CGRF

# SandBox™

November 2020

Volume 1 | Issue 7


CGRF™

CREATE & GROW
RESEARCH FOUNDATION

CREATE & GROW™
RESEARCH FOUNDATION

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





# INDEX



**குறள்: 483**

அருவினை யென்ப உளவோ கருவியான்
காலம் அறிந்து செயின்.

**Thirukural: 483**

Is there anything difficult for him/her to do, who acts, with the right instruments at the right time?

## From the Editor's Desk

**Dear Readers**

Amidst Navrathri festivities from October leading to Diwali in November, it is our pleasure to bring out the November 2020 issue of CGRF SandBox. We are glad to notice a clear intent on the part of the Governments, both Central and States, to take a cautious but practical approach to unlock the Covid-19 restrictions barring a few activities like schools, colleges, cinemas, etc.

**Good news on "Compound Interest"**

Thanks to the push given by the Supreme Court, the Government has come out with a scheme to refund the difference between the compound interest and simple interest paid by certain class of borrowers between1st March 2020 to 31st August 2020. The borrowers with total sanctioned or outstanding loans of Rs.2 crores (excluding non-fund based limits) as on 29th February 2020 will be eligible for this refund. This benefit will be available even to those who did not opt for moratorium offered by the banks. A Crisil-report estimates the total outgo for banks on this front at Rs.7,500 crores which may eventually be footed by the Government. The comforting point is that the borrowers need not make any application for the refund and it will be automatically credited to the accounts before 5th November 2020.

**IBC catches up with Personal Guarantors to Corporate Debtors**

National Company Law Tribunal, Division Bench, New Delhi on 28th October 2020 has pronounced orders on an application filed by one Mr. Anil Syal who is a personal guarantor to FLPL Logistics Private Ltd. which is going through Corporate Insolvency Resolution Process. The guarantor made an application under Sec.94 of IBC to initiate insolvency resolution process on himself. The personal guarantee was given by him to Union Bank of India, who has brought FLPL (Corporate Debtor) into IBC. NCLT has issued orders under Sec.100 of IBC admitting the application. Even though some of the high profile personal guarantors have approached High Courts challenging the notifications issued by MCA and IBBI, the matter is now resting with the apex court which has, on an application by IBBI has transferred to itself all the pending cases before various High Courts, considering the importance of constitutional validity of law. The next hearing by the Apex Court on this matter is scheduled on 2nd December 2020.

There are several questions arising in the minds of lenders about proceeding against personal guarantors under IBC. A few relevant questions and answers compiled on this subject are presented to the readers in this issue of SandBox.

**Women power in management**

One of the primary objectives of CGRF is to propagate emerging role of women in governance. Governance can be related not only to managing corporates. It can be attributed to running of governments, even managing one's personal affairs. Recent instances of board-room battles in large corporates to secure proper representation in the boards for family members including women assume significance in this context. CGRF aims to bring out highlights of such cases in the forthcoming issues.

CGRF Team is proud to share that it will be celebrating its 1st Anniversary in November, 2020. Looking back, the turbulent times of Covid – 19 pandemic actually sowed the seeds for the SandBox to start its maiden issue in April 2020.

**CGRF SandBox Team wishes its readers a safe and colourful "Diwali"!!**


**Yours truly**
**S. Rajendran**

## "Swiss Challenge Method" for NPA Management

**N Nageswaran**
**Insolvency Professional**

One of the most important tenets of IBC is value maximization of the assets of the corporate debtor. For this purpose it is necessary to put into use the best tool available for discovering the price of the assets whether the corporate debtor is under insolvency resolution process or liquidation. In this context, RBI gave a direction in September 2016 itself suggesting use of Swiss Challenge Method (SCM) as part of the Framework for Revitalising Distressed Assets in the Economy. However, not much traction has been seen in this regard so far. In this article we will discuss in detail about the SCM itself in the first place followed by an analysis as to how it could be useful or otherwise, first in fighting against NPAs and then in the matters of cases brought in under IBC.

### Genesis of SCM

Wikipedia defines **Swiss Challenge** as "a form of public procurement operated in some jurisdictions, which requires a public authority (usually an agency of government) which has received an un-solicited bid for a public project (such as a port, road or railway), or for services to be provided to government, to publish the bid and invite third parties to match or better it."
In this method of bidding an interested party initiates a proposal for a contract or the bid for a project. The government then puts the details of the project out in the public and invites proposals from others interested in executing it. On the receipt of these bids, an expert committee will be put in place to analyse the proposals received. Then, in case one of the alternate proposals is found to be an improved one, then the original gets an opportunity to match the best bid. In case the original proposer is not able to match the more attractive and competing counter proposal, then project will be awarded to the bidder with counter-proposal.

### Is it new in India?

A Swiss Challenge allows an infrastructure developer to come up with a *suo motu* proposal for a new project without waiting for the government to call for bids. If applied to public projects, it may lead to more innovative project proposals and quicker execution, as a bidder with a good idea needn't wait for the government to set the ball rolling. This can foster innovation, as contractors or developers may initiate projects that the administrators didn't even think of. The method was upheld by the Supreme Court of India in 2009 for awarding public projects and the Government of India has tried out this method in road and railway projects.

The Indian Railways is found to be using this model of attracting investors under Public Private Partnership (PPP) for developing railway's infrastructure. In June 2015, bids were invited for re-developing nearly 400 railway stations all over India with project term of 45 years. Subsequently, in 2017 also Indian Railways adopted SCM for inviting tenders for renovation of its 23 railway stations.


(Image Source: Website)

### RBI and SCM

Reserve Bank of India's direction to its licenced entities suggesting usage of SCM came out in its circular dated 1st September 2016 on Guidelines on Sale of Stressed Assets by Banks. In this circular the broad contours of the SCM have been defined for the banks to be adhered to their attempt to reduce the level of NPAs. Following this guideline, some banks like SBI, Bank of India, and Punjab National Bank were putting to use the SCM in disposing off the stressed assets, though no noticeable transaction reportedly took place.

Subsequently, on 8th June 2020 RBI has put out a draft comprehensive frame work for sale of loan exposures by the lenders. In its draft framework, the regulator has proposed that lenders can put in place a board-approved policy on adopting auction-based models for price discovery. This is a clear shift from its earlier stance prescribing the adoption of the Swiss challenge method for the sale of stressed assets.

