CGRF

SandBox

June 2020

CREATE & GROW
RESEARCH FOUNDATION

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எண்பொருள வாகச் செலச்சொல்லித்
தான்பிறர்வாய் நுண்பொருள் காண்ப தறிவு.

Thirukural 424:
"Brilliance is to express even profound thoughts in simple terms so as to make listeners understand and by focussed listening, understand the subtleties of the speech delivered by others".

From the desk of the Editor

Dear Readers

On behalf of CGRF SandBox team, I have great pleasure in bringing you the June-2020 issue with a fresh flavour. We fervently hope that the lockdown days are behind us and we should now look up to move forward with caution.

Bankers' Corner

I am glad to share that from the June 2020 issue onwards, we are introducing an exclusive column for banking community to deal with day-to-day issues faced by them. Seldom it is realised that the bankers, in spite of doing a yeomen service to the nation, are most vulnerable to onslaught by the three C's (CBI, CVC and CAG). Our objective is to aid the bankers from the corporate law perspective to protect their interest vis-à-vis the borrowers.

Articles, Q&A

True to our commitment to bring the readers interesting perspectives on IBC and corporate laws, this SandBox June 2020 issue comes loaded with analytical articles on Companies Act, 2013. Notable among them being appointment of auditors in a casual vacancy, actionable claims, etc. On the IBC front, a few interesting decisions have been analysed. We have also added a Q&A section wherein we reply to the queries raised by the readers.

Work from home

Covid-19 pandemic has also taught some valuable lessons to mankind. Traditional workspaces have gone for a toss. Co-working spaces are luring new entrepreneurs. IT behemoths are announcing permanent "work-from-home" mode (WFH) for even upto 50% of employees.

While there were many positives on this new normal, several ill-effects have also been reported. Inappropriate furniture, bad connectivity, power outages, space restrictions and distractions at home came in the way of productivity in WFH. Motivation was another issue when one worked alone in her/his bunker devoid of social connection and interaction.

Another important aspect in this context is that for any organisation to develop and grow, real-life interaction of its team is very essential. Only when you meet, can you communicate more effectively and inspire each other. Though virtual meetings do provide some help in this cause, yet, nothing equals the huddle at the middle.

Exemplary performance

I am proud to share that with all these issues, our team was able to turn in a remarkable show delivering results for two months on the trot. Well, is this sustainable in the long run? I wouldn't hazard a guess as the general impression is that WFH removed the lines separating office and home, and people were putting in more hours of work. Or, at least we got that kind of an impression. Adding fuel to fire, the bosses were sending missiles that the team should always be alert, day or night. This situation has reportedly brought more pressure on the employees leading to stress and sleep disorders. Remote working environments sometimes lead to wrong impression being formed of contribution by individuals as they are out of sight.

Xcel From Anywhere (XFA)

Is there any remedy for this? Well, we did give a thought about this new menace called "WFH" and put together a few simple suggestions to bring back the zing in our daily routines. The new approach, named "**XFA**" is sure to give you an alternative style in the current context. Do enjoy reading more about **XFA** elsewhere in this issue in case you are a victim of WFH or you want to make the best out of your team in WFH.

Share your thoughts

CGRF values your feedback – comments, suggestions – either a bouquet or brick-bat, we take it in the right spirit!!

S. Rajendran

What Is An "Actionable Claim"?

S.Srinivasan , Chairman CGRF

(Actionable claim is a fairly vast subject. What is attempted herein is to give a basic idea of the subject to the Manager who is not a legal expert so as to equip him/her with bare information necessary.)

In a lender–borrower relationship, very often we find that the "Deed of Hypothecation" executed by the corporate borrower contains a clause giving the lender *inter-alia* a right to a charge on "***Actionable Claims***" of the company in cases of default. It is no exaggeration to say that neither the front-line lender nor the borrower has any inkling of some of the terms used in the deed and such terms are taken for granted by both parties at the execution level. One such term is "***Actionable Claims***".

This reminds me of an incident which took place about 40 years back when I first started my career as a Company Secretary which will give an insight into the attitude of the borrower and the lender. I was young and buoyant, raring to go. One of the first assignments given to me in the private limited company was getting the documentation done for a loan which was sanctioned to the Company by a nationalised bank. The Chairman of the Company wanted me to visit the Manager of the Bank with all the documents properly executed by the assigned director of the Company. I set about collecting the documents after getting the Common Seal affixed on documents which I thought was relevant. On the visit to the bank, the Manger was questioning me on the absence of the Common Seal on some of the documents to which I tried explaining the purpose of Common Seal from the knowledge I had acquired while undergoing the Company Secretary's course. He would not have it. He wanted the Common Seal on all the documents including the copy of Board Resolution and Take Delivery Note. I was furious but had to hide back my feelings. I came back to the Chairman to narrate what had happened. The Chairman after a patient hearing told me to take the Common Seal and affix it wherever the Manager required. I tried explaining that law forbids me from taking the Common Seal out of the office. By this time, he had lost his patience and shouted "Do what I say. If the Manager wants the Seal on his forehead, affix it. I want money." I was aghast since it was my first experience in documentation. The reason why this incident is being narrated is, on one side the Manager, with his limited legal knowledge, would not like to take a chance even if affixing of the Common Seal is superfluous and on the other side, we have the Chairman who cares a damn for documentation. Unfortunately, things on this front have not changed even today.

Be that as it may, before we get into the technicalities of the subject, let us first understand under which statute the term "*Actionable Claim*" is defined. Section 3 of the Transfer of Property Act,1882, defines the term as under:

"actionable claim" means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent".

This definition was introduced by an amendment to the Transfer of Property Act, 1882, in the year 1900. Prior to that, we were following the English Act under Common Law jurisdiction which had terms like *Chose in Action and Chose in Possession.* To understand Actionable Claim, we must know what are *Chose in Action and Chose in Possession* which terms were replaced by the concept of Actionable claim.

The term "**chose in action**" refers to all personal rights to property which can only be claimed or enforced by action and not by taking physical possession of the property. It is a right to recover something, not in one's possession. It is a right of which a person does not have present enjoyment but may recover it (if withheld) by action say where the Civil courts recognize as affording grounds for relief. It is a right of proceeding in a court of law to obtain a sum of money or to recover damages. Examples include rights under an insurance policy, a debt, and rights under a contract. A chose in action is a form of property and can be assigned, sold, held in trust,

etc. It may be assigned by writing if signed by the assignor, absolute in terms, and notice in writing being given to the debtor. As opposite to chose in possession discussed hereunder, where there is a corporeal tangible thing that can be physically possessed, chose in action refers to those incorporeal intangible interests that can only be obtained by way of legal action.

(Image Source: Website)

A "**chose in possession**" is a right of which the owner has the actual enjoyment. Chose in Possession as opposed to chose in action means vesting of actual possession of a thing or a right in person. All *proprietary rights in personam,* of chose in possession, refers to anything or right which is in claimant's possession. For example, the money which a person has in his purse is a chose in possession whereas the money which a debtor owes to him is a chose in action.

a) Chose in action

I. These are intangible rights which can only be enforced by court action.
II. They are not capable of physical possession; for example, debts, and patents, among others.

b) Chose in possession

These are tangible things or subject matter, capable of physical possession; for example, land and motor vehicles.

Therefore, from the above, a "chose in action" under common law can refer to all personal rights that do not fall within the category of "chose in possession", encompassing a great variety of proprietary interests.

These above concepts, which are not in vogue in India now, underwent a change when the term *Actionable Claim* was introduced by the amendment to the Transfer of Property Act referred to above.

Conditions for a claim to be an "actionable claim"

1. It should be a claim on any debt;
2. The debt should not be secured by mortgage of immovable property or by hypothecation or pledge of movable property;
3. The claim should be to any beneficial interest in the unsecured moveable property, ***not in the possession,*** either actual or constructive of the claimant, tangible or intangible, such as a claim on an unencumbered asset or trade mark or patent;
4. The claim should be such that civil courts should be capable of affording reliefs in relation to such claims;
5. The claim to such debt or beneficial interest must be existent, accruing, conditional or contingent". e.g Insurance Policy which is not secured by way of mortgage or hypothecation or pledge other than marine insurance; Claim for arrear of rent is actionable claim since it is not secured on anything; Right to claim provident fund; Claim for accounts or his share in profit by a partner in the firm; right to claim maintenance; a right to annuities; a right to claim the benefit of a contract; salary in arrears; book debts or receivables; investment in fixed deposits or RDs as long as there is no lien favouring third parties; dividend due on shares; earnest money becoming payable; confirmed sale price; a letter of credit; etc.

Whether the Actionable Claim can be subjected to a charge?

Generally, an Actionable Claim is subjected to a floating charge. The lender can have a specific charge as long as the claim is identifiable exclusively. Of course, the charge has to be registered with the Registrar of Companies validly.

Whether the Actionable Claim can be assigned?

Every Actionable Claim is assignable except in the following cases:

- where the assignment is prohibited by law;
- where the terms of a contract under which the claim accrues prohibit such assignment;
- where the contract is of a personal nature; and
- where the assignment would increase the burden on the other party.

Extent and Operation of Charge a Phrase Taken For Granted

S.Srinivasan , Chairman CGRF

If a secured creditor claims that he has got a charge over an asset of the borrower company, he cannot afford to leave it loose and take it for granted that on default of repayment by the borrower company, the right over the entire asset will automatically vest on him whatever be the money lent or he can deal with the asset in whatever manner he wants for initiating the recovery process since he has a charge registered in his favour.

Section 77 of the Companies Act, 2013,(new Act) and earlier section 125 of the Companies Act, 1956 (old Act) has/had, cast an obligation on the borrowing company (after the creation of a charge by the borrowing company), to "file (old Act) / register (new Act) the **particulars** of the charge so created" with the registrar of companies. It is, however, pertinent to point out here that though the intention of the new Act was also the same, through a drafting error, S.77 states that the company must "register" the particulars of the charge, instead of using the word 'file' or 'seek registration' in place of "register". It is only the Registrar who shall register and not the company. Be that as it may, neither the new Act nor the old Act has/had defined the word '**particulars**' in the context of registration of charge.

However, these sections do state that the '**particulars**' must be filed in **Form No. CHG-1** (for other than debentures) and **Form.No.CHG-9** (for debentures) under Serial Nos. 11 & 12 of Form No.CHG -1 and Serial No. 12 of Form No.CHG - 9 respectively. The requirements are that the principal terms and conditions in brief such as rate of interest, repayment terms, margin, date of redemption of debentures, and creation of debenture reserve must be stated as also "**the extent and operation of the charge**".

Therefore, the credit manager must understand the import of this phrase while these forms are filled up with proper back-up documents. This phrase assumes enormous importance at the time of recovery if the loan fails. As long as the company is a going concern, by default, this phrase is generally ignored by the credit manager as the repayments are forthcoming.

EXTENT:

The word "**extent"** has been defined in English Law as: "The range, magnitude, or distance over which a thing extends or the degree to which a thing extends".
The origin of the word comes from the phrase "writ of extent". A writ was formerly used to recover debts of record to the British crown and under which the lands, goods, and person of the debtor might all be seized to secure payment. The recovery man would assess how much should be recovered and how much should be paid to the creditor.

In the context of Form CHG-1 and CHG-9, it means to what extent in terms of monetary value the charge could extend. It is obvious that the amount cannot be indefinite. Assuming for the sake of example that the loan extended by the secured creditor was Rs.1 Crore. And the value of the property on which a charge has been created in his favour is Rs 2 crores; he has stated in the aforesaid form that the extent of charge as Rs.1 crore plus whatever amount has been rightfully debited to the company's account from time to time which may include interest, overdue interest, penal interest, cost of expenses, if any, the amount of guarantee invoked, if any, etc. The borrowing company may not allow him to have a charge on the property to the extent of anything more than this amount (much less than Rs.2 crores) just because the value of the property at the time of borrowing was Rs.2 Crores. The value of the property would have gone up due to efflux of time but the extent of charge can only be Rs.1 crore or thereabouts. The extent of charge must be quantified and explicit. If it is not quantified the charge would become infructuous and unenforceable. It would be as good as having no charge. Therefore, due care must be taken by the credit manager when the form is filled and filed to confirm that the extent of charge covers the credit limits sanctioned by his bank.

