CGRF

SandBox™

Aug - Sept 2020

Volume 1 | Issue 5

CGRF

CREATE & GROW™

RESEARCH FOUNDATION

CREATE & GROW
RESEARCH FOUNDATION

CIN: U73200TN2019NPL132843
(A section 8 Company registered under Companies Act, 2013)

INDEX

குறள் 396:

தொட்டனைத் தூறும் மணற்கேணி மாந்தர்க்குக்
கற்றனைத் தூறும் அறிவு

Thirukural 396:

The deeper a well is dug, the more the water that springs. Similarly, the more one learns, the more wisdom it brings.

From the Editor's Desk

Dear Readers

I feel quite happy to meet the esteemed readers of CGRF SandBox once again through this column. It gives me immense pleasure that CGRF SandBox has been reaching the elite community of senior corporate lenders, corporate professionals, entrepreneurs, and aspiring students as well.

Advent of August

August usually brings great relief from the scorching heat. This year, it has not only revived the sentiments of the Corona-stricken citizens but also has added a cautious celebration of festivities, commencing with Ganesh Chathurthi. Commercial activities have largely been restored barring public transport, metro, theatres, and malls. Come September, these restrictions also are most likely to go away.

More start-ups in the fray

Another silver lining seen was the substantial increase in number of company registrations. It has been reported that in July 2020, 16,487 incorporations have been done, more than 54% increase over same month last year. Apparently, more entrepreneurs are embracing corporate business entity form which is a welcome sign for ease of doing business.

In this context, the circulars issued by Reserve Bank of India on 6th August 2020 announcing a one-time window to restructure credit facilities to industries facing COVID 19 challenges bring a whiff of healing breeze. More on these measures is analysed elsewhere in this issue for the benefit of the readers.

Signing off in style by MSD

When you ask someone to name a calm, composed and cool character, I bet you wouldn't be surprised to hear "MSD" as the answer. Well, in his own inimitable style, MS Dhoni announced his retirement from international cricket wef 19:29 hours of 15th August 2020 much to the anguish of his huge fan base. 19:29 hours is stated to be the sunset time for that particular day. The corporate gurus often draw inspiration from his passion for the game, quick thinking brain to outwit the competition, playing always fair and more eminently, the finishing skills. As much as we salute the soldiers on the border for their bravery to protect our nation, we take pride in honouring great sports-persons India has given to the world.

Embracing Fintech – Big data, Artificial Intelligence (AI), Machine Learning (ML) – need of the hour

Big data analytics have found ways to develop algorithms to predict consumer behaviour by analysing buying preferences, current and future lifestyle events. During the lockdown period, online transactions have registered a staggering increase. The role of AI and ML in the banking sphere is interestingly poised. Banks can now assess their delinquency risk with reference to lending to an organisation or individuals. Perhaps the technique can be even applied to step up lending to persons who have no past data. No doubt, with the block-chain technology being widely used to ensure data integrity, banking sector is sure to embrace Fintech in a big way in the next few years.

Resilience holds the key

Together, the country has managed the Covid-19 crisis in a laudable manner although health care system is grappling with its limited resources. Thanks to a good monsoon, the agrarian economy is likely to record a bumper crop. Closely following, the other sectors are also expected to spring back on track. Rail freight and highway traffic are stated to have already hit 90% of pre-covid levels. Therefore, on the whole, the resilience of the nation is at its best to stage a smart come-back.

While we place on record our humble gratitude to your continued support, it is your critical feedback which will spur us to reinvent to serve you better.

CGRF SandBox Team wishes its readers a "**Super September"**, ahead of more festivals to cheer.

Yours truly,
S. Rajendran

Should the bank / FI worry if a director of a borrower company resigns?

S. Srinivasan
Chairman, CGRF

What is happening within the four walls of the boardroom of a Company is an internal matter of the Company. The director resigning from the board has hitherto been a matter which has not caught the attention of bank/FI as it should. The bank manager has all along been taking umbrage under the Doctrine of Indoor Management. There has always been casual approach on the part of credit manager in ascertaining periodically who the members of the Board of the company which has been funded by the bank are. As they say it was considered a "Ghar ka Mamla". Provisions of the erstwhile Companies Act, 1956, deals with the subject of resignation of a director. Section 284 of the Act provided for removal of a Director in a General Meeting, whereas section 283 dealt with vacation of office in certain specific circumstances. Nothing was mentioned in the statute with reference to resignation of a Director or its acceptance by the Board of Directors. However, a Director was merely considered to be an agent who would determine his agency. It was generally understood that the resignation of director could take effect the moment the director concerned submitted his resignation. Even the RoC would come to know of the resignation only when the (erstwhile) Form No: 32 was filed with his office. Provisions for resignation of a director were governed by the Articles of Association of the company. In fact, the AoA of many companies were generally silent on this subject whereupon in the normal circumstances 'Table A' used to apply. Unfortunately, Schedule I to Table A of the Companies Act, 1956, was also silent. But the question what the credit manager could ask is "what bearing the resignation of a director could have on the lending to that company by his bank?" Should he get worried? After all this is a part and parcel of running the company.

Gone are the days when a credit manager could take it easy on such matters. Good fund management demands a continuous monitoring of the profile of the board of a company where the bank is a stakeholder. This is to ensure that directors who are crucial to the proper management of the company stay put in the company as long as the borrowings from the banks subsist. The director may be a promoter, investor- director, professional director or key personnel based on whose profile the bank has advanced loans even when such advances had been made on the merits of the project. Realizing the need for a provision in the statute particularly with many corporate scams surfacing in the recent past, the government of the day introduced a new provision in the Companies Act, 2013, namely section 168.

Provisions of Companies Act, 2013

The following are the salient points of section 168 of the Companies Act, 2013 read with rules 15, 16 of the Companies (Appointment and Qualification of Directors) Rules, 2014 which took effect from 01.04.2014:-

i. A director has a choice to resign from his office;
ii. If he chooses to resign he has to give notice in writing;
iii. The notice must be given to the company through the board of directors;
iv. On receipt of such notice the board shall **take note** of the same;
v. The Company has to intimate the RoC within 30 days from the date of receipt in e-Form DIR-12;
vi. If the Company has any website, it has to post the information on it;
vii. The director concerned, at his option may, forward a copy of the notice of his resignation along with detailed reasons for the resignation to the RoC within 30 days of resignation in e-Form DIR-11; Of course, filing of Form No.11 by the director is not mandatory but only optional now.
viii. The Board should place the fact of such resignation in their report laid in the immediately following general meeting of the company. It is presumed that there is a drafting error to the extent that the meeting referred here should be annual general meeting since there is no requirement under the Companies Act, 2013, for placing the director's report in every general meeting other than the annual general meeting.
ix. The resignation of the director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.
x. However, the director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure.
xi. Where all directors of a company resign, the promoter or in his absence, the Central Government can appoint the required number of directors till new directors are appointed in a general meeting.

For the attention of credit managers

The above points are mainly meant for the company and the director who resigns. However, the credit manager should take note of the following:

a) It is the director's choice to resign. Neither the board nor the banker can prevent him from resigning. The board has only to note his resignation. There is no need for the board to accept his resignation. The board cannot also refuse to accept his resignation. Resignation of a director is unilateral action and not bilateral. Since under the Companies Act, 1956, there was no provision as to resignation of the directors, the AoA of the company sometimes used to provide a clause that the resignation would become effective only on the acceptance of the resignation by the board. Since the 2013 Act has explicitly mentioned that the resignation will take effect as provided in (ix) above, Articles now cannot provide otherwise. This is true even in the case of a promoter director. However, if the promoter director has resigned and also simultaneously transferred all his shares or significant portion of it, then it is a cause for concern to the banker since it may result in change in management. Even in that case the remedy available to the banker is only to take recourse to the contractual obligations stipulated in the sanction letter wherein there is generally a clause stating that the NoC is required from the bank for the change in the management. At best, the bank can sue the company for the violation of the terms of contract under the Indian Contract Act and simultaneously recall the loan.

b) The credit manager would do well to inspect the records of the RoC on the MCA site in e-form DIR-11, if at all filed by the director concerned, to ascertain the reasons for the director's resignation since it would throw light on any possible mismanagement in the company. For example, if the director who has resigned states that the company has siphoned off monies and hence he does not want to be a party to it. However, it is to be noted that since filing of DIR-11 by the director who resigns has been made optional now it may not be available on the MCA. But still the credit manager can ascertain from the Board the reasons for the director's resignation.

c) Similarly, it is a cause for grave concern if all the directors have resigned suggesting change in management.

d) The credit manager should also keep track of the directors' report as and when filed by the company with the RoC to ascertain any further relevant information is available to know the reasons for the director having resigned.

It goes without saying that the personal guarantee, if any, executed by the director who has resigned continues to bind him on all the liabilities of the company towards the bank even after his resignation till the bank relieves him of the guarantee.

Conclusion:

Corporate governance is the mantra of good corporates. Board of directors have the responsibility to follow the principles of good corporate governance. Keeping an eye on the constitution and changes in the board of directors of the assisted company will surely give early warning signals to the credit manager.

Do You Know?

- Company incorporation touched a seven year high of 16,487 in July according to data from the Ministry of Corporate Affairs. The figure is a 50% increase from a year earlier.
- Filings for new company registrations continue to rise in August.
- Company incorporations more than doubled to 10,954 in June from 4,835 in May. The increase was due to initiatives such as the SPICE+ form for online name reservation and company registration introduced in February via the MCA21 platform.

Secretarial Audit of Borrower Companies - Importance for Banks

Sidharath Jain
SR Srinivasan & Co LLP

Generally, when lenders take a decision on sanctioning of credit facilities to corporate clients, they go by a defined check-list for various parameters to assess the risk factors. Past track record, industry perception, commercial viability, financial strength of the promoter, etc. are the major factors that get the prime importance.

However, from a compliance perspective, the very existence of an organization could be under threat, leave alone commercial viability or financial feasibility, if an essential compliance is overlooked. Take for example, in the recent case of **Vedanta Limited vs State of Tamil Nadu &Ors. judgment**, the Hon'ble Madras High Court has ordered closure of the unit with the following observations: Closure and permanent sealing of the Sterlite Copper smelter is just and proper as the unit operated for 16 years and 92 days without obtaining mandatory valid consent from Tamil Nadu Pollution Control Board, and for 10 years, 2 months and 15 days without a valid hazardous waste management authorization. Hence, **such judgment puts a halt to the operations of the company which affects the very existence of a company, thereby seriously affecting lenders and various stakeholders.**

In this regard, the Secretarial Audit Report along with the Due Diligence report is being preferred by many of the bankers to enable them to understand the position of the company with respect to various compliances. The secretarial audit reports under Section 204 of the Companies Act, 2013 cover the position of a company in all respects and under the applicable laws.

Applicability of Secretarial Audit is limited to public companies having a paid-up share capital of Rs. 50 Crores or more or public companies having turnover of Rs. 250 Crores or more, and hence the scope of such reports did not cover the private companies which indeed have vast borrowings. It would be pertinent to highlight here that the Government widened the scope of secretarial audit by bringing in an amendment w.e.f. 01.04.2020 that every company (including private companies) having a borrowing of Rs. 100 crores or more from banks or public financial institutions should also be subjected to secretarial audit.

