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CONTENTS

INVITATION FOR CONTRIBUTING AN ARTICLE

Readers are invited to contribute article/s for the Journal. The article should be on a topic of current relevance on Corporate Law, Tax Law, or on any other matter or issue relating to Economic or Commercial Laws. The article should be original and of around 7-8 pages in word file (approx. 2500 words). Send your articles at email id : articles@vidhimaan.com along with your student registration number. The shortlisted articles shall be published in the Journal.

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MESSAGE FROM THE PRESIDENT

Dear Students,

Let me begin the communication of this month with the wonderful quote of Mahatma Gandhi, wherein he said that "The Best way to find yourself is to lose yourself in the service of others". Certainly, real happiness is based upon the selfless service of all the members of the society towards each other.

Mahatma Gandhi, the Father of our Nation devoted his entire life in the service of the Nation. Owing to his sacrifices for the wellbeing and development of the masses, the word Mahatma Gandhi is not just a name, but a phenomenon which swept through world history, creating a tornado of revolution, while using the force as mild as a spring breeze.

He was honoured with the title of 'Father of the Nation' and therefore in the honour of his birthday, 2nd October is being celebrated as Gandhi Jayanti every year. This day has its own importance internationally also, as the United Nation decided to celebrate his birthday as the International Day of Non-violence.

Friends, besides being a preacher of Truth, Non-Violence, Cleanliness, Unity, Good and Happiness for all, he was a firm believer of good governance and adherence to law correspondingly. Mahatma Gandhi defined Good Governance in his own inimitable simple way, where he said, "Do the policies help the poorest and weakest man? If yes, that is Good Governance."

Considering his agenda of inclusive growth as the greatest service to the people, the government is following abundant initiatives ensuing the development of the nation at parity and at equity. Inter-alia, the initiation of Swatch Bharat Abhiyan and the recent launch of 'Swachhata Hi Seva Movement' marking the beginning of 150th birth anniversary of Mahatma Gandhi in 2018, aim at ensuring freedom of our India from filth and dirt.

Friends, what could be more heartening for us as a Professional Comity that the month which honours the birth of the Father of Nation, also commemorates the Foundation Day of the Institute on 4th October every year. Further, this is a delightful coincidence that on one hand, where year 2018 marks the beginning of 150th birth anniversary of Mahatma Gandhi, on the same end, the Institute as Premier National Body in the field of Governance is successfully contemplating 50th year of its service to the nation on October 4, 2018.

On this note of such a proud October for us, my heartiest wishes to all of you on Gandhi Jayanti as well as on Golden Jubilee Year – Foundation Day of ICSI, 2018.

Last but not the least, to quote our Bapu "व्यक्ति अपने विचारों से निर्मित प्राणी है, वह जो सोचता है वही बन जाता है." (A man is but the product of his thoughts what he thinks, he becomes), *So Think Big, Think Good Governance, Think Compliance and Bring your Best in the Service of the Nation*.

Wishing you the best in all your endeavours.

CS Makarand Lele

President, ICSI

Issue of Sweat Equity Shares by an Unlitsed Company

In this article, the author reviews in brief the concept of Issue of Sweat Equity Shares by Unlisted Companies under the Companies Act, 2013 and the Companies (Share Capital and Debentures) Rules, 2014.

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Definitions of 'Sweat Equity Shares', 'Employee' and 'Value Additions'

Section 2(88) of the Companies Act, 2013 ('Act') defines the expression 'sweat equity shares' as such equity shares as are issued by a company to its directors or employees at a discount or for consideration, other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called.

The term 'employee' is defined in *Explanation* 1(i) to rule 8 of the Companies (Share Capital and Debentures) Rules, 2014 as (*a*) a permanent employee of the company who has been working in India or outside India, for at least last one year; or (*b*) a director of the company, whether a whole time director or not; or (*c*) an employee or a director as defined in sub-clauses (*a*) or (*b*) above of a subsidiary, in India or outside India, or of a holding company of the company. The expression 'value additions' is defined in *Explanation* 1*(ii)* to rule 8 of the Companies (Share Capital and Debentures) Rules, 2014 as actual or anticipated economic benefits derived or to be derived by the company from an expert or a professional for providing know-how or making available rights in the nature of intellectual property rights, by such person to whom sweat equity is being issued for which the consideration is not paid or included in the normal remuneration payable under the contract of employment, in the case of an employee.

Issue of Sweat Equity Shares

Section 54(1) of the Act provides that notwithstanding anything contained in section 53 (which prohibits issue of shares at discount), a company may issue sweat equity shares of a class of shares already issued, if the following conditions are fulfilled -

- Issue is authorized by a special resolution passed by the company
- Resolution specifies the number of shares, the current market price, consideration, if any, and the class or classes of directors or employees to whom such equity shares are to be issued
- not less than one year has, at the date of such issue, elapsed since the date on which the company had commenced business
- Where the equity shares of the company are listed on a recognized stock exchange, the sweat equity shares are issued in accordance with the regulations made by the Securities and Exchange Board of India in this behalf and if they are not so listed, the sweat equity shares are issued in accordance with such rules as may be prescribed

Section 54(1)(c) has been omitted by the Companies (Amendment) Act, 2018.

Issue of Sweat Equity Shares by an Unlisted Company

Rule 8 (1) provides that a company other than a listed company, which is not required to comply with the Securities and Exchange Board of India (Issue of Sweat Equity) Regulations, 2002 on sweat equity, shall not issue sweat equity shares to its directors or employees at a discount or for consideration other than cash, for their providing know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called, unless the issue is authorized by a special resolution passed by the company in general meeting.

Explanatory Statement

As per Rule 8(2) the notice issued to the shareholders for the conduct of general meeting for authorization of issue of sweat equity shares shall contain an explanatory statement which shall contain the following:

- Date of the Board meeting at which the proposal for issue of sweat equity shares was approved
- Reasons or justification for the issue
- Class of shares under which sweat equity shares are intended to be issued
- Total number of shares to be issued as sweat equity
- The class or classes of directors or employees to whom such equity shares are to be issued
- Principal terms and conditions on which sweat equity shares are to be issued, including basis of valuation
- Time period of association of such person with the company
- Names of the directors or employees to whom the sweat equity shares will be issued and their relationship with the promoter or/ and key managerial personnel
- Price at which the sweat equity shares are proposed to be issued
- Consideration including consideration other than cash, if any to be received for the sweat equity
- Ceiling on managerial remuneration, if any, be breached by issuance of such sweat equity and how it is proposed to be dealt with
- Statement to the effect that the company shall conform to the applicable accounting standards
- Diluted earning per share pursuant to the issue of sweat equity shares calculated in accordance with the applicable accounting standards.