While the finality is yet to be achieved in this regard as to what are the guidelines that RBI would like to issue after taking the views from the connected persons, the query raised by RBI revolves around whether the lenders would agree with the proposal to deregulate the price discovery process in the case of sale of stressed assets,

or should the process still be prescribed by RBI as was the case with the Swiss Challenge Method.

The Reserve Bank of India (RBI) has said that the price discovery process may be deregulated during sale of bad loans by financial institutions such as banks, non-bank lenders and housing finance companies (HFCs).

### SCM and IBC

As many corporate insolvency cases in India are held up by disputes between bidders, Indian banks are now looking to use the Swiss Challenge route to decide on winning bidders. Some time back when Adani Wilmar and Patanjali vied to buy out Ruchi Soya Industries, lenders tried out a Swiss Challenge Method to decide the winning bid for the soya processor. Finally, Patanjali bagged the deal.

Applied to the ongoing insolvency cases, a Swiss Challenge may entail two rounds of bidding for a distressed company or its assets. Assume that Company X wins the first round of bidding by a quoting a price of ₹1,000 crore for a chemical plant. This will be made public and a second set of bids invited. If Company Y quotes ₹1,200 crore, Company X will be offered a second opportunity to match it. If it refuses, Company Y would be declared the winning bidder. If Company X quotes more, then it will bag the chemical plant at its quoted price.

### Can SCM improve value maximisation?

The Swiss Challenge Method allows a seller to mix-and-match the features of both an open auction and a closed tender to discover the best price for an asset. In the recent bankruptcy proceedings of Binani Cements, Indian banks came up against a sticky situation where UltraTech Cements bettered the winning bid by the Dalmia group, after the official bidding process came to an end. Bankers predictably were all for relaxing the rules a little bit as it meant more money in their coffers. But this position was legally challenged by the Dalmias. Finally, NCLAT and Supreme Court upheld the bid of UltraTech and dismissed the appeal of Dalmias.

Had SCM been put to use, additional rounds of bidding, would have been allowed to get possible maximisation of value of assets.


(Image Source: Website)

### Why SCM may not be the choice?

By allowing a bidder to initiate an idea and giving him the first right of refusal, the Swiss Challenge can promote favouritism in the award of public projects, opening the doors to corruption. Questions are raised level of transparency and fair treatment to all bidders. To guard against this, legal experts suggest an open list of public projects that allow Swiss Challenge and full public disclosure of bid details when the government receives a proposal.

World over, particularly in developing countries the SCM is being preferred with certain attributes attached. For example South Africa and Chile government (governments) allow reimbursement project development costs to the original proponents to encourage activism with regard to conceptualising such projects. Advantage of offering cost reimbursement maintains private sector interest during the development phase of an infrastructure project, helps to ensure that the ideas are sourced from one and all and ensure that lack of financial resources does hold back any likely proponents. In Philippines, the challengers, after bids for invitations are floated are given only 60 days to submit the counter bid. In some other countries such as Korea and Argentina, bonus points are awarded to the original proponent when challenging bids are being considered.

### Is the Swiss Challenge suited to India?

This is a million dollar question with the jury is still out on the success rate of Public-Private-Partnership in all government controlled projects, including infra projects. With the Damocle's sword of scrutiny and actions by institutions like CVC and CAG hanging above their head, the tendency to shy away from taking decisions by the bureaucrats cannot be stopped as the major projects are funded directly or indirectly by the Government and in the absence of no strong legal frame work ring-fencing the decisions taken by them.

However, in the matter of cases under IBC, the lenders will be able to adopt SCM more easily. The commercial wisdom is unassailable with more and more of judgements upholding the same view. If the rules are properly scripted by the Resolution Professional and the CoC in Expression of Interest and the Request for Resolution Plan to the prospective resolution applicants while inviting bids for resolution of stressed corporates, using SCM should not pose a problem.

While IBC framework has left the modus operandi of getting Expression of Interest and Request for Resolution Plan to IBBI, it would be prudent for the stakeholders to wait for a while as the Regulations may be tweaked by IBBI giving the CoC more leeway to maximise the value of distressed assets.

## Extra-ordinary Situation on Resignation of Retiring Director after Notice to AGM is issued

**S Srinivasan**
**Chairman, Indian Institute of Directors**
**Senior Partner, SR Srinivasan & Co. LLP**

A rare situation can arise in a company when a retiring director who is slated for re-appointment in the AGM resigns after the notice to AGM is issued and who may or may not be relieved before the date of AGM. The following is marked **as a case study** for the Company Secretary to tackle the situation within the boundaries of law.

Facts of the Case

i. The Company is a listed Company.

ii. The Company's AGM was scheduled to be held on 06.08.2020.

iii. Notices for the AGM was dispatched within the prescribed time to all the members

iv. The Stock Exchanges were also informed of the event.

v. The Notice contains inter alia an item of business to be transacted as an "*ordinary business*", the appointment of a director in place of Mr. X (DIN: xxxxxx) who retires by rotation and, who being eligible, has offered himself for re-appointment.

vi. The re-appointment of Mr. X as a director as an item of business has been included for the purpose of e- voting of members and the process of voting is on.

vii. Mr.X has resigned from his office w.e.f. 21.07.2020 i.e. on a date before the date of the AGM but after issue and service of Notice to the members and others eligible to receive the notice, leaving a gap of only 15 days before the scheduled AGM and the resignation has been noted by the Board as required u/s 168(1) of the Companies Act, 2013 before the date of AGM. Any amendment to the notice issued as a corollary to be communicated to the recipient of the notice is, therefore, ruled out as the number of days available for such an action is simply not available.

viii. The reasons cited by the retiring director for his resignation which may go on the records of the RoC when he, if at all, files e-form DIR-11 are not known. Such reasons must corroborate with the announcement to be made by the Chairman of the meeting when the item comes up for discussion. In this case, it is presumed that the reasons adduced may not have an impact on the action that the Chairman may propose to take when the item comes up for discussion at the meeting.

ix. The Company does not propose to appoint any other director in the place of the retiring director.

The Take

**How should the Company Secretary (CS) of the Company address the issue so that the solution is within the framework of law?**

Involved are:

Section 152 of the Companies Act, 2013, the e voting rules, Secretarial Standards, and compliance with LODR.