The secretarial audit covers vast gamut of compliances in the entire landscape in which the company operates;

1. To verify and report on compliances under Companies Act,2013 and Secretarial Standards;
2. To verify and report on compliances of all applicable laws majorly focusing on Labour laws, Industrial Laws, Environmental Laws and Industry specific Laws;

Thus, protecting the interest of various stakeholders i.e. the customers, employees, shareholders, society, etc. and avoiding unwarranted legal actions/penalties by law enforcement agencies and other persons as well.

Corporate governance is the buzz word for the sustained existence of a corporate. While lenders should take all care to check on the corporate governance track record of their borrowers it would be interesting to note that RBI has come out with a discussion paper on 11.6.2020 even for banks and financial institutions to have proper corporate governance system highlighting its importance.

A proper secretarial audit of a corporate borrowers (be it a private limited company or public limited company) would give a wholesome picture of its standing from compliance perspective which is the very foundation for the existence of the company. In our view, this exercise should be done periodically for every corporate borrower to avoid future risks, keeping the interest of the lenders in mind.

Public Credit Registry

M.S. Elamathi & R. Charu Latha
Legal Team, CGRF

Introduction

Public Credit Registry (PCR) is a web-based initiative of the Reserve Bank of India (RBI) to capture an extensive database of credit information of borrowers which is accessible by all lending and credit decision making institutions.

A Public Credit Registry (PCR) is an information repository where all information about existing as well as new borrowers is stored. This includes both corporate as well as retail borrowers. The idea is to capture all relevant information in a single large database on both the outstanding loans and repayment history of an entity/corporate/individual.

PCR differs from the Credit Information Bureau (CIBIL) regulated by RBI and Central Repository of Information on Large Credits in the aspect of the recording of information and making the information public.

The need for and scope of PCR

RBI in 2014 constituted a High Level Task Force (hereinafter referred to as 'Task force') to assess the need and scope of setting Public Credit Registry in India. Currently, there are both public and private entities storing credit data. The force had identified certain drawbacks in the functioning of the same which include –

- data stored is not comprehensive and is fragmented across different entities
- Data has to be cross-validated
- time lags and discrepancies between multiple sources of information.

In order to overcome these drawbacks, the Task force had recommended the initiation of a Public Credit Registry where transparency could be observed in the credit markets which would help in removing information asymmetry and improving access to credit.

The PCR will also include data from entities like market regulator SEBI, Ministry of Corporate Affairs, Goods and Service Tax Network (GSTN) and the Insolvency and Bankruptcy Board of India (IBBI) to enable the banks and financial institutions to get a 360-degree profile of existing and prospective borrowers on a real-time basis. The entire registry will be open for inspection to all the stakeholders including borrowers, banks, and investors.

What are the benefits of PCR?

1. Reduction in the number of credit risk and the risk of new loans turning into NPAs as the bankers would be aware of the credit history of the borrower.
2. The ease of doing business shall improve with full coverage of the credit market ensured by mandatory reporting.
3. It would create a level playing field in the financial markets. Borrowers can now approach lenders with reliable credit information. Such a level playing field will make it nearly impossible for banks to discriminate between different sizes of borrowers.
4. Banks can personalise credit decisions and negotiations to favour the good borrowers and be strict towards defaulters.
5. Instead of generalised industry information, specific information on the collateral valuation of the borrower will help banks in rationalising the credit and security decisions.

(Image Source: Website)

Conclusion

Access to credit information, including debt details and repayment history would drive innovation in lending. With satisfactory payment history and validated debt details made available, there will be an increase in credit availability to enterprises along with the deepening of the financial markets. This will support the policy of financial inclusion.

Tata Consultancy Services and Dun & Bradstreet were identified as the L1 and L2 bidders respectively, to implement the project. Finally the contract has been awarded to Tata Consultancy Ltd. for a value of Rs. 349.92 Crores to be implemented over a period of 8 years.

FinTech for Banks

M.S. Elamathi & R. Charu Latha
Legal Team

Introduction

Fintech is the term used to refer to innovations in the financial and technology crossover space, and typically refers to companies or services that use technology to provide financial services to businesses or consumers.

The use of modern technologies in NBFCs and banks allows them to develop products that offer customers more at lower prices. In the past, product options were limited, and this was followed by strict policies that made the customer dissatisfied and annoyed with the banking system. Now financial institutions have a better understanding of clients and offer or recommend choices based on their actual requirements and needs. One such effort taken by the banking sector is to use technological advancements to reach out to the customers and thus, introduced the new framework namely FinTech.

Opportunities for the banking sector to utilize Artificial Intelligence

Adaptation to the latest technology is a daily necessity but the key feature of a successful business is to deliver services or products according to the market needs. FinTech firms are tailoring themselves to the needs of evolving markets. Unlike traditional banking, FinTech is growing fast with optimal use of big data, artificial intelligence, and predictive intelligence. These latest technologies have become an integral part of FinTech firms and their role is not only to develop customised business solutions but also to play a key role in protecting customer personal information and ensuring the security of FinTech's financial assets. The use of Artificial Intelligence in the financial sector is multifold.

- **Enhanced quality of data -** Right from collection to sorting and filtering complex and cumbersome calculations. It saves a large amount of manpower and yields higher accuracy in data. It can also play a role in maintaining error-free and updated records.
- **Fraud Prevention** - Preventing financial frauds and data robberies are two key areas where AI has been a game changer for financial institutions.
- **Customized Marketing Strategies** - helps in developing and executing strategies based on data analysis and research which shall be free from human bias.

Risks faced by FinTech

In the present scenario, sensitive information collected by apps from its users is the most valuable thing. With the spread of FinTech nationwide and there is an increase in the amount of personal data including financial, health, and social data of the user stored online, things like data ubiquity, data security are becoming a major challenge for the FinTech industry. Fintech firms would have to inform their customers on the threats and how to stay secure against ransomware and other fraud.

Technical and legal measures in this regard are to be strengthened. Options of cybersecurity concepts like data labelling, selective data sharing, and identity-aware data shareholding can be the solutions to various risk-related problems for this space.

(Image Source: Website)

Impact of COVID-19

Fintech startups have influenced other finance domains, be it savings, insurance, or financial planning, considerably, beginning with banking. During the Pre- COVID phase it was safe to physically visit the banks and other offices. Clients are to be given confidence that virtual commodity banks use a real-time face. It was hard for bankers to convince clients to use the upgraded technology while the transaction involved significant amounts of money. However, with the outbreak of the pandemic the tables have turned around. Senior citizens, being more vulnerable to coronavirus, can make use of the Fintech startups which could customize the service to the desires of this demographic group.

To recover from the economic impacts caused by pandemic, people and small businesses including the new to credit (NTC) customers will avail affordable and personalized loans. While the banks focus mostly on the standard parameters such as salary, credit scores, etc the above mentioned category who lack in having any credit history fails to qualify. It is when the FinTech lenders play a major role by adopting a more agile and innovative approach and look for more alternative data points.

The digital lending platforms can pitch in by looking into alternative data collections that will help in identifying the potential credit risks and reducing the dependency on financial documents. Though this may result in increased risk of frauds, defaults and other credit risks, it can be overcome by adopting cutting-edge technologies like artificial intelligence, machine learning and big data analytics.

Conclusion

Internet is the backbone for the advent of innovation in technology. As the access to the internet becomes wider and stronger across the country, adoption rates will increase and new solutions will come up. By introducing non-traditional sources of credit to a credit-starved population and small businesses, FinTech lenders can help people get easy access to capital.

Digital technologies create a faster, safer, and more efficient lending ecosystem, which can protect the interests of both the borrowers and the lenders. India's robust digital lending ecosystem has the potential to participate in economic progress.

The financial crisis gave us an entirely new ecosystem of financial products. It will be interesting to find out what this one would throw up, but what is sure is that technology will play an ever-increasing role in our finances and lives.

Do You Know?

Over 3 Lakh Micro, Small, and Medium Enterprises (MSMEs) have registered in nearly two steps registration process on the '**UDYAM'** portal.

Secretary in the MSME Ministry Mr. A K Sharma had stated that "more than 3 lakh registrations have taken place in July and August and now the speed is going up."

In a webinar organised by Confederation of Indian Industry (CII) he further said that the Fund of Funds scheme will soon be rolled out.

> "The other scheme we are working on is the Fund of Funds scheme, most of the formalities are over and in a very short while we will go to the market and invite private equity funds and venture capital funds"

Covid 19 and Assistance to Micro Small and Medium Enterprises and Small Business Ventures

N. Nageswaran
Insolvency Professional

During the outbreak of the Covid19 pandemic very often we heard across the world two phrases being used – "tested positive" and "assistance to small business establishments". The importance of assistance to small businesses was felt across all the economies – whether they are developed, developing our underdeveloped. The World Economic Forum stepped in to analyse the situation level of assistance provided to SMEs.

It will be a surprise to know that even before the outbreak of Covid-19, less than 15% of SMEs in fast-growing economies had access to the credit they needed to grow; constraining economies and hampering job and wealth creation. According to the International Finance Corporation (IFC), the unmet financing need of SMEs in these markets is a staggering USD 5.2 trillion every year (about Rs. 350 lac crores). Now it is clear as to why every country looked into financing this gap as this is anticipated to widen significantly following the COVID-19 pandemic with the units in this sector likely to lose whatever little security they had to offer.

In India, the MSME sector is called the growth engine of the country with about 5.6 crores units employing close to 12.4 crores of people. It is found to be contributing about 8% of GDP and 45% of the merchandise exports. It is also known as the cause for equal development of different regions of the country.

We know enough about the special schemes and programmes which were being announced by Govt. of India to mitigate the pains of the Micro, Small, and Medium (MSME) sector post-outbreak of Covid-19 pandemic. The most important announcement was to change the definition of MSME paving way for entry of more number of units to get covered. The new definition eliminated the difference between manufacturing and services units and also brought in the parameter of turnover in addition to the existing one of investments in plant and machinery. The government was also aware that though the financial institutions were flushed with funds but could not take the risk of extending finance to MSME

sectors for want of securitisation. To remove this logjam, the government announced that it would backstop banks up to Rs. 3 lakh crores of their finance to this sector collateral-free. Additional measures such as lower interest rate, a moratorium on repayment, etc were also announced.

Now let us dwell upon a little more on how different countries have engaged themselves in addressing the problems of the SME sector each one in their own unique way.

The Singapore way:

1. A rebate of corporate tax payable in the assessment year 2020 to the extent of 25% of tax payable upto Sing $ 15000.
2. Automatic Deferment of Tax payable for the period of Covid 19.
3. Temporary relief by the postponement of contractual obligations such as lease rentals, payment of installments for secured loans, etc for the above period to provide temporary cash flow relief for the businesses.
4. Property tax rebates for commercial properties to the landlords with a condition that it should be passed on to its tenants in full.
5. Temporary collateral-free bridge loan for SMEs financing their working capital requirements upto S$ 50 lacs at 5% with a repayment period of 5 years guaranteed by the government.
6. Operational cash flow loans upto S$ 1 million repayable in 5 years against the guarantee of the government.
7. Low-cost funding to participating financial institutions for the above purposes.
8. Trade loans upto S$ 10 million against inventories repayable in one year.