Operation

As important as the extent, is the "**operation"** of the charge. In fact, the operation of charge operates on a larger and varied canvas. If the extent of charge dwells on the quantum of charge, the operation is largely related to the quality of the charge. How forceful it is? How much is its exertion of power or influence?

It is a state of being in effect, in action, or operative. We have heard of first exclusive charge, second charge, pari passu charge, first pari passu charge, cross charges, and

so on. All these indicate that there is a scramble for the priority of charges amongst various creditors, therefore, it is important that the credit manager explicitly spells out in the form the nature of his charge vis-à-vis other creditors and establishes his place in the ranking of the charges.

First Exclusive Charge

There is nothing like the first exclusive charge. The sum and substance of it is that the charge holder has the first charge on the assets in priority over all other charges. The word exclusive is cosmetic and superfluous unless it is a specific charge. That means the secured creditor who holds the first charge on the assets of the company is entitled to defray all his debts in priority to those of the others whether one calls it exclusive or not. If anything of the proceeds of the asset is left after they are sold and after the liabilities of the first charge-holder is discharged, then the person having subsequent charge is entitled to get his debts redeemed out of the proceeds.

Second Charge

The Second Charge is subordinate to the first charge and will spring into operation only after the dues of the first charge holder are discharged fully. The Second charge is a diluted charge and such a charge holder runs the risk of not getting anything at all on a winding up and will be as bad as unsecured creditor unless the value of the security is so high as to cover the dues of the second charge holder. Typically, a second charge is created and registered on the immovable properties of the borrower company after an NoC is obtained from the first charge holder since the value of the immovable property is bound to rise due to efflux of time, unlike the current assets. In fact, a second charge on the movable assets of the company is always risky. The NoC is insisted upon by the Registrar only in relation to immovable properties since he may not be aware of the status of registration on mortgages with the concerned sub-registrar thereby putting the first charge holder on alert. There is no such NoC required for registering the second charge on movables. It is important to note here that under the Companies Act, 2013, the date of registration of charge and not the date of its creation is relevant unlike in the old Act. And therefore, what is intended to be a second charge will turn out to be the first charge if due to default the first charge-holder gets his charge registered on a date subsequent to the date of registration of charge of the second charge holder. But it remains to be seen how courts will decide in a case of litigation involving immovable properties where the mortgage would have been registered first in the first charge-holder's favour and the document to the title may be held by the first charge-holder assuming it is a case of Mortgage by Deposit of Title Deeds. Please note that the second charge holder is also a secured creditor and accordingly rights of secured creditor accrue to second charge holder too. Further, the first charge or prior charge holders may challenge the validity of such a charge if proper prior clearance of prior charge holders had not been obtained before creating the subsequent charge. For the purpose of the SARFAESI Act, the second charge is as good a secured asset like any other secured asset and subject to provisions of the SARFAESI Act, second charge holder too can initiate a recovery action.

Pari Passu Charge

The term "Pari Passu" can be interpreted in the context of finance as well in the context of rights of secured creditors on the distribution of proceeds of the sale of assets in a winding-up. It's a Latin phrase meaning "equal footing". In finance, this term refers to loans, bonds, or classes of shares that have equal rights of payments or equal seniority. In addition, secondary issues of securities that have equal rights with existing securities rank pari passu. It also describes a situation where two or more assets, securities, creditors or obligation are equally managed without any display of preference. An example of pari passu occurs during corporate insolvency proceedings when a verdict is reached. All the secured creditors are regarded in the same time in the proportion of their respective lending.

Therefore, if there is an agreement or the so called arrangement or a specific clause is inscribed in the inter-se agreement amongst creditors for sharing the proceeds in a pari passu manner, such intention must be reflected in the column under **'operation'** in the afore cited forms.

Therefore, it will only be prudent for the credit manager to pay extra attention to the item requiring the description of the extent and operation of the charge in the aforesaid forms as and when they are filed.

Did Supreme Court Demonetise RBI in the matter of Virtual Currency?

N.P. Vijay Kumar
(Advocate)

Preamble

The recent verdict of the Supreme Court on the 'Bitcoins' issue has set the cat among the pigeons, as a pink paper put it. We live in digital times. The march of technology is exponential. The use of cryptocurrency has always been a bone of contention with its legality being a mystery to the public.

Bitcoins are a form of digital currency and are not considered to be 'legal tender' as we are ordinarily attuned to. However, these are capable of functioning as a medium of exchange akin to money. In April 2018, RBI issued a circular prohibiting Banks and Financial Institutions from providing banking services to entities that deal in Virtual Currencies (VCs).

Aggrieved by the Circular, Internet and Mobile Association of India, an association representing digital platform service providers to these VC Exchanges, challenged the circular before the Supreme Court of India. The Supreme Court by its judgment dated 04 March 2020 held the circular to be unconstitutional.

While upholding the power of RBI to issue the circular under the Banking Regulation Act, Reserve Bank of India Act and Payment and Settlement Act, Supreme Court held that the circular does not pass the 'test of proportionality' as the order prohibiting banks/FIs from dealing with entities engaged in VCs was disproportionate to the damage caused, if any caused by VCs, which was sought to be prevented by RBI. There was no evidence to show that VCs have caused any loss or damage to the banks/FIs necessitating such order of prohibition, ruled the top court.

What is a Bitcoin?

To make it an acceptable medium of exchange, world across the form of currency is determined by legislature and Central Banks inter alia regulate the currency, the financial market and ensure stability in the economy. As a result, each country has different currency and respective Central Banks regulate it. Differences in value of various currencies, have complicated international trade as there is no uniformity in denomination of transactions, high commissions and back-end charges to be paid for ensuring payment and settlement of transactions resulting in greater time lag in settlement of transactions. In fact, world would benefit with a unified currency. However, such unified currency does not find favour with countries as such an utopian situation would result in countries losing control over pricing policies, currency regulation, trade and its trading partners which would change the scales of bargaining. When sovereigns could not have consensus on a unified currency, individuals and private players introduced the world to 'Bitcoin'. This parallel economy but permissible one is the world of bitcoin.

(Image Source: Website)

Whether the RBI circular was extreme and will it not pass the test of proportionality?

The Court came to the conclusion that

a. that RBI had not so far found, in the past 5 years or more, the activities of VC exchanges to have actually impacted adversely, the way the entities regulated by RBI function;
b. that the consistent stand taken by RBI up to and including in their reply dated 04-09-2019 is that RBI has not prohibited VCs in the country; and
c. that even the Inter-Ministerial Committee constituted on 02-11-2017, which initially recommended a specific legal framework including the introduction of a new law namely, Crypto-token Regulation Bill 2018, was of the opinion that a ban might be an extreme tool and that the same objectives can be achieved through regulatory measures.

In my view, RBI has been studying the currency markets, financial markets to assess the impact of VCs. It has also been studying the reports of various regulators across the world to understand the manner in which they are dealing with VCs. Most regulators have not been in favour of VCs because of their unregulated nature and also on account of the fact that there is no underlying goods to these VCs like gold/treasury bonds/forex reserves etc. VCs are not uniform in nature. They are subject to change and any private person can create his VC and his exchange to deal in VCs.

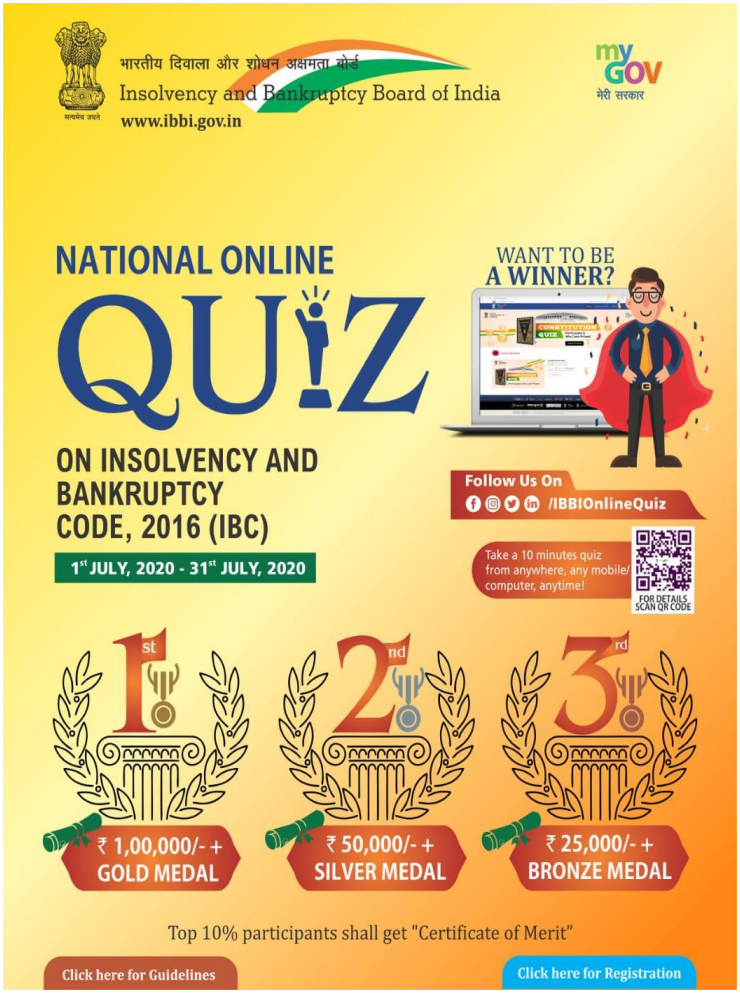
Since VCs operate in a very wide spectrum of financial markets, it has its impact on the banking system, currency market, creation of parallel economy, issues relating to money laundering, stability of financial system. As a result, RBI is bound to regulate and protect the banking system. In all fairness, RBI did not exercise any control over VC Exchanges or VC traders instead directed Banks/FIs to not deal in VCs so that Banks are not exposed to the risks aforementioned. As held by the Court the impact on VC exchanges is collateral and the same does not prevent RBI from protecting its constituents.

However, the Court has now set an additional bench mark which an executive action must satisfy in matters of economic policy viz. evidence of damage suffered. The Court by setting aside the circular replaces the wisdom of RBI as expert body in matters of economy, markets and financial currency. Courts ought not step on the toes of policy makers when it is found that policy makers have acted in accordance with law and have taken measures in the larger public interest and in this case in the interest of depositors and the large banking system. Regulators like RBI need to take such steps to remain in sync with the global market changes and the test of 'damage suffered' as laid down by Court would not inure to the benefit of economy.

Conclusion

It would therefore appear that the Apex Court may have been too keen to invoke the proportionality doctrine, the only tool it possibly saw to reach the conclusion it did. It seems avoidable in the larger context of the health of the nation's financial and security system, which is vested in the hands of RBI by "We The People". Principles of proportionality must yield to public interest particularly health and stability of financial system. Banning of Crypto Currency and Regulation of Official Digital currency Bill, 2019 has been introduced in the Parliament. The Bill would address the concerns raised by RBI and once the Bill is passed and notified as a legislation, this judgment would become academic. While the Supreme Court has not questioned authority of RBI to issue circulars to regulate banks and financial institutions, it has only felt that the RBI may take further steps on 'cause and effect analysis' relying on real or simulation evidence. It is suggested by many that the Supreme Court demonetized RBI, the fact remains RBI as a regulator continues to have an active regulatory role and in the words of Supreme Court 'exercise of power when the need arises to protect the financial system'.

Kind Attention!!



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ALL THE BEST!!

What are the Economic Consequences of RBI's Operation Twist? Has it really helped in reviving the Indian economy?