Suggested Solution

i. The following documents have to be examined thoroughly:
   (a) Articles of Association of the Company; and
   (b) The Notice of the AGM.

ii. The CS has to prepare the procedure to be adopted *before, at and after* the AGM to be compliant with law, and regulations including on e-voting.

iii. The Companies Act, 2013 r/w the AoA or any of its Rules has perhaps not envisaged such a situation and do not provide for any solution to the predicament which the CS is finding himself or herself in now.

iv. The rules regarding Notice of any general meeting to be issued in accordance with provisions of section 101 of the Companies Act, 2013 has been elaborated in Rule 18 of the Companies (Management and Administration) Rules, 2014 and these Rules are silent on the procedure to be adopted by a company when a situation such as this arises. Nor does the SS-2 address such a situation. However, it does recognize the possibility of an amendment to Notices already issued vide its para 1.2.9. which is reproduced as under:

*1.2.9 No items of business other than those specified in the Notice and those specifically permitted under the Act shall be taken up at the Meeting. A Resolution shall be valid only if it is passed in respect of an item of business contained in the Notice convening the Meeting or it is specifically permitted under the Act. Items specifically permitted under the Act which may be taken up for consideration at the Meeting are:*

*(a) Proposed Resolutions, the notice of which has been given by Members;*

*(b) Resolutions requiring special notice, if received with the intention to move;*

*(c) Candidature for Directorship, if any such notice has been received.*

*Where special notice is required of any Resolution and notice of the intention to move such Resolution is received by the company from the prescribed number of Members, such item of business shall be placed for consideration at the Meeting after giving Notice of the Resolution to Members in the manner prescribed under the Act.*

***Any amendment to the Notice, including the addition of any item of business, can be made provided the Notice of amendment is given to all persons entitled to receive the Notice of the Meeting <u>at least twenty one clear days before the Meeting.</u>***

v. We find that amendments to notices issued for the AGMs by other companies is not uncommon. Since complying with para 1.2.9 of SS-2 is practically impossible now because of paucity of time. The only solution is to **immediately:**

   a. issue an appropriate **advertisement** in a widely circulated Newspaper in both languages namely, English and the local language by way of corrigendum, if that is found necessary, as a compliance. However, it is found that it is **not necessary** to publish such an advertisements due to reasons described in the paragraphs which follow elsewhere;
   b. display the fact of amendment in the Company's web-site by way of corrigendum in an appropriate manner;
   c. intimate the Stock Exchanges concerned of issue of such corrigendum and intimate the fact of corrigendum having been displayed on the web site; and
   d. Wherever mail ids have been provided by members, intimate such members of such an amendment enclosing the corrigendum as an extract from the web-site.

The Composition of the Board as on date after the resignation of Mr. X Non-Executive Director, is as under:

i. Mr. A……CMD
ii. Mr. B……..JMD & CEO
iii. Mr. C……..Director- Finance
iv. Mr. D……..Non-Executive Director
v. Mr. E……...Independent Director
vi. Ms. F……..…….Independent Director
vii. Ms. G…..…….Independent Director
viii. Mr. H ……Independent Director
ix. Mr. I ……...Independent Director

The notice for AGM issued has indicated only Mr. X, Non-Executive Director, who holds office as a director till 22nd July 2020 as retiring by rotation at the ensuing AGM. It is understood that the Company is not desirous of appointing anybody else as a director in his place since it is not mandatory on the part of the Company to fill up the vacancy as the word "**may**" has been used under section 152(6)(e). The option to appoint any other person **is a right** and **not a duty** of the Company.


(Image Source: Website)

**There are several questions as detailed hereunder that have to be addressed:**

**Query 1:** *Who are the other directors whose period of office is liable for determination by retirement by rotation? Are their numbers less than two thirds of the total number of directors?*

The independent directors numbering five should not be included for the purpose of calculating the "total number of directors" by virtue of Explanation to sub-section (6) of section 152. Again, by virtue of section 152(6)(a)(i), the office of the CMD is not to be reckoned for the purpose of calculating the total number of directors. Therefore, before the exit of Mr. X as a director, the number of directors that needed to be reckoned for purpose of determining the directors liable to retire by rotation comes to four, namely, Mr.B, JMD & CEO, Mr.C, Director-Finance, Mr.D, Non-Executive Director and Mr.X, Non-Executive Director.

It may not be out of place to mention here that the designation given to Mr. B as JMD is mis-placed since he cannot be considered as Managing Director with all

the powers that go along-with that post and hence, he has to be included in the "total number of directors" liable to determination by rotation. Therefore, after the exit of Mr. X as a director, the total number of directors for the purpose of calculation of number of directors liable to determination by retirement by rotation comes to three. Two thirds of three will be two and one third of two will be again one with fraction being rounded off to one. Therefore, one of the three directors, namely, Mr.B, JMD&CEO, Mr C, Director-Finance, and Mr.D, Non-Executive Director has to retire by rotation depending upon who has been longest in office.

(Image Source: Website)

**Query 2:** *At what point of time should the determination of retirement by rotation of the directors liable to retire by rotation has to be made? Is it at the time of issue of notice or at the time of AGM?*

There are certain preludes and formalities to be complied with before an appointment of a director is considered and, therefore, **all conditions necessary to be fulfilled** before a person is considered for appointment as a director retiring by rotation **has to be crystallized just before issue of notice** and one need not wait till the date of AGM since the cause of action arises at the time of issue of notice and not at the time of AGM. These conditions are known as conditions precedent. Therefore, CS has considered rightfully that Mr. X will retire at the AGM since he would have been eligible for re -appointment at the time of AGM and the CS has included the re appointment as an item of business in the Notice. Cause of action to appoint any body else in his place (including the reappointment of the three directors mentioned above) to exercise **the right** (not duty in this context) of the management u/s 152(6)(e) would arise before or at the time of issue of notice and not later.

Since Mr. X has resigned after the date of issue of the notice, that right cannot be exercised by the management between the date of issue of the notice and the date of AGM. A **duty** to appoint another director (not in place of the retiring director but independently) as provided u/s 152(6)(e) of the Companies Act, 2013, would arise only pursuant to the compliance of the provisions of section 160 of the Companies Act,2013, and it is understood that no such proposition has been received by the Company as on 23st July, 2020(i.e. 14 days before the date of AGM). Therefore, decision not to appoint any body else as a director in place of the retiring director would be perfectly in order.

However, the Company has to **expressly** resolve the fact that it does not propose to appoint any body else in his place at the AGM by means of a formal resolution at the AGM to avoid adjournment of the meeting as provided under sub section (7) of section 152.