The South African way:

A survey conducted found that three out of four small business owners, across industries, indicated that their business will not survive prolonged lockdown restrictions beyond 1 July 2020.

According to the survey, many small businesses appear to be either passive or untrusting of the Covid-19 relief options available to them – less than half of the business owners surveyed have applied for relief from the government, banks, or other financial institutions. Of those that have applied, 68% were unsuccessful in their applications.

The New Zealand Way:

Apart from addressing the problems about financing the manufacturing and services units in SME sector, in New Zealand, considering the importance of continuing the R&D activities for a long term sustained growth of the sector, a special scheme called Callaghan Innovation's R&D Loan to help businesses continue their research and development activities impacted by COVID-19 is launched.

Details of the loans include:

- up to $400,000 to support planned eligible R&D activity
- interest-free if the loan is paid back in full within a year
- 3% interest from the start of the loan
- repayments not required for the first three years
- Maximum loan period of 10 years.

The Australian way:

The most important point to be noted is that the schemes announced covered a self-employed or a venture which provided indirect employment opportunities for others were also covered. A study of all the schemes reveal that on a non-repayable model, tax-free funds were put in the hands of people, whether they are employer or employee to have a sustenance living.

The German Way:

Apart from all other usual assistance in the form of direct and indirect monetary assistance, SMEs based in Germany can apply for financial support from the federal government for availing consultancy services. The consulting firms with good track records were encouraged to extend their consultancy to the respective SMEs to fight the financial stress.

It is also to be noted that apart from fixing the requirement of a track record for the enterprises which applied for assistance, the authorities were clear that there was no requirement of a risk assessment by the lending banks and it was made clear that they should go based on a self-declaration by the applicants for the assistance.

The Japanese way

According to statistics made available by the Ministry of Economy, Trade, and Industry 99.7% of companies in Japan fall into the category of Small and Medium-sized Enterprises (SMEs). Hence while proposing the financial package, the Government of Japan declared a state of emergency as well.

The Government declared that the economic packages would be available for non-Japanese companies with Japanese subsidiaries as well.

The Canadian way

The Canadian government brought in the expertise that was available with its organisation called Export Development Canada (EDC) though it made it clear that all the Small Business Enterprises, irrespective of the fact that they sell within Canada or internationally would be benefitted. Particular attention was given to Women in trade and their business requirements during Covid 19 pandemic.

The UK way

Naming it as a Bounce Back Loan, Small Business Ventures were made eligible for loans upto GBP 50000 subject to a maximum of 25% of their turnover with the interest for the first year to the government's account. In 2018, Parliament identified 5.7 million SMEs, making up 99% of all businesses in the country. Hence support to this segment of the trade was considered very important.

The USA way

The SME sector was found to be employing closer to 60 million people in the United States, or about 48 % of the total private-sector workforce. Their GDP contribution measured about USD 6 trillion though this data is quite old (for 2014). Nevertheless, in this most developed country also it was a recognised fact that SME is an important sector both by way of contribution to the GDP and employment generation.
Some of the financial assistance programmes are:

1. Paycheck Protection Programme for taking up the burden paying idle employees and at the same time a labour welfare measure;
2. Economic Injury Disaster Loan Emergency advance

An important provision in all the special schemes which are announced is that a borrower can ask for a write off upto USD 10000 and the advances availed can be repaid over 20 years at a competitive rate of interest.

Conclusion

The various initiatives and measures outlined above taken by various countries highlight how the governments continued their commitment to support SMEs during the ongoing COVID-19 pandemic.

The COVID Conundrum for RBI and the Government

CGRF Research Bureau

The readers may be aware that a 6-month moratorium was offered by banks to the borrowers considering their plight due to Covid-19 pandemic. The initial moratorium of 3 months (March-May 2020) was later extended by another 3 months upto August 2020.

Interestingly, many of the borrowers realised that they would have to shell out more EMIs if they opt for the moratorium as it would just postpone the payments with no relief on the interest liability. Further, interest will accrue on the interest unpaid during the moratorium period, adding to the burden of the borrowers. This issue went before the Supreme Court. The Government and RBI were putting forth the views that the lenders cannot waive the interest dues as it would cost a bomb to the bankers who play with depositors' money. Supreme Court was more concerned about the calamitous effect of the pandemic on the borrowers as livelihoods were being destroyed due to complete lockdowns. In a hearing held recently, the Union Government informed the Supreme Court that the loan moratorium introduced during the lockdown period is extendable to two years, referring to the RBI Circular dated 6th August 2020.

As the matter is subjudice, it would be unwise to count the chicken before they are hatched.

Nevertheless, it would be worthwhile to know a few perspectives. Here's an editorial by the Economic Times, dated 1st Sept. 2020 which articulates the plight of bankers as well.

"Leave Interest Rates to Government and RBI"

"The Supreme Court is wrong to push the Centre on interest rate waiver on bank loans, on the servicing of which a moratorium has already been granted by banking regulator Reserve Bank of India (RBI). The apex court should not step in to arbitrate on policy decisions that are based on economic judgements of the government and the RBI. Reportedly, the petitioner has sought the court's direction for an interest waiver, saying that deferment of interest payments would not solve the problem of borrowers hit by the economic crisis as accumulated interest would pile up when the moratorium ends. The SC should not even admit petitions on such matters unless there is a constitutional or legal principle at stake."

"Loans are a form of capital that need to be serviced, regardless of the borrower's profitability. Equity, on the other hand, is a form of capital that needs to be serviced only when profits are made. …."

"RBI has said that it would be imprudent to go for a forced waiver risking the financial viability of the banks. After all, how can banks pay interest to their depositors unless borrowers pay interest on their loans? Breaking off a link in the chain will impair the financial system that hinges on debts being honoured and serviced. Banks are already saddled with bad loans and in no position to absorb any extra costs. A subsidy to meet the interest payment on loans is not a viable option either, as government finances are in bad shape. It is for the executive to find the right solutions."

RBI Circular on Resolution Framework for COVID 19 Related Stress

CGRF Research Bureau

On August 6, 2020, the Reserve Bank of India issued a circular on 'Resolution Framework for COVID-19 related Stress' ("Resolution Framework") providing for a resolution window under the existing RBI (Prudential Framework for Resolution of Stressed Assets) Directions 2019, dated June 7, 2019 ("Prudential Framework"), with a view to mitigate the financial stress faced by borrowers on account of the economic fallout of the COVID-19 pandemic.

The Prudential Framework provides for recognising incipient stress in loan accounts and a principle-based resolution framework for addressing such defaults in a normal scenario. However, any concession offered to a borrower under such a resolution framework leads to a downgrade in the asset classification of the borrower's account, except in case of change in ownership in the prescribed manner.

Keeping in mind the significant risks posed to the financial stability of the borrowers in these unprecedented times, the RBI has introduced the Resolution Framework to enable lenders to implement a resolution plan in respect of eligible borrowers without change in ownership, including personal loans, while classifying such exposures as 'standard' subject to the prescribed conditions. The reference date for the outstanding amount of debt that can be considered for resolution under the Resolution Framework shall be March 1, 2020.

Given that the Prudential Framework is applicable to only certain specified categories of lending institutions, the applicability of the Resolution Framework has been broadened to include all Commercial Banks, Primary (Urban) Co-Operative Banks/State Co-Operative Banks/ District Central Co-Operative Banks, All-India Financial Institutions and Non-Banking Financial Companies (including Housing Finance Companies) ("Lenders"). Accordingly, exposures of lending institutions not covered by the Prudential Framework will also be included for any resolution under the Resolution Framework.

It is to note that all the norms as applicable to implementation of a resolution plan and the specific implementation conditions as set out in the Prudential Framework, shall continue to be applicable to any resolution plan implemented under the Resolution Framework.

Disclosure to be made in a Company's website as per the provisions of Companies Act, 2013 and Rules made thereunder which are applicable for different types of Companies and events

E. Gunaseelan

There has been increasing disclosure requirements under various laws. Transparency is the mantra in good corporate governance. I have attempted and consolidated the website disclosure requirements under Companies Act, 2013. This is part 2 continued from the last issue.

13	Rule 37	Incorporation	Conversion of Unlimited Liability Company into a Limited Liability Company by Shares or Guarantee	(2)The Company shall within seven days from the date of passing of the special resolution in a general meeting, publish a notice, in Form No. INC-27A of such proposed conversion in two newspapers (one in English and one in vernacular language) in the district in which the registered office of the company is situate and shall also place the same on the website of the Company, if any, indicating clearly the proposal of conversion of the company into a company limited by shares or guarantee, and seeking objections if any, from the persons interested in its affairs to such conversion and cause a copy of such notice to be dispatched to its creditors and debentures holders made as on the date of notice of the general meeting by registered post or by speed post or through courier with proof of dispatch. The notice shall also state that the objections, if any, may be intimated to the Registrar and to the company within twenty-one days of the date of publication of the notice, duly indicating nature of interest and grounds of opposition.
14	Rule 10(1)	Management and Administration	Closure of Register of Members or Debenture Holders or Other Security Holders	A company closing the register of members or the register of debenture holders or the register of other security holders shall give at least seven days previous notice and in such manner, as may be specified by Securities and Exchange Board of India, if such company is a listed company or intends to get its securities listed, by advertisement at least once in a vernacular newspaper in the principal vernacular language of the district and having a wide circulation in the place where the registered office of the company is situated, and at least once in English language in an English newspaper circulating in that district and having wide circulation in the place where the registered office of the company is situated and publish the notice on the website as may be notified by the Central Government and on the website, if any, of the Company
15	Rule 4(2) & (3)	Acceptance of Deposits	Form and Particulars of Advertisements or Circulars	Every eligible company intending to invite deposits shall issue a circular in the form of an advertisement in Form DPT-1 for the purpose in English language in an English newspaper having country wide circulation and in vernacular language in a vernacular newspaper having wide circulation in the State in which the registered office of the company is situated, and shall also place such circular on the website of the company, if any." Every company inviting deposits from the public shall upload a copy of the circular on its website, if any.