Shamilee Rajkumar, Advocate

Introduction

Operation Twist is a monetary policy measure aimed to swiftly flatten the yield curve by simultaneously selling short-term bonds and buying long-term bonds i.e., raising the yield on short-term bonds and lowering the yield on long-term bonds.

The economic consequences of RBI's Operation Twist

When RBI sells short-term bonds, the demand for short-term bonds will reduce which will cause the price of short-term bonds to reduce and the yield will be raised, because price and yield are inversely proportional. Similarly, when RBI buys long-term bonds, the demand for long-term bonds will increase which will cause the price of long-term bonds to increase. With the increase in price, the yield of long-term bonds will decrease. This means the public can avail of long-term loans at lower interest rates. This will bolster the economy by making loans less expensive for those desiring to buy homes, purchase cars, and finance businesses while saving becomes less desirable because it does not yield as much interest. Thus, when Operation Twist auctions are carried out, both the public and the government will be able to borrow funds at materially lower rates which will help revive the economy.

Flattening the yield-curve

The RBI has conducted three Operation twist auctions in 2020, the first of which was conducted in January, 2020. In the first Operation twist auction, replacing the regular one-year treasury bill, the government had to pay a premium of 0.80 percentage points to borrow through a 10-year bond. On 29th June, 2020, the fourth Operation Twist auction has been announced by the RBI to be conducted on 2nd July, 2020. The premium in the fourth auction has been raised to 2.21 percentage points from the initial 0.80 percentage points. In the upcoming fourth auction, the RBI has planned to buy long-term bonds maturing between 2027 and 2033, and sell short-term bonds maturing in October, 2020 and April 2021. The most important question regarding RBI's Operation twist is whether this measure has achieved its purpose of reviving the Indian economy i.e., whether it has made a difference in flattening the yield curve? The truth is that though it was aimed to help profoundly, it has only led to mediocre outcomes. It is, however, true that the auctions have helped to an extent in adjusting the steep yield curve (the yield on the most traded 6.45% 2029 bond reduced by two basis points to reach 5.99%, while that on the 5.79% 2030 bond reduced by two basis points to reach 5.89%) and also in supporting the market temporarily by lowering rates at which the government borrows funds from the market.

(Image Source: Website)

Reviving the Indian economy

In order to achieve better results, a major aspect that needs to be taken into consideration is the consistency of conducting these auctions. Operation Twist auctions need to be carried out periodically and in shorter intervals. The recent auction has been announced to be conducted in July, 2020. Therefore, for the period of 6 months from January to June, 2020, there have been only three auctions. On perusing the effect that these three auctions have had on the yield curve; it is clear that those have not been sufficient and the RBI's intervention is required more frequently. There is still a long way to go in making loans less expensive, encouraging housing and business investments. The interest at which the government and the public borrow funds have also not reduced to a great extent.

The name 'Operation Twist' has itself been derived from the effect, that it is expected to have, on the graph depicting yields of long-term and short-term bonds. The short-term yield curve is expected to drastically rise and the long-term yield curve is expected to trend down, thereby creating a complete twist. But such an effect has not been achieved in India and the prospects of materialising it appears bleak, considering the frequency at which the support measures are being undertaken.

Conclusion

As India aims to alleviate the damage suffered due to the Corona virus pandemic, proven support measures such as Operation Twist auctions need to be scheduled frequently and spearheaded by the RBI, with much more consistency in order to steer towards economic recovery.

Aftermath of Auditor Being Appointed in Casual Vacancy on Resignation by Existing Auditor

S.Srinivasan , Chairman CGRF

Once a new auditor is appointed by the Board under Section 139(8)(i) of Companies Act 2013, in the place of the existing auditor the following questions arise:

1. ***Can the new auditor straightaway commence the audit exercise without waiting for the approval of the members in a General Meeting?***

   Yes. He can. Infact, as per J J Irani Committee's recommendation a company should not be without an auditor at any time.

2. ***What is the term of the auditor so appointed***?

   As per Section 139(8)(i) of the Act, the new auditor can hold office only till the conclusion the next AGM

3. ***Suppose the AGM intervenes between the date of his appointment and the expiry of three months from the date of appointment during which period the GM has to approve his appointment as per Section 139(8)(i) of the Act. Can the AGM approve his appointment***?

   If there is a situation where the Annual General Meeting has to be held within three months from the date of appointment of the auditor by the Board, technically speaking, there is no reason why the approval of the members cannot be sought and granted at the AGM. As per section 139(8) (i) the appointment of the auditor has also to be approved by the company in a **general** meeting which has to be convened with three months of the recommendation of the Board. Annual General Meeting being General Meeting his appointment can be approved at that meeting.

   There are further questions which may arise such as given below:

4. ***In the Notice to Members calling for AGM, in which serial order in the items for consideration of the members, the approval of the appointment of the auditor should be taken up? Can it be taken up as item no. 1?***

   The resolution approving the appointment of the auditor filled up by the Board in a casual vacancy can be considered as the first item in the Agenda as a Special Business needing Ordinary Resolution before the accounts are approved. The appointment of auditor for the next financial year can be considered after the approval of the accounts.

5. ***But the items of business to be transacted at the AGM as ordinary business has been stipulated in section 102(2)(a) as under:***

   (i) the consideration of financial statements and the reports of the Board of Directors and auditors;
   (ii) the declaration of any dividend;
   (iii) the appointment of directors in place of those retiring;
   (iv) the appointment of, and the fixing of the remuneration of, the auditors; and

6. ***Normally, the above ordinary business are transacted first and any other business for transaction is considered as special and is taken up for consideration of the members in the AGM after the above ordinary business are disposed off. Then how is it that the Company can take up for consideration as a special business, the approval of the appointment of the auditor filling up the casual vacancy for the previous year even before the ordinary business as stated above are taken up?***

   The Act does not stipulate the sequence of taking up the items of business as ordinary business or special business. Section 102(2)(a) of Companies Act,2013, merely mentions the four items which are to be considered as ordinary business and that all other business are to be deemed to be special and nothing more. In the extra-ordinary circumstances such as the one under discussion, the law does not prevent the company from arranging the sequence and order of the items of business to suit its convenience. Therefore, the notice to members calling for AGM can fix, as item no. 1, the special business (requiring ordinary resolution) the approval of the appointment of the auditor by the Board to fill up the casual vacancy and also ratify the remuneration to the auditor fixed by the Board.

7. ***In such a case should the auditor sign his report after the approval of the appointment is accorded by the members as above for placing the same along with the financial statements before the members for their approval?***

   There is no reason why the auditor has to wait for the approval of the members of his appointment u/s 139(8)(i) to sign his report. The moment the directors sign the financial statements he can sign his report which can be done giving space for adequate

notice to members calling for AGM. When there is sanctity in his appointment by the Board, he has to submit his report as per section 143(2). His appoint implies that he has a right to sign the report. In fact, it is his duty too. This report has to be attached to financial statements and sent to those who are entitled to receive the notice to AGM along with the Board's Report. The auditor need not wait for the members to approve his appointment to sign the report. When they approve his appointment it goes without saying that he is entitled to submit his signed report.

8. ***We have been presuming that the members will automatically accord their approval for the appointment of the auditor by the Board to fill in the casual vacancy. What if the members do not approve?***

   There are two possibilities as under:

   Possibility1: The members will approve the appointment and ratify the remuneration to the auditor as fixed by the Board. In this case the members can take up the other items for transaction as slated in the notice.

9. ***When the item for considering the appointment of auditors for the next financial years is taken up, can the same auditor be considered by the Board as auditors for the next five years or is there a liberty to the members to appoint any other auditor or even the same auditor who has resigned?***

   There is no reason why the same auditor cannot be re-appointed as auditor as long as the provisions of section 139(9) which is reproduced below for convenience is complied with:

   Subject to the provisions of sub-section (1) and the rules made thereunder, a retiring auditor may be re-appointed at an annual general meeting, if—

   a) *he is not disqualified for re-appointment;*
   b) *he has not given the company a notice in writing of his unwillingness to be re-appointed; and*
   c) *a special resolution has not been passed at that meeting appointing some other auditor or providing expressly that he shall not be re-appointed.*

As stated above the members may appoint some other auditor including the auditor who has resigned if it complies with section 139(9)(c) above and the other auditor proposed to be appointed meets with all other requirements for being eligible to be reappointed.

Possibility2: The members do not approve the appointment of the Auditor by the Board which has filled in the casual vacancy under section 139(8) of the Act.

This possibility is quite rare unless the members have enough justifiable reasons for not approving the appointment. But then the members need not adduce any reasons for non-approval. Nevertheless, hypothetically and technically speaking, there is a possibility that the members may not approve the appointment. In such a situation it amounts to the members overruling the decision of the Board. The question now will be, in the given situation who is supreme, the Board or the Members?

We give below the relevant extract of section 179(1) of the Act to describe the general powers of the Board:

(1) The Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do:

Provided that *in exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in that behalf in this Act, or in the memorandum or articles, or in any regulations not inconsistent therewith and duly made thereunder, including regulations made by the company in general meeting:*

Provided further that *the Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting.*

We can see that the section gives enormous powers to the Board by stating that "***the Board of Directors of a Company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do****".* The section under the second proviso also goes on to say that "***the Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting".***

From the second proviso as stated above it is clear that the Board has no power to do act which is exclusively reserved to the members. The act of filling up the casual vacancy of an auditor is not a power given to the members exclusively but given to the Board u/s 139(8) of the Companies Act,2013 unlike in section 224(6)(a) of the Companies Act,1956, where such power was

exclusively reserved for the members. Therefore, we can infer that the Board has not acted *ultra vires* its powers in filling up the casual vacancy.

We shall now come to the first proviso where it says *that "**in exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in that behalf in this Act, or in the memorandum or articles, or in any regulations not inconsistent therewith and duly made thereunder, including regulations made by the company in general meeting".***

The argument could be that section 139(8) states that the appointment of the auditors by the Board shall also be approved by the company in a general meeting. On page 3200 in the 18th Edition of the renowned author A. Ramaya under the heading ***"Powers of management vested in the Board cannot be usurped by shareholders"*** goes on to say that in the general management of a company, the shareholders have no right to interfere except to the extent provided by the second proviso to subsection (1) of section 291 of the 1956 Act [(corresponding to second proviso to S.179(1) of the 2013 Act] or by the articles of association or by special resolution. Citing many English and Indian case laws the Author has inferred that even a resolution of numerical majority at a general meeting of the company insufficient to alter the articles cannot impose its will upon the directors when the articles had confided to them the control of the company's affairs. If the Companies Act confers on the Board any power, that power cannot be taken away by the memorandum or articles and given over to the general meeting of shareholders. The shareholders can overrule the Board's decision only when the action of the Board is *mala fide.* If the shareholders are not satisfied with the decision of the Board, the only way the shareholders can interfere is by removing the directors as provided in section 169 of the Companies Act,2013 but that will be operative only prospectively. In fact, in the explanatory statement to the notice of AGM it would be prudent for the Board to explain that they have appointed the auditor with bona fide intentions and has acted within its powers as vested in section 139(8) of the Act and discretely, perhaps, drive home the point that the shareholders' powers are restricted to endorsement of the decision of the Board only.

If inspite of the above, the members chose to not to approve the appointment of the auditors, what is the remedy?

The only remedy for the directors is to collectively approach the NCLT with a prayer to:

(i) Declare that the appointment of the auditor appointed by the Board in the casual vacancy as valid;

(ii) Order that the Audit Report submitted by the auditor be taken on record.

The auditor appointed in the casual vacancy on his part, if he so wishes, may move an application in a civil court and claim damages if he has not been paid the remuneration fixed by the Board and damages for loss of reputation impleading the Board and the Company.

Res integra

Res integra means an entire thing; untouched matter; a point without a precedent; a case of novel impression. The term res integra is applied to those points of law which have not been decided, which are untouched by dictum or decision.

Consensus ad idem

Consensus ad idem means meeting of the minds. It is a phrase in contract law, used to describe the intentions of the parties forming the contract. In particular, it refers to the situation where there is a common understanding in the formation of the contract.

