Incorrect or incomplete information to governing body and KMPs, the Auditor or to the regulators, banks FI, lenders concealment);
 - Intentional disregard to the executive, authoritative bodies or Auditor; and
 - Events and transactions made event or transaction.
 - Reporting of Whistle blower events
 - Major noncompliance on affecting the going concern existence of the Auditee.
- 8.5** The basis for the materiality shall be recorded in writing in the audit file.

9. Confirmation

Auditor shall obtain a reply independently from third party with regard to those information which is related to third parties.

Illustrations:

- a) Certificate from the bankers on Dividend account balances;
- b) Letter from the internal Auditor and/or statutory Auditor on any identification of fraud or any despite knowledge of the lack of legal basis to carry out the particular weaknesses in the systems and processes during their audit.
- c) Letter from the banker on the date of transfer of Unpaid Dividend Account.
- d) Letter from the Independent directors on the familiarization programme attended by them.
- e) Certificate from the Chairman of Independent Directors on conduct of the meeting of the independent directors, if the minutes are not available/provided for verification.
- f) Report on status of compliances from Stock Exchange or other regulators.

10. Record Keeping

- 10.1** Audit documentation shall be assembled for retention within a reasonable period of time after the Auditor's report is released. Such reasonable period of time shall not exceed forty five days.
- 10.2** Auditor shall record all information in writing. In case any information is provided orally, the same shall be documented by the Auditor immediately.
- 10.3** Auditor shall establish policies and procedures for retention of engagement documentation for a period sufficient to meet the needs of the firm or as required by law or regulation.

CSAS-3

Auditing Standard on Forming of Opinion

Contents

Scope

Effective Date

Objective

Definitions

- i. Auditor
- ii. Audit Evidence
- iii. Records
- iv. Materiality
- v. Misstatement
- vi. Third Party
- vii. Third Party Information

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1. Process for forming of Opinion
2. Precedence and Practices
3. Forming an opinion on report of third party
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5. Opinion Paragraph
6. Communication with Those Charged with Governance
7. Auditor's Responsibility
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CSAS-3

Auditing Standard on Forming of Opinion

Scope

This Auditing Standard ('the Standard') is applicable to Auditor while carrying out Audit under the Companies Act, 2013 or SEBI Act, 1992 or any other law for the time being in force. This Standard deals with basis and manner for forming Auditor's opinion on subject matter of the audit.

Effective Date

This Standard is effective for audit conducted by Auditor on or after.....

Objective

The objective of the standard is to lay down the basis and manner, enabling the Auditor to:

- a) form an opinion, based on evaluation of the conclusions drawn from the audit evidence obtained; and
- b) clearly express such opinion through a written report.

Definitions

- i. **Auditor**
Auditor means a Member of the Institute of Company Secretaries of India undertaking the Audit.
- ii. **Audit Evidence**
Audit evidence is evidence obtained during the audit and recorded in the audit file and working papers either in physical or electronic form.
- iii. **Records**

For the purpose of this Standard the term records include:

- (i) Minutes, returns, forms, indexes, and Statutory Registers
- (ii) Books and papers including books of accounts, deeds, vouchers;
- (iii) Agreements, Memorandum of understanding; and
- (iv) Other documents maintained by the Auditee either in physical or electronic form.

iv. Materiality

Materiality is the threshold above which missing or incorrect information is considered to have an impact on the decision making of Auditor. Information is material if its omission or misstatement could influence the opinion of Auditor. Materiality can also be construed in terms of net impact.

v. Misstatement

Misstatement means any information which is false, incorrect, incomplete or misleading.

vi. Third Party

Any person who does not have a direct connection with the given assignment but whose inputs might influence the opinion and includes an expert.

vii. Third Party Information

The third party information means the information that either belongs to or is obtained from the third party.

Requirements

1. Process for forming of Opinion

- 1.1 Forming of opinion based on the audit observations is an important part of any audit as through this process the outcome of audit are presented in the form of Audit Report to the intended users. Audit inter alia involves reporting compliance of or deviations from the applicable laws.
- 1.2 Auditor shall consider materiality while forming his opinion and adhere to the principles of completeness, objectivity, timeliness and contradictory process while reporting:
 - (i) The principle of completeness requires the Auditor to consider all relevant audit evidence before issuing a report;
 - (ii) The principle of objectivity requires the Auditor to apply professional judgment and skepticism in order to ensure that all reports are factually correct and that findings or conclusions are presented in a relevant and appropriate manner;
 - (iii) The principle of timeliness implies preparing the report in due time; and
 - (iv) The principle of a contradictory process implies checking the accuracy of facts and incorporating responses from concerned persons.

2. Precedence and Practices

Auditor shall adhere to generally accepted precedence and practices in relation to opinion formation as may be available from historical perspective of any kind of audit.

3. Forming an opinion on report of third party

Sometimes due to circumstances like geographical constraints or want

of expertise an Auditor may be required to rely on the third party reports and third party reports may sometime also be arranged by the Auditee. The auditor shall adhere to the following while forming opinion on third party reports:

- (i) The Auditor shall clearly indicate the fact of use of third party report and shall also record the circumstances necessitating the use of third party report;
- (ii) The Auditor shall indicate the fact if third party report is arranged by Auditee;
- (iii) The Auditor shall consider the important findings/observation of third party;
- (iv) The Auditor shall, if necessary and possible, carry out a supplemental test to check veracity of the third-party report.