Validity of Special Resolution

The special resolution authorizing the issue of sweat equity shares shall be valid for making the allotment within a period of not more than twelve months from the date of passing of the special resolution.

Restrictions on Issue of Sweat Equity Shares

The company shall not issue sweat equity shares for more than 15 per cent of the existing paid up equity share capital in a year or shares of the issue value of Rs.5 crores, whichever is higher.

The issuance of sweat equity shares in the company shall not exceed 25 per cent of the paid up equity capital of the company at any time. A startup company may issue sweat equity shares not exceeding fifty percent of its paid up capital up to five years from the date of its incorporation or registration.

Lock in Period

The sweat equity shares issued to directors or employees shall be locked in/non transferable for a period of three years from the date of allotment and the fact that the share certificates are under lock-in and the period of expiry of lock in shall be stamped in bold or mentioned in any other prominent manner on the share certificate.

Valuation of Sweat Equity Shares

The sweat equity shares to be issued shall be valued at a price determined by a registered valuer as the fair price giving justification for such valuation. The valuation of intellectual property rights or of know how or value additions for which sweat equity shares are to be issued, shall be

carried out by a registered valuer, who shall provide a proper report addressed to the Board of directors with justification for such valuation. A copy of gist along with critical elements of the valuation report obtained shall be sent to the shareholders with the notice of the general meeting.

In respect of sweat equity shares issued during an accounting period, the accounting value (the accounting value shall be the fair value of the sweat equity shares as determined by a registered valuer) of sweat equity shares shall be treated as a form of compensation to the employee or the director in the financial statements of the company, if the sweat equity shares are not issued pursuant to acquisition of an asset.

If the shares are issued pursuant to acquisition of an asset, the value of the asset, as determined by the valuation report, shall be carried in the balance sheet as per the accounting standards and such amount of the accounting value of the sweat equity shares that is in excess of the value of the asset acquired, as per the valuation report, shall be treated as a form of compensation to the employee or the director in the financial statements of the company.

Non Cash Considerations

Where sweat equity shares are issued for a non-cash consideration on the basis of a valuation report in respect thereof obtained from the registered valuer, such non-cash consideration shall be treated in the following manner in the books of account of the company :

- Where the non-cash consideration takes the form of a depreciable or amortizable asset, it shall be carried to the balance sheet of the company in accordance with the Accounting Standards
- Where the above is not applicable, it shall be expensed as provided in the Accounting Standards

Sweat Equity Shares as Part of Managerial Remuneration

The amount of sweat equity shares issued shall be treated as part of managerial remuneration for the purposes of sections 197 and 198 of the Act, if the following conditions are fulfilled :

- Sweat equity shares are issued to any director or manager
- They are issued for consideration other than cash, which does not take the form of an asset which can be carried to the balance sheet of the company in accordance with the applicable Accounting Standards.

Disclosure in the Director's Report

The Board of directors shall, inter alia, disclose in the Directors' Report for the year in which such shares are issued, the following details of issue of sweat equity shares :

- Class of director or employee to whom sweat equity shares were issued
- Class of shares issued as sweat equity shares
- Number of sweat equity shares issued to the directors, key managerial personnel or other employees showing separately the number of such shares issued to them, if any, for consideration other than cash and the individual names of allottees holding one percent or more of the issued share capital
- Reasons or justification for the issue
- Principal terms and conditions for issue of sweat equity shares, including pricing formula
- Total number of shares arising as a result of issue of sweat equity shares
- Percentage of the sweat equity shares of the total post issued and paid up share capital
- Consideration (including consideration other than cash) received or benefit accrued to the company from the issue of sweat equity shares
- Diluted earnings per share (EPS) pursuant to issuance of sweat equity shares.

Register of Sweat Equity Shares

The company shall maintain a Register of Sweat Equity Shares in Form No. SH.3 and shall forthwith

enter therein the particulars of sweat equity shares issued. The register of sweat equity shares shall be maintained at the registered office of the company or such other place as the Board may decide. The entries in the register shall be authenticated by the company secretary of the company or by any other person authorized by the Board for the purpose.

Contents of Form SH – 3

The following information is to be recorded in the Sweat Equity Register:

- Sl. No.
- Reference to entry in register of members
- Name of the allottee
- Status of the allottee – whether director or employee
- Date of passing of Board resolution
- Date of the special resolution authorizing the issue of sweat equity shares
- Date of issue of sweat equity shares
- Number of sweat equity shares issued
- Certificate No. / Folio No.
- Face value of the share
- Price at which the shares are issued
- Amount to be treated as paid up
- Total consideration paid, if any, by the employee / director
  - Consideration received in cash
  - Particulars of consideration other than cash
- Lock in period
- The date of expiry of lock-in- period
- Remarks, if any
- Date of Joining
- Fair value obtained by Valuer
- Basis of Valuation
- Name of Valuer

KNOWLEDGE UPDATE

FOREIGN EXCHANGE MANAGEMENT LAW

External Commercial Borrowings (ECB) Policy – Liberalisation

Reserve Bank of India, vide A.P. (DIR Series) Circular No. 9 dated 19th September, 2018 decided to liberalise the ECB Policy including Policy on Rupee denominated bonds pertaining to (*i*) ECBs by companies in manufacturing sector, and (*ii*) underwriting and market making by Indian banks for Rupee denominated bonds (RDB) issued overseas.

Foreign Exchange Management (Establishment in India of a Branch Office or a Liaison Office or a Project Office or any Other Place of Business) (Amendment) Regulations, 2018

Reserve Bank of India, vide GSR 827(E) dated 31st August, 2018, has amended Foreign Exchange Management (Establishment in India of a Branch Office or a Liaison Office or a Project Office or any Other Place of Business) Regulations, 2016 by substituting sub-regulation (*d*) of regulation 5 and amendment to Form FNC.

Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (Second Amendment) Regulations, 2018

Reserve Bank of India, vide GSR 823(E) dated 30th August, 2018, has amended the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 by deleting clause (*1*) of sub-regulation 13.1 and substituting clause (*11*) of sub-regulation 13.1.

SEBI LAW

Securities and Exchange Board of India (Credit Rating Agencies) (Second Amendment) Regulations, 2018

SEBI, vide Notification No. SEBI/LAD-NRO/GN/2018/36 dated 11thSeptember, 2018 has amended the Securities and Exchange Board of India (Credit Rating Agencies) Regulations, 1999 by substituting the clause (*f*) in regulation 9.

'Dormant Company' : A Ready Reference

The idea of the dormant company is recently inducted in the Companies Act, 2013. Dormant company, also known as Asset Shieldings provides shield to the assets of a company. The meaning of 'dormant' is 'something that is inactive but has the ability to be active at a later time'. This article is intended to talk about 'dormant companies' as defined in sub-section (1) of Section 455 of the Companies Act, 2013.

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Dormant Company

A dormant company is an inactive company which has not been carrying on any business or operation or has not made any significant accounting transaction. In terms of sub-section (1) of section 455 of the Companies Act, 2013 ('the Act'), a company that has been formed and registered under the Act :

- for a future project or to hold an asset or intellectual property : and
- has no significant accounting transaction, has to make an application to the Registrar to obtain the status of dormant company.

Benefits of "Dormant" Status

The benefits derived from such status may be summarized under the following heads:

- ***Protection of the Company Name*** **-** The intellectual property that the dormant company holds includes "trademark" of the company name. The name of the company is protected so that others are prevented from trading under the name of the dormant company.
- ***Future Project*** **-** A company may have been formed in preparation of a future project. This signifies the intention of the promoters to trade and therefore retain the domain name of the said company.
- ***Assets Shield*** - A dormant company offers excellent advantage to the promoters who want to hold an asset or intellectual property under the corporate shield for its usage at a later stage. For instance: if a promoter wants to buy land now for its future project at a comparatively lesser price, he may do the same through dormant company so that he can use the land for its future project.
- ***Company History*** - Although this is a very significant benefit, by establishing a company that is initially dormant and later begins business, can claim to be well-established since its incorporation though it may have started its business much later. It helps a company to project a better image to prospective clients and/or creditors.

Criteria for Applying Dormant Status

As per sub-section (1) of Section 455, a company which has not been carrying out any business or has not any significant accounting transaction may apply to the Registrar for granting the status of a dormant company. The *explanation* to that sub-section defines expressions 'Significant Accounting Transaction' and 'inactive company' as follows :

Inactive 'Company' means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years;

'Significant Accounting Transaction' means any transaction other than –

- payment of fees by a company to the Registrar;
- payments made by it to fulfill the requirements of this Act or any other law;
- allotment of shares to fulfill the requirements of this Act; and

- payments for maintenance of its office and records.

Therefore, if a company carries out any transaction that does not fall within the above-mentioned four heads, it stands the chance of losing its "dormant" status.

Other Requirements for Acquiring the Status of Dormant Company

The proviso to rule 3 of the Companies (Miscellaneous) Rules 2014 (Miscellaneous Rules) lays down several conditions that a company must fulfill before it will apply for the status of a dormant company. These conditions are as follows:

- No inspection, inquiry or investigation should have been ordered or taken up or carried out against the company.
- No prosecution should have been initiated and pending against the company under any law.
- Company should neither have any public deposits which are outstanding nor should it be in default in payment thereof or interest thereon.
- Company should not have any outstanding loan, whether secured or unsecured.
- There should be no dispute in the management or ownership of the company and a certificate in this regard should be enclosed with Form MSC-1 (e-Form for applying the dormant status).
- Company should not have any outstanding statutory taxes, dues, duties etc. payable to the Central Government or any State Government or local authorities etc.
- Company should not have defaulted in the payment of workmen's dues.
- Securities of the company should not be listed on any stock exchange within or outside India.

Process for Acquiring the Status of Dormant Company

STEP 1 – Company must pass a Board resolution for authorizing any director of the company for making an application in e-Form MSC-1.

STEP 2 – Issue notice for convening extra ordinary general meeting (EGM) of the members for passing a special resolution of the company pursuant to section 101 of the Act.

STEP 3 – Company must pass a special resolution in the EGM of a company or notify its shareholders and obtain the consent of at least three-fourth of shareholders in value.

STEP 4 –The Company must file an E-form MGT-14 with Registrar of Companies within 30 days from the passing of special resolution in Extra Ordinary General Meeting.

STEP 5 - Company must file an application pursuant to rule 3 of the Miscellaneous Rules, through e-From MSC–1 to the Ministry of Corporate Affairs after filing e- Form MGT-14 and pay the prescribed fees under the Companies (Registration Offices and Fees) Rules, 2014. For filing e-Form MSC-1, the following documents should be attached by the company with that e-Form –

- Certified true copy of the board resolution passed by the board, as mentioned in Step 1.
- Certified true copy of the Special resolution authorizing for obtaining the dormant status, as mentioned in Step 3.
- Statement of affairs duly certified by chartered accountant or auditor(s) of the company.
- Copy of approval or no objection certificate (NOC) from other regulatory authority incase company is regulated by such authority.
- Latest financial statement or annual return of the company is mandatory to attach in case the same is filed to the Registrar.
- Consent of lender or creditor, if any loan amount is outstanding.
- Certificate regarding no dispute in the management or ownership.
- Any other information can be provided as an optional attachment(s).

STEP 6 - Upon satisfaction, pursuant to sub section (2) of section 455 and rule 4 of the Miscellaneous Rules, the Registrar on consideration of the application shall allow the status of a dormant company to the applicant and issue a certificate of dormant company in form MSC - 2. [Note that the Registrar must be satisfied that the company fulfills the criteria laid down under sub - section (1) of section 455 and the rule 3 of the Miscellaneous Rules, prior to granting of the certificate of dormant company as mentioned above].

STEP 7 - The Registrar shall enter the name of the company in the Register of dormant companies maintained by Registrar pursuant to sub section (3) of section 455.