16	Rule 18(3)	Management and Administration	Notice of the Meeting	The notice of the general meeting of the company shall be simultaneously placed on the website of the company if any and on the website as may be notified by the Central Government
17	Rule 20	Management and Administration	Voting through Electronic Means	4. c. ii. the notice shall also be placed on the website, if any, of the company and of the agency forthwith after it is sent to the members; g. website address of the company, if any, and of the agency where notice of the meeting is displayed h. name, designation, address, email id and phone number of the person responsible to address the grievances connected with facility for voting by electronic means: Provided that the public notice shall be placed on the website of the company, if any, and of the agency
18	Rule 22(4) and (13)	Management and Administration	Procedure to be Followed for Conducting Business Through Postal Ballot	(4) The notice of the postal ballot shall also be placed on the website of the company forthwith after the notice is sent to the members and such notice shall remain on such website till the last date for receipt of the postal ballots from the members. (13) The results shall be declared by placing it, along with the scrutinizer's report, on the website of the company.
19	Rule 23(4)	Management and Administration	Special Notice	(4) Where it is not practicable to give the notice in the same manner as it gives notice of any general meetings, the notice shall be published in English language in English newspaper and in vernacular language in a vernacular newspaper, both having wide circulation in the State where the registered office of the Company is situated and such notice shall also be posted on the website, if any, of the Company.
20	Rule 13	Appointment and Qualification of Directors	Notice of Candidate of a Person for Directorship	The company shall, at least seven days before the general meeting, inform its members of the candidature of a person for the office of a director or the intention of a member to propose such person as a candidate for that office- (1) by serving individual notices, on the members through electronic mode to such members who have provided their email addresses to the company for communication purposes, and in writing to all other members; and (2) by placing notice of such candidature or intention on the website of the company, if any:
21	Rule 15	Appointment and Qualification of Directors	Notice of Resignation of Director	The company shall within thirty days from the date of receipt of notice of resignation from a director, intimate the Registrar in Form DIR-12 and post the information on its website, if any.
22	Rule 35	National Company Law Tribunal	Advertisement Detailing Petition	(3) Where the advertisement is being given by the company, then the same may also be placed on the website of the company, if any.

23	Rule 87 (1)	National Company Law Tribunal	Publication of Notice	(b) requiring the company to place the public notice on the website of such company, if any, in addition to publication of such public notice in newspaper under sub-clause (a): Provided that such notice shall also be placed on the websites of the Tribunal and the Ministry of Corporate Affairs, the concerned Registrar of Companies and in respect of a listed company on the website of the concerned stock exchange where the company has any of its securities listed, until the application is disposed of by the Tribunal.
24	Rule 7	Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund)	Refund to claimants from Fund	(2A) Every company which has deposited the amount to the Fund shall nominate a Nodal Officer for the purpose of coordination with IEPF Authority and communicate the contact details of the Nodal Officer duly indicating his or her designation, postal address, telephone and mobile number and company authorized e-mail ID to the IEPF Authority, within fifteen days from the date of publication of these rules and the company shall display the name of Nodal Officer and his e-mail ID on its website. ”
25	Rule 7	Compromises, Arrangements and Amalgamations	Advertisement of Notice of the Meeting	The notice of the meeting under sub-section (3) of section 230 of the Act shall be advertised in Form No. CAA.2 in at least one English newspaper and in at least one vernacular newspaper having wide circulation in the state in which the registered office of the company is situated, or such newspaper as may be directed by the Tribunal and shall also be placed, not less than thirty days before the date fixed for the meeting, on the website of the company of the SEBI and the recognized stock exchange where the securities of the company are listed: Provide that where separate meetings of classes of creditors or members are to be held, a joint advertisement for such meetings may be given.
26	Rule 3	The National Company Law Tribunal (Procedure for reduction of share capital of Company)	Issue of notice and directions by the National Company Law Tribunal	The Tribunal shall along with directions under sub-rule (1) give directions for the notice to be published, in Form No. RSC-4 within seven days from the date on which the directions are given, in English language in a leading English newspaper and in a leading vernacular language newspaper, both having wide circulation in the State in which the registered office of the company is situated, or such newspapers as may be directed by the Tribunal and for uploading on the website of the company (if any) seeking objections from the creditors and intimating about the date of hearing.
27	Rule 7	Removal of Name of Companies from the Register of Companies	Manner of Publication of Notice	(1) The notice under sub-section (1) or sub-section (2) of section 248 shall be in Form STK 5 or STK 6, as the case may be, and be- i. placed on the official website of the Ministry of Corporate Affairs on a separate link established on such website in this regard; ii. published in the Official Gazette; iii. Published in English language in a leading English newspaper and at least once in vernacular language in a leading vernacular language newspaper, both having wide circulation in the State in which the registered office of the company is situated. Provided that in case of any application made under sub-section (2) of section 248 of the Act, the company shall also place the application on its website, if any, till the disposal of the application.
28	Sec. 149(8) Schedule IV	Code for Independent Directors		The company and independent directors shall abide by the provisions specified in Schedule IV. & The terms and conditions of appointment of independent directors shall also be posted on the company’s website.

Covid -19 spending gets into CSR Policy

Harsha Gulecha
Company Secretary

MCA Vide its notifications dated 24th August, 2020 has amended the Companies (CSR Policy) Rules, 2014 and Schedule VII of the Companies Act, 2013 to provide benefit to more entities engaged in research and development.

The Covid-19 outbreak in March turned the world upside down and with all hopes pinned on a vaccine, the MCA had announced that spending of CSR funds for Covid-19 related activities would be treated as eligible CSR activity. Now, it has gone a step further to even treat the R&D spent on Covid-19 vaccines, drugs and medical devices as eligible CSR expenses.

As per Companies Act, 2013 every Company with a net worth of Rs. 500 Crores or more, or turnover of Rs. 1,000 Crores or more, or net profit of Rs. 5 Crores or more in the immediately preceding financial year, to mandatorily spend 2% of average net profit of the preceding three years on CSR.

The MCA has amended the CSR Rules 2014 to allow the companies to bring R&D expenditure on new vaccine, drugs and medical devices development for the financial years of 2020-21, 2021-22 and 2022-23 as part of their 'CSR policy'. In effect, such expenditure can be considered as 'CSR activity' subject to the **CONDITIONS** that –

(i) such research and development activities shall be carried out in **collaboration with any of the institutes or organizations** mentioned in item (ix) of Schedule VII to the Act.

(ii) **details of such activity shall be disclosed separately in the Annual Report** on CSR included in the Board's Report".

The government has specified broad areas of mandatory CSR spending in Schedule VII.

Accordingly, contributions to Incubators or R&D projects in the field of science, technology, engineering and medicine, funded by the Central or State Governments or any Public Sector Undertaking or any agency of the Central Government or State Government & also the following would be counted under CSR:-

- Contributions to public funded Universities;
- Indian Institute of Technology (IITs);
- National Laboratories and autonomous bodies established under Department of Atomic Energy (DAE);
- Department of Biotechnology (DBT);
- Department of Science and Technology (DST);
- Department of Pharmaceuticals;
- Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy (AYUSH);
- Ministry of Electronics and Information Technology and other bodies, namely Defense Research and Development Organisation (DRDO);
- Indian Council of Agricultural Research (ICAR);
- Indian Council of Medical Research (ICMR) and Council of Scientific and Industrial Research (CSIR),
- Institutions engaged in conducting research in science, technology, engineering and medicine aimed at promoting Sustainable Development Goals (SDGs)".

(Image Source: Website)

The latest MCA initiative would assist in providing necessary fiscal relief to companies engaged in research activities for development of Covid-19 vaccine as they would be able to adjust their research related expenses towards their CSR obligation and this has also widened the scope of CSR giving and spending especially for research in science, technology, engineering and medicine aimed at promoting Sustainable Development Goals (SDGs).

FAQs on Dissenting Financial Creditors in a CIRP

S. Rajendran, Insolvency Professional
R.V. Yajura Devi, Advocate


Preamble

While a Resolution Plan is put to vote in a meeting of the Committee of Creditors, the financial creditors who are members of the CoC may cast their vote either for the resolution plan or against the resolution plan. When a financial creditor is casting his vote dissenting for the resolution plan, they are called dissenting financial creditors. In this context, a few questions are often raised to know the status of the dissenting financial creditors. An attempt is made by the author to give clarifications:

Q1: Is there any definition for a dissenting financial creditor?

A1: Well, yes there was one. The concept of dissenting financial creditor has evolved over time. When the Code came into effect, the Regulations contained the definition of a dissenting financial creditor which stood as, "a financial creditor, who voted against the resolution plan approved by the Committee." Reg. 2(f) of IBBI (IRPCP) Regulations, vide a notification dated 31st Dec. 2017, substituted the definition as, "a *financial creditor, who voted against the resolution plan or abstained from voting for the resolution plan, approved by the committee."* Now the concept can be seen in Sec. 30 of IBC, elaborated in A7 below.

Q2: Do you mean that this definition is no more valid?

A2: Yes. The aforementioned definition has also been omitted vide notification dated 5th Oct., 2018.

Q3: But still, there could be dissenting financial creditors in a resolution process, isn't it?

A3: Yes, of course. IBC has addressed their cause notwithstanding omitting the definition for a dissenting financial creditor. The word "dissenting" is conspicuous by its absence in the Code as well as Regulations.

Q4: As a dissenting financial creditor, am I entitled to any special privilege in a resolution process?

A4: Good question!! Well, to be frank, there was a special privilege to a dissenting financial creditor. Reg.38(1) as it existed prior to amendment provided that "a resolution plan shall identify specific sources of funds that will be used to pay the liquidation value due to dissenting financial creditors and provide that such payment is made before any recoveries are made by the financial creditors who voted in favour of the resolution plan."

Q5: OK, this provision does not exist now?

A5: Yes, this particular provision has also been omitted. It's worthwhile to note that the Reg.38(1) as it stood prior to amendment also carried a similar provision for payment of liquidation value due to operational creditors in priority to payment to any financial creditor and also that the operational creditors should be paid before the expiry of 30 days after the approval of the resolution plan. Even this provision also has been amended. Therefore, with effect from 5th Oct. 2018, the amended Reg.38 (1) simply says:

"The amount due to the operational creditors under a resolution plan shall be given priority in payment over financial creditors."

Q6: Fine, but what is my position as dissenting financial creditor?

A6: Newly inserted Reg.38 (1A) states that "A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders, including financial creditors and operational creditors of the corporate debtor." That's all. It doesn't specifically say how a dissenting financial creditor should be dealt with.

Q7: That means I have no place to go if I say "No" to a resolution plan?

A7: Well, don't get overly worried. The amended provisions of Sec.30 of IBC address the cause of dissenting financial creditors. In this context, the term used in the Code is *"financial creditors who do not vote in favour of the resolution plan" and not "dissenting financial creditors".*

The amended provisions of Sec.30(2) of IBC are given below:

"The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –

a) Provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;

b) Provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than –

i) The amount to be paid to such creditors in the event of liquidation of the corporate debtor under Sec.53; or

ii) The amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in Sec.53(1), whichever is higher; and ;

Provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with Sec.53(1) in the event of a liquidation of the corporate debtor.

Explanation 1: For the removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors……"

Q8: My God, it's a pretty long provision. Can you please summarise?

A8: Let me make it simple. It's the same position with regard to the minimum amount payable to dissenting financial creditors – i.e. the amount payable to financial creditors in the event of liquidation of the corporate debtor. But, the priority in payment over assenting financial creditors has gone.

Q9: If that's the case, is there any point in saying "No" to a resolution plan?

A9: Well, it's your call. By the way, there are resolution plans which provide for plan amount much lower than liquidation value. In those cases, the above provision will be handy inasmuch as at least the liquidation value payable to financial creditors should be paid to dissenting financial creditors.

Q10: Tell me one thing…In such a situation of plan value being lower than liquidation value, could there be a situation of other financial creditors wanting to approve the resolution?