**Query 3:** *Why is it not necessary to give a corrigendum ad in the newspapers particularly when precedents have been set by other companies?*

There is no express provision in the Companies Act, 2013, Secretarial Standards or LODR to issue a corrigendum in Newspapers in respect of a situation that has arisen. Therefore, no authority whether the MCA or SEBI can haul the CS for violation of law or regulations. Yes, it is agreed that there are precedents where corrigendum to notices have been issued *inter alia* through advertisements in newspapers. But these were for different reasons where there were material impacts on the relationship the members had with the company. In the instant case, there is no material impact on the relationship with the members. It is possible the e-voting exercised so far could have been 100% positive for the re-appointment of Mr. X as a director. These votes will become infructuous once the Chairman announces the fact of his resignation and the futility of passing any resolution in this regard.

**Query 4**: *What will be the take away on the e-voting?*

Since the item of business is going to be dropped at the AGM there is no question of any e-voting on the non-consideration of his re-appointment and whatever voting has been made will become infructuous. However, since two resolutions have to be passed at the AGM, one for expunging the item slated for the re-appointment of Mr. X as a director and another for not filling up the vacancy created by his resignation, e-voting will apply for the latter.

**Query 5:** *What should the Chairman announce at the AGM and what is the resolution to be passed?*

At the time when the matter comes up for discussion, the Chairman of the Meeting has to announce all of the under mentioned items:

i. **THAT** the Notice to the AGM carries as item no.2 for consideration by the members of the appointment of a director in place of Mr. X who ought to be retiring by rotation at this AGM and who being eligible had offered himself for reappointment;

ii. **THAT** Mr. X has resigned from the Board as a director of the Company w.e.f 22nd July 2020 (reasons for resignation may be mentioned here) and the resignation has been has been noted (and accepted?) by the Board at its meeting held on_____;

iii. **THAT** the director resigned on a date which fell after the signing and dispatch of the Notice to members and hence the fact of his resignation could neither be brought to the notice of the members through the Directors' Report nor could the item of business for his reappointment be excluded in the Notice which had already been circulated, due to impracticability of performance;

iv. **THAT** the Company has arranged to issue a corrigendum (If such a corrigendum had been issued which is not really necessary) to the Notice inviting the attention of the members and others concerned to the above facts and on its website on 23rd July 2020, the earliest possible date and also dispatched the corrigendum to all those members electronically whose email ids have been registered with the Company and physically to those members whose mail Ids are not registered with the Company. The corrigendum has to be dispatched so as to reach the recipients well before the cut-off date fixed to exercise their respective rights through electronic voting as enumerated in item no ____ to the Notes to the Original Notice and which also appears on pages ___, and ___ of the Annual Report which has already been circulated. He may further inform the members that there was no time to communicate to the members of the fact of the director's resignation except through the Company's web site which has displayed the fact and to intimate to the members who have provided their mail IDs and that the Company has adopted the best possible modes in the shortest time available so as to reach out to the members about the fact of resignation of the director who was to be reappointed and its aftermath;

v. **THAT** the Board has decided not to propose the name of any other person to be appointed as a director in his/her place since there is no such duty cast on the Board to make such a proposal under the provisions of the Companies Act, 2013;

vi. **THAT** pursuant to the right vested with the members u/s 152(6) (e) read with Section 160 of the Companies Ac,2013, no proposal has been made by any other person nor any proposal has been received by the Company for filling up that vacancy.

(Image Source: Website)

Summing up

He can sum up by stating that the proposal to re- appoint Mr. X as a director having become infructuous, he proposes that the item be dropped as an item of business and be expunged from the proceedings of this meeting. He can further state that since no other proposal has come from any other person in accordance with law, the Company does not propose to appoint any other person as a director in his/her place or even otherwise.

He can mention that in view of what has been stated by him, the draft of resolutions for consideration by the members for passing as ordinary resolutions on a proper proposal and seconding by any of the members have been included in the aforesaid corrigendum (if at all issued)and which read as under:

**RESOLUTION 2A**

**"RESOLVED THAT** in view of the resignation of Mr. X as a director of the Company w.e.f from 21st July 2020, consent be and is hereby accorded to the Company to expunge from the notice to this Annual General Meeting, the business slated for consideration as item no.2 as having become infructuous, and to thereby drop the same from the proceedings here-at."

**RESOLUTION 2B**

**"RESOLVED THAT** in accordance with the provisions of section 152(7)(a) of the Companies Act, 2013, read with clause ____ of the Articles of Association of the Company consent be and is hereby accorded to the Company for not filling up the vacancy created in the office of a director retiring by rotation u/s 152(6)(a) by any other person, such vacancy having arisen by the resignation of Mr. X , a director of the Company whose term of office expired at this Annual General Meeting."

If no corrigendum has been issued, the above resolutions may be proposed by the Chairman as a modification to the original proposal.

The Chairman can then proceed to put the motions to vote individually.

## Why Audit Committees are important

**Prof R Balakrishnan, FCS**

### A brief on Audit Committee

The main purpose of constituting an audit committee in an organization is to provide oversight of the financial reporting process, the audit process, the company's system of internal controls and compliance with applicable laws, rules and regulations. The audit committee also oversees and improves financial practices and reporting in the organization by providing its oversight. The audit committee periodically meets the chief executive officer (managing director) of the company along with its chief financial officer and other financial officers to review and maintain effectiveness of organizational controls and as well as external financial reporting.

In a nut shell an effective audit committee in an organization provides the following benefits:-

i. actionable insights to oversee and improve financial practices and reporting in the organization.
ii. oversees the organization's external audit.
iii. contributes towards enhancing the internal audit function of the organization.
iv. Assists in strengthening credibility with stakeholders of the organization.
v. The last but not the least, audit committee assists / helps in creating and maintaining effective anti-fraud programmes.

### Governing provisions on Audit Committee under Companies Act 2013

Section 177 of the Companies Act, 2013 and Rule 6, 6A and 7 of Companies (Meetings of Board and its Powers) Rules, 2014 deals with the Audit Committee and its requirements.

### Companies required to constitute Audit Committee under the provisions of Companies Act 2013.

Rule 6 refers to Rule 4 of Companies (Appointment & Qualification of Directors) Rules, 2014 and states that every listed company and a company covered under Rule 4 of Companies (Appointment & Qualification of Directors) Rules shall constitute an Audit Committee. The following companies are required to constitute an Audit Committee.

i. all listed companies
ii. all public companies with a paid up capital of Rs.10 Crores or more
iii. all public companies having turnover of Rs.100 Crores or more
iv. all public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding Rs.50 Crores or more.