Agreement between different people or groups about the exact meaning of a contract is necessary before the contract is considered to be legally acceptable.

Class Action Suit

R.V. Yajura , Advocate

A Class Action Suit! Isn't this sounding very foreign? Why don't we hear this word very often in India? Was India new to this concept of a Class Action Suit when it was first introduced in the Companies Act, 2013?

The concept of a Class Action Suit

The concept of a Class Action Suit lies where a collective group of aggrieved persons sue for similar reliefs on similar grounds. This concept seems to be popular in the United States as "class action lawsuit", "class suit", or "representative action" and several other countries have adopted this in the recent past.

Class Action Suit in India

In India, we can say, this concept can be seen in what is termed as a "representative suit" filed by virtue of the provisions of The Code of Civil Procedure, 1908, or with similar aesthetics in a Public Interest Litigations. Consumer Protection Act, 1986 also allows Complaints to be filed by representatives of, and on behalf of a group of consumers having the same interests. Similarly, the Competition Act, 2002 allows an application to be filed with the permission of the Appellate Tribunal therein. Also, homebuyers' Application under Insolvency & Bankruptcy Code, 2016 and proceedings under the Real Estate (Regulation and Development) Act, 2016, (where a number of complaints are of similar facts and for same or similar relief against the same promoter in the same project, the Complaints are clubbed and disposed of in common proceedings), may be taken as few examples with characteristics of a class action suit.

Although the introduction of the "Class Action Suit" was done vide the Companies Act, 2013 (in Section 245), it was notified only in 2016 *(vide MCA notification - S.O. 1934(E) dated 01.06.2016)* and in NCLT Rules, 2016 which was effective from 21.08.2016, provided the procedure to file an application for a Class Action Suit (Rule 84). Further in 2019 (08.05.2019), the NCLT Rules were amended, inserting provisions to specify the thresholds to file a Class Action Suit. It may be noted that very few cases have been filed for a Class Action Suit under the Companies Act, 2013. *Abhimanyu Singh & ors Vs. Brijnandan Industries Pvt. Ltd. & Ors.* (Source: NCLT order dated 22.11.2019 in Case No. 129/245/PB/2018) and *Jacob Mathew Vs. A.V. George and Ors.* (Source: NCLT order dated 29.10.2018 in CP. No. 384/245/PB/2018) a few of the cases to mention.

Class Action Suits under the Companies Act, 2013.

As per the 21st and the 57th Report of the Standing Committee on Finance, the Committee was of the view that the provisions needed to be made specifically enabling the shareholders or creditors of the company to approach the Tribunal *against wrongful or fraudulent conduct of the auditor* of a company and *requiring the auditor to pay compensation/damage* as per international practices.

Further, in the 57th Report, the Committee observed that –

"*Creditors can enforce their claims through contracts / agreements with borrower companies, they may not be given statutory right for a class action. On the other hand, since depositors do not have any contractual rights and are mainly of unsecured nature, they are being proposed to be empowered with the right to file class-action petitions before Tribunal."*

It is pertinent to note that the Companies Bill expressly exempted the Banking Company after it was pointed out by the RBI that Class Action Suits should not be extended to the Banking Companies as it may affect the Depositors' Interests and "*adding that the Banking Sector has well-defined grievance redressal machinery*" such as Banking Ombudsman Scheme. Perhaps the same view could not be taken upon other companies and that it was necessary to bring such provisions for Class Action Suits.

Thus the Section 245 of the Companies Act, 2013, provided that such number of member(s), depositor(s) or any class of them, as the case may be, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors for seeking such orders which includes to claim damages or compensation or demand any other suitable action from or against:

- **the company or its directors** for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;

- **the auditor including audit firm** of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or
- **any expert or advisor or consultant or any other person** for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;"

Further, investors can initiate the proceeding by way of a class action against such persons for causing misstatements in the prospectus (section 34 & 35) or fraudulently inducing persons to invest money (section 36) under the Companies Act, 2013.

Key procedures for a Class Action Suit under Companies Act, 2013 read with NCLT Rules, 2016

- To ensure the threshold is as per Section 245(3) of Companies Act, 2013 read with Rule 84(3) & 84(4) of the NCLT, Rules 2016 (as amended in 2019)

Threshold to file class action suit	
For a Company having Share Capital	Minimum 100 Members or 5 % of total no. Members, whichever is less *OR* Member(s) holding minimum 5 % of issued share capital (*Unlisted Company*) / Member(s) holding minimum 2 % of issued Share Capital (*Listed Company*)
For a Company not having Share Capital	Minimum 1/5th of the total no. of members
Depositors - Minimum 100 Depositors or 5 % of total no. Depositors whichever is less *OR* Depositor(s) to whom the company owes 5 % of the Company's total deposits.	

- An Application (FORM NCLT-9) to be filed in NCLT upon a fee of Rs. 5000/- (Schedule of fees – NCLT Rules, 2016)
- Copy to be served to the Company, other respondents and such other persons the Tribunal may direct.
- The power to decide whether the said suit is a class action suit or suit for personal grievance lies with the Tribunal. On the admission of an application filed under sub-section (1) of section 245 of the Companies Act, a public notice shall be issued by the Tribunal (Form No. NCLT-13) to all the members of the class.
- A class member who receives the aforesaid notice shall be deemed to be the member of a class, unless he expressly opts out of the proceedings, with the permission of the Tribunal (in Form No. NCLT-1).
- All similar applications prevalent in any jurisdiction should be consolidated into a single application and two applications for the same cause of action shall not be allowed.
- Any order passed by the Tribunal shall be binding on the company and all its members, depositors, and auditor including audit firm or expert or consultant or advisor or any other person associated with the company.

Consequences of failure to comply with the order:
Punishable with fine, not less than Rs.5,00,000/- but which may extend to Rs. 25,00,000/-. Every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 3yrs and with fine which shall not be less than Rs.25,000/- but which may extend to Rs.1,00,000/-.

Reimbursement of legal expenses for Applicants under a Class Action Suits:
The members, debenture-holders or depositors as may be sanctioned by the Tribunal, are entitled for reimbursement of legal expenses incurred in pursuing class-action suits from funds provided under Investor Education and Protection Fund (IEPF). (Section125).

Safeguards provided under the Act, to avoid misuse of the provisions:
Where any application filed before the Tribunal is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, reject the application and make an order that the applicant shall pay to the opposite party such cost, not exceeding Rs.1,00,000/-, as may be specified in the order.

Oppression mismanagement Vs. Class Action Suit:
The objective of both the provisions at the outset appears to be similar; however, a class action suit has a much wider scope and coverage. The provisions for oppression & mismanagement are limited to protect the interest of minority shareholders of the Company while provisions for Class Action Suit seeks to ensure casting responsibility of third parties (Auditors, experts, etc.) for their acts done apart from protecting the interests of investors.

Conclusion
It may be a common myth that a "Class Action Suits" may not be effective in India. As stated in the above paragraphs, India has already witnessed proceedings in the nature of a class action suits under the provisions of various other laws. And now that major gaps concerning the filing of Applications under the provisions of class action suits under Companies Act have been filled, we may witness such proceedings under Section 245 of the Companies Act, 2013 read with Rule 84 of NCLT Rules, 2016 in the days to come as it has wider scope to protect the interests of investors of the Company.

Phoenixing

S. Rajendran

(Image Source: Website)

"Phoenixing" in commercial parlance and in matters relating to insolvency, refers to a situation where the promoters of a sinking company divert the business, assets, resources, etc., to another company under their control and leaving in the process the ashes of the sinking company to its lenders.

"Phoenixing" is illegal and many countries like US, Australia have vested significant powers with the official liquidators to deal with such situations. "Phoenixing" takes different shapes: when the assets of a company are transferred for throw-away value to another company to avoid payment of the transferor company's debts. This is to facilitate resuming the business operations of the transferor company, which is facing eventual liquidation, through the transferee company. Orders from customers will be obtained on the new company name instead of the one under insolvency resolution.

In India, the Insolvency and Bankruptcy Code, 2016 empowers the resolution professional or the liquidator of a corporate debtor to apply to the adjudicating authority for avoidance of preferential, under-valued, extortionate or fraudulent transactions under the provisions of Sec.43,45,49,50 and 66 of IBC for suitable orders. There is a specific provision under Sec.66(2) whereby the director of the corporate debtor shall be liable to contribute to the assets of the corporate debtor if he did not exercise due diligence during the period of corporate insolvency resolution process in minimising the potential loss to the creditors of the company if the adjudicating authority directs by an order on an application made by the resolution professional.

Way Forward for Litigations under IBC

N. Nageswaran
Insolvency Professional

We have seen in the last three months a plethora of instructions/orders issued by the Central and State Governments as well as the judiciary, some suo moto, and others on representations from various forums, in the matter of giving relaxations to the parties involved legal struggles on account of failed entities. The central theme of every such instruction was to provide an opportunity to prove that the much talked about Insolvency and Bankruptcy Code holds the maxim "Resolution is the rule and Liquidation is an exception".

For the recap of the readers, the important orders/amendments to the IB Code and Regulations /Notification are given below:

1. The notification of the Ministry of Corporate Affairs No S.O.1205(E) dated 24th March 2020 which was carried out as an ordinance to amend Section 4 of the IB Code changing the minimum amount of default from one lakh rupees to one crore of rupees.

2. The Hon'ble Supreme Court of India in a suo motu Writ Petition (Civil) No(s).3/2020 in Re: cognizance for extension of Limitation, vide order dated 23.03.2020, observed that in view of the challenge faced by the country on account of Covid-19 virus and the resultant difficulties likely to be faced by the public in the matters of observing the law of Limitation. Hence, the apex court decided that the entire period w.e.f 15th March 2020 till further order(s) to be passed on this petition will be exempted in all matters where the Law of Limitation needs to be applied.

3. The Hon'ble National Company Law Appellate Tribunal took suo motu a Company Appeal (AT) (Insolvency) No.01 of 2020 and issued order 30.03.2020. It is informed that the period of lockdown ordered by the Central Government and the State Governments including the period as may

be extended shall be excluded for the purpose of counting the period of Resolution Plan under Section 12 of the IB Code.

4. Introduction of Regulation 40 C by IBBI for the purposes of ensuring that the lockdown period is exempted while calculating the timelines under the IB Code. Introducing Regulation 47C. Under Liquidation, Regulation to ensure that like in the lockdown period is exempted while arriving at the timelines.

5. An ordinance dated 5th June 2020 inserting Section 10A to IB Code. The section provides for suspending initiation of the Corporate Insolvency Resolution Process for any default arising after 25th March 2020 for a period of 6 months (which can be extended up to a period of 1 year). Most importantly it reads that no application for CIRP shall ever be filed for any default which shall occur in this period. The ordinance also inserted sub-section (3) in Section 66 paving the way for deactivating the provisions Section 66 (2) of the Code that a Resolution Professional can no longer file an application to initiate an action of recovery for default occurring in the prescribed period covered under Sec 10A.

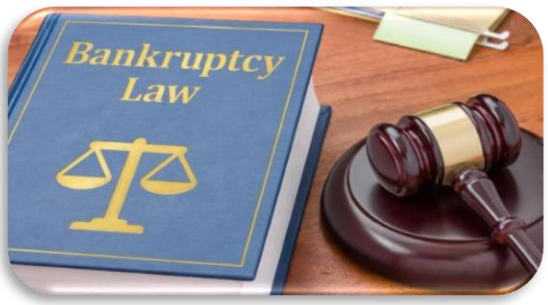
6. All changes in the provisions of the Code should be read along with Reserve Bank of India's Notification dated 27th March 2020, 17th April 2020, and 23rd May 2020, announcing extended EMI moratorium term loans and on payment of interest on working capital loans.

In this article, we will capture how the judicial forums have interpreted these new guidelines while dealing with the cases on their hand.