Minimum Number of Directors in Dormant Company

Pursuant to rule 6 of the Miscellaneous Rules, a dormant company should have a minimum number of directors as follows:-

- Public company : Three directors
- Private Company : Two directors
- One Person Company : One director.

It means the same criteria will be applied for the minimum number of directors as mentioned in clause (*a*) of sub section (1) of section 149 of the Act. The provision of rotation of auditor shall not apply to the dormant company.

Return of the Dormant Company

A dormant company shall file a "return of dormant company" annually, indicating financial position duly audited by a chartered accountant in practice in "Form MSC – 3" along with such annual fess as provided in Companies (Registration Offices and Fees) Rules, 2014 within a period of 30 days from the end of each financial year.

Other Compliances by Dormant Company

The dormant company has to file return of allotment in E-Form PAS–3 within thirty days of allotment of shares by such company, if any allotment has been made by the company. The dormant company has to file the particulars of change in directors in e-Form DIR–12 within thirty days of passing of resolution by the company, if any change has been made in the board of company.

Process for Seeking the Status of an Active Company

According to sub rule (1) of Rule 8 the Miscellaneous Rules, an application, under sub-section (5) of section 455, for obtaining the status of an active company shall be made in e-Form MSC-4 along with fees as provided in the Companies (Registration Offices and Fees) Rules, 2014 and shall be accompanied by a return in Form MSC-3 in respect of the financial year in which the application for obtaining the status of an active company is being filed, by the following mode:-

- ***By the Directors –*** Where a dormant company does or omits to do any act mentioned in the grounds of application in e-Form MSC-1 submitted to the Registrar for obtaining the status of dormant company, affecting its status of dormant company, the directors shall within seven days from such event, file an application for obtaining the status of an active company.
- ***By the Registrar of Companies –*** Where the Registrar has reasonable cause to believe that any company registered as 'dormant company' under his jurisdiction has been functioning in any manner, directly or indirectly and it is found that the company has actually been functioning, he may initiate the proceedings for enquiry under section 206 of the Act and if, after giving a reasonable opportunity of being heard to the company in this regard,the Registrar may remove the name of such company from register of dormant companies and treat it as an active company.

According to the sub-rule (2) of rule 8, the Registrar shall, after considering the application filed under sub-rule (1), issue a certificate in Form MSC-5 allowing the status of an active company to the applicant. Provided that the Registrar shall initiate the process of striking off the name of the company if the company remains as a dormant company for a period of consecutive five years. After seeking the status of an active company a company can act,like it was acting as a normal company before obtaining the status of dormant company.

Conclusion

In line with India's investor-friendly policies, the provision regarding dormant companies can be seen in the light of promoting and facilitating the procedure of incorporation and functioning of a company. For obtaining or retaining the dormant status of a company is so that the company retains its corporate status despite not carrying out any business. According to the renowned author Ramaiya, a newly incorporated company can also apply for the status of a dormant company if it has not been carried out any business or operation since its incorporation, except for filing of returns with the Registrar of Companies or any other payments to comply with the conditions under Company Law or any other law. ■■■

BCCI Clean Bowled by CCI

Recently, in a case the Board for Control of Cricket in India (BCCI) was found to be contravening the provisions of Competition Law and a penalty of Rs.52.24 crore was imposed by the CCI. This article deals with the key features of this case.

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Abuse of Dominance Position by Denial of Market Access

Clause (*c*) of sub-section (2) of section 4 of the Competition Act, 2002 prohibits an enterprise or group from indulging in practice or practices resulting in denial of market access in any manner. Any contravention of the said provision is treated as abuse of dominant position and hence liable for punishment by the Competition Commission of India (Commission / CCI), in accordance with the applicable provisions under section 27. In Case No. 61/2010 (CCI), the Board for Control of Cricket in India (BCCI) was found to be contravening that clause and a penalty of Rs.52.24 crore was imposed by the CCI.

Background

The Commission had passed an order on 8th February, 2013 under section 27 of the competition Act 2002 of ('the Act') wherein the conduct of the BCCI was found to be in contravention of the provisions of Section 4 of the Act - *Surinder Singh Barmi v. Board for Control of Cricket in India* Case No.61 of 2010 dated 8th February, 2013. The Commission had found BCCI dominant in the market for organization of private professional cricket leagues/events in India and its conduct was found to be in contravention of Section 4(2)(c) of the Act. Aggrieved by the said order of the Commission, BCCI preferred an appeal before the erstwhile Competition Appellate Tribunal (CompAT). The CompAT, vide its order dated 23rd February, 2015, set aside the Commission's aforesaid order dated 8th February, 2013 on the ground of violation of principles of natural justice and remitted the matter to the Commission for fresh disposal. The Commission vide its order dated 5th May, 2015, directed the Director General (hereinafter, 'DG') to conduct further investigation into the matter in accordance with the directions contained in the order of CompAT. On 29th November, 2017, the Commission passed fresh order and maintained the penalty of Rs.52.24 crore.

Ascertainment of Dominance Position

The key pre-requisites for dealing with a case involving abuse of dominance are delineation of relevant market and ascertainment of dominant position. In this case, the relevant market was identified as 'market for organization of professional domestic cricket leagues/events in India'. Thereafter, the Commission held that the BCCI was holding the dominant position in the relevant Market on the following grounds:

- BCCI assumes the role of de facto regulator of cricket in India on account of the pyramid structure of sports governance and endorsement from ICC as the national body for cricket in India. ICC declares its members like BCCI as the 'custodian' of cricket in the concerned territory and vests them the right of deciding on

any matter relating to the said sport. By virtue of the conditions laid down in section 32 of the ICC Manual, only BCCI has the exclusive authority to sanction/ approve cricket events in India.

- BCCI is the only association for cricket in India at national level and in that capacity, ICC vests it with certain rights. Prime amongst them is the right to sanction/approve cricket events in India. BCCI's regulatory role empowers it to create entry barriers for cricket leagues, other than those organized by it, in the form of requiring approval.
- BCCI has undisputable market share and strong position in terms of size, resources and economic power. As per the audited financials of BCCI, its financial surplus ranged between Rs.53.77 crore in 2008-09 and Rs.525.95 crore in 2013-14.