4. Form of Opinion and Qualification

4.1 Unmodified Opinion

The Auditor shall express an unmodified opinion when the Auditor concludes that-

- (i) there is due compliance with the applicable law in terms of timelines and process; and
- (ii) the records as a whole are free from material misstatement and maintained in accordance with applicable laws.

4.2 Modified Opinion

The Auditor shall modify the opinion, if the Auditor:

- (i) concludes, based on the audit evidence obtained, that there is material non-compliance with the applicable laws in terms of timelines and process; or
- (ii) concludes, based on the audit evidence obtained, that the records as a whole are not free from material misstatement; or are not maintained in accordance with applicable laws; or
- (iii) is unable to obtain sufficient appropriate audit evidence to conclude there is due compliance with the applicable laws in terms of timelines and process
- (iv) is unable to obtain sufficient and appropriate audit evidence to conclude that the records as a whole are free from material misstatement; or are maintained in accordance with applicable laws.

4.3 Management-imposed Limitation

- 4.3.1 If, after accepting the engagement, the Auditor becomes aware that Management has imposed a limitation on the scope of the audit which, in the opinion of the Auditor, is likely to result in the need to express a qualified opinion or to disclaim an opinion, the Auditor shall request the Management to remove the limitation.
- 4.3.2 If Management refuses to remove the limitation, the Auditor shall communicate the matter to those charged with governance and compliances, unless all of those charged with governance are involved in managing the entity, and determine whether it is possible to perform alternative procedures to obtain sufficient appropriate audit evidence.
- 4.3.3 If the Auditor is unable to obtain sufficient appropriate audit evidence, the auditor shall determine the implications as follows:
 - (a) If the Auditor concludes that the possible effects of unavailable audit evidence could be non-material, the Auditor shall qualify the opinion; or
 - (b) If the Auditor concludes that the possible effects of unavailable audit evidence could be material the Auditor shall:
 - (i) Withdraw from the audit, where practicable and possible under applicable law or regulation; or
 - (ii) If withdrawal from the audit before issuing the audit report is

not practicable or possible, disclaim an opinion.

- 4.3.4 If the Auditor withdraws as contemplated above, before withdrawing, the Auditor shall communicate to those charged with governance any matters regarding non-compliance identified during the audit that would have given rise to a modification of the opinion.

5. Opinion Paragraph

- 5.1 When the Auditor modifies the audit opinion, the Auditor shall use the heading "Adverse Opinion," "Qualified Opinion," or "Disclaimer of Opinion," as appropriate, for the opinion paragraph.
- 5.2 When the Auditor expresses an adverse opinion, the Auditor shall state in the opinion paragraph that, in the Auditor's opinion, because of the significance of the matter(s) described in the "Basis for Adverse Opinion" paragraph and then continue with the opinion and describe reasons in the "Basis for Adverse Opinion" paragraph.
- 5.3 When the Auditor expresses a qualified opinion, the Auditor shall state in the opinion paragraph that, in the Auditor's opinion, except for the effects of the matter(s) described in the "Basis for Qualified Opinion" paragraph and then continue with the opinion and describe reason in the "Basis for Qualified Opinion" paragraph.
- 5.4 When the Auditor disclaims an opinion the Auditor shall state in the opinion paragraph the opinion is disclaimed because of the matter described in the "Basis for Disclaimer of Opinion" paragraph and describe reasons in the "Basis for Disclaimer of Opinion" paragraph.

6. Communication with Those Charged with Governance

When the Auditor expects to modify the opinion in the Auditor's report, the Auditor shall communicate with those charged with governance the circumstances that led to the expected modification and the proposed wording of the modification. Those charged with the governance, where appropriate, shall be given opportunity to supply further information, explanation and material in respect of the matter(s) giving rise to expected modification.

7. Auditor's Responsibility

The Auditor's report shall include a section with the heading "Auditor's Responsibility". Auditor's Report shall state that the responsibility of the Auditor is to express the opinion on the compliance with the applicable and maintenance of records based on audit. Auditor's Report shall also state that the audit was conducted in accordance with applicable Standards. The Auditor's Report shall also explain that those Standards require that the Auditor comply with ethical requirements and plan and perform the audit to obtain reasonable assurance about level of compliance with applicable laws and maintenance of records.

8. Format of Report

- 8.1 The report shall be addressed to the appointing authority unless otherwise specified in Audit engagement letter or provided in the applicable law. The report shall be detailed enough to serve its intended purpose, but, it shall avoid unnecessary details. Where specific formats (like MR-3 for Secretarial Audit Report) are prescribed, those formats shall be followed for reporting. If any information cannot be captured within the paragraphs of the report, it shall be given in form of annexure(s).
- 8.2 Signature block shall mention the name of the audit firm, the personal name of the Auditor or both, as appropriate for the particular jurisdiction along with certificate of practice number and the membership number, specifying whether associate or fellow member. The Auditor should clearly mention date and place of signing the report, in case report is signed by two different persons at on different dates or different places; same should be mentioned in the report.