### Audit Committee in private limited companies

From the above governing provisions of Companies Act 2013, under sub-section (1) of section 177 of the Act, the constitution of an Audit Committee in case of private company is not mandatory under the Companies Act.

### Audit Committee requirement under Reserve Bank of India (RBI) regulations

Under the provisions of RBI regulations, the Non-Banking Financial Companies ('NBFCs') and Housing Finance Companies (HFCs) are required to constitute an Audit Committee in order to comply with the provisions of directions/guidelines/ circulars and notifications issued by the RBI and (NHB) National Housing Bank, respectively irrespective of the company being either a public limited company or a private limited company.

Obviously, it means, a private limited company which is incorporated under the Companies Act 2013 (or under the earlier Companies Act 1956), if it is registered with the Reserve Bank of India, as Non-Banking Financial Company or Housing Finance Companies and obtained a license by fulfilling the condition as per para 45-IA of the Reserve Bank of India Act 1934 is required to constitute an Audit Committee though as per the Companies Act 2013 provisions, the private companies are not mandated to constitute an Audit Committee.


(Image Source: Website)

**Governing provisions on Audit Committee under RBI Act 1934**

As per para 68 (1) and (2) of the Master Directions issued by RBI for Non-Banking Financial Company – Systemically Important Non-Deposit taking Company (SI-NDC) and Deposit taking Company, such Companies are required to constitute an Audit Committee. Similarly as per Para 3 (I) and (II) of the Housing Finance Companies, such companies are required to constitute an Audit Committee.

**In summary**

With the foregoing paragraphs above, we can conclude that even if a company is exempted from the purview of sections 177 and 178 of the Companies Act, 2013, but if such company is regulated by any other authority, i.e., by RBI or NHB or any other authority and the regulations issued by such authority requires constitution of Audit Committee then the compliance of such specific regulations needs to be ensured.

Therefore, it follows if a private limited company which is incorporated as NBFC and HFC though exempted from section 177 and 178 of the Act, 2013 by virtue of the Companies (Meetings of Board and its Powers) Rules, 2014 read with Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2017 will be required to constitute the Audit Committee in accordance with the applicable regulations.

As per the directions notified by RBI, the Audit Committee constituted by a NBFC shall have the same powers, functions and duties and the Audit Committee shall have to be function as per the provisions of section 177 of the Companies Act 2013.

# Do You Know?

Government extended due dates for filing IT Returns

Ministry of Finance, Department of Revenue, Central Board of Direct Tax vide press release dated 24th October 2020 extended the due date for furnishing of Income Tax Returns and Audit Reports for AY 2020-21 due to the outbreak of COVID-19.

| S.No. | Basis of Compliance | Original Due Date | Extended Due Date |
|---|---|---|---|
| **1.** | Belated Return of income for the AY 2019-20 | 31.03.2020 | 30.11.2020 |
| **2.** | Revised return of income for the AY 2019-20 | 31.03.2020 | 30.11.2020 |
| **3.** | Return of income (in case of TP Audit) AY 2020-2021 | 30.11.2020 | 31.01.2021 |
| **4.** | Return of income (Company Assesse) AY 2020-2021 | 31.10.2020 | 31.01.2021 |
| **5.** | Return of income (where audit is mandatory) AY 2020-2021 | 31.10.2020 | 31.01.2021 |
| **6.** | Return of income (in case of a partner in a firm whose audit is mandatory) AY 2020-2021 | 31.10.2020 | 31.01.2021 |
| **7.** | Return of income (in any other case) AY 2020-2021 | 31.07.2020 | 31.12.2020 |
| **8.** | Filing of tax audit report and all other reports AY 2020-2021 | 30.09.2020 | 31.12.2020 |

## Recent Amendments to Companies Act, 2013

**E Gunaseelan**
**CS Professional Student**

### Introduction:

From 28th September 2020, the talk of the town is the Companies (Amendment) Act, 2020 ("CAA") which has liberalised lot of provisions of Companies Act, 2013 ("CA 2013") considering the technical issues faced by companies in complying with the provisions of the Act and Rules made thereunder, promoting ease of doing business and for promotion of entrepreneurship. Amendments have been made in 66 sections of CA, 2013. The amendments may be notified on different dates for different provisions of the Companies (Amendment) Act, 2020. The amendments are yet to be notified. This article highlights the top ten significant amendments:

### Brief description on the amendments and comparison with earlier provisions:

i. The Companies (Amendment) Act, 2020 aims at decriminalising several offences under the Companies Act, 2013 where the case of defaults are technical in nature and which does not contain any element of fraud or does not involve larger public interest. Accordingly, several provisions of the CA, 2013 containing fines or/and imprisonment have been decriminalised and the offences are now punishable with only penalty. Moreover, majority of the penalties are now limited by fixing a ceiling.

ii. A Company which has listed only its debt securities will not be considered as "Listed Company" and therefore such debt-listed companies will not be under pressure to comply with various regulations issued by SEBI.

iii. Earlier the provisions of Producer Company were contained only in CA, 1956 and were not incorporated in CA, 2013 and due to which even after enactment of CA, 2013 the provisions of Producer Company were referred to in previous Companies Act. Vide this amendment the provisions of Producer Company have now been incorporated as Chapter XXIA in CA, 2013 with additional provisions to enable re-conversion of a producer company into a multi-state co-operative society or a society after obtaining necessary approvals from National Company Law Tribunal.


(Image Source: Website)

iv. With regard to Corporate Social Responsibility (CSR) the following amendments have been made:

a. Companies which have spent excess amount towards CSR activities during a financial year may set off such excess amount against the CSR expenditure for succeeding financial years without any limit for carrying forward until set off.

b. In case a Company needs to spend less than Rs.50 Lacs for CSR activities, the Company is now not required to constitute a CSR Committee as stipulated in CA, 2013 and the roles and responsibilities of CSR committee will be discharged by the Board of Directors.

c. The penal provisions for non-compliance for CSR spending as shown below are made stricter.