A10: It's quite possible. Financial creditors, who would like to sign off with whatever recovery coming their way, may like to move forward by approving the resolution plan. It's an interplay or a trade-off between resolution and liquidation. Such cases could be few, far and between.

Q11: Can a resolution applicant have the liberty to say that he shall not pay anything more than liquidation value to a dissenting financial creditor?

A11: The amended provisions of Section 30 of the IBC only talks about the minimum payment to financial creditors who do not vote in favour of the resolution plan, which shall not be less than the amount to be paid to such creditors in accordance with Sec. 53(1) in the event of a liquidation of the Corporate Debtor.

Q12: Do you mean to say the resolution applicant can indirectly put pressure on the financial creditors not to say "No"?

A12: Well, we believe that's not the intent of law. However, it is pertinent to note that the words used therein are "*at least*".Therefore we can derive the intention and the objective the amendment seeks to achieve, is to ensure *"at least"* the minimum guaranteed amount is provided to such creditors and not to provide leverage to the Resolution Applicant to propose a Resolution Plan that may force the Creditors to vote in favour of the Resolution Plan.

A situation came up in *Binani Industries Limited V. Bank of Baroda & Anr. (NCLAT)* wherein, the Resolution Applicant had proposed a plan which provided differential treatment with regard to terms of repayment of their dues, for Financial creditors forming same class of creditors. It was observed by the Hon'ble NCLAT that although the plan was approved certain CoC members voted in favour recording a protest note(s) that they were forced to vote in favour of the 'Resolution Plan' as the 'Resolution Applicant' ('Rajputana Properties Private Limited') in its plan made it clear that those who will not vote in favour of its 'Resolution Plan' will be paid liquidation value which was almost NIL.

A similar case arose in Hero Fincorp Ltd Vs. Rave Scans Pvt. Ltd. &Ors., wherein the Hon'ble NCLAT directed the Resolution Applicant to equate the provision made to the Appellant, with all other similarly situated 'Secured Financial Creditors'. Thus although it is left to the commercial wisdom of the requisite majority of the Committee of Creditors to accept a resolution plan, which may involve differential payment to different classes of creditors, the CoC should ensure equitable treatment of similarly situated creditors.

Q13: Can there be a situation where ***the Resolution Applicant provides for only minimum payment and nothing more than what may be payable to such Creditors (Liquidation Value) who did not vote in favour of the Resolution Plan while providing a better payments to Creditors who may vote in favour of the plan?***

A13: As recorded in the Report of Standing Committee on Finance (2019-2020) dated 4th Jan. 2020, it was recommended to make - *"A specific provision that Financial Creditors who have not voted in favour of the Resolution plan and operational creditors shall receive at least the amount that would have been received by them if the amount to be distributed under theresolution plan had been distributed in accordance with section 53 of the Code the amount that would have been received if the liquidation value of the corporatedebtor had been distributed in accordance with section 53 of the Code, whicheveris higher."*

Q14: Thus the next question arises, ***to what extent the differentiation of the same class of creditors, is acceptable in a Resolution Plan?***

It is well settled law that equality principle cannot be stretched to treat 'unequals' equally, as that will destroy the very objective of the Code which is to resolve stressed assets. In *Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta &Ors*, the Hon'ble Supreme Court held that *"Equitable treatment is to be accorded to each creditor depending upon the class to which it belongs: secured or unsecured, financial or operational".*

Further the IBC Amendment Act 2019 inserted the words *"....value of the security interest of a secured creditor"*, in Sec. 30(4), with effect from 16th Aug. 2019, which is reproduced hereunder:

"Sec.30(4): The committee of creditors may approve a resolution plan by a vote of not less than sixty-six per cent. of voting share of the financial creditors, after considering its feasibility and viability, ***the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor*** *and such other requirements as may be specified by the Board."*

Thus it is quite clear that amongst secured financial creditors themselves, there can be differentiation based on their security value. Therefore, there can be differentiation between secured and unsecured financial creditors when it comes to amounts to be paid under a resolution plan. Further where assenting and dissenting creditors are similarly suited they cannot be differentiated in a Resolution Plan for allocation of funds to be paid to them.

Exercise of Powers by CoC Members - Voting and Evoting

S. Rajendran
Insolvency Professional

Preamble

When a corporate entity gets into the insolvency resolution process under the provisions of **Insolvency & Bankruptcy Code, 2016** (**IBC**), the management control over such an entity shifts from its board of directors (or promoters) to the interim resolution professional (IRP) or the resolution professional (RP). Having said that the ultimate control over such entity is exercised by the Committee of Creditors (CoC) which consists of independent financial creditors. This is often referred to as "**from debtors-in-possession to creditors-in-control**" in pursuit of insolvency resolution. The road at the end for the entity could lead to either "Resolution" or "Liquidation". This crucial decision lies in the hands of the CoC as a company under the resolution professional navigates through the resolution process.

This article captures the contours of the decision-making process of the Committee of Creditors, how they exercise their powers, comparison with such decision making process under Companies Act, 2013 as well as other relevant legislations for a better understanding of the scheme of things under IBC which works with a clear focus on the ticking-clock.

How a CoC takes decisions

The role of CoC under the IBC process is portrayed in a very subtle but strong manner. While the IRP or RP is vested with the management of affairs of the corporate debtor, the CoC has been mandated with oversight and supervisory role. There exists a delicate balance between the roles of an RP and the CoC. It would be correct to state that the IRP or RP facilitates the navigation through the labyrinth of the insolvency resolution process but crucial decisions in the journey are taken by the CoC.

The CoC takes several decisions during the CIRP period. The provisions of IBC vesting powers to the CoC are touched upon here.

Sec.21(8) of IBC lays down that ***"Save as otherwise provided in this Code, all decisions of the committee of creditors shall be taken by a vote of not less than fifty-one percent of voting share of the financial creditors."*** However, while dealing with a few important items like the ones given below, the voting share mandated for approval of such items is at a higher percentage signifying the need to have more consensus amidst the members of the CoC than a simple majority.

Event requiring approval by the Committee of Creditors	Required voting share	Remarks / relevant Section
Appointment of RP replacing an existing IRP or replacing an existing RP with another RP##	66%	Sec.22
One-time extension for CIRP period beyond 180 days ##	66%	Sec.12
Approval or rejection of a resolution plan ##	66%	Sec.30(4)
Transactions listed under Sec.28 of IBC ##	66%	Sec.28
Withdrawal of application under Sec.12A	90%	Reg.30A(4)
Sale of the assets by RP outside the ordinary course of business	66%	Reg.29(2)
Any other transaction for which specific voting share is not provided under IBC	51%	Sec.21 (8)

- voting share reduced from 75% to 66% with effect from 6th June 2018.

Three-fourth majority or two-third voting share

Prior to an amendment in June 2018, the provisions of IBC required a decisive 75% of the voting share of the CoC for the purpose of deciding whether a resolution plan should be approved or not. This was more or less on the lines of the Corporate Debt Restructuring (CDR) mechanism wherein the 75% of the bankers approve a restructuring plan, then it would be binding upon the remaining 25% of the lenders as well. (75% in value and 60% in number was also the requisite majority to approve a restructuring plan under CDR mechanism.) The amendment brought in with effect from 6th June 2018 brought down the threshold voting share for the important decision of resolution or otherwise, from 75% to 66%, bowing to the response from various quarters that a two-third majority should also be having a say in matters of importance rather than the conventional three-fourth majority.

It may be relevant to note that under IBBI (Liquidation Process) Regulations, 2016, Reg.31A speaks of Stakeholders' Consultation Committee wherein it provides that ***"the consultation committee shall advise the liquidator by a vote of not less than sixty-six percent of the representatives of the consultation committee, present and voting."*** It is another thing that the advice of the consultation committee shall not be binding on the liquidator.

Voting by the CoC members

The members of the Committee of Creditors may meet in person or through video conferencing or other audio and visual means.

Regulation 25 of IBBI (IRPCP) Regulations, 2016 lays down the procedure to be followed for voting by the committee of creditors. For this purpose, the Code envisages that certain matters which are specified in Sec.28 of IBC require prior approval of the Committee of Creditors. The resolution professional shall convene a meeting of the CoC and seek voting on those actions listed therein. The following are the important actions listed in Sec.28 (1):

a) *raise any interim finance in excess of the amount as may be decided by the committee of creditors in their meeting;*

b) *create any security interest over the assets of the corporate debtor;*

c) *change the capital structure of the corporate debtor, including by way of issuance of additional securities, creating a new class of securities or buying back or redemption of issued securities in case the corporate debtor is a company;*

d) *record any change in the ownership interest of the corporate debtor;*

e) *give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;*

f) *undertake any related party transaction;*

g) *amend any constitutional documents of the corporate debtor;*

h) *delegate its authority to any other person;*

i) *dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;*

j) *make any change in the management of the corporate debtor or its subsidiary;*

k) *transfer rights or financial debts or operational debts under material contracts otherwise than in the ordinary course of business;*

l) *make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; or*

m) *make changes in the appointment or terms of contract of statutory auditors or internal auditors of the corporate debtor.*

Role of Resolution Professional

Any action other than the above said list may also be considered in the meetings of CoC for its approval. The resolution professional shall take a vote of the members of the committee present in the meeting, on any item listed for voting after the discussion on the item.

At the conclusion of a vote at the meeting, the resolution professional shall announce the decision taken on items along with the names of the members of the committee who voted for or against the decision or abstained from voting.

Reg.25 further states that the resolution professional shall circulate the minutes of the meeting to all members of the CoC within 48 hours of the meeting and seek a vote of the members **who did not vote at the meeting** on the matters listed for voting, by an electronic voting system. The e-voting window shall be kept open for at least 24 hours from the circulation of the minutes. The resolution professional shall announce and make a written record of the summary of the decision taken on a relevant agenda item along with the names of the members of the CoC who voted for or against the decision or abstained from voting.

E-Voting mechanism

Electronic voting (also known as **e-voting**) is voting that uses electronic means to either aid or take care of casting and counting votes, with a view to facilitate larger participation by the stakeholders without their being physically present at the venue of the meeting.

(Image Source: Website)

E-Voting under Companies Act, 2013

Companies Act, 2013 has introduced a new provision of voting through electronic means under Section 108 read with Rule 20 of Companies (Management and Administration) Rules, 2014**.**

As per the provisions of the said Rules, every listed company or a company having not less than one thousand shareholders, shall provide to its members the facility to exercise their right to vote at general meetings by electronic means. A shareholder may exercise his right to vote at any general meeting by electronic means and the company may pass any resolution by electronic voting system in accordance with the provisions of this rule.

It is laudable that the legislators of IBC have also thought about e-voting for the CoC members in view of the cruciality of the decisions taken by them for the revival or liquidation of the corporate debtor.

In the above context, it is very important as to how the CoC members take their decisions in the CoC meetings. Whether the CoC members present should take decisions in the meeting itself or they can go back, mull over the item, consult his bosses and then register their decision by means of e-voting is a question debated in many forums. The directions given by Tribunals / Courts in this regard also merit our attention inasmuch as the IBC itself is a time-bound legalised process of resolution and the CoC members cannot take their own sweet time by sending officers just to attend the meeting and make decisions later on by higher officials.