Abuse of Dominance

The Commission noted that though free entry is one of the necessary conditions for competition to flourish, it is well accepted that in view of the specificities of certain sectors, entry may be subject to regulatory conditions. The effects of such entry rules stipulated by the regulator need a case-by-case evaluation taking into account the legitimate regulatory goals such as quality, safety, orderly growth of the sector etc. The Commission held that the clause in the IPL Media Rights Agreement that 'it shall not organize, sanction, recognize, or support during the Rights period another professional domestic Indian T20 competition that is competitive to the league' and Rule 28(b) which provided that 'no member or a club affiliated to a member or any other organisation shall conduct cricket match or tournament specified therein, without the approval of BCCI', create an insurmountable entry barrier in the relevant market for organization of domestic professional cricket leagues. It the absence of any plausible regulatory rationale or necessity of the same for promotion of the sport, the anti-competitive effect of the impugned clause is indubitable. Based on its assessment, the Commission concluded that the representation and warranty given by BCCI in the IPL Media Rights Agreement and Rule 28(b) of the BCCI Rules, amounts to denial of market access for organization of professional domestic cricket leagues/ events in India, in contravention of clause *(c)* of sub-section (2) read with sub-section (1) of section 4 of the Act. The Commission did take a note of the fact that competition cases relating to sports associations/ federations usually arise due to the conflict between their regulatory functions and their economic activities. Therefore, it is necessary to appreciate whether the impugned clause in the IPL Media Rights Agreement and the impugned rules of the BCCI rules are in place to serve the development of the sport or preserve its integrity or otherwise. If the impugned restrictions impede competition without having any reasonable justification for protection of the legitimate interest of the sport, the same would fall foul of competition law.

Order

To address the contravention found and to remedy the harm flowing therefrom, the Commission directed the BCCI as under:

- BCCI shall cease and desist from indulging into the aforesaid conduct, which is found to be in contravention of the provisions of clause *(c)* of sub section (2) read with sub section (1) of section 4.
- BCCI shall not place blanket restriction on organization of professional domestic cricket league/ events by non-members. This shall, however, not preclude BCCI from stipulating conditions while framing/ modifying relevant rules for approval or while granting specific approvals, that are necessary to serve the interest of the sport. Such changes shall entail norms that underpin principles of nondiscrimination and shall be applied in a fair, transparent and equitable manner.
- Having done the above, BCCI shall issue appropriate clarification regarding the rules applicable for organization of professional domestic cricket leagues/ events in India, either by members of BCCI or by third parties, as well as the parameters based on which applications can be made and would be considered. Besides, BCCI shall take all possible measure(s) to ensure that competition

is not impeded while preserving the objective of development of cricket in the country.

- BCCI shall file a report to the Commission on the compliance of the aforesaid directions within a period of 60 days from the receipt of this order.

Penalty

The Commission decided to impose the same amount by way penalty as was done in its earlier order of February 2013. The Commission held as under:

> "Earlier, the Commission vide its order dated 8th February, 2013 had imposed a penalty of INR 52.24 crore on BCCI. Although, at present, the average of the relevant turnover for the last three financial years is slightly higher than the one which was considered by the Commission while passing the earlier order dated 8th February, 2013, the Commission prefers to maintain the penalty of INR 52.24 crore, which comes to nearly 4.48% of the average of the relevant turnover during the last three preceding financial years."

Conclusion

The Commission, in its order, also opined that the system of approval under pyramid structure of sports governance is a normal phenomenon of sports administration. It added that the sporting rules often create a restrictive environment for the economic activities that are incidental to the sport. To address such ills, the statute like Competition Act needs to be used like a rule book. The Commission has also applied competition assessment principles in case of other sports like hockey, chess, and athletics. Final orders have also been passed. That goes on to establish that the sports and games sector in India needs to comply with the competition rules also.

KNOWLEDGE UPDATE

COMPANY LAW

Designation of Special Court

Central Government, vide Notification No. SO 4285(E) dated 5th September 2018, has designated Special Courts for the purposes of providing speedy trial of offences punishable with imprisonment of two years or more under the said Act for the State of Nagaland, Mizoram and Arunachal Pradesh.

Relaxation of Additional Fees and Extension of Last Date of Filing of Form BEN-2 under the Companies Act, 2013

Central Government, vide General Circular No. 07/2018 dated 6th September, 2018, has extended last date for filing of e-Form BEN-2 without additional fees under the Companies (Significant Beneficial Owners) Rules, 2018 notified vide GSR No. 561(E) dated 13th June 2018. The time limit for filing the BEN-2 Form would be 30 days from the date of deployment of BEN-2 e-Form on the MCA-21 portal and no additional fee shall be levied if the same is filed within 30 days from the date of deployment of the said e-form.

Companies (Prospectus and Allotment of Securities) (Third Amendment) Rules, 2018

Central Government, vide Notification No. GSR 853(E) dated 10th September 2018, has amended the Companies (Prospectus and Allotment of Securities) Rules, 2014 by inserting new rule 9A, which states that Issue of securities in dematerialized form by unlisted public companies.

Sections 66 to 70 of Companies (Amendment) Act, 2017 Come into Force with effect from 12th September, 2018

Central Government, vide Notification No. SO 4823(E) dated 12th September, 2018, has appointed the 12th September, 2018 as the date on which the provisions of sections 66 to 70 (both inclusive) of that Act shall come into force.

Amendments in Schedule V of the Companies Act, 2013

Central Government, vide Notification No. SO 4822(E) dated 12th September 2018, has amended the Schedule V of the Act.

Companies (Corporate Social Responsibility Policy) (Amendment) Rules, 2018

Central Government, vide Notification No. GSR 895(E) dated 19th September, 2018, has amended the Companies (Corporate Social Responsibility Policy) Rules, 2014.

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 – A Bird's Eye View

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 duly assented by the President on 17th August, 2018, amends the Insolvency and Bankruptcy Code, 2016 to bring about much needed changes in both substantive as well as procedural aspects relating to the insolvency process. In this article, the author explains the key changes introduced in the Code.