If a company is in default in complying with the provisions of sub-section (5) or sub-section (6) of Sec.135 of CA, 2013, the company shall be liable to a penalty of twice the amount required to be transferred by the company to the Fund specified in Schedule VII or the Unspent Corporate Social Responsibility Account, as the case may be, or one crore rupees, whichever is less, and every officer of the company who is in default shall be liable to a penalty of one-tenth of the amount required to be transferred by the company to such Fund specified in Schedule VII, or the Unspent Corporate Social Responsibility Account, as the case may be, or two lakh rupees, whichever is less."

v. CA, 2013 has provided a limited relief for non-compliances by small companies and one person companies by capping the penalty to the extent of 50% of the penalty prescribed in the Act. Vide, the CAA, the above relief is now being extended to start-up companies, producer companies, to the officers in default or any other persons designated by the Board of Directors. (Section 446B of CA 2013)

vi. In case any company and its officers have not filed the Financial Statements and Annual Return for a financial year with Registrar of Companies within 30 days and 60 days respectively from the date of conclusion of Annual General Meeting of the financial year, the Company and its officers were liable to penalty. However, as per the amendment, the Company and its officers will be given a time of thirty days from the date of issue of the notice by the adjudicating office for rectification of the defaults. During the 30 days period no penalty will be imposed and if the defaults are rectified within the time, the adjudication proceeding in this regard shall be deemed to have been concluded. (Sec.454 of CA, 2013)

vii. Financial Results were required to be prepared by only listed companies as per CA 2013 whereas as per the amendment, certain class of unlisted companies to be specified by Central Government shall also adhere to the following compliances: (Sec.129A of CA, 2013)

   a. Preparation of the financial results for such period and in such form as may be prescribed.

   b. With the approval of the Board of Directors, the Company has to complete audit or limited review of such periodical financial results in such manner as may be prescribed; and file a copy with the Registrar within a period of thirty days of completion of the relevant period.

viii. Such class of public companies to be prescribed by Central Government may issue such class of securities for the purposes of listing on permitted stock exchanges in permissible foreign jurisdictions or such other jurisdictions, as may be prescribed. (Sec. 23 of CA, 2013)

ix. As per the amendment in case of no profits or inadequate profits in a company for a financial year, the company shall not pay to its directors, including any managing or whole-time director or manager or any other non-executive director, including an independent director, by way of remuneration any sum exclusive of any fees payable to directors as per the provisions of CA, 2013 except in accordance with the provisions of Schedule V.

   Therefore, vide this amendment non-executive directors are also brought under the purview of provisions of Schedule V of CA, 2013 which deals with conditions to be fulfilled for the appointment of a managing or whole-time director or a manager without the approval of the Central Government. (Sec.149 of CA, 2013)

x. A new section viz. 418A has been incorporated in CA, 2013 which states that such number of benches of National Company Law Appellate Tribunal (NCLAT) may be established by the Central Government in consultation with the Chairperson of NCLAT. Prior to amendment only one bench i.e. Principal Bench of NCLAT at New Delhi was hearing the appeals filed under CA, 2013, Competition Act, 2002 and Insolvency and Bankruptcy Code, 2016.

**Conclusion:**

Companies (Amendment) Act, 2020 has provided much needed relief by decriminalising certain defaults/non-compliances which are purely technical in nature. Further, the long awaited incorporation of provisions of Producer Companies in CA, 2013 has been done. Not only that, even the amendments envisage promotion of entrepreneurship by slashing the penalties by half in case of non-compliances by start-ups. Overall, the amendments have given the CA, 2013 a big leap towards "Ease of doing Business".

## Do You Know?

As per Sec. 149 of the Companies Act, 2013 every company incorporated under the Act shall have atleast one director who should have stayed in India for a period of at least 182 days during the financial year.

Considering the requests received from various stakeholders, the Ministry of Corporate Affairs on 20th Oct. 2020 by way of a circular extended the relaxation of requirement of minimum residency period of directors for the financial year 2020-21 also. Earlier, the relaxations was given in respect of financial year 2019-20.

## PG to CD – the FAQs

**CGRF Bureau**

In the context of spurt in proceedings by lenders invoking personal guarantees of promoters of corporates under the provisions of IBC, several grey areas have come to the fore. Here is an attempt to answer a few frequently asked questions in this emerging area which has come to haunt the personal guarantors even after the completion of corporate insolvency resolution process for the company to which the guarantees were given by them.

1. What is the significance of the new provisions of Insolvency Resolution Process against Personal Guarantors to Corporate Debtors (PG to CD) notified by Ministry of Corporate Affairs with effect from 1st Dec. 2019?

   The creditors to a corporate debtor, notwithstanding their rights under IBC to initiate corporate insolvency resolution process (CIRP) against the corporate debtor, can also proceed against the personal guarantors under the provisions of IBC for any dues unrecovered from the CIRP.

2. The Corporate Debtor (Borrower), for whom Personal Guarantee was given by the Personal Guarantor, is not undergoing CIRP or liquidation proceedings in National Company Law Tribunal (NCLT). Where the Application should be filed by a Creditor?

   The application should be filed in the Debt Recovery Tribunal (DRT) having territorial jurisdiction over the place where the personal guarantor actually and voluntarily resides or carries on business or personally works for gain.

3. The Corporate Debtor (Borrower) for whom Personal Guarantee was given by the Personal Guarantor, is currently undergoing CIRP or liquidation proceedings in National Company Law Tribunal (NCLT). Where the Application should be filed by the Creditor?

   The application should be filed in the NCLT where the corporate insolvency resolution process or liquidation proceeding against the Corporate Debtor is pending. The word "pending" has a larger ramification. An application filed by a creditor which has not yet been admitted by the NCLT – can it be construed as "pending" is a valid question. Since Sec.60 (2) speaks of a fresh application to be filed, it makes sense to presume that such an application should be heard along with the other application already filed for the CIRP or liquidation of the corporate debtor. Wherever there is no application for CIRP or liquidation before NCLT has been filed, the application against personal guarantor to such CD should be filed before the respective DRT.


(Image Source: Website)

4. Can these provisions be used in a case where the creditor intends to go against a PG where the corporate debtor has already reached a settlement? If so, what is the time limit? Where such an application should be filed?

   In the event of a settlement reached between the applicant creditor and the corporate debtor as per Sec.12A of IBC, then, the adjudicating authority (NCLT) has to pass an order relieving the corporate debtor from the rigors of IBC. In such an event, as there is no pending proceeding- be it CIRP or liquidation – in respect of the corporate debtor, the application against the personal guarantor should be filed before the jurisdictional DRT. Limitation Act will apply with reference to the personal guarantee.

5. What are the advantages for me as a financial creditor (Bank / FI) if I go for action under these provisions of IBC instead of taking recourse under SARFAESI Act?

   Whether the creditor has got specific assets of the personal guarantor mortgaged with him, going under SARFAESI Act is like a "surgical strike". In cases where the creditor does not have the assets of the personal guarantor mortgaged or charged, it would be advisable to proceed against them under IBC. In this process, all the assets and all the liabilities of the PG will be brought into the process for a "repayment plan".

6. Should the application be filed against every PG to CD separately or collectively? Can an application be filed selectively?

   An application can be filed by a creditor against any PG separately or against all the PGs collectively. A creditor can also be selective in pursuing against a particular personal guarantor.

7. Is there a limitation period for PG within which the matter should be taken up?

   The provisions of Limitation Act will be applicable for proceeding against the personal guarantors as well. As the liability of the guarantor is co-existing

with the liability of the corporate debtor, the limitation provisions applicable to the principal debt will be applicable to the guarantors as well.

8. Can a creditor proceed against a personal guarantee signed by a Power of Attorney holder on behalf of the guarantor to the corporate debtor.

   Yes, he can. The principal is liable for all actions of the agent performed under the duly constituted power of attorney.

9. A PG has withdrawn his guarantee by means of a letter to CD but not to the bank. Can the creditor proceed against the PG under these provisions?

   Yes, he can. Unless the guarantor is duly relieved by the creditor, the guarantor's liability continues under the guarantee agreement.

10. What happens if the PG to CD dies before the application under the newly notified provisions is filed before NCLT / DRT?

    The provisions of the guarantee agreement shall decide this issue. However, in general, the estate of the deceased shall be liable under the guarantee agreement.

11. A Personal Guarantor has filed an application in DRT under the newly notified IBC provisions. Subsequently, an application has been filed in NCLT by a lender against the CD and the application has not yet been admitted. Will the process in respect of the PG's application in DRT be continued?

    Yes. However, upon the NCLT admitting the CD into CIRP, the proceedings before DRT in respect of the personal guarantor shall have to be transferred to the NCLT.

12. Can a secured financial creditor proceed under SARFAESI when an application by a creditor against the PG has been admitted by NCLT/ DRT?

    No. The interim moratorium shall be applicable once an application is filed by a creditor with the NCLT / DRT.

13. The Resolution Plan for the Borrower (Corporate Debtor) has been approved and as per the plan Financial Creditors are being paid in full ie., 100 % of their Claim amount calculated till the CIRP Commencement date. Can any of these Financial Creditors whose claims are being paid in full initiate Insolvency Process against the PG for any other dues of the CD (like unpaid interest after the CIRP period, etc.)?

    Yes, the creditors have the right to proceed against the personal guarantors to the corporate debtor so long as the resolution plan does not specifically curtail the rights of the creditors against the personal guarantors. Contract of guarantee being an independent agreement and if the creditors do not voluntarily give up their rights arising out of such an agreement, the creditors do have the option to proceed against the personal guarantors to the corporate debtor for the balance unpaid amount covered under the guarantee.

14. Where an application filed by a Banker (Financial Creditor) under section 7 has been admitted and CIRP has commenced for the Corporate Debtor (Borrower), can an Application under Section 95 to initiate proceedings against the Personal Guarantor be filed simultaneously?

    Yes. There is no bar on such an application being filed against the PG to CD.

15. Pursuant to the approval of Resolution Plan, the security of the Personal Guarantor held by the financial creditor has been released at the instance of the resolution applicant. Can the financial creditor still proceed against the Personal Guarantor in respect of the Personal Guarantee given by him?

    The terms of the contract of guarantee have to be seen because the security held has been released. If the personal guarantee agreement speaks of liability towards the outstanding loan and not capping to the value of the security, yes, the creditors can proceed as per the guarantee terms.

16. How will the cost incurred during the Insolvency Process be treated/ accounted?

    The "resolution process costs" include the fees payable to the Resolution Professional (RP), expenses incurred by the RP for the resolution process, amount and cost of interim finance raised for the purpose of resolution process, etc. The "repayment plan" shall provide the source of funds that will be used to pay the resolution process costs and that such payment shall be made in priority over any creditor. Logically, such costs should be expenses in the hands of the personal guarantor.


(Image Source: Website)

17. Who can initiate Insolvency Resolution Process against the Personal Guarantors to the Corporate Debtor and when?

    Any creditor (operational or financial) or the guarantor himself can initiate insolvency resolution

process against the personal guarantor on a default in payment of the debt. The threshold amount of debt is Rs.1,000/= but the Central Government can notify this amount upto Rs.1,00,000/=. In the case of an application by a creditor, there has to be a demand notice issued to the personal guarantor for payment of the debt and failure of the guarantor to pay the debt within 14 days of the demand notice.


(Image Source: Website)

18. Whether all creditors are entitled in the Insolvency Resolution Process for decision making?

    Yes. There is no differentiation of financial or operational creditor in the meetings of the creditors. An associate of the guarantor cannot be entitled to vote in a meeting of the creditors. A secured creditor shall forfeit his right to enforce the security interest during the insolvency resolution period. If he is not forfeiting his right, then, the secured creditor can exercise his voting right only to the extent of unsecured part of the debt.

19. Will there be in any situation in which creditor(s) may be required to forego their enforcement of security for the successful implementation of Settlement Plan proposed by the Personal Guarantor?

    Yes. There could be such a situation.

20. Whether secured creditors are superior than unsecured creditors in the Insolvency Resolution Process of a personal guarantor to corporate debtor?

    No. In fact, a secured creditor has to forfeit his right to enforce the security interest during the insolvency resolution process if his voting share has to be for the entire debt. Otherwise, his voting share will be computed only in respect of unsecured part of the debt.

21. Whether meeting of creditors is mandatory for approval of the "repayment plan"? At whose discretion a meeting of creditors will be called?

    No, meeting of creditors is not mandatory. If the Resolution Professional is of the view that there is no need for a meeting of the creditors, he shall record the reasons for such decision. The RP can call a meeting of the creditors. The RP shall convene a meeting of the creditors on the request of creditors representing 33% of the voting share.

22. In case RP submits to the adjudicating authority that the application filed by the Personal Guarantor is not proper as per law, whether the creditors have any other recourse?

    In such an event, the adjudicating authority may reject the application and the order shall record that the creditor is entitled to file for a bankruptcy order in respect of the personal guarantor.

23. Is it mandatory for the creditor or the guarantor to file their application before adjudicating authority through a Resolution Professional?

    An application can be made by the creditor or guarantor by themselves or through a Resolution Professional. If it is done by the creditor or guarantor himself, the adjudicating authority shall direct the Insolvency and Bankruptcy Board of India to nominate a resolution professional who shall be appointed by the adjudicating authority.

24. What is excluded debt? What kind of treatment is given to the excluded debt?

    Excluded debts are those debts which have the character of a statutory liability – say a fine imposed by a court or tribunal, liability to pay damages for negligence, nuisance or breach of a statutory, contractual or legal obligation; liability to pay maintenance to any person under any law for the time being in force; liability in relation to a student loan, etc. Though there is no specific provision in the Rules or Regulations on the treatment of such excluded debts, the "repayment plan' has to provide for the details of the excluded debts of the guarantor.

25. Who makes a public announcement after the admission of the application by the adjudicating authority?

    The adjudicating authority (NCLT / DRT) shall issue a public notice within 7 days of passing the order admitting the application, inviting claims from all creditors within 21 days of such issue.

26. Can the RP of the CD be the RP of the personal guarantor as well?

    No. A person shall not be eligible to be the RP for the insolvency resolution process of the personal guarantor if he is an associate of the personal guarantor, if he is related party of the corporate debtor or he has acted or is acting as IRP or RP or Liquidator of the corporate debtor.

27. Is it mandatory that the RP in the Insolvency Resolution Process should only be the Bankruptcy Trustee in the Bankruptcy Process of the personal guarantor to the corporate debtor?

    No. There is no such provision. The creditor or the guarantor may propose an insolvency professional as

bankruptcy trustee while making an application for bankruptcy process. If no such proposal is made, the adjudicating authority may appoint an insolvency professional nominated by IBBI as the bankruptcy trustee.

28. What is the voting share required for the creditors to approve a repayment plan?

    The repayment plan or any modification thereof shall be approved by a majority of more than three-fourth (>75%) in value of the creditors present in person or by proxy and voting on the resolution in a meeting of the creditors.

29. Which type of personal guarantors are eligible to initiate Insolvency Resolution Process voluntarily? Is there any disqualification?

    A personal guarantor who is an undischarged bankrupt or who is undergoing an insolvency resolution or bankruptcy process shall not be entitled to make an application under Sec.94 for an insolvency resolution process.

30. What is Interim moratorium? Is it different from a regular moratorium? Whose interests will the moratorium safeguard - Personal guarantors or the creditors?

    Upon an application being filed with the adjudicating authority by a creditor or the guarantor, an interim moratorium starts which shall cease to have effect on the date of admission of the application. During the interim moratorium period, the creditors of the guarantor shall not take any legal action or proceedings in respect of any debts and any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed. Interestingly, the provisions of interim moratorium do not say anything about the guarantor alienating, transferring, encumbering or disposing of any of his assets or his legal rights or beneficial interest therein which form part of the regular moratorium.

31. How many days moratorium will be provided to the Personal Guarantors to propose a settlement plan to the Adjudicating Authority?

    Moratorium is provided for a period of 180 days from the date of admission of the application or until the date on which the adjudicating authority passes an order under Sec.114 either approving or rejecting the repayment plan.

## Role of Monitoring Committee in implementation of a Resolution Plan under IBC

**S Rajendran**
**Insolvency Professional**

When a resolution plan is approved by the Adjudicating Authority (NCLT), the implementation of the resolution plan gets kick-started. Who will ensure proper implementation of the resolution plan? Whether all the terms and conditions specified in the plan in conjunction with the final approval of NCLT have been complied with? When the company under IBC (corporate debtor) is said to be under the control of the new management? Who pays for the cost during such implementation process? Who is responsible for various compliances during the period of implementation of the resolution plan? Whether RP's role ends on the approval of resolution plan by NCLT? These are some of the questions that arise in the minds of the stakeholders involved.

A brief attempt is made in this article to throw light on the provisions of the Code in relation to implementation of a resolution plan.

Sec.30 (2) (c) and (d) of IBC requires that the resolution professional shall examine each resolution plan to confirm that the resolution plan:-

- **provides for the management of the affairs of the corporate debtor after approval of the resolution plan; and**
- **Provides for implementation and supervision of the resolution plan.**

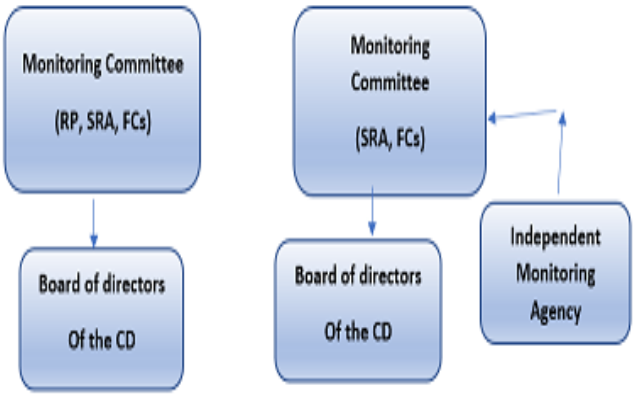
In this context, the general approach being adopted by successful resolution applicants (SRA) is to provide in the resolution plan itself for constitution of a Monitoring Committee (MC) consisting of the following persons and define its role:

a) Representatives of the Committee of Creditors;
b) Representatives of the Successful Resolution Applicant;
c) Resolution Professional (RP).

The RP is entrusted with the role of "Head of the Monitoring Committee" to convene and conduct meetings of the MC. In this arrangement, there would be continuity from the Corporate Insolvency Resolution Process (CIRP) till the resolution plan is implemented in full. As the implementation process involves cooperation from all the three members, the Monitoring Committee serves the purpose well to bring the parties together for a smooth implementation. The continuity of RP in the MC makes things easier to write to various statutory authorities or other stakeholders about the new management taking control of the corporate debtor for

smooth continuation of the business. It is quite possible several non-compliances in the past would emerge during this period when the new management starts running the business. In those cases, the continuation of RP has proved to be very handy.

However, of late, there have been cases (Axis Bank Ltd. vs. BSR Diagnostics Ltd.) where the successful resolution applicant proposes an independent agency or any other professional to implement the resolution plan. Such terms are also approved by the CoC and later by NCLT. Variants of monitoring structures are emerging. The following picture