E-voting under Insolvency and Bankruptcy Code, 2016

The provisions in relation to e-voting are governed by Regulation 25 and Regulation 26 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

It may be noteworthy that the provision relating to e-voting has undergone several changes.

It would be very relevant to see the amendment on 4th July 2018 in Reg.25 (5) (b) wherein it is stated that the RP shall seek a vote, of the members who **"did not vote at the meeting**" on the matters listed for voting, by electronic voting system in accordance with Reg.26.

Prior to this amendment, the Reg.25(5) provided that, if all the members are not present at a meeting, a vote shall not be taken at such meeting and the RP shall circulate the minutes of the meeting within 48 hours and seek a vote on the matters listed for voting in the meeting, by electronic voting system.

From the reading of the above provisions, it appears that the IBBI has applied its mind to a situation where for instance only one or two members of the CoC were not present at the meeting but the remaining members present constituted more than 66%. In such a case, going for e-voting did not make any sense. The author himself has faced similar situations in many CoC meetings when a prudent decision was recorded in the Minutes that the CoC members present constituted so much per centage and therefore, there is no requirement to go for e-voting as going for such e-voting entailed only additional cost and did not make any effect on the decision already taken at the CoC meeting by the members present.

The author went to the extent of highlighting this situation to the authorities in one of the seminars that the CoC members present felt belittled when their decision did not matter and the RP would proceed to go for e-voting requiring the time and efforts of all the CoC members once again to register their vote in the e-voting process. Probably, the e-voting portals got more business thanks to such decisions!!!

However, even after the said amendment in Reg.25(5), there is still a situation happening wherein the members present in the CoC meeting but not taking part in the voting process will still have an opportunity to vote by e-voting process thanks to the words "**who did not vote at the meeting"** in the amended Reg.25(5).

Financial creditors, particularly bankers, have a hierarchy in their management and therefore they seek their higher authority's approval before taking a decision by themselves. They now have a handy tool to say that we did not vote in the CoC meeting and therefore we have the right to vote in the e-voting process.

Dictate by IBBI

As per the Circular No.IBBI/CIRP/016/2018 dated 10th August 2018 issued by the Insolvency and Bankruptcy Board of India, it was observed in the matter of ***Jindal Saxena Financial Services Pvt. Ltd. Vs. Mayfair Capital Pvt. Ltd.,*** the Hon'ble Adjudicating Authority noted that there were four financial creditors who attended the first meeting of the CoC. In the said meeting, the CoC did not approve the appointment of IRP as RP since two of the four financial creditors, having aggregate voting rights of 77.97% required internal approvals from that competent authorities. It observed: "*We deprecate this practice. The Financial Creditors/Banks must send only those representatives who are competent to take decisions on the spot. The wastage of time causes delay and allows depletion of value which is sought to be contained. The IRP/RP must in the communication addressed to the Banks/Financial Creditors require that only competent members are authorized to take decisions should be nominated on the CoC. Likewise, Insolvency and Bankruptcy Board of India shall take a call on this issue and frame appropriate Regulations*."

IBBI went to the extent of directing the IRP / RPs that they shall in every notice of the meeting of the CoC and any other communication addressed to the financial creditors other than creditors under Sec.21 (6A) (b) requires that they must be represented in the CoC or in any meeting of the CoC by such persons who are competent and are authorized to take decisions on the spot and without deferring decisions for want of any internal approval from the financial creditor.

Conclusion

CoC is a very important pillar in the IBC edifice. The CoC members, though generally financial creditors, wear several hats when they sit in the CoC meetings as they decide the fate of the corporate debtor. Recognising the "intelligible differentia" of the financial creditors, the Supreme Court has also recognized their role vis-à-vis the operational creditors. IBC has bestowed upon their shoulders a very significant responsibility to weigh various things in the right perspective and take appropriate decisions and in this context, their voting is extremely important. Therefore, the voting should take place in the meeting itself if the decisions were to be taken quickly as per the requirement of the IBC for a time-bound insolvency resolution. The e-voting should be resorted to only when the required percentage of the voting threshold could not be achieved with the voting of the members present in the meeting and the voting share of persons who were not present in the meeting would be critical to reach the threshold and pass the resolution.

KEY AMENDMENTS TO IBC

IBBI (Voluntary Liquidation Process) (Second Amendment) Regulations, with effect from 5th August, 2020.

The CD should appoint a liquidator while passing a resolution in AGM to go under a voluntary liquidation process. The amendment to the Regulations has brought in that the corporate person may replace the liquidator by appointing another insolvency professional as liquidator by a resolution of members or partners, or contributories, as the case may be.

IBBI (Liquidation Process) (Third Amendment) Regulations, with effect from 5th August, 2020.

The Remuneration of the Liquidator is either fixed by CoC or as per Reg. 4 i.e., a certain percentage on the amount realised and on the amount distributed by the Liquidator.

For the purpose of Reg. 4, a clarification has been brought in, where there is change of liquidator between the realization of the asset and distribution of the proceeds. The liquidator realizing the asset shall be entitled to a fee corresponding to the amount realised by him. Likewise, the liquidator distributing the proceeds shall be entitled to a fee corresponding to the amount distributed by him.

IBBI (Insolvency Resolution Process for Corporate Persons) (Fourth Amendment) Regulations, with effect from 7th August, 2020.

Where there is more than one Resolution plan, the CoC after evaluation all compliant resolution plans as per evaluation matrix, shall vote on all compliant resolution plans simultaneously. The resolution plan, which receives the highest votes, but not less than sixty - six percent of voting share, shall be considered as approved. With regard to seeking of voting instructions from creditors (Homebuyers) the authorised representative shall seek voting instructions only after circulation of minutes of meeting and vote accordingly. He shall, however circulate the agenda, and may seek preliminary views of creditors in the class before the meeting, to enable him to effectively participate in the meeting.

Court orders

R.V. Yajura, Advocate
R. Charu Latha, M.S. Elamathi
(Legal Team, CGRF)

(Image Source: Website)

Babulal Vardharji Gurjar
Vs.
Veer Gurjar Aluminium Industries Pvt Ltd & Anr.
(SC) (14.8.2020)

The date of coming into force of the IB Code does not and cannot form a trigger point of limitation for applications filed under the Code.

An Appeal was filed under Section 62 of the Code against the order passed by the NCLAT, whereby, the NCLAT had rejected the contention that the application made by Applicant FC under Section 7 of the Code, seeking initiation of CIRP in respect of the CD, is barred by limitation and declined to interfere with the order passed by the NCLT, Mumbai Bench for commencement of CIRP.

Appellant (Suspended Director of CD) had raised the question of limitation and submitted that the 'default' was committed on 08.07.2011 whereas the petition u/s 7 of the I&B Code was filed in March, 2018 and that the application was not maintainable being barred by limitation. Hon'ble NCLAT had rejected the plea of bar of limitation essentially on two major considerations: One, that the right to apply under Section 7 of the Code accrued to the respondent financial creditor only on 01.12.2016 when the Code came into force; and second, that the period of limitation for recovery of possession of the Mortgaged property is twelve years *[placing reliance on decision of Hon'ble Supreme Court in the matter of 'B.K. Educational Services Private Limited'.]*

The Hon'ble SC reiterated and summarized the principles laid down in earlier judgments which dealt with the operation of law of limitation over IBC proceedings as follows:

a) *that the Code is a beneficial legislation intended to put the corporate debtor back on its feet and is not a mere money recovery legislation;*

b) *that CIRP is not intended to be adversarial to the corporate debtor but is aimed at protecting the interests of the corporate debtor;*

c) *that intention of the Code is not to give a new lease of life to debts which are time-barred;*

d) *that the period of limitation for an application seeking initiation of CIRP under Section 7 of the Code is governed by Article 137 of the Limitation Act and is, therefore, three years from the date when right to apply accrues;*

e) *that the trigger for initiation of CIRP by a financial creditor is default on the part of the corporate debtor, that is to say, that the right to apply under the Code accrues on the date when default occurs;*

f) *that default referred to in the Code is that of actual non-payment by the corporate debtor when a debt has become due and payable; and*

g) *that if default had occurred over three years prior to the date of filing of the application, the application would be time-barred save and except in those cases where, on facts, the delay in filing may be condoned; and*

h) *an application under Section 7 of the Code is not for enforcement of mortgage liability and Article 62 of the Limitation Act does not apply to this application.*

Thus in view of the above, the Hon'ble SC held that the Applicant was barred by Limitation, as it is 3 years under IBC. and reiterated that the date of the Code coming into force ie., 01.12.2016 was wholly irrelevant to the triggering of any limitation period for the purposes of the application being filed under IBC.

Thus, the Hon'ble SC, set aside the judgements of NCLAT and NCLT and removed the CD from CIRP.

Sunil S. Kakkad Promoter and Shareholder of M/s Sai Infosystems (India) Ltd Company under liquidation)
Vs.
Atrium Infocom Pvt. Ltd. through Sunil Kumar Aggarwal Liquidator
(NCLAT) (10th Aug. 2020)

CoC can Liquidate Corporate Debtor without taking any steps for the Resolution of the Corporate Debtor.

An Appeal was filed by the Shareholders/ promoters to set aside the Liquidation order passed by the Hon'ble NCLT, contending that the CoC decided to go for Liquidation, without exploring options for the revival of the Company. It is pertinent to note that the CoC had deferred the

publishing of Expression of Interests and subsequently resolved to liquidate the CD.

The Question before the Hon'ble NCLAT was that, whether a Resolution Professional, due to the approval of CoC with the requisite vote, directly proceed for the Liquidation of Corporate Debtor Company without taking any steps for Resolution of the Corporate Debtor.

The Hon'ble NCLAT, taking note of Sec. 33(2) (b) held that the CoC can decide to liquidate the CD at any time during the Corporate Insolvency Resolution Process, after the constitution of CoC but before the confirmation of the Resolution plan, including at any time before the preparation of the Information Memorandum.

Thus, it was observed that the decision of CoC to Liquidate the Corporate Debtor without taking any steps for Resolution of the Corporate Debtor is covered under explanation to sub-clause (2) of Section 33 of the I&B Code. Also, such a decision being part of the commercial wisdom of CoC, is non-justiciable.

(Image Source: Website)

Smt. Andal Bonumalla
Vs.
Tomato Trading LLP. & Ors.
(NCLAT) (20th Aug. 2020)

Advances given for supply of goods or services is not an Operational Debt.

An Application was filed by an Operational Creditor U/s 9 of the IBC, 2016 for debts due from the CD for advances paid by the Applicant to the CD in order to supply Goods (Sugar), as per their Sale and Purchase Agreement. Hon'ble NCLT admitted the said Application and initiated CIRP Proceedings for the CD, stating that the amounts defaulted by the CD arises out of an agreement.

On an Appeal preferred by the promoters, the Hon'ble NCLAT viewed that the advance amount paid by the OC to the CD, for the supply of Goods is not an operational debt as it does not come within the definition of an Operational Debt as per Section 5(21) of IBC, 2016 and released the CD from the rigour of CIRP by setting aside the order of Hon'ble NCLT.

It is noteworthy that a similar view has been taken by the Hon'ble Appellate Tribunal in *Daya Engineering Workers Vs. UIC Udyoge Ltd., Kavita Anil Taneja Vs. ISMT Ltd., Roma Infrastructure India Pvt. Ltd. Vs. A.S. Iron & Steel Pvt. Ltd., and Mironda Trade & Commerce Pvt. Ltd. Vs. Sai Laxmi Tulasi Ferros Pvt. Ltd.*

Kotak Investment Advisors Limited
Vs.
Mr Krishna Chamadia (Resolution Professional in the matter of Ricoh India Limited)
(NCLAT) (05.08.2020)

Should the CoC take a commercial decision to extend the timeline, it shall do so by publishing a fresh notice in Form 'G' under Regulation 36A of the CIRP Regulations. (Fresh EOI indicating extension of timeline)

An application was filed by an Unsuccessful Resolution Applicant objecting the approval by the CoC, of a Resolution Plan submitted beyond the last date of submission.

Hon'ble NCLT dismissed the Application relying on the Hon'ble SC's decision *in the matter of K Sashidhar v. Indian Overseas Bank & Ors*, wherein it is held that the commercial decision of the CoC for approval of resolution plan is non-justiciable.

However the Hon'ble NCLAT held that *"If the CoC took a commercial decision to extend the timeline, it should have done so by publishing a fresh notice in Form 'G' under Regulation 36A of the CIRP Regulations"*. Thus issued directions to the CoC to take decision afresh for considering on the Resolution Plans already submitted within the stipulated timeline.

Univalue Projects Pvt. Ltd.
Vs.
The Union of India & Ors
(HC, Calcutta) (18.08.2020)

It is not mandatory to submit Information Utility (IU) while filing an Application by a Financial Creditor.

A Writ petition was filed under article 226 of the Constitution of India challenging an order dated 12.05.2020 issued by the Registrar of the NCLT, New Delhi, whereby the order had imposed a mandatory prescription on all financial creditors under IBC to submit certain *financial information* as a record of default from the Information Utility as a condition precedent for filing an application under Section 7 IBC (Application filed by FC). The order also extended the mandate, retrospectively on all pending applications under Section 7 of the IBC, 2016 before the various Benches of the NCLT.

The Hon'ble HC held that the Information Utility (IU) is

only one of the designated methods of furnishing proof to the AA or NCLT, to prove the existence of a financial debt that has accrued to a financial creditor. The FC may also prove before the Hon'ble NCLT by any of the four classes of documents stated in sub-regulation 2(b) of Regulation 8 of the CIRP, 2016 or as the Supreme Court has observed in Swiss Ribbons (P) Ltd. (supra), all the eight classes of documents stated in Part-V to Form-1 appended with the AA Rules, 2016.

Hon'ble HC also observed that Section 424 of the Companies Act, 2013, conferred no powers to NCLT/NCLAT to makes such rules of such procedure that alter the statutory provisions of Companies Act, the IBC or the regulations framed under IBC.

Thus the Hon'ble HC struck down the order of NCLT.

Sh. Sushil Ansal
Vs.
Ashok Tripathi
(NCLAT) (14.08.2020)

A decree-holder would not fall within the definition of 'Financial Creditor' for the purpose of execution of such decree.

An Appeal was preferred by the suspended Directors, against the order of admission of Application under Section 7 of the Code filed by few home buyers claiming to be the Financial Creditors.

The NCLT passed the CIRP admission order on the basis of the Recovery Certificate issued by the 'Uttar Pradesh Real Estate Regulatory Authority' ("UP RERA") to establish the existence of financial debt and liability of Corporate Debtor.

The question before Hon'ble NCLAT was, whether a decree-holder would fall within the definition of 'Financial Creditor'.

Hon'ble NCLAT on looking into the definition of Financial Debt under IBC, held that amount claimed under the decree is an adjudicated amount and not a debt disbursed against the consideration for the time value of money. Thus the Hon'ble NCLAT set aside the order initiating CIRP.

Bharat Heavy Electricals Ltd. (BHEL)
Vs.
Mr. Anil Goel, The Liquidator of "Visa Power Ltd" & Anr
(NCLAT) (10.08.2020)

Sections 45 to 48 of Sale of Goods Act, 1930 and Section 55(4)(b) of Transfer of Property Act, 1882 can not to relied upon to claim oneself to be a secured creditor under IBC

An Application was filed by BHEL, U/S 42 of IBC, for partial rejection of claim by Liquidator, and u/s 60(5) to set aside the Auction, pointing out irregularities with regard to valuation. The facts in brief are, BHEL and CD signed a Letter of Award for supply of an erection of plant & machinery. BHEL claimed lien (as unpaid seller as per Sale of Goods Act, 1930) and / or charge (as per Transfer of Property Act, 1882) in relation to the material supplied to CD. Therefore claimed to be a Secured Creditor under IBC.

The Hon'ble NCLT had looked into the definition of "Secured Creditor" under IBC. Further interpreting the word "created" used in Section 3(30) and 3(31) of IBC, and contractual agreement between the parties, the Hon'ble NCLT held that the Appellant is not having security interest and consequently, cannot be considered as a Secured Creditor.

The Hon'ble NCLT dismissed the Application without allowing either of the prayers. Thus an Appeal was filed by (BHEL).

The Hon'ble NCLAT, on the ground that there was improper valuation and various other irregularities set aside the Auction, however on the question of whether BHEL was a 'Secured Creditor', the Hon'ble NCLAT upheld the reasoning of Hon'ble NCLT that the BHEL was not a 'Secured Creditor' as per IBC. The Appeal was partly allowed.

Regional Provident Fund Commissioner-II
Vs.
Bijay Murmuria & Anr.
(NCLAT) (10.08.2020)

The power of the NCLAT to condone the delay for appeal to be filed after expiry of said 30 days, shall not exceed 15 days

An IA was filed by the PF Authorities to condone the delay of 22 days and allow the Appellant to contest his Appeal on merits.

As per Section 61(2) of the code, *Every appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal:*

Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days."

Looking into the above provision, the Hon'ble NCLAT held it cannot condone delay beyond 15 days as prescribed.

Accordingly the appeal was dismissed as time barred.

Samay Impex Pvt. Ltd.
Vs.
Gujarat Ambuja Exports Ltd.
(NCLAT) (06.08.2020)

"On CD having satisfied the Operational Debt after reconciliation of accounts and rebate allowed cannot be resolved in Corporate Insolvency Resolution Proceedings."

An Appeal was filed against the NCLT order dismissing an Application under Section 9 of IBC for initiating CIRP against Respondent (Corporate Debtor) in respect of operational debt.

The Hon'ble NCLAT observed that there was a pre-existing dispute and after that the accounts stood fully settled and paid after reconciliation based on the consideration of the debit note and the rebate given later through the credit note.

The Hon'ble NCLAT found no legal infirmity in the order passed by the Hon'ble NCLT, dismissed at the very pre-admission stage.

M/s. Samtex Desinz Pvt. Ltd.
Vs.
Bharat Bhushan
(NCLAT) (11.08.2020)

Order passed by Hon'ble NCLT at the pre-admission stage of application filed by the Operational Creditor under Section 9 is prohibitory in nature

An Appeal was filed against the interim order passed by the Hon'ble NCLT directing the CD not to alienate, sell or create encumbrance of the Plant & Machinery of the CD, further sale effected if any be kept in abeyance.

Hon'ble NCLAT, observed that the Hon'ble NCLT had failed to follow the mandate under section 9(5) of IBC as it is supposed to pass order of admission or rejection in regard to section 9 application in 14 days instead of an interim direction. Thus, the Hon'ble NCLAT held the order passed at pre admission stage to be prohibitory in nature and directed AA, New Delhi bench to pass order in regard to admission or rejection of the said application within one week.

Jagdish Prasad Sarada
Vs.
Allahabad bank
(NCLAT) (28.08.2020)

"The determining factor is the three years period from the date of default / NPA"

An appeal was filed by Mr. Jagdish Prasad Sarda, Suspended Managing director of M/S Sarda Agro Oils Ltd. (corporate debtor), under Section 61 read with Section 7 of IBC against the exparte order passed by the Hon'ble NCLT, Hyderabad initiating CIRP against the corporate debtor. The Appellant contended that the Application filed by the FC was barred by limitation as the FC had declared the CD as NPA in 2015. Also although a payment was made by the CD in 2016 the Account of the CD remained to be an NPA and was not regularized by the Applicant FC.

The Hon'ble NCLAT relied upon the recent judgment passed by the Apex Court in the matter of Babulal vardharji Gurjar (14.08.2020) held that the date of default will be the date of declaration of account as NPA and such date of default would not shift.

NCLAT was of the view that the determining factor is the three years period from the date of default / NPA.

The Hon'ble NCLAT has reinstated that the provisions of the Limitation Act, 1963 vide section 238 of IBC,2016 will be applicable to all NPA cases provided they meet the criteria of Article 137 of the Schedule to the Limitation Act 1963. The extension for the period of limitation can only be done by way of application under Section 5 of Limitation Act, 1963, if any case for the condonation of delay is made out.

In view of the above the appeal was allowed and the order of Hon'ble NCLT was set aside.

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 Word'.

KYB and KYC – In the eyes of Thiruvalluvar

S. Rajendran

We are all familiar with KYC being done by various agencies, like banks, credit rating agencies, etc. This is a different type of KYC which is getting more and more relevant today in the market place. It's amazing to know how thousands of years ago, Thiruvalluvar, one of the most revered poet and sage of our own land has viewed this KYB and KYC. Know your business and Know your competition.

(Image Source: Website)

While he is very gentle to begin with in commenting on competition, he becomes very brutal towards the end. Let's examine what Thiruvalluvar has got to say as to how a business should be able to protect itself against growing competition.

> **தன்துணை இன்றால் பகைஇரண்டால் தான்ஒருவன்**
> **இன்துணையாக் கொள்கவற்றின் ஒன்று.**

When you are not having a great presence in the market or you don't have a stronger supporting system and you have more than one competitor threatening to make inroads into your business, do not hesitate for a merger with one of your competitors. Otherwise, before too long, you will be extinct. Perhaps, the concept of corporate M&A acquisitions has its roots since then!!

He further adds:

> **வகையறிந்து தற்செய்து தற்காப்ப மாயும்**
> **பகைவர்கண் பட்ட செருக்கு.**

If you are competent enough to know your business in its depth and you have the instincts, guts and wherewithal to cement your position, your competitors will think twice before setting their sight on your business. Well, it is easier said than done. Yet, is he not giving you a very sane advice that you must know your business well to keep the predators away?

In this context, I am tempted to share the success story of "AirAsia" as it existed a few years before, when the airlines made headlines as the fastest growing low cost airline in the Asian continent. Before getting into this business, Tony Fernandes, its promoter, had no clue as to how to run an airline, leave alone a low cost one! If one were to read his book "Flying High", you will get a glimpse of the unrelenting spadework done by his team and the struggles faced to get to a commercially profitable level from a very humble beginning. Many a times, the airlines faced threats of extinction but survived the onslaught purely due to perseverance and hard work.

It would be interesting to hear Thiruvalluvar's blunt advice to kill competition in its bud.

> **இளைதுஆக முள்மரம் கொல்க; களையுநர்**
> **கைகொல்லும் காழ்த்த இடத்து.**

Beware of an emerging threat. "Look around the market place who is your competitor and kill him in the beginning itself." Don't take his advice literally, though. See that he becomes irrelevant by either giving a better product to customers at cheaper price or take your offering to another level where competition becomes irrelevant to your product.

Before signing off, I must add here the kind of advice Thiruvalluvar gives for a sustained leadership in market. This piece, of course, comes with loads of plausible interpretations.

> **பகைநட்பாக் கொண்டுஒழுகும் பண்புடை யாளன்**
> **தகைமைக்கண் தங்கிற்று உலகு.**

He says that the market loves to stay with you if you have good ties even with your competition. Should we consider his point like you should have a good understanding with your competition? Would it not amount to forming a cartel? Would it not restrict competition and free trade? Would it not amount to an unfair trade practice? Well, according to me, "No", as any business owner worth his salt would not allow to impair his reputation by getting into unholy alliance with competition. On the other hand, he can have a meaningful relationship to bring value to the customers which alone will earn him more accolades and enable him to build a sustainable business model.

In this context, I wouldn't be rather surprised to see in the near future a grand gala merger of Flipkart and Amazon, purely to make more sense to the ultimate consumers. Let's see if what Thiruvalluvar said comes true in the most happening business segment which is seeing aggressive competition and insane capital burning!!

Disclaimer: The interpretations are author's own. Do not hold him responsible for any unintended result!!

MORTGAGE OF IMMOVABLE PROPERTY UNDER TRANSFER OF PROPERTY ACT, 1882 (TOPA)

K. Bhuvaneshwari
CMA

"SECTIONS 58 TO 104 OF TOPA, 1882 DEAL WITH MORTGAGES"

MORTGAGE:

Section 58 – Mortgage *is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to pecuniary liability.*

TYPES OF MORTGAGE:

Simple Mortgage - Sec. 58(b)		Note
Key features	• Property mortgaged to the Mortgagee. • Payment of Mortgage Money to the Mortgagor. • Possession of Property with the Mortgagor. • Binding on the Mortgagor to repay, on repayment, Mortgage Deed is cancelled.	Since the words used are "cause the mortgaged property to be sold, the mortgagee shall first obtain a decree from court. Thus the sale by Mortgagee must be through intervention of Court and not directly by the Mortgagee.
On Default	• Mortgagee shall have the right to cause the mortgaged property to be sold. • Proceeds of sale will be applied, so far as may be necessary, in payment of the mortgage money and the remaining if any to be distributed to the Mortgagor	

Mortgage by Conditional Sale - Sec. 58(c)		Note
Key features	• Mortgagor ostensibly (apparently) sells the mortgaged property to the Mortgagee with a condition for re-purchase of the mortgaged Property on repaying the loan. • The ostensible sale to the Mortgagee shall become invalid on repayment of loan.	It may be noted that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which affects or purports to affect the sale.
On Default	• The ostensible sale to the Mortgagee shall be considered valid (actual sale as on the date of ostensible sale) on repayment of loan.	

Usufructuary Mortgage - Sec. 58(d)		Note
Key features	• Property mortgaged to the Mortgagee. • Payment of Mortgage Money to the Mortgagor. • Possession of Property delivered to the Mortgagee. • Authorizes Mortgagee to retain such possession until the payment of the mortgage money and to receive the rents and profits accruing from the property and to appropriate the same in lieu of interest or in payment of the mortgage money.	This type of Mortgage is not prevalent in India.
On Default	• Mortgagee cannot foreclose or sue for sale. • And no time limit can be fixed expressly during which the mortgage is to subsist.	

English Mortgage - Sec. 58(e)		Note
Key features	• Property mortgaged to the Mortgagee. • Payment of Mortgage Money to the Mortgagor. • Ownership of the property as security, is transferred to the Mortgagee. • Binding on the Mortgagor to repay, on repayment, mortgagee promises to re-transfer the ownership to the Mortgagor.	The difference between the mortgage by conditional sale and English mortgage is that in English mortgage, the mortgagor binds himself personally to repay the money.
On Default	• The Mortgagee is not bound to retransfer ownership to the Mortgagor.	

Mortgage by deposit of title deeds (Equitable Mortgage) - Sec. 58(f)		Note
Key features	• Mortgage created by delivering to the creditor, documents of title of his immovable property with an intention to create a security, in order to obtains loan. • On repayment of debt obtained the Title Deeds are returned to the Mortgagor.	The property to be mortgaged, maybe situated in any place across India, however the title deeds can be deposited only in certain towns that have been specified wherein, this type of Mortgage is prevalent.
On Default	• The security can be enforced by a suit for sale of mortgaged property with the intervention of the Court.	

Anomalous Mortgage - Sec. 58(g)		Note
Key features	• In the case of the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.	A mortgage which is not a simple mortgage/ a mortgage by conditional sale,/ an usufructuary mortgage/ an English mortgage / a mortgage by deposit of title-deeds may come under the category of anomalous mortgage.
On Default	• As maybe agreed in the Mortgage Deed, the rights will be available to the Mortgagee in case of default of repayment of Debt.	

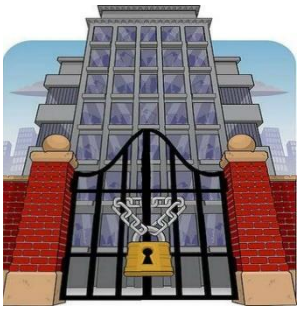
Two other terms are in common use in connection with mortgage:

1. **Sub-mortgage**: Where the mortgagee transfers by mortgage his interest in the mortgaged property.(i.e.,) A mortgages his house to B for Rs. 1 Lakh and B mortgages his mortgagee right to C for Rs. 80,000. B has created a sub-mortgage.
2. **Puisne mortgage**: Where the mortgagor, having mortgaged his property, mortgages it to another person to secure another loan, the second mortgage is called a puisne mortgage.

Picture Parable
Revival of Sirpur Paper Mills

CGRF Bureau with contribution from Mr. N. Nageswaran

M/S **The Sirpur Paper Mills Ltd**. (SPM) was established by Mir Osam Ali Khan, the last Nizam of Hyderabad. It was incorporated as a company on 17.11.1938 and started its production in the year 1942. The factory was in Kaghaznagar in the Adilabad district of Telangana. In the 1950s, the Birla family group of industries took over the mill and was later transferred to the Poddars. It was owned by R. K. Poddar at the time of its closure. SPM, an integrated pulp and paper mill and one of the largest manufacturers of various kinds of papers.



SPM turned out to be a loss-making unit in later years and halted of production on 14.09.2014. Reportedly, due to sharp hike in the prices of raw materials and the shortage of power supply to the units, the management took a view that they were unable to make profits and therefore decided to close the Unit. This resulted in severe hit on the livelihood of 3,000 odd families that depended on the mill.

Telangana State Cabinet on 14.03.2018, decided to revive the Mill so as to boost the local economy which was majorly dependent on the Mill. Considering the plight of the employees, the State Government announced a slew of tailor-made benefits under mega projects category for the company, such as preference to the company in supply of copier and maplitho paper to the Telangana government at market rates, etc. The company was entitled to benefits such as capital subsidies, lower coal linkage prices, and cheaper power from the grid, which have been approved by the Telangana Government.

M/s. Rama Road Lines (Operational Creditor) initiated CIRP against SPM in 2017. The NCLT Hyderabad, vide order dt. 18.09.2017 commenced CIRP. JK Paper had submitted its resolution plan of about Rs 600 crore for SPM which was approved by the Committee of Creditors on 16.05.2018 by a majority of 80.66% voting share. NCLT, Hyderabad approved this resolution plan vide order dt. 19.07.2018.

The acquisition provides a growth opportunity to JK Paper to expand its existing line of business of paper and paper board. JK Paper Limited revived the sick SPM, by investing Rs 628 crore in 2018. In september 2019, JK Paper had also announced the plan for expansion of Sirpur Paper Mills.

Your Feedback matters

Thanks for your mail, you last issue was good. Thanks for sharing.

Mr. P. Sriram, P.Sriram & Associates.

Thank you Sir. It was really informative. Special regards to you, for this initiative. The timing of your message is also very relevant for bankers. All the Best to You and the entire Team.

Mr. Biju S, Asst General Manager, Union Bank of India.

From the editor's desk, sharpen your saw, journey of a sick company to profit - Kamani tubes- impressive. Quite a lot of message to business enterprises and entrepreneurs.

Mr. Ramu K, Sr Mgr Finance and Accounts, Pioneer Wincon

Thank you so much. It's Very nice and useful.

Mr. R Chandrasekaran, Fox Mandal

Very nice write-up on Actionable Claim. All your team members have done an excellent job and their contribution is of a very high order. Big box of information really.

Mr. G Jagannath, Ex Deputy Registrar in NCLT

Let me congratulate you and your team for conceptualizing & bringing out CGRF SANDBOX. Very interesting name to start with. My Best wishes to you and your Team for an everlasting & glorious innings.

Mr. NV Nagendra, Cluster Head, Axis Bank

Article on vigil mechanism was very useful. Right time to publish an article like Kamani Tubes for the business resilience in the current scenario. Crossword looks like a test for the readers.

Mr. T. Vinod Kannan, CMA, Vinod Kannan Associates.

Thank you. CGRF Sandbox July 20 issue is finely loaded with Informative and Educative features. Added welcome features being Case laws designed with headlines &Clinching conclusions, Crossword puzzle, Known jargons -unknown meaning etc. Authoritative articles on Companies Act, IBC, Banking, Time management etc. enhance knowledge and drive the readers and professionals to be more vigilant.

Mr. A. Sankaralingam, Former Additional Registrar of Cooperative societies, Govt of TN

Our Services

Providing supporting services to IPs:

- Claims Processing
- Management of operations of the Corporate Debtor
- Section 29A verification
- Preparation of Request for Resolution Plans (RFRP) with Evaluation Matrix
- Framework for Resolution Plans
- Evaluation of Resolution Plans / Settlement Plans / Repayment Plans Scrutinizers for e-voting process

Independent Advisory Service:

- Admissibility of Claims.
- Validity of decisions taken by COC
- Powers and duties of directors under CIRP
- Resolutions Plan / Settlement Plan
- Repayment Plan by Personal Guarantors to Corporate Debtors

Providing Services to the Investors / Bidders / Corporates:

- Assessing the viability of the businesses of the Corporate Debtor under CIRP
- Drafting of Resolution Plans / Settlement Plans/ Repayment /Restructuring Plans
- Implementation of Resolution Plan
- Designing viable Restructuring Schemes

Registered Office:

CREATE & GROW RESEARCH FOUNDATION

2nd Floor, Evalappan Mansion, No.188/87, Habibullah Road,
T.Nagar, Chennai - 600 017. (Near Kodambakkam Railway Station)
Phone: 044 2814 1603 / 04 | Mob: 94446 48589 / 98410 92661
Email: createandgrowresearch@gmail.com
Website: www.createandgrowresearch.org