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Key Changes

Homebuyers – A New Class of 'Financial Creditors'

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 ('Amendment Act') has amended the definition of 'financial debt so as' to include amounts raised from 'allottees' in respect of a real estate project (as defined under the Real Estate (Regulations and Development) Act, 2016 (RERA)). Accordingly, homebuyers will now become entitled to a seat on the 'Committee of Creditors' (CoC) of the Corporate Debtor. However, given regard to the fact that there can be a large number of homebuyers for a project, they will be treated as a class of creditors and be represented in the CoC by an 'authorised representative' to be appointed by the National Company Law Tribunal (NCLT).

Applicability of Section 29A Widened and Eligibility Conditions Revised

Since its introduction, section 29A of the Insolvency and Bankruptcy Code, 2016 ('Code') has had considerable impact on the course of resolution of Corporate Debtors under the Code. The Amendment Act has widened its applicability and provided limited exemptions to resolution applicants by making fine adjustments in the eligibility criteria.

Related Parties (of Individuals)

The definition of 'related party', in the context of an individual persons has been introduced in clause (*24A*) of section 5 of the Code which is as follows :

'"Related party", in relation to an individual, means –

(*a*) a person who is a relative of the individual or a relative of the spouse of the individual ;

(*b*) a partner of a limited liability partnership, or a limited liability partnership or a partnership firm, in which the individual is a partner ;

(*c*) a person who is a trustee of a trust in which the beneficiary of the trust includes the individual, or the terms of the trust confers a power on the trustee which may be exercised for the benefit of the individual ;

(*d*) a private company in which the individual is a director and holds along with his relatives, more than two per cent. of its share capital ;

(*e*) a public company in which the individual is a director and holds along with relatives, more than two percent. of its paid-up share capital ;

(*f*) a body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the

advice, directions or instructions of the individual ;

(*g*) a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual ;

(*h*) a person on whose advice, directions or instructions, the individual is accustomed to act; (i) a company, where the individual or the individual along with its related party, own more than fifty per cent. of the share capital of the company or controls the appointment of the board of directors of the company.'

It's quite evident that the definition seeks to provide clarity to the scope of connected persons (of a resolution applicant) who have to be tested for disqualifications set out in clauses *(a)* to *(i)* of section 29A (the disqualification criteria). The definition of an individual's related party's is extensive and will cast a wide net. In addition, where the individual (whose connected persons need to be determined) is married, the relative of the individual's spouse will also be included within the scope of 'connected persons'. The definition under the Amendment Act will increase the burden on the resolution professional and the CoC (from the perspective of eligibility determination).

Exemptions relating to clause(c) of Section 29A

One of the major concerns highlighted by market participants is that financial investors should not be barred from bidding for companies under the Code on account of section 29A. This was (and to a certain degree continues) to be the case, given the broad ambit of the disqualification criteria, the principal amongst them being clause *(c)* of that section, which disqualifies a person who is the promoter or in control of a company whose account has been a non-performing account (NPA) (whether in India or abroad) for more than one year (the NPA disqualification). Sub-clause *(viii)* of section 22 of the Amendment Act, inserting *Explanation II* to section 29 A, identifies certain 'financial entities' – though non-banking financial companies are absent from this list – which have been exempt from the NPA disqualification provided that such financial entities are not related to the Corporate debtor (in the manner as prescribed under the Amendment Act). Also, it is worth noting that such an exemption is available only where the resolution applicant is a 'financial entity' and not to connected persons of the resolution applicant (even where such connected person is a 'financial entity'). For an entity to qualify as a 'financial entity', it would also have to comply with additional criteria to be prescribed by the Government in consultation with the relevant financial sector regulator (in this case, the RBI and SEBI).Sub-clause *(C)* of section 22 of the Amendment Act, inserting *Explanation* II to clause (*c)* of section 29A also exempts the NPA Disqualification for a resolution applicant that has acquired a company (whose account is an NPA) pursuant to a resolution plan approved by the NCLT under the Code. This exemption is available to the relevant resolution applicant for a period of three years following the approval of the plan.

Exemption for a category of 'Connected Persons'

Connected persons, referred to in clause (*iii*) of Explanation I (clause (*j*) of section 29A) have now been exempt from the disqualification criteria set out in clauses (*d*) and (*e*) of section 29A.

Exemption for 'MSMEs'

The Amendment Act provides further relief to 'micro', 'small' and 'medium' enterprises (MSMEs) by exempting them from the disqualification criteria under clauses (c) and (h) of section 29A and also allows the Government to exempt the other disqualification criteria for MSMEs as well (or direct their applicability with modifications).Amendments to section 29A however will not apply to any resolution applicant that has submitted a resolution plan prior to 6th June, 2018.

Moratorium Not to Apply to Guarantors

The Amendment Act has clarified that the moratorium imposed by the NCLT under sub-section (1) of section 14 (at the time of admission of an insolvency application) will not apply to guarantee contracts in relation to the Corporate Debtor's debt. Additionally, sub- section (3) of section 61 of the Code has been amended to ensure that the NCLT (which has jurisdiction over the insolvency resolution of the Corporate debtor) will also have jurisdiction over the insolvency resolution of the Corporate guarantor (irrespective of the jurisdiction (within India) where the Corporate guarantor may have been incorporated). This provision previously only covered personal guarantors.

Lowering of CoC Voting Thresholds

Previously, all decisions of the CoC needed to be approved by 75 per cent of the voting share of the CoC members. This threshold has now been lowered to 51 per cent except for the following requirements :

- 90 per cent approval for withdrawal of an insolvency application post admission by the NCLT (dealt with in more detail below).
- 66percentage approval for resolutions - *(i)* approving extension of the corporate insolvency process beyond 180 days,*(ii)* relating to matters listed out under section 28 of the Code*, (iii)* approving a resolution plan, *(iv)* replacing a resolution professional.

Considering the Supreme Court's decisions to permit withdrawal of insolvency proceedings post admission (by using its inherent powers under article142 of the Constitution) on a case specific basis, the Amendment Act has introduced section 12A permitting the NCLT to now allow insolvency proceedings to be withdrawn provided it has the consent of 90 per cent of the voting share of the CoC members. However, certain additional conditions for withdrawal have also been prescribed under the Regulations. The application to withdraw must be submitted (*i*) by the same person who had filed the insolvency application to the resolution professional in the specified format prior to issuance of the invitation for expressions of interest (pursuant to regulation 36A); and (*ii*) be accompanied by a bank guarantee for the specified amounts. The application (as submitted to the resolution professional) must be approved by the CoC by the relevant majority (i.e. 90 per cent) within seven days (of the constitution of the CoC or the application, whichever is earlier) and the resolution professional is required to submit the application to the NCLT within three days of such approval.