CSAS-4

Auditing Standard on Secretarial Audit

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CSAS-4

Auditing Standard on Secretarial Audit

Scope

This Auditing Standard ('the standard') is applicable to Auditor undertaking Secretarial Audit under section 204 of the Companies Act, 2013. The Standard deals with responsibilities of the auditor while carrying out Secretarial Audit of a Company. The Standard is in addition to other Auditing Standards, as may be applicable with regard to Secretarial Audit.

Effective Date

This Standard is applicable for Secretarial Audit undertaken by the Auditor on or after.....

Objective

The objective of this Standard is to prescribe principles for evaluation of:

- a) statutory compliances; and
- b) corporate conduct in relation to statutory Compliances for conducting Secretarial Audit and expression of an opinion thereon by the auditor.

Definitions

- i. **Auditor**
Auditor means a Member of the Institute of Company Secretaries of India undertaking the Audit.
- ii. **Audit Procedure**
An audit procedure represents the broad framework of the manner of handling the audit, including techniques used for forming an opinion.
- iii. **Board process**
The board process means process followed for decision making by the Board and its committees.
- iv. **Systems and process**
Systems and process signify broad framework including activities for compliance of law.
- v. **Trigger test**
Trigger test means the parameters by which applicability of particular enactment, rule, regulation, guideline, provision, etc. is ascertained.

Requirements

1. **Identification of applicable laws**
The Auditor shall take note of various laws applicable to the Company as identified by the Board of Directors of the Company

in addition to the laws specifically mentioned in the form of the Secretarial audit report.

1.1 Identification of basic details

The Auditor shall identify the basic details as indicated below to apply trigger test for the applicability of the laws:

- Key financial parameters such as Turnover, Paid-up share capital, Net worth, Borrowings, etc.
- Geographic location of registered office, units/divisions/plants/branches, etc.
- Status of company such as listed/unlisted
- Type/Class of company such as Private, Public, Holding, Subsidiary, Foreign, Nidhi, Producer, Section 8, etc.
- Registration with various authorities such as SEZ, Sectoral Regulators, etc.
- Segment such as Manufacturing/Trading/Service/e-commerce and Industry classification thereof;
- Agreements governing rights, obligations of shareholders such as Joint venture, shareholders' agreements
- Number, class and category of employees/workers such as women, contractual employees, etc.

1.2 Trigger test for validation of applicable laws

The auditor shall validate the laws applicable to the Company by applying trigger test on details collected at Para 1.1 above.

1.3 Segregation of Industry specific and other applicable laws

Segregation of laws applicable on the Company into the Industry specific and other category is essential. The auditor shall make the segregation of the same based on the understanding of the Company and after application of trigger test as provided in 1.1 and 1.2 above. The auditor shall ensure the verification of the various laws is done as per the table below:

Category	Principles	Verification Requirement
Industry Specific Laws	All laws, rules, regulations made for regulation of specific Industry; and	Comprehensive verification of Compliances
Other applicable laws	All laws applicable on Company other than Industry Specific	Assessment of systems and process only

2. Verification of corporate conduct & compliance of Laws

2.1 Creation of master checklist

The auditor shall create master checklists for laws (laws specifically mentioned in the format of the secretarial audit report and Industry Specific laws) by making segregation in event based and calendar based compliances.

2.2 Identification of Events/Corporate Actions

The auditor shall identify events/Corporate actions that took place during the audit period. The identification can be made by reviewing the website of the regulators, statutory records including books and papers, interaction with the Company and in any other appropriate manner.

2.3 Verification of Compliance

The auditor shall verify all event based and calendar based compliances with master checklists, making mention of source documents relied for verification.

2.4 Summarizing Non Compliances

Based on above verifications, the auditor shall create summary of non-compliances, if any, for seeking clarifications from management or for reporting in the Audit report.

3. Board composition

3.1 Minimum and maximum limit on number of Directors on the board

The auditor shall verify the overall composition of the Board including the minimum and maximum strength of the Board as per provisions of the Companies Act, 2013, SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015, Articles of Association and provisions of other Acts/rules/regulations as may be applicable to the Company.

3.2 Optimum Combination of Board

The auditor shall verify the combination of Executive, Non-executive, Independent, Non-independent, retiring, non-retiring, woman, nominee in the Board as per provisions of the Companies Act, 2013, SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Articles of Association, agreement with Lenders/Investors and provisions of other Acts/rules/regulations as may be applicable to the company.

3.3 Eligibility requirements of directors

The auditor shall verify the eligibility criteria including qualifications of Directors in accordance with the provisions/principles laid down in the Companies Act, 2013, SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Articles of Association and provisions of other Acts/rules/regulations as may be applicable on the Company.

3.4 Board Committees

The auditor shall verify the constitution and composition of mandatory Board Committees.

4. Board processes

4.1 The auditor shall ensure the verification to the effect that whether Board decisions have been taken in compliance to applicable Secretarial Standards, Act, Rules, Articles of Association, SEBI Listing Regulations and other applicable laws.