In the matter of Sunil Kumar Agarwal, RP, Digjam Ltd Vs. Finquest Financial Solutions Pvt Ltd, (FFSP), Resolution applicant for Digjam Ltd at NCLT, Ahmedabad 27th May 2020

In the captioned case the CoC approved resolution plan dated 12th Feb 2020 submitted by FFSP was filed with the NCLT, Ahmedabad for its approval. In between, due to Covid 19 and related lockdown, there was some delay in the matter being heard. During the intervening period, three independent applications were filed against the plan being approved. Subsequently, on 29th April 2020 RP filed the necessary "No Objection Certificates" on 29th April 2020 from the appellants against approval of the Resolution Plan. On the same day, the resolution applicant filed an application seeking permission to change the terms of the payment which was put in the resolution plan due to the financial difficulties arising out of the current pandemic situation of the Covid 19 virus and consequent lockdown. The Tribunal directed the resolution applicant to approach the CoC and submit to them his revised proposal and file the revised resolution plan.

Out of the two financial creditors, UCO Bank with 83% voting rights agreed for the variation in terms in full but State Bank of India holding 17% voting rights agreed partly only. When the matter came up before the Adjudicating Authority on 14th May 2020 the counsels of all the parties were heard. Finally, the orders were issued on 27th May 2020 in which it is observed that the Tribunal heavily relied on the "Developmental and Regulatory Policy" announced by RBI in view of the Covid 19 Pandemic outbreak and resultant lockdown. The Tribunal observed that RBI's instructions were specific that due to economic difficulties sufficient time need to be provided for meeting out the financial commitments made prior to the outbreak of the pandemic. As there was not going to be any change in the terms and conditions which would be the same and applicable post the moratorium period, no necessity for revised documentation to be obtained. In the present case also, the amount remaining the same, the resolution applicant is seeking change in the period of payment only. Also, the lender with 83% voting rights has agreed. Considering all these points and based on the latest guidelines of Reserve Bank of India the Adjudicating Authority approved the resolution plan.



(Image Source: Website)

In the matter of Pankaj Agarwal vs Union of India at High Court, Delhi on 23rd June 2020

This is a case where the order of the NCLT, New Delhi commencing corporate insolvency resolution process vide its order dated 29th May 2020 has been appealed against in the High Court, Delhi by the Promoter-Director of the corporate debtor, VMA Enterprises Limited. The averments made by the appellant before High Court, Delhi are that VMA Enterprises Limited is a registered MSME and that the changed default limit of Rs. 1 crore for NCLT to admit any application for insolvency has not been observed. Neither the Interim

Resolution Professional nor the applicant creditor before NCLT, Delhi, both based in Gujarat, were not represented during the hearing though according to the applicant advance copy of the petition had been served on both of them. Upholding the contention of the applicant that NCLT, Delhi has erred in not applying the new threshold limit of a minimum amount of default of Rs. 1 crore which came into effect from 24th March 2020, the Delhi High Court stayed the orders of the NCLT, Delhi till the date of next hearing.

To understand the case a little more we need to go through the orders of NCLT, Delhi in the matter of Panoli Intermediates India Private Limited vs VMA Enterprises Limited which was filed on 1st May 2019. While hearing the case, it was noticed that the dispute was in vogue since November 2017 and the first date of default was 7th June 2018, when the cheques issued by the corporate debtor were returned unpaid. The other important date to be reckoned with is that the date of reply by the corporate debtor for the notice sent under Sec 8 of the IB Code was 6th June 2019. As the Delhi High Court has only stayed the orders of NCLT, New Delhi till the date of next hearing and has granted liberty to the Interim Resolution Professional to approach the court for further directions,

It is to be seen how the case develops on an appeal made, if any, by the affected parties since it will deal with the question of law whether the changes in the jurisdictional limit for NCLT from Rs. 1 lakh to Rs. 1 crore is prospective or retrospective in nature.

In the matter of New Ram Traders (Successful Resolution Applicant) vs Rajiv Goyal, Head of Monitoring Committee of FM Hammerle Textiles Limited

In the above case, the resolution plan was approved by the NCLT, Chandigarh on 13th March 2020. As per the plan, the Resolution Applicant was to bring in the first tranche of Rs.39.93 crores of the plan amount within 30 days of the approval of the plan. This amount was to be credited into the new Escrow Account to be opened as decided in the first Monitoring Committee meeting held on 18th March 2020. The SRA as well as the lenders tried to have the matters in place but post the declaration of lockdown on 25th March 2020 it was not possible to achieve results. Union Bank of India, a member of the MC informed that due to skeletal staff strength at the branch they were providing only essential and emergency services to the customers. By the time all these discussions were on, the due date for payment of the first tranche, 12th April 2020 came and the SRA communicated his inability to meet the deadline. The Monitoring Committee in their meeting held on 27th April 2020 took note of the matters and decided to approach the NCLT for its directions. Taking up the matter through a Video Hearing on 11th May 2020, the NCLT heard the matter. It considered the application in the backdrop of the following:

1. The orders on the suo moto writ petition Civil No 3/2020 in Re: Cognizance for extension of limitation by the Supreme Court of India on 23.03.2020 extending period of limitation from 15th March 2020 till further orders in the matter by them.
2. The orders on the suo moto Company appeal (AT) Insolvency 01/2020 by the National Company Law Appellate Tribunal on 30.03.2020 excluding the entire lockdown period while calculating the CIRP period under Section 12 of IB Code.
3. Insertion of Regulation 40C to the Insolvency Regulation Process of Corporate Persons of IB Code detailing that the lockdown period declared by the Central Government will not be counted for the purposes of timelines under the IB Code.
4. Also, insertion of Regulation 47A to the Insolvency and Bankruptcy Board of India (Liquidation Regulations) detailing that the lockdown period declared by the Central Government will not be counted for the purposes of timelines under IB Code and ordered that the entire lockdown period be excluded from the timelines of the approved resolution plan.

We are anxiously looking forward to appeals that may be filed, challenging the above orders, which are purely on interpretations of the important orders/amendments to the IB Code and Regulations and other Notifications issued in this regard.

Do you know?

Doctrine of Alter Ego

A doctrine of law which disregards the principle of limited liability enjoyed by a corporate entity when it is proven that, in fact, no separate identity of the individual and corporate exists.

Income Tax relief on buying/acquiring shares under Resolution Plans

S. Rajendran

(image source: website)

Readers may be aware that under the provisions of Insolvency and Bankruptcy Code, 2016, several viable corporate entities have got a fresh leaf of life by way of resolution plans from investors. It is quite natural that when an investor would like to resurrect a sick unit, he assesses the value of assets, both tangible and intangible, and scope for viable and sustainable operations in the future. In most of the resolution plans submitted to National Company Law Tribunals (the adjudicating authority), the resolution applicants seek reliefs and concessions. One of the important prayers, generally, is to seek a waiver of all tax liabilities on the acquisition of the assets including shares of the corporate debtor being taken over. A question was lingering in the minds of investors what happens if the tax sleuths come charging heavily after the acquisition with a heavy tax liability due to write-back of liabilities (haircut to lenders and creditors). This was weighing heavily in the minds of investors while structuring a resolution plan.

- In order to allay the fears of the investors and to provide an impetus to revive the ailing corporates, the Government has already brought in certain provisions under the Income Tax Act, 1961 exempting the new investors from the rigors of conditions applicable for carry-forward of losses, MAT computation, etc. When a change in shareholding takes place due to a resolution plan approved by NCLT under the provisions of IBC, the conditions specified in Sec.79 relating to carrying forward of losses will not be applicable. The corporate debtor will also be eligible to claim aggregate of brought forward losses and unabsorbed depreciation for MAT purposes.
- In a recent notification by CBDT issued on 29th June 2020, the Government has extended the exemption to Sec.56(2)(x) of Income Tax Act to resolution plans approved under Sec.242 of Companies Act, 2013. It may be recollected that the Government has powers under Sec.241 to suspend the board of directors of a company and appoint new directors nominated by the Government under Sec.242 of Companies Act. Any resolution plan approved by NCLT under Sec.242 (after affording an opportunity of being heard to the jurisdictional principal commissioner of Income Tax) will enjoy this exemption. It is noted that this notification has been specifically brought out for Yes Bank Ltd. restructuring though, in the process, other cases of corporates also can avail of the exemption.

Arguendo

It is a Latin legal term meaning for the sake of argument. "Assuming, arguendo, that ..." and similar phrases are used in courtroom settings and academic legal settings to designate provisional and unendorsed assumptions that will be made at the beginning of an argument in order to explore their implications.

Inter se

Inter se is a legal Latin phrase that means "among or between themselves". The phrase is "used to distinguish rights or duties between two or more parties from their rights or duties to others".

COURT ORDERS – JUNE 2020

COMMERCIAL WISDOM OF CoC

1. Praveen Kumar Nanda Kumar Vs. VSL Securities Pvt. Ltd. & Ors.(NCLAT) CA(AT)No. 308 of 2020

On an appeal sought by the promoters on the Liquidation order passed by the Tribunal, the Appellate Tribunal observed as below:

> *"It is by now settled that, the commercial wisdom of the Committee of Creditors qua the business decision as regards the feasibility and viability of the Resolution Plan cannot be questioned before the Adjudicating Authority or even before this Appellate Tribunal. Likewise, the decision of CoC recommending liquidation of the Corporate Debtor after proper evaluation of the assets and liabilities of Corporate Debtor with no Resolution Plan forthcoming would be a business decision falling within the domain of commercial wisdom of the Committee of Creditors which is not amenable to judicial review."*
>
> Thus, dismissed the Appeal.

2. IMR Metallurgical Resources AG Vs. Ferro Alloys Corporation Ltd.&Ors. (NCLAT) CA (AT) (Ins) No. 272 of 2020

NCLT had dismissed the Application filed by an unsuccessful Resolution Applicant for seeking intervention and directions to CoC for reconsideration of its Resolution Plan, before accepting the resolution plan submitted by the Successful Resolution Applicant. The Appeal in the above matter was preferred challenging the Evaluation Matrix applied by the CoC. NCLAT dismissed stating that the *evaluation matrix applied by the CoC falls within the commercial wisdom of the CoC and that it is settled position of law that approval or rejection of Resolution Plan depends upon the commercial wisdom of the CoC, which involves evaluation of the Resolution Plan based on its feasibility. Such commercial wisdom of the CoC with the requisite voting majority is non-justiciable.* Also, the *powers of the Adjudicating Authority under Section 31 of the Code are limited to the matters covered under Section 30(2)* of the Code when the Resolution Plan does not conform to the stated condition.

IBC AND ARBITRATION & CONCILIATION ACT

3. Harish v. Chemizol Additives Pvt Ltd (NCLT Bengaluru) C.P. (IB) No. 62/BB/2020

On an Application filed by an Employee for pending salary (Operational Creditor), the Hon'ble court took a view that instead of initiating the CIRP, directed the Respondent (CD) to settle the issue amicably, failing which the Petitioner is at liberty to invoke arbitration clause as per Employee Agreement and granted liberty to invoke appropriate remedy as per law in case the Petitioner is aggrieved by the proceedings passed during Arbitration on the following observations:

- That the petitioner has not resorted to any other remedy but invoked IBC and the mere acceptance of debt by the Respondent would not automatically entitle the Petitioner to invoke the provisions of the Code unless the debt and default are undisputed and proved it to the satisfaction of the AA.
- That as per the Annual Returns of the CD, on the turnover and net worth basis appears to be solvent so as to resolve the issue of the outstanding amount.
- Further NCLT is conferred with power even to refer the matter pending before it to the Mediation and Conciliation u/s 442 of the Companies Act, 2013. The AA being NCLT, u/s 60(1) of the Code, can suo motto refer the matter to either Mediation and Conciliation or to Arbitration to settle the dispute.

4. Indus Biotech Pvt. Ltd. Vs. Kotak India Venture Fund – I (NCLT Mumbai) IA No. 3597/2019 in C.P. (IB) No. 3077/2019

A Company Petition under Section 7 of the IBC, filed by the Financial Creditor was dismissed and the Interlocutory Application filed under Section 8 of the Arbitration Act filed by the applicant/corporate debtor *was* allowed, holding it incapable of being admitted on the following observation:

- we are not satisfied that a default has occurred.
- the Applicant/Corporate Debtor is a solvent, debt-free, and profitable company. It will unnecessarily push an otherwise solvent, debt-free company into insolvency, which is not a very desirable result at this stage.