Limitation Act Applicable to Insolvency Proceedings – Section 238A Introduced

The newly introduced section 238A clarifies a confusion brought up again and again in various orders including *Black Pearl Hotels Pvt. Ltd. v. Planet M Retail Ltd*. [Civil Appeal No. 2973-2974 of 2017 dated 17th February 2017]. A lot of time-barred claims were being filed since the NCLAT had opined that limitation would apply only from 2016 when the Code came into force. The practice was discouraged by the Principal Bench, NCLT but the decision of the NCLAT was regularly cited leading to conflict. The issue is now resolved.

Certificate on Affidavit for Eligibility as a Resolution Applicant – A Mandatory Requirement under Section 30

This confusion had arisen in several matters including the matter of *Liberty House Group Pte Ltd. v. Bhushan Power and Steel Ltd*. [CA No. 152(PB)/2018 in CP (IB)- 202(PB)/2017, dated 23rd April 2018]. It was time and again contended that section 29A does not introduce a pre-eligibility requirement and the resolution professional's powers to ask for undertakings and affidavits for section 29A eligibility was limited to examining the same at the time of opening the resolution plan and its consideration. The Amendment Act clarifies that a prior affidavit is to be sought.

Certificate Referred in Clauses *(c)* of sub-section (3) of Section 9 is now to be filed "if available"

It has been held by the Supreme Court in the

case of *Macquarie Bank Ltd.* v. *Shilpi Cable Technologies Ltd.* [CA No. 15135 of 2017, dated 15th December, 2017] that the certificate under clause (*c*) of sub- section (3) of Section 9 from the financial institution is to be filed only where available. As a matter of practice, showing that effort was made to procure the certificate would suffice to get application under section 9 admitted. This position has now become crystallized in the words of the statute. This resolves a genuine grievance of many applicants regarding non-cooperation from banks. This also resolves the time and effort being put by the NCLT to summon banks and seek reasons.

Section 12A Introduced to Recognise Settlement after the Commencement of Insolvency

This was a major grey area and the hands of NCLAT and NCLAT were tied since the Supreme Court in the case of *Lokhandwala Kataria Construction Pvt Ltd v. Nisus finance & Investment Managers LLP* [Civil Appeal No. 9279 of 2017 dated 24th July 2017] had observed that the power to recognize settlement after admission of insolvency was not present in the Code and only the Supreme Court could recognize such settlement under article 142 of the Constitution. As such, it was widely criticized that exercise of extraordinary power under Article 142 by the Supreme Court had become a matter of course. Moreover, conflicting judgments had started to be passed by various NCLT Benches recognizing settlement under rule 11 of NCLT Rules, 2016 that provides for inherent powers. The consistent view of the NCLAT was that Rule 11 of NCLT rules does not apply to the Adjudicating Authority under the Code. This issue now stands resolved with the NCLT and NCLAT being empowered to recognize settlement post admission of application.

Resolution Professionals to Manage the Company till Resolution Plan is Approved by the Adjudicating Authority – Proviso to sub-section (1) of the Section 23

A question had arisen as to when the Resolution Professional becomes *functus officio* and if the Adjudicating Authority is seized of the matter then who continues to manage the Corporate debtor till such time. The amendments clarify that the Resolution Professional is to continue to remain in charge. The broad timeline of 1 year has also been prescribed for the Resolution Professional to get all relevant permissions once the resolution plan is approved by the CoC.

Deemed Approval of Shareholders – *Explanation* to sub-section (2) of the Section 30

If plan requires approval of shareholders, then the same shall be deemed to be given : This position was clarified by the Ministry of Corporate Affairs vide General Circular dated on 25.10.2017 stating that consent of shareholders which would otherwise be required under the Companies Act, 2013 is deemed to have been given if an action is taken under the Resolution Plan. The same position is now crystallized in law. this is important since the resolution plans providing for mergers ought not to be subject to the process of the Companies Act for getting approvals.

Conclusion

The Amendment Act would provide relief to many stakeholders including the homebuyers of the real estate companies undergoing insolvency resolution process. The amendments will certainly increase confidence of the lenders in the insolvency process and would result in promoting resolution over liquidation of the companies.

Mapping the Insolvency Code and the Challenges Surrounding the Code

This article deals with how the Insolvency and Bankruptcy Code, 2016 ('Code'), was mapped. It will also throw light on the history of Insolvency regime in India and what all laws introduced in that respect. Inter alia the article highlights the challenges related to implementing the Code and Corporate Insolvency.

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History[1]

Earlier in the twentieth century it was realised that the Indian Insolvency Act, 1848 had become antiquated and it was decided to make a new law on the lines of English Bankruptcy Act. The Act of 1848 was accordingly repealed and the Presidency Towns Insolvency Act, 1909 was enacted which governed the law specifically on personal bankruptcy. Lastly the Provisional Insolvency Act, 1920 was enacted which too governed the law specifically on personal bankruptcy.

Since independence and up till the year 1985, the Companies Act, 1956 dealt with insolvency and bankruptcy. Then in 1985, the Sick Industrial Companies Act (SICA) was enacted to ease the burden of non-performing assets. The Board for Industrial and Financial Reconstruction which was the quasi-judicial body setup under this Act decided upon the reference in the presence of the company and creditors. In the 1990's the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBI) was introduced. The RDDBI was enacted with provisions to expedite the recovery process. However, it was unsuccessful in improving the predicament of insolvency regime in India, primarily because the SICA had precedence over it.

After this, the Securitisation and Reconstruction of Financial Asset and Enforcement of Security Interest Act, 2002 (SARFAESI) was enacted. The SARFAESI Act provided a legal mechanism for expediting the process of recovery of secured assets by empowering banks and other financial institutions to recover their non performing assets without any court intervention. Though this Act did expedite the recovery process to some extent yet the effect of the same was limited to secured assets. Around the same time RBI also introduced a corporate debt restructuring scheme which laid down the broad guidelines for debt restructuring by banks. Having been amended multiple times, it rather became a working document than a statute.