4.2 In case of conflict between various provisions the stricter compliance to be verified.

5. Systems and Processes

5.1 Assessment of Compliance organogram

The Auditor needs to check as to whether there is clear demarcation

of responsibility for ensuring various compliances to be done by the Company. In the absence of such clear demarcation, the ultimate responsibility lies with the Board of Directors of the Company. The auditor shall perform an assessment of Compliance organogram to understand compliance responsibility centers, control points, matrix, flow of information/non-compliances escalation.

5.2 Assessment of Compliance tracker

The auditor shall perform an assessment of Compliance tracker (manual or software driven) to understand its extent, coverage and severity mapping. The Auditor may also make assessment of Compliance manual/standard operation Procedures (SOP's), if any, available with the Company.

5.3 Identification of Non Compliances & Instances of Show cause notices received, Penalty/fine levied

The auditor shall identify the non-compliances and instances of Show Cause notices received, reply submitted by the company including the likely impact on the Company based on provisions in accounts and disclosures in contingent liabilities, Penalty/fine levied to make assessment of compliance mechanism towards compliances and risk assessment.

5.4 Maintenance of Records

The auditor shall perform an assessment of adequacy and effectiveness of the maintenance of records.

5.5 Concurrent Audit of Samples

The auditor shall identify sample size and timing for respective compliance for performing concurrent audit to assess the adequacy of systems and processes.

5.6 Compliance reporting

The auditor shall review the Compliance reports submitted to the management /Board at regular interval to assess compliance level as well as systems and process.

5.7 Overall Assessment

An Overall assessment of systems and process, based on above verifications and also making an assessment of adequacy thereof, considering size, no of units/branches, severity of compliance shall be performed by the auditor.

6. Detection of Fraud

6.1 A fraud may impact the organization adversely in monetary or other terms. The Auditor shall report the fraud, if the same has been observed by him during the course of audit.

6.2 The Auditor shall check whether the company has any anti-corruption and/or anti-bribery policy, ethics policy which may be in place at the Company.

6.3 The Auditor may communicate directly with the internal auditors

and statutory auditors to verify whether they have suspected/identified any fraud during the course of their audit.

6.4 During the course of the audit, if the auditor suspects any commission of fraud, he shall endeavour to collect further evidence for the same. The suspicion may arise on perusal of internal control systems, perusal of any complaints under whistle blower mechanism, reports of the other auditors, etc.

6.5 The auditor shall ensure to collect sufficient evidence which substantiates his suspicion of the commission of the fraud against the Company by the employees and officers of the company. The auditor shall ensure that he has sufficient reason to believe that there is commission of fraud and should have justifiable grounds for the same.

7. Reporting of Fraud

7.1 The Auditor shall report the fraud to Audit Committee/Central Government as per process laid down in the Companies Act, 2013 and include the same in Secretarial Audit Report.

7.2 The Auditor shall verify if Audit Committee has given any comments on such suspected fraud and directors have included details of suspected fraud in their report in terms of the provisions of the Companies Act, 2013.

7.3 The Auditor shall verify if the fraud detected by other Auditor has been reported to Audit Committee/Central Government. If yes then include the same in Secretarial Audit Report.

7.4 If fraud has been detected by management, which is not required to be reported by Auditor to the Audit Committee/Central Government in terms of the provisions of section 143(12) of the Companies Act, 2013, it shall be included in the Secretarial Audit Report.

8. Identification & Reporting of the events/actions having major bearing on Company's affairs

It shall be the duty of the Auditor to identify and report all events/actions having major bearing on the Company's affairs in pursuance of the applicable laws, rules, regulations, guidelines, standards, etc. An event/action may be considered as having major bearing on Company's affairs includes the following situations:

8.1 Events/actions affecting going concern status of the Company

8.2 Events/actions altering the charter documents of the Company

8.3 Capital structure of the company

8.4 Change in the affairs and management of the company

8.5 Change in the licensing or permission for the business operation of the company

8.6 Capacity expansion and utilization of the company.

6

MISCELLANEOUS CORNER



- ETHICS & SUSTAINABILITY CORNER
- COMPETITION LAW CORNER
- GST CORNER
- CG CORNER

THE VALUE OF BEING FOCUSED IN LIFE

Contributed by Brahma Kumaris, Om Shanti Retreat Centre, Gurugram

“More often than not, when a new case is presented, (he) does nothing more than sit back in his leather chair, close his eyes and put together his long-fingered hands in an attitude that begs silence,” (Konnikova, 2012). This is his approach to thoughts; what in other words cognitive psychologists refer to as being focused and alert. Any guesses who are we referring to?

The man with a deerstalker hat, Mr. Sherlock Holmes! The world’s most popular fictional detective knows the value of focus; of “throwing his brain out of action,” as Dr. Watson puts it. It is like the concept of holding a magnifying glass in the sun; if you ever did it, you would know; how scattered sunlight can be focused to start a fire. Imagine concentrating brain power into one streak of light and focus it like a laser on any task that has to be accomplished. And to co-relate, we all know the rate of success of Mr. Holmes’ detective cases, once he is done “throwing his brain out of action.”

Whether in a classroom or a board room meeting or in a telecon, we have often heard from the other end asking us to ‘focus.’ Even though we have somehow gathered that it means to be more attentive, nobody ever told us ‘how.’ And often it is not deliberate; it is the brain’s inability to concentrate. And the current problem is, our ongoing mental traffic jam- too much screen time, deadlines, interruptions, responsibilities at home, and numerous other conveniences which are the genesis of the “internet age. A recent survey by the University of California (2012) estimates that we are bombarded with “34 GB of information a day”, twice as much as it was 30 years ago. Office workers are interrupted (on an average) every three minutes. College and university counseling centers are examining how best to serve the growing number of students seeking their services. More and more students are reeling under academic pressure and the constant competition to do better and outperform others. It is tough for students pursuing CS; which is worse with the pressure to be placed. And little do we realise that once we are placed, the pressure and stress gets even worse with the mountain of workload along with administrative responsibilities. The modern life is rife with such situations, so I shall not divulge into our constant nightmares. My intension here is, rather to delve deeper into the well known and yet elusive concept of Focus. In an attempt to do so I shall first explore the deeper meaning of the phenomenon. In the step I will relate tried and tested methods to improve focus and showed what intervention is necessary to channelize our brain power to a focused form of energy.

So, adhering to our first aim, let us understand and analyze what focus is. Focus is a skill that allows people to begin a task without procrastinating and maintain the attention and effort until the task is complete. This also means focus is the ability to direct one’s mind according to one’s will and not any external circumstance. Focus is generally understood as deep concentration on any subject or object.

Focus is indispensable not only for survival but also for success in any sphere of life. Through focus, the mind and intellect acquires the potentiality of a lens and can penetrate deeply into any object or subject to perceive its original nature and thereby focus strengthens our power to discern. Focus is an inherent trait that already exists in our nature; but the downside of modern life has made this inherent ability elusive.

So, if we reflect on the idea a little deeply, we will very well be aware that focus in our life has been receding as we grew up or as time passed by. As expectations and demands increase, we have tried to adjust or divide our attention to various issues rather than being focused on the one issue at hand. This generation considers constant interruptions to be perfectly normal and anyway we are expected to multi-task, consequently our focus wanes away. People unrelentingly argue that there is always more than one issue at hand, or that it is an age of multi-tasking. In reality we can only focus on one activity at a time. And if we are not doing that, we are not justifying the activity at hand and rather planning for the next set of actions. This in turn requires more effort for the present task and also delays the next task. In the words of Ms. Linda Stone (1998, 2010) an MIT based researcher, “Multi-tasking



Focus is a skill that allows people to begin a task without procrastinating and maintain the attention and effort until the task is complete.



Focus is indispensable not only for survival but also for success in any sphere of life. Through focus, the mind and intellect acquires the potentiality of a lens and can penetrate deeply into any object or subject to perceive its original nature and thereby focus strengthens our power to discern.

leads to a state of continuous partial attention" which in turn, achieves much less than a fully focused mind. Dr. Glenn Wilson (2005) found that workers who were constantly distracted by phone calls and emails experienced a 10% drop in their IQ and this unchecked 'infomania' could reduce workers' mental agility. We are constantly consuming a stream of information without actually concentrating on one specific information. Consequently we retain nothing. This reminds me of a beautiful Zen proverb, "When walking, walk. When eating, eat." The rest is self-explanatory and I would refrain from diluting the essence and beauty of the proverb.

Now let us explore another dynamics of focus. Let's take the famous example of the Sir Isaac Newton's theory of falling of apples which marked the beginning of formulation of the law of gravity. We have often heard famous inventions starting with 'Eureka.' However, have we ever thought what exactly 'Eureka' could be? A moment of Eureka involves a deep connection with the self, in silence, when the mind is more focused and not thinking of the many possibilities and the intellect is not judgmental and trying to observe and understand the truth at hand. And when we talk about this focus, it means that our mind is stable and intellect is not wavered and that they are on the same lines. It is quite rare now-a days as when we are trying to concentrate our mind, the intellect is thinking of other parallel possibilities while when the intellect sticks to one idea, our mind quickly jumps to either formulating the consequences or building fantasies. This unique duo of mind and intellect creates focus, i.e. coming together onto something, like rays of Sun when directed onto a lens or parabolic reflector.

If we replicate the same theory in our everyday lives, do we think that we can accomplish better? If our thinking is focused and action is in sync; can we not achieve more in a shorter period of time? If we look closely, most of our thought process invokes the thought of the target rather than the process. We are constantly panicking about the deadline and not focusing on the task right then and there. And it is not our fault. It is the environment that has culminated in us a culture where everyone behaves the same manner. We have been taught to internalize the value of results and performance enhancements and not of focus. And when we fail to accomplish, we are asked to 'focus' better.

So as mentioned earlier, we are all aware that the thumb rule is to concentrate on the job but with due course, it weans away with external pressure. That is exactly why a child is able to focus better than adults. As we grow older succumb to the external demands thereby dissociating from our original qualities. And to achieve this, meditation is the only intervention. There is no need to explain what meditation is, we all have the dictionary definition and personalized understanding of the phenomenon. As theory suggests, when we are able to keep the mind focused on a specific object uninterruptedly for twelve seconds, we achieve one unit of concentration, especially with reference to 'Raja Yoga' meditation. The words meditation and focus are interlinked and are symbiotic. Yet meditation is more than just focus or concentration. Meditation in the larger domain is a process by which the meditator becomes one with the object or subject of meditation. Focus is the preliminary stage of meditation which is achieved easily through an conscious effort. When this focus becomes effortless and durable it takes the form of meditation. The zenith of meditation is total absorption in the object or subject of focus. This is the higher meaning of focus and achievable only through meditative techniques.

As we have already discussed meditation is the way to learn and practice concentration. However, to practice meditation or connect with the subject or object, knowledge of a person is of paramount importance. Correct knowledge is the only way to be able to do meditation. Meditation connects our discordant thoughts into the principal goal or purpose. Our desires, instincts, and actions are therefore controlled and brought together in a unified direction. As the impressions in the principal subconscious mind reduce, the impulses coming to the conscious mind from the subconscious also reduce. This aids the development of better concentration. The absence of development of new impressions and negation of existing impulses through Rajyog meditation prevents the development of impressions about other things on the subconscious mind.

Rajyog is perhaps the best way in the wakeful state to prevent the occurrence of new impressions in the subconscious mind thereby sharpening our focus. Another important aspect of focusing better is to take breaks. Disconnection from the current task at hand for



If our thinking is focused and action is in sync; can we not achieve more in a shorter period of time?

We are constantly panicking about the deadline and not focusing on the task right then and there.

a few minutes relieves a cluttered mind and de-stresses it.

Focus is nothing but to concentrate the mind and intellect as per one's desire and it needs learning and practice. And through focus and concentration, we can transform any task that we have at hand without having to feel much effort. To back with facts, a new study by the University of Wisconsin-Madison (2014) shows that those participants, who had practiced meditation, were better at completing tasks, when faced with distraction. Meditation increases alertness and focus of mind to deal with situations better in the present moment.

To have focus means to be in the 'now' and this is a practice that we have to inculcate. The moment we realise that the mind has been distracted, we can consciously bring it back to the present, using Rajyog meditation as a tool. Improving focus is as much about spirituality as it is about deepening concentration: it is the ability to quiet your mind, focus your attention on the present, and dismiss any distractions that come your way.

Conclusively, the fact remains that we continue to be a part of the result oriented society where we focus more on the outcome than the process; where targets matter more than the means. But if we take knowledge and meditation into consideration, both the process and result will change qualitatively. The benefits and value of focus isn't just behavioral; it is also physical. Mindfulness has been shown to improve connectivity inside our brain's attention networks, as well as between- changes that save us from distraction.

It's a relatively simple process to discipline the brain and increase our focus. And this has far reaching impacts on our professional achievements, relationships and self-fulfillment. If we could simply stay focused on the right things, life would stop being a reaction to events and things. Focus can go a long way in rewarding many areas of our everyday life. Therefore it is beneficial to invest a little time and effort in sharpening it. It actually helps us shield from the excesses of modern demands.



Meditation connects our discordant thoughts into the principal goal or purpose. Our desires, instincts, and actions are therefore controlled and brought together in a unified direction. As the impressions in the principal subconscious mind reduce, the impulses coming to the conscious mind from the subconscious also reduce. This aids the development of better concentration



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Recent updates on Competition Law Enforcement

Competition law is designed to protect the interest of consumers and businesses from harm arising out of anti-competitive behaviour in market. Competition law ensures effective competition by fostering productive, allocative and dynamic efficiencies in the economy. Competition Act, 2002 (“Act”) follows the principle of competition neutrality i.e. it’s an ownership and sector neutral law and all enterprises operating in India whether state owned or private are required to comply with the competition law.

Hyundai Motor India Limited - Resale Price Maintenance Case

Section 3(4) of the Act deals with Anti-Competitive Agreements namely vertical agreements, where any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including— (a) tie-in arrangement; (b) exclusive supply agreement; (c) exclusive distribution agreement; (d) refusal to deal; (e) resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India. As per Section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition with India. For the purpose of sub-section (4) of Section 3, “resale price maintenance” includes any agreement to sell goods on condition that the prices to be charged on resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

In case no. 36 and 82 of 2014, the Competition Commission of India found Hyundai Motor India Ltd. (“**HMIL**”) to be in contravention of the provisions of section 3(4)(e) read with section 3(1) of the Act for imposing arrangements upon its dealers which resulted into Resale Price Maintenance in sale of passenger cars manufactured by it. Further, HMIL was found to have contravened the provisions of section 3(4)(a) read with section 3(1) of the Act for mandating its dealers to use recommended lubricants/oils and penalising them for use of non-recommended lubricants/oils. Apart from issuing cease and desist order against HMIL, the Commission imposed a penalty of Rs. 87 crore upon HMIL for the anti-competitive conduct.

Coal India Ltd – Abuse of Dominance Case

Section 4 of the Act deals with Abuse of dominant position, if an enterprise imposes directly or indirectly unfair or discriminatory conditions in purchase or sale of goods or services or restricts production or technical development or create hindrance in entry of new operators to the prejudice of consumers.

The Commission found Coal India Limited (“**CIL**”) and its subsidiaries to be in contravention of the provisions of Section 4(2)(a) for imposing unfair/discriminatory conditions in Fuel Supply Agreements (“**FSAs**”) with the power producers for supply of non-coking coal. Apart from issuing a cease and desist order against CIL and its subsidiaries, the Commission had directed modification of FSAs in light of the findings and observations recorded in the order. The Commission also imposed a penalty of Rs. 591.01 crore upon CIL for the aforesaid abusive conduct.

SECTION 5 & 6 ORDERS

Section 5 & 6 of the Act deal with the regulation of combinations i.e. M&A above the thresholds given in the Act. The CCI does crystal-ball gazing into markets, to assess the impact of proposed mergers and acquisitions on the competition in the market in the future. The provisions regarding regulation of mergers and acquisitions came into effect in June 2011.

Approval of Merger of Chennai Network Infrastructure Limited into GTL Infrastructure Limited

The Commission received a notice jointly given by GTL Infrastructure Limited (“**GIL**”) and Chennai Network Infrastructure Limited (“**CNIL**”) on May 22, 2017. The combination relates to merger of CNIL into GIL and was notified pursuant to board resolutions of each of the company.

GIL, listed on BSE and NSE, is engaged in the business of providing passive infrastructure services to various telecom operators across India. CNIL, a public company incorporated in India and an associate company of GIL, is also engaged in the business of providing passive infrastructure services to various telecom operators in seventeen telecom circles in India. They are both registered with the DOT as an IP-I service provider.

The Commission observed that both GIL and CNIL are engaged in the business of providing passive infrastructure services to various telecom operators in India and that their operations overlap in many telecom circles. The Commission also noted that there is no vertical relationship between the activities of the Parties. The Commission took into account that there are more than 600 IP-I service providers registered with the DOT indicating that there is no significant legal or regulatory barriers to enter into the business of providing passive infrastructure services. In circles where operations of both GTL and CNIL overlapped, there are a number of other players such as Indus Towers Limited, Bharti Infratel Limited, ATC Viom, Reliance Infratel Limited, Bharat Sanchar Nigam Ltd., Vodafone and Idea, which are engaged in business of providing passive infrastructure services.

Accordingly, the Commission approved the combination under sub-section (1) of Section 31 of the Competition Act, 2002.

1. GST Council Meeting

The GST Council in its 20th meeting held on August 5, 2017 at New Delhi, appealed to the Indian industry to pass on the input credit to customers.

The major highlights of the meeting are as under:

- The E-way bill would be rolled out from October 1, 2017. Goods more than Rs 50,000 in value will have to be pre-registered online before they can be moved. There will be no check posts and the whole process will be technology-driven with minimum human intervention
- The tax rate on some tractor parts has been reduced to 18% from 28%
- The job work rate for all kinds of work in the textile chain has been kept at 5%
- Work contracts under GST will be taxed at 12% with input tax credit
- 71 lakh central and state taxpayers have migrated to the Goods and Services Tax system. Another 15.67 lakh new applications for registration have been received
- The National Anti-profiteering Authority has been proposed to be a three-tier structure including a committee at the state level to deal with local complaints

The next meeting of the GST Council will be held at Hyderabad on September 9, 2017

2. GST mop-up in first month beats government's estimate

- The government has managed to mop up Rs 92,283 crores from Goods and Services Tax during the first month of the new regime, from a little under 65% of the registered taxpayers
- The collections are marginally higher than the internal estimate of Rs 91,000 crore and officials are expecting more collection since several taxpayers are still filing returns

3. Over 1.9 million file GST returns

- As many as 19,42,354 taxpayers had filed returns for July under GST regime
- Officers of the GST Network (GSTN), responsible for the information technology (IT) backbone of the GST, said they hoped 2.8 million more would do so by the deadline
- Those who wished to claim transitional input tax credit could file returns by August 28, 2017

4. GSTN names 69 companies in second shortlist of GSPs

- The GST Network has shortlisted 69 more companies to become GST Suvidha Providers which include HDFC Bank, Zoho Corporation and two of the remaining Big Four consulting companies – PwC and KPMG

5. GST rollout improves business efficiency by 30%: PM Narendra Modi

- Trucks (carrying goods) are saving 30 per cent (travel) time post GST as check posts have been removed. This has helped save thousands of crores of rupees and more importantly time – Hon'ble PM
- Post-GST, travel time for long-haul trucks have reduced by at least a fifth according to Ministry of Road Transport and Highways

6. Government extends tax exemption for industry in north east, hilly states

- Industries in the north eastern and Himalayan states will continue to get tax exemption till March 2027, albeit as refund, under the current GST regime – Shri Arun Jaitley after the Cabinet meeting headed by Prime Minister Narendra Modi
- As per the scheme, industries which commenced operations during the period got excise tax holiday for 10 years, he said, adding that there is a separate residuary period for every industry because of commencement of production and their consequent entitlement of 10 year exemption

7. Number of slabs in GST will be reduced later: Shri Arjun Ram Meghwal

- The number of tax slabs in the Goods and Services Tax regime would be reduced with improvement in revenue-Union Minister of State for Finance and Corporate Affairs

8. Tax-GDP ratio may rise to 11.9% due to GST, closer scrutiny: Government

- The government expects the Goods and Services Tax and increased surveillance to boost tax revenues over the next two years, taking India's tax-to-GDP ratio close to 12%

9. GSTN starts registration of casual taxpayers for occasional businessmen

- GST Network said it has started the facility for registration of casual taxpayers those who conduct businesses occasionally which will be valid for 90 days

10. Government notifies dates in September for filing first GST returns

- In line with the recommendations of Goods and Services Tax Council, the government has notified dates for filing of first GST returns, for the months of July and August
- The date of filing returns was extended earlier by the Council by a month to give more time to the taxpayers to come into the system
- For July, the three forms -- GSTR 1, GSTR 2 and GSTR 3 will have to be filed between September

1 and 5, September 6 and 10 and September 11 and 15, respectively

- For the month of August, the three forms will have to be filed between September 16 and 20, September 21 and 25 and September 26 and 30, respectively
- The GSTR-3B form for July has to be filed by August 20, while for August it needs to be filed before September 20
- For September, the last date for GST return filing for forms GSTR 1, GSTR 2 and GSTR 3 will be October 10, October 15 and October 20, respectively and there is also likely to be a penalty for delayed filing

11. State GST Bills

- Kerala government passed in the State Assembly, the Kerala Goods and Services Tax Bill, 2017
- The West Bengal Goods and Services Tax Bill, 2017, was passed by the State Assembly with the legislation replacing the ordinance promulgated earlier

12. Lok Sabha passes Bills to extend GST to J&K

- The lower house passed the Central Goods and Services Tax (Extension to Jammu and Kashmir), Bill, 2017 and the Integrated Goods and Services Tax (Extension to Jammu and Kashmir), Bill, 2017 after a brief discussion

13. Centre to levy 3 % IGST on banks for gold imports

- Banks indulged in importing gold and precious metals will have to shed 3 per cent Integrated-Goods and Services Tax (IGST)
- Banks did not pay any Value Added Tax on import of precious metals previously. They only paid customs duty- CBEC
- Further, the banks would be responsible to pay IGST on such imports and not any overseas supplier, as per which the ownership is vested during movement of gold or silver.

14. Finance Minister Arun Jaitley indicates scope for rationalisation of rates under GST

Certificate Course on Compliance, Governance and Risk Management in Insurance

Offered by

Insurance Institute of India (III) jointly with The Institute of Company Secretaries of India (ICSI) for Associate / Fellow of ICSI

Objective: The objective of the Course is to create a cadre of Associates / Fellows ICSI professionals in the Insurance industry to be well versed in risk management, governance and regulatory compliances.

Scope & Coverage: Course seeks to empower

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The course covers matters relating to Risk Management, Governance and Compliance in the Insurance industry. This would include:

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Enrollment Date for Dec. 2017
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CORPORATE GOVERNANCE CORNER

DEVELOPMENTS – AUGUST 2017**CENTRAL BANK OF THE PHILIPPINES
RAISES BAR ON CORPORATE GOVERNANCE**

The Monetary Board (MB), highest policy-making body has made amendments to the BSP* Corporate Governance Guidelines raising the bar on the expectations from the board of directors and risk management systems of its supervised financial institutions (BSFIs). The approved standards are at par with international standards and are likewise aligned with the Securities and Exchange Commission's (SEC) Code of Corporate Governance for Publicly-Listed Companies.

The amendment to the policy enhanced the requirements on the membership composition of the board which was anchored on the fundamental principle that the tone of good governance should come from the top.

The said amendment is aimed at ensuring that the board of directors is comprised of a collective mix of individuals who possess the expertise and competence to effectively manage the financial institution.

The amendments also aim to promote an environment that fosters critical exchange of views and exercise of objective judgment.

In particular, the new BSP guidelines required:

1. The positions of chairperson of the board and chief executive officer of banks must not be held by only one person in order to "promote independence of the board from management and to support an environment where the board can sufficiently challenge the actions of those involved in operations."

But in exceptional cases wherein the Monetary Board approved a single person as chair and CEO, there must be another lead independent director to be appointed by the bank.

2. Also, the new rules mandated that non-executive directors, including independent directors, must compose the board majority.
3. The number of independent directors must also increase to one-third of the board membership from 20 percent previously, or two directors, whichever is higher.
4. As for rural banks, the Monetary Board kept the existing requirement of only one independent director.
5. The policy further provides that an independent director may only serve as such for a maximum cumulative term of nine years and that a non-executive director may concurrently serve as director in a maximum of five publicly listed companies.
6. In this respect, duties and responsibilities of the board of directors were streamlined highlighting accountabilities in five key areas specifically related to:
 - (a) Shaping the corporate culture and values
 - (b) Setting out objectives and strategies and oversight on management's implementation thereof
 - (c) Appointing key members of senior management and control functions
 - (d) Overseeing the corporate governance framework
 - (e) Adopting a robust risk governance framework

As a whole, the BSP, through the amended corporate governance rules aims to:

"Promote a culture of good governance by adopting policies and displaying practices that maintain a balance between rewarding effective and efficient performance and upholding consistent adherence with the values of the organization".

COMPANY SECRETARIES BENEVOLENT FUND



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The Company Secretaries Benevolent Fund (CSBF) provides safety net to Company Secretaries who are members of the Fund and their family members in distress.

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Contact

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For more details please visit www.icsi.edu/csbf

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