5. Agrocorp International Pvt Ltd vs National Steel and Agro Industries Limited (NCLT Mumbai)
C.P. (IB) No.798/MB/C-IV/2019

While an Application u/s 9 was filed claiming that the CD has defaulted in making payment as per an Arbitration Award passed in the United Kingdom was under consideration, the question of enforceability of Foreign Arbitration Award came to be challenged and the following observations were made:

- A claim is defined to include a right to a remedy for breach of contract, if such breach gives rise to a right of payment, whether or not such a right has been reduced to a judgment. Thus, a claim includes a judgment, being an award passed by a court of competent jurisdiction.
- An award is 'final' if under the laws of the country in which an award has been made, is no longer open to a challenge on merits.

THE CODE CANNOT BE USED IN TERROREM TO RECOVER.

6. JM Kathrotlya Vs. Cosmos Technocast Pvt. Ltd (along with 2 other petitions – common order (NCLT, Ahmedabad)
C.P. (I.B) No. 37/7/NCLT/AHM/2018

Petitions filed by various Financial Creditors were rejected and disposed of with exemplary cost of Rs. 30,000/- each payable to Prime Minister's Relief Fund (COVID – 19 Care) on the following observations:

- That the notices issued by the Petitioners were in 2017 while the Debt was of the periods of 2006-2007 & 2007 to 2010 individually. Therefore, it is a well-settled legal position that the limitation prescribed for filing an Insolvency and Bankruptcy petition is three (3) yrs. from the date of default.
- The Code cannot be used in terrorem to recover. Based on the course of proceedings it was observed by the Court that the petitioners do not wish to settle or seek a revival of the Corporate Debtor and only intend to recover their Debts.

SALE OF NON-CORE ASSET OF CORPORATE DEBTOR

7. Mr. AshishChhawchharia (RP of Jet Airways) Vs. HDFC Limited (NCLT Principal Bench)
IA No.998/2020 of CP (IB) No. 2205/MB/2019

The application was filed by the RP seeking approval of the Tribunal to sell a non-core asset of the CD to utilise the proceeds of the sale to clear overseas debts (to US EXIM over finance lease created on six aircrafts) to free encumbrance of six aircrafts, that would maximise the value of CD during CIRP, also to clear dues of HDFC bank for the security interest.

- On there *being no objection either from any member of the COC or from the charge holder of the premises i.e., HDFC*
- for *there being a huge value addition to the Corporate Debtor*, the Adjudicating Authority allowed the Application

Also, no further claim will lie on/toward HDFC on receipt of the proceeds to the extent of their security interest.
Thus the above is a case, where an encumbered asset was sold during CIRP with the permission of the Tribunal and a Secured Financial Creditor (HDFC) who was a part of CoC was settled and discharged from his claim in the CIRP proceedings.

ONE-SIDED INVOICES OR EMAILS CANNOT BE A SUBSTITUTE FOR A MUTUAL AGREEMENT

8. Logwell Logistics & Aviation Services (OPC) Limited vs Velankanni Electronics Private Limited. (NCLT Bengaluru)
C.P. (IB) No. 10/BB/2020

It is mandatory to have documented proof that parties were in contract/agreement.

In the absence of any agreement, there is no right to payment of interest at a certain rate and there cannot be a default for such interest within the meaning of the Code, even if such interest is payable.
One-sided invoices or emails cannot be a substitute for a mutual agreement.

LOAN FROM DIRECTORS IN IBC PROCEEDINGS

9. Mukesh Kumar Aggarwal vs Anurag Gupta &Anr. (NCLAT)
CA(AT)(Ins) No. 1264 of 2019

A loan rendered by a director is a financial debt as under S. 5(28) of the Code.
NCLT admitted the CD into CIRP considering the Section 7 Application filed by the Applicant stating that he had disbursed a total amount of Rs.20,46,500/- to the CD in his capacity as the Director.
The Appellate Tribunal upheld the order passed by the Tribunal stating that *the amount (loan) given by the appellant in the capacity of a director is qualified to be a financial debt as per section 5(8) of the Code.*

APPLICATION OF MORATORIUM

10. Regional Provident Fund Commissioner Vs. T.V. Balasubramanian (RP) (Sholingur textiles ltd) &Anr (NCLAT)
CA (AT)(Ins) No. 1521 of 2019

An appeal was sought by the Regional Provident Fund Commissioner on the ground that NCLT passed an order without considering the submission of the appellant stating it would be prejudicial to the CIRP.
The Appellate Tribunal observed as below:
If the attachment of the property was made much before the issuance of the CIRP then there is no violation of Sec 14 of IBC (moratorium). In the instant case, EPFO Authorities had attached the property of the CD much before the initiation of CIRP, but it was only recorded in the register during CIRP. Thus the Appeal was allowed stating that the Adjudicating Authority failed to take notice of the date of attachment which was prior to CIRP period.

11. Dy. CIT vs. BhuvanMadan RP for Diamond Power Infrastructure Ltd (NCLT, Ahmedabad)
IA No. 672 of 2019 in C.P. (IB) No. 137/2018

CIRP was commenced and moratorium declared under section 14 of the IBC, thus the IT Dept. was constrained to prefer an application to seek the permission of the AA to continue with the assessment proceedings under section 153A of the IT Act.

- *It is made clear that the Income Tax Department cannot proceed/file a case against the CD without prior permission from the Adjudicating Authority.*
- *It is made clear that problems should not be there during assessment work for the RP in completing the CIRP on time and also RP to extend full cooperation to the IT Dept. in their assessment.*
- *Further, the IT Dept. was directed to file a claim, if any and RP to examine in accordance with the provisions of the Code.*

POWER OF CoC TO CHANGE RP IN SUBSEQUENT MEETINGS

12. Bank of India Vs. M/s. Nithin Nutritions Pvt. Ltd. (NCLAT)
CA(AT)(Ins) No. 497-501 of 2020

-NCLT disallowed the Application filed by the CoC to replace the IRP in its 3rd meeting and observed that no reason is assigned as to why the resolution to replace the IRP was not adopted in its first meeting. The NCLT further took a view that Law doesn't envisage that the CoC could replace the IRP appointed by the Authority at anytime it chooses.

However, the Appeal sought by the FC was allowed and *held that the CoC has the requisite powers to propose a change of the Interim Resolution Professional even in meeting/s subsequent to the first meeting mentioned in Section 22(2) of IBC. There is no requirement in law that they should give particular reasons for the change.*

ABATEMENT OF DRT PROCEEDINGS AND IT'S EFFECT ON IBC PROCEEDINGS

13. Babasaheb Sawalaram Chaware vs Punjab National Bank & Anr. (NCLAT)
CA (AT) (Ins) No. 839 of 2019

The Appeal was filed by the CD against the admission of CIRP contending that an O.A. by the Bank in DRT was abated, hence no liability exists and the application under IBC could not be maintained. The said Appeal was dismissed stating that *abatement of Original Suit before DRT will not affect the proceeding in NCLT under IBC as the dues still remain outstanding.*

MATURITY OF CLAIMS ARISING IN FUTURE

14. NTPC Ltd. (Sipat Project) Vs. Rajiv Chakraborty IRP of Era Infra Engineering Ltd. (NCLAT)
CA (AT)(Ins) No. 491-495 of 2020

The appeal was filed on the ground that the claim filed by the Claimants in regard to *debts due and payable in future could not be rejected and such claim could be filed as held by this Appellate Tribunal in "Andhra Bank v. F.M. Hammerle Textile Ltd.- Company Appeal (AT) (Insolvency) No. 61 of 2018"*. Where NCLT dismissed the applications moved by the Claimants directing that the *information relating to the disputes with the 'Corporate Debtor' including the disputes with respect to claims arising out of loss or damages shall be reflected in the Information Memorandum*. NCLAT observed that in view of this legal position, we are of the considered opinion that the prayer in the appeals cannot be acceded to at this stage when the Resolution Process is underway and has not fructified into the approval of a Resolution Plan.

Moreover, the Adjudicating Authority has already taken care of the apprehensions of Appellants in so far as incorporation of the claims as regards loss and damages claimed to be 'operational debt' in Information Memorandum is concerned.

CIVIL SUIT FILED AFTER RECEIPT OF DEMAND NOTICE

15. GT Polymers vs. Keshava Medi Devices Pvt Ltd (NCLAT)
CA(AT)(Ins) No.1266 of 2019

Civil suit filed after receipt of demand notice – not a dispute under S. 5(6) of the Code .

Hon'ble NCLT rejected an Application on the ground that the claim of the appellant falls within the ambit of a disputed claim.

Hon'ble NCLAT allowed the appeal directing Hon'ble *NCLT for admitting the application u/s 9 of I & B Code* after notice to the Corporate Debtor in view of *Innovative Industries Ltd Vs ICICI Bank and Anr*. wherein Hon'ble Supreme Court observed that *"claim means a right to payment even it is disputed."*. Further, it was noted by the Hon'ble NCLAT that a Civil suit was filed by the CD after receipt of demand notice. Therefore, it was viewed that there was no pre-existing dispute.

LIMITATION ACT AND IBC

16. Corporation Bank Vs. Uluberia Metaliks Pvt. Ltd. (NCLAT)
CA(AT) (Ins) No.461 of 2020

The appeal was filed against the dismissal of Application under Section 7 of the Code by the Appellant as Financial Creditor against the Corporate Debtor. The account in question become NPA on 14.08.2012 and Application under Section 7 of IBC was filed on 20.12.2018. Hon'ble NCLT dismissed on the basis that the claim is time-barred.

It was contended that the Bank (FC) had a mortgage in its favour which gave limitation of 12 years. Hon'ble NCLAT on taking into consideration the Judgements relied upon the Hon'ble NCLT in *B.K. Educational Services Private Limited Vs. Parag Gupta and Associates 2018 (SC) &Gaurav Hargovindbhai Dave Vs Asset Reconstruction Company (India) Ltd & Anr. (SC)* upheld that period of limitation relating to the mortgage would apply to suits and not to application u/s 7 of IBC, therefore Limitation period under IBC is 3 years and the existence of mortgage would not extend the period of Limitation.

Non sequitur

A statement that does not correctly follow from the meaning of the previous statement.

Ubi jus ibi remedium

The principle that where one's right is invaded or destroyed, the law gives a remedy to protect it or provides for damages in the event of loss. Further, where one's right is denied, the law affords the remedy of an action for its enforcement.

Xcel From Anywhere - A strong personal development to take you places

S.Rajendran, Director CGRF

What is XFA?

The Corona era has confined us to our homes for more than 100 days now. Who knows, this could linger for a longer while. Most of us are working from home. In many virtual meetings, the video option of participants is asked to be muted to have a better streaming. In a few Google Meet occasions, I found that the participants, especially our female friends, did not volunteer to show up in the video in spite of friendly requests!! I felt the very purpose of having a virtual meeting is to see the other participants, exchange positive energy and communicate effectively. Surprisingly some senior professionals confessed they were not in a "presentable" position, so would prefer to be "muted". This made me think why can't we have certain voluntary framework for work-from -home. Already, in a brief survey in our organisation, the participants felt that they have been burning more hours at home than when they were in office. They felt that their sleep cycles have been disrupted due to frequent checking of mails and chats to give prompt response to their bosses. In spite of working for longer hours, they felt tired, exhausted – more mentally than physically.

Stealing a few ideas from stalwarts on the subject, I suggest the following routine can give you a greater sense of confidence, more satisfaction and a free-flying mind to think and act more creatively, killing the monotony and boredom, anywhere, anytime:

- Get ready for work 5 minutes before the regular office hours. Groom yourself well as you will feel more comfortable psychologically to carry yourself and communicate in a better manner.
- Take a break of 10 minutes after every one hour, treat yourself to a lot of water, a cup of steaming tea or coffee.
- Take a lunch break for 45 minutes or one hour, rest and relax for a while. You can get yourself into a casual dress to feel the change.
- Get into the 2nd half of the day, again in your formal or semi-formal dress, to clear the jobs assigned in the morning, quick follow up meetings, reporting for the day, etc. Wind up things maximum by 6 pm. Say loudly "Bye for the day… See you again fresh tomorrow morning…."
- Go for a stroll on the terrace or any space available to switch from Office to Home mode. Hear some favourite music, take a bath, and get fresh for a chat with the family members.
- Plan for the day tomorrow… Get up in time, catch up with 30 minutes of Yoga or any physical work out... Attend to household works, use the commuting time on hand now to read newspapers. Your brain being fresh in the morning would throw a lot of new ideas... Note down them for your sharing it with your team. Get ready for your regular office time the next day.

I found it to be very effective especially when we meet officials from other organisations. The moment they see us in proper shape and ready-for-combat mode, you have already got an edge!! In fact, I have noticed that our thinking pattern, communicating style and the tone in our voice vary according to the garbs we wear, place where we are in and circumstances before us.

Make your brain believe

Well, experts say that the brain can be conditioned to behave in a particular fashion irrespective of any situation. Yet, a few little tangible things we do can make the brain believe that we are in a normal day and enjoying the banter of colleagues at office. Seeing is believing. We must be seen in virtual meetings to get that feel. So, for heaven's sake, do not feel uncomfortable to show your face while sharing your views with the participants.

Human psychology works in the subconscious sphere, without our knowing. You will feel you have done great work for the day and you would feel lighter at the end, ready to fly. Remember, the more productive work we do, the lighter we feel and the more urge we get to finish more.

Motivation

One of the powerful ways to motivate people is through personal development. By helping the team members to grow and expand their skill-sets, they begin to feel passionate about life, people and their jobs. This would make them want to contribute more. This they do it more out of a sense of personal pride than due to pressure from someone else. More than the financial incentives, the personal realisation that they are growing taller in the organisation makes them feel richer. Living examples, we see right before us reinforce this point.

You have a few more days or weeks to WFH. Try XFA and share your success...!!

Do you know?

Phishing

Phishing is a way of attempting to acquire information such as usernames, passwords, PIN, bank account, credit card details by masquerading as a trustworthy entity details through electronic communication means like e-mail. Phishing is typically carried out by e-mail spoofing or instant messaging and it often directs users to enter details at a fake website whose look and feel are almost identical to the legitimate one. Phishing is an example of social engineering techniques used to deceive users.

How can I recognize a message of Phishing?

- Normally Phishing emails display grammatical errors or overlapped text.
- Test using false data before putting in actual information.

What should I do if I think I've responded to a phishing scam?

Take these steps to minimize any damage if you suspect that you've responded to a phishing scam with personal or financial information or entered this information into a fake website.

- Change the passwords or PINs of all your online accounts that you think could be compromised.

- Place a fraud alert on your credit reports. Check with your bank or financial advisor if you're not sure how to do this.

- Contact the bank or the online merchant directly. Do not follow the link in the fraudulent e-mail.

- Routinely re-view your bank and credit card statements for unexplained charges or inquiries that you didn't initiate.

"Filing Nil Form GSTR 3B through SMS on GST Portal"

T. Vinod Kannan
Practicing CMA, Qualified Independent Director

1. A taxpayer may now file NIL Form GSTR-3B, through an SMS, apart from filing it through online mode, on GST Portal.
2. To file NIL Form GSTR-3B through SMS, the taxpayer must fulfill following conditions:
    a. They must be registered as Normal taxpayer/ Casual taxpayer/ SEZ Unit / SEZ Developer.
    b. They have valid GSTIN.
    c. Phone number of Authorized signatory is registered on the GST Portal.
    d. There is no pending tax liability for previous tax periods, interest or late fee.
    e. All GSTR-3B returns for previous tax periods are filed.
    f. No data should be in saved stage for Form GSTR-3B on the GST Portal, related to that respective month.
    g. NIL Form GSTR-3B can be filed anytime on or after the 1st of the subsequent month for which the return is to be filed.
3. NIL Form GSTR-3B for a tax period must be filed if the taxpayer:
    a. Has NOT made any Outward Supply
    b. Do NOT have any reverse charge liability
    c. Do NOT intend to take any Input tax credit; and
    d. Do NOT have any liability for that particular or previous Tax Periods.
4. All the authorized representatives, for a particular GSTIN can file NIL Form GSTR-3B through SMS.
    a. If more than one authorized representative/ signatory have the same mobile number registered on the GST Portal, such SMS requests will not be accepted for filing NIL Form GSTR-3B.
    b. An SMS and e-mail will be sent on the e-mail and mobile number of the primary authorized signatory.
    c. In case, filer of NIL Form GSTR-3B is an authorized signatory, SMS will be sent to his/her mobile number also.
5. Taxpayer can file NIL Form GSTR-3B, through SMS for all GSTINs, for whom they are an Authorized Signatory, using same mobile number.

The Great Global Downturn

N.Nageswaran
Registered Insolvency Professional

Why this topic now? Of course, because of the Covid 19 pandemic outbreak and post return to normalcy (or new normal?) how the global economy is going to look and whether it would be as it looked like post Great recession of 2008 or Great depression of 1930s?

Incidentally, what is this recession and depression? Are they synonyms? Here it is. In a serious topic of this nature, you will find some jokes creeping in, nevertheless each joke itself throwing a part of the definition for the term's recession and depression. Mind you, all these statements are at least 7 decades old but very relevant today as the subject matter it talks about.

As to the difference between a recession and a depression a recession is said to have set in when your neighbour loses his job, but a depression is said to have set in when you lose your own. The difference between a depression and a recession is that the first creates a class who expect the worst and the latter a class who sweat and expect what they're getting.

A recession is when the price of everything goes up so high no one makes enough to live on and a depression is when wages are cut so low no one makes enough to live on. The only difference between a recession and a depression is that one is a let-up and the other a let-down.

A Recession is where you tighten your belt and a Depression is when you don't have any belt to tighten.

Jokes apart, the Merriam Webster dictionary captures the implied meaning of the above statements as under:

Economic Recessions Vs. Economic Depressions Is there a real difference between a recession and a depression	
A recession is a downward trend in the business cycle, one that is characterized by a decline in production and employment.	A depression is a major downswing (far more severe than a downward trend) in the business cycle.
This trend lowers household income and spending, which consequently causes many businesses and households to delay making large investments or purchases.	A depression is characterized by sharply reduced widespread unemployment, a serious decline of growth in construction, and great reductions in international trade and capital movements.
A recession can be limited geographically, like in a single country.	A depression can have global reach.

Ok. Having understood about the two Great (!!) things next question is where do you fit in the third Great – the Great Global Downturn (G2D) post Covid 19 pandemic? Also understand the multiplier effect – not to be confused with economic and monetary theories of multiplier effects – that the technological improvements we have today which makes me see and hear when my son sneezes in Chicago that the technology can add to both good and bad sides of the G2D.

Now when the economic slowdown is going to affect every country, developed, developing and underdeveloped, the steps each country is initiating to address the problem for their boundaries will be creating further problem to the countries outside their boundaries. Thus, the cause and effect of decisions being taken by every country will have to be looked into in relation to the country or countries which will be affected by the respective decision(s).

Now that when it is emerging that the G2D is going to be the greatest of the greats, luckily, we can turn to all the studies that followed the outbreak of the causes that led to the Great Depression and Great Recession. For example, I found a study in U.S. by Moody's Analytics in Dec 2007 on the impact of the increase in the number of adult children (25 to 29 years of age) move to living with their parents to beat the blues of the impact of Great Recession. The study leads to the economic impact created when households are shut and they move into the households of their parents. The study estimates, applying the multiplier effect, how closure of one household brings down the addition to the GDP by USD 145,000 and leading to the deprival of creation of about USD 25 billion of purchasing power.

Compulsorily I am reminded of the problem of migrant labourers' exodus to their native places risking their lives during the Covid crisis. Coming to think of it, their moving to the native places will have a twin effect on the economy – their contribution in adding products and services to the supply side and their keeping away from the demand side because of not having the power to purchase.

The central idea of this article is not to throw pessimism about future but to understand and appreciate that whatever effect the G2D is going to be, we should face the downturns of G2D without "recency bias".

DECISIONS OF 40TH GST COUNCIL MEETING HELD ON 12TH JUNE. 2020

T Vinod Kannan
Practicing CMA, Qualified Independent Director

GST return	Tax Period	Condition	Late Fee
GSTR - 3B	Jul'2017 to Jan'2020	GSTR 3B furnished between 1.07.2020 to 30.09.2020	NIL (If there's no tax liability)
			Maximum late fee capped at Rs. 500/- per return (If there is any tax liability.)
GSTR - 3B	May'2020, Jun'2020 & Jul'2020	Taxpayers having aggregate turnover up to Rs. 5 crore **And** GSTR 3B is furnished by September, 2020	No Late Fee & Interest

GST Return	Condition	Tax Period	Due date	Rate of Interest for delay in filing GSTR 3B
As per Notification No. 31/2020 – Central Tax dated 03rd Apr. 2020				
GSTR – 3B	Taxpayers having aggregate turnover more than 1.5 crore and up to Rs. 5 crore	Feb'2020	29th Jun. 2020	9% p.a if GSTR 3B Filed after 29th Jun. 2020 but within 30th Sep. 2020
		Mar'2020	29th Jun. 2020	9% p.a if GSTR 3B Filed after 29th Jun. 2020 but within 30th Sep. 2020
		Apr'2020	30th Jun. 2020	9% p.a if GSTR 3B Filed after 30th Jun. 2020 but within 30th Sep. 2020
GSTR – 3B	Taxpayers having aggregate turnover up to 1.5 crore	Feb'2020	30th Jun. 2020	9% p.a if GSTR 3B Filed after 30th Jun. 2020 but within 30th Sep. 2020
		Mar'2020	03rd Jul. 2020	9% p.a if GSTR 3B Filed after 03rd Jul. 2020 but within 30th Sep. 2020
		Apr'2020	06th Jul. 2020	9% p.a if GSTR 3B Filed after 06th Jul. 2020 but within 30th Sep. 2020

<u>One-time extension in period for seeking revocation of cancellation of registration</u>

The taxpayers who could not get their cancelled GST registrations restored in time can file application for revocation of cancellation of registration up to 30.09.2020, in all cases where registrations have been cancelled till 12.06.2020.

(Source: Press Release in relation to 40th GST council Meeting by Press Information Bureau)

MSME will be known as 'Udyam'

Gopinath D

Ministry of Micro, Small and Medium Enterprises (MSME) has come out with a Consolidated Notification No. S.O.2119 (E), dated the 26th June, 2020 in the form of guidelines for classification and registration of MSMEs to be effected from July 1, 2020.

It is also pertinent to note that the said notification has been issued in *super session* of the notifications of the Government of India in the Ministry of Micro, Small and Medium Enterprises number S.O.1702 (E), dated the 1st June, 2020, S.O. 2052 (E), dated the 30th June, 2017, S.O.3322 (E), dated the 1st November, 2013 and S.O.1722 (E), dated the 5th October, 2006, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-Section (ii), except as respects things done or omitted to be done before such super session.

(Image Source: Website)

Therefore, the entrepreneurs, enterprises and the MSMEs have to refer to just the said notification for matters relating to classification or registration w.e.f. July 1, 2020. **Existing MSMEs have to register again on or after 1 July, 2020.**

As per revised definition, an enterprise shall be classified as a micro, small or medium enterprise on the basis of the following criteria, namely: –

Enterprises	Investment and Turnover	Limit
A Micro Enterprise	Investment in plant and machinery or equipment; AND	does not exceed one crore rupees (<Rs. 1 crore)
	Turnover	does not exceed five crore rupees (<Rs. 5 crore)
A Small Enterprise	Investment in plant and machinery or equipment; AND	does not exceed ten crore rupees (<Rs. 10 crore)
	Turnover	does not exceed fifty crore rupees (<Rs. 50 crore)
A Medium Enterprise	Investment in plant and machinery or equipment; AND	does not exceed fifty crore rupees (<Rs. 50 crore)
	Turnover	does not exceed two hundred and fifty crore rupees (<Rs. 250 crore)

As per the notification, an MSME will be known as ***'Udyam'***, as this is closer to the word Enterprise and accordingly, the registration process will be known as '***Udyam Registration'***. Any person who intends to establish a micro, small or medium enterprise may file Udyam Registration online in the **'Udyam Registration Portal'**, based on self-declaration with no requirement to upload documents, papers, certificates or proof.

On registration, an enterprise will be assigned a permanent identity number to be known as "**Udyam**

Registration Number". Thereafter, an e-certificate, namely, **"Udyam Registration Certificate**" shall be issued on completion of the registration process.

New registration process:

1. The requisite form shall be provided in the **Udyam Registration Portal**, for which there will be **no fee**.
2. It is necessary for a person to have **Aadhaar Number** for Udyam Registration. The Aadhaar number shall be of the proprietor in the case of a proprietorship firm and of the managing partner in the case of a partnership firm and of a Karta in the case of a Hindu Undivided Family (HUF).
3. In case of a Company or a Limited Liability Partnership or a Cooperative Society or a Society or a Trust, the organisation or its authorised signatory shall provide its GSTIN and PAN along with its Aadhaar number.
4. It is to be noted that no enterprise shall file more than one Udyam Registration. Any number of activities including manufacturing or service or both may be specified or added in one Udyam Registration.

Registration of Existing Enterprises:

1. All existing registered under EM-Part-II or UAM shall register again on the Udyam Registration portal **on or after 1 July, 2020.**
2. All enterprises registered till 30 June 2020, shall be re-classified in accordance with this notification.
3. **The existing enterprises registered prior to 30 June 2020 shall continue to be valid only for a period upto the 31 March 2021.**
4. An enterprise registered with any other organization under the Ministry of Micro, Small and Medium Enterprises shall register itself under Udyam Registration.

Calculation of turnover:

1. Exports of goods or services or both, shall be excluded while calculating the turnover of any enterprise whether micro, small or medium, for the purposes of classification.
2. Information as regards turnover and exports turnover for an enterprise shall be linked to the Income Tax Act or the Central Goods and Services Act (CGST Act) and the GSTIN.
3. The turnover related figures of such enterprise which do not have PAN will be considered on self-declaration basis for a period up to 31st March, 2021 and thereafter, PAN and GSTI shall be mandatory.

TAX DEDUCTED AT SOURCE ON CASH WITHDRAWALS (AMENDMENT IN SECTION 194N)

Vinod Kannan
Practicing CMA, Qualified Independent Director

We would like to update you about the recent amendment in Section 194N the Income Tax Act on TDS (Tax Deducted at Source) on cash withdrawals in excess of specified limits. The Government has introduced Sec 194N in the Union Budget 2019 proposed on 05th Jul. 2019, in order to discourage cash transactions in the country and promote the digital economy. TDS on Cash withdrawals over and above Rs. 1 Crore has been introduced through the Finance Bill, 2019.

With effect from July 1, 2020, the threshold as well as the rate of TDS applicable on cash withdrawals will be dependent on the submission of proof of filing your last 3 assessment years Income Tax Return to the Bank, Co-operative Society engaged in the business of banking, Post Office.

TDS on Cash withdrawal will be applicable if:

The total cash withdrawal across all accounts under your PAN exceeds Rs. 20 Lakh / Rs. 1 Crore in a financial year with the respective Bank, Co-operative Society engaged in the business of banking, post office. TDS will be charged on the amount withdrawn above Rs. 20 Lakhs / Rs. 1 Crore. The Cash withdrawal limit for this financial year will be considered from April 1, 2020.

Rate of TDS will be as follows:

Aggregate cash withdrawals in all accounts in a financial year	Income Tax Return copy submitted to Bank	Income Tax Return copy NOT submitted to Bank
Up to Rs. 20 lakhs	Nil	Nil
Rs. 20 lakhs to Rs. 1 crore	Nil	2%
In excess of Rs. 1 crore	2%	5%

The following entities are exempted from TDS on cash withdrawal:

- State and Central Government Accounts.

- Banking Company or Co-Operative Society engaged in carrying on the business of banking or a post office.
- Any white label automated teller machine operator of a banking company or co-operative society engaged in carrying on the business of banking, in accordance with the authorisation issued by Reserve Bank of India.
- Business correspondent of a banking company or co-operative society engaged in carrying on the business of banking.
- Such other person(s) as the Central Government may notify.

In order to avail of a higher cash withdrawal threshold for TDS, account holders need to submit the ITR V (Acknowledgment of filing of Income Tax Return) pertaining to last 3 years (i.e) FY 2018-19, FY 2017-18 & FY 2016-17 or FY 2019-20, failing which, the threshold of Rs. 20 Lakh and corresponding TDS rate as mentioned in the table above will be applicable on cash withdrawals.

Hearty Congratulations on your appointment as Additional Solicitor General by the Government of India. Truly a great recognition for your meritorious services.

Snr. Adv. R. Sankaranarayanan

We as a nation owe our salutes and deepest respect to our Indian Army. The ultimate sacrifice of life by our great heroes at the Galwan Valley attack on 15th June 2020 to protect the territorial integrity of our country is remembered.

Jai hind!

"Either I will come back after hoisting the Tricolor, or I come back wrapped in it, but I will definitely be back for sure."

- Capt. Vikram Batra, PVC

KIND ATTENTION !!

Articles are Invited

We would be delighted to have you in our panel of writers to contribute articles / snippets / write-ups to add value to CGRF SandBox. This will go a long way in enhancing the quality of CGRF SandBox which is expected to have wide readership amongst top bankers, corporates and professionals.

Your materials for publishing may please be sent to
create.and.grow.research@gmail.com

In 'MS Office Word'.

Mr S.Ravindra B.Com.FCA has raised the following queries

CGRF bureau

Query

Section 103 states that members personally present shall be included for quorum (The minimum number of members is prescribed)

(i) A preference shareholder is a member of the company. Can he be counted for quorum if he attends the meeting personally. (It is relevant to note that 2013 Act has dropped the words "and entitled to vote" after members personally present which was in section 174 of 1956 Act)

(ii) In case of default in payment of dividend for two continuous years the preference shareholder gets a right to vote on all matters at the meeting. In such a case will his presence be counted for quorum?

Reply

(i) Before we proceed to reply the query, it would not be out of place to mention that the reference to u/s 174 of the Companies Act, 1956 by the querist in so far as entitlement to vote is concerned is erroneous. The section has no reference to voting at all.

The following sections of CA 2013 are relevant for our discussions:

*(a) "2(55) "**member**", in relation to a company, means—*

*(i) every other person who agrees in writing to become a member of the company and **whose name is entered in the register of members of the company;***

(ii) every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository;"

Sec.88(1) of the CA, 2013 also amply provides clarity that preference shareholders are members of a Company as we can see from the relevant extract of the Section as given below:

"Every company shall keep and maintain the following registers in such form and in such manner as may be prescribed, namely: —

*(a) **register of members indicating separately for each class of equity and preference shares held by each member residing in or outside India;***

Section 103 of CA 2013 states as under:

(1) Unless the articles of the company provide for a larger number, —

(a) in case of a public company ,—

i. five members personally present if the number of members as on the date of meeting is not more than one thousand;

ii. fifteen members personally present if the number of members as on the date of meeting is more than one thousand but up to five thousand;

iii. thirty members personally present if the number of members as on the date of the meeting exceeds five thousand;

(b) in the case of a private company , two members personally present, shall be the quorum for a meeting of the company.

For the purpose of determining the quorum for the meeting, the members personally present shall be counted as mentioned clearly in section 103 of the Companies Act, 2013. The members herein refer to both equity shareholders of the Company as well as the preference shareholders of the company.

From the section it is very clear that a preference shareholder has to be counted for the purpose of quorum irrespective of whether the resolution proposed to be passed directly affects the interest of the preference shareholder or not. There is no such rider in the section.However, Para 3.1 of the Guidance note on General Meetings issued by the ICSI reads as under-

"Reckoning of Preference Shareholders and Joint Shareholders for Quorum

*If any business to be transacted at a General Meeting **does not include any item or Resolution which directly affects the rights of the preference shareholders, their presence should not be taken into account for the purpose of determining the Quorum**.*

*Where a Resolution is put to vote at the General Meeting by which the **rights of preference shareholders are directly affected, their presence should be taken into account for the purpose of the Quorum** and voting on the Resolution."*

Similar view is stated in the 'Clarifications and Circulars on company Law provided by the Department of the Company Affairs in the Government of India publication 1977 edition' (attached for ready reference- pg.86) as under-

"Presence of Preference shareholders whether count for quorum

*If business proposed to be transacted at a General meeting **does not include any item or resolution proposed to be passed, which directly affects the rights of the preference shareholders, their presence should not be taken into account for purposes of determining the quorum** but where the subject matter includes any resolution in which the **rights of preference shareholders are directly affected, their presence shall be taken into account for the purpose of the quorum**."*

In view of the above, preference shareholders shall be considered to be part of quorum only for such matters which directly affect their rights and not in regard to every item proposed to be transacted.

(ii) The preference shareholders shall not be counted for the purpose of quorum for **all** the business matters where they are entitled to vote in a meeting except with regard to the item when the resolution for payment of arrears of dividend on preference shares is taken up and not otherwise. This is possible only as per the circumstance specified in second proviso to Section 47(2).

S. 47 (2): Every member of a company limited by shares and holding any preference share capital therein shall, in respect of such capital, have a right to vote only on resolutions placed before the company which directly affect the rights attached to his preference shares and, ...

Provided that ....

***Provided further that** where the dividend in respect of a class of preference shares has not been paid for a period of two years or more, such class of preference shareholders shall have a right to vote on all the resolutions placed before the company.*

The question now is in the circumstances mentioned in the second proviso to section 47(2) since he has a right to vote on ***all the resolutions** (not necessarily affecting his rights alone)* placed before the company, should he not be counted for the purpose of quorum for the meeting? We think not. The quorum is a different matter and is not linked to his voting rights per se. Yes. He shall be counted for the purpose of quorum in so far as resolution proposed to be passed in connection with the payment of his dividend is concerned and not for any other matter even though he is entitled to vote on all resolutions at that particular meeting which, of course, includes the resolution dealing with payment of dividend to him.

We hope we have sufficiently clarified the questions raised by the querist.

CGRF SandBox - May 2020 was a treat to read. Very interesting and informative. Wishing you all the best.
Mr. R. Sadasivan – Chartered Accountant & Insolvency Professional

Thank You! I appreciate your sharing this useful newsletter
Mr. S. Annamalai, MD Pioneer Jellice India Private Ltd.

Overall it looks good & by reading, able to view the team effort of CGRF - Mr. T. Vinod Kannan, CMA (Vinod Kannan Associates)

Thank you so much for the update's magazine.
Mr. Venkat Somayajula

Thanks for your mailed "SANDBOX".
Mr. S. Ravindra Sathyamurthy – Chartered Accountant

Very informative and useful.
Mr. S. Kalyanaraman - Director of TTK pharma Ltd

The details in the issue are informative. Thank you for sharing
Mr. Shrikanth R Rao

Gone through the contents and really enjoyed the materials and updates. Really enjoyed a lot.
Mr. Venkataramanarao Nagarajan – Insolvency Professional

I heartily congratulate you and your team at CGRF for bringing out CGRF SandBox and sharing with me the May 2020 issue
Mr. Panchajanyam - Chartered Accountant

Nice! In a nutshell most of the things are covered and the editorial team of women have done a great job.
Mr. Subrahmaniya Sivam R - Chartered Accountant

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