In parallel, various committees were evaluating true efficacy of company law and suggesting amendments to effectively tackle insolvency and bankruptcy. Even though there was an abundance of legislations addressing the corporate issue of insolvency and bankruptcy, the lacuna of a unified, comprehensive and efficacious regime could not be provided for. Eventually the process for a comprehensive bankruptcy was initiated with setting up of Financial Sector Legislative Reforms Commission, led by Justice Srikrishna in 2011. Subsequently the Ministry of Finance instituted the Bankruptcy Legislative Reforms Committee (T. K. Vishwanath Committee) in 2014. The ensuing result was a push to replace the existing labyrinth of laws with a single framework dealing with matters of insolvency and bankruptcy of individuals, partnership firms, limited liability partnerships, companies or any other incorporated bodies.

The Code leaves intact some elements from the

1. Sir Dinshaw F. Mulla, "The Law of Insolvency in India", 5th ed. (2013).

previous framework, including prominently the SARFAESI Act. While Code provides different stakeholders the ability to seek either restructuring or liquidation based on a model of collective action, the extant SARFAESI Act specifically deals with the ability of creditors to launch individual recovery actions.

Challenges in Implementing the Code

The Code envisages a very elaborate infrastructure mechanism consisting of insolvency professionals, insolvency professional agencies, Insolvency and Bankruptcy Board of India (IBBI) and information utilities. The National Company Law Tribunal (NCLT) and Debt Recovery Tribunal (DRT) have been given the role of adjudicators under the Code. The Code relies heavily on this institutional infrastructure for the successful implementation of law and the resolution of insolvency matters within the specified timeframe. The major problem is the lack of expertise and understanding of the Code, all these institutions also face challenges which are unique to their role in the insolvency proceedings.

The insolvency professionals have been given vast powers under the Code but the extent of their powers and mechanism to ensure accountability to stakeholders and regulators is still unclear. A major problem faced by Insolvency Professionals in their everyday working is the lack of cooperation of the Board of directors in terms of information sharing and resistance to their activities. In the face of uncertainty about the role of the Board in this process, such resistance is expected to continue. Granting of licence only to those individuals who have the required skill and experience required to discharge the duties entrusted to them under the Code while also ensuring that there is no shortage of licensed Insolvency Professionals requires large scale training and simultaneously creating an effective barrier maintain quality control. The ambit of an insolvency professional's role requires suitable logistical and personnel support which might not be within the capacity of an individual Insolvency Professional. The resources available to an insolvency professional as well as the company being wound up are scarce. In the face of such a resource crunch meeting the deadlines set by the Code are often difficult. Furthermore, the task of an insolvency professional has other challenges such as, raising work capital and addressing the claims of operational creditors.

The Adjudicatory Authorities under the Code also have their own share of practical difficulties. The NCLT already handles all the cases under the Companies Act. The Code has increased the case load on the NCLT manifold and many question the capacity of NCLT and its expertise to handle this burden. Prolonged pendency defeats the purpose of a Code which aims at revolutionising insolvency through time bound procedures. The NCLT is facing the task of interpreting an all new Code with very little help from established jurisprudence. The IBBI needs to substantially build capacity to monitor the insolvency professionals and ensure that malpractice and fraud do not seep into the profession. For this, The IBBI needs to ramp up its information and technology capabilities and build a far greater level of preparedness than the status quo.

The information utilities as an information network is dependent on the co-operation of all stakeholders in providing and maintaining authentic information. In the absence of sufficient Information Utilities, initiating a case as well as forming a creditor's committee would take far longer than expected. Resistance in sharing such sensitive information as well as risk of exposure to data privacy and data threat are other concerns, which Information Utilities system would have to address.

Emerging Problems with Corporate Insolvency

The IBC has been lauded by the World Bank and IMF for its innovative and time bound resolution framework, but still it is riddled with several problems. The most remarkable feature of this Code is its creditor-oriented approach that allows creditors to take charge and initiate the corporate insolvency resolution process through the Creditors' Committee; something that was not possible under the previous regime. However, this raises concerns about the interplay of these proceedings with existing restructuring mechanisms driven by the RBI and whether insolvency can be initiated when discussions under these schemes are ongoing at the Joint Lenders' Forum.

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Moreover, the 270 day period envisaged for the completion of the insolvency resolution, though laudable for creating a sense of urgency amongst stakeholders to resolve bad loans, suffers from practical impediments. The undue pressure created on insolvency resolution professionals due to incomplete records, pending compliances and uncooperative debtors, the poor track record of public sector banks (forming a large majority of the creditors) in arriving at some consensus and the gaps in specifying time limits for certain procedures is likely to cause undue delay in the process. This is further exacerbated by the fact that Insolvency Resolution Professionals, placed in charge of running the business of the corporate debtor, often struggle to raise resources for the day to day requirements of the corporate debtor.

Conclusion

While the Code as well as subsequent regulations have created the initial infrastructural frame work needed, its subsequent growth, maintenance and regulations continue to pose major challenges. The development of the Code and plugging gaps in the legislation is primarily dependant on the NCLT and the manner in which it interprets the Code. Most notable among is the Supreme Court's order to incorporate homebuyers as operational creditors in the insolvency case against Jaypee Infratech Ltd. Then the government got an amendment in the Code to include homebuyers. This shows how the Judiciary and Legislature are working together in tandem to develop the Code.

The Legislature also tackled the issue posed on micro small and medium enterprises by the amendment barring the promoters from acting as resolution applicants. Another amendment was introduced which exempted these enterprises and help avoid situations like deadlock within the company, hostile takeovers and anticompetitive practices. Furthermore to reduce the burden on the NCLT's, eight more NCLTs are being set up in Mumbai, Delhi, Kolkata, Chennai, and Hyderabad.

But still there are certain questions which are unanswered like whether the new regime will balance the cost of bankruptcy with high realizations and better credit recoveries is yet to be seen. The success of the Code heavily depends on the alacrity with which the government, court, tribunals and IBBI will respond to the early stage on the Code's implementation and its domain.

As bankers continue to grapple with its instrumentalities and await successful resolutions, the Code is a work in progress. As the associated bodies overcome teething issues, it remains to be seen whether the avenues for improvement and refinement will be addressed by the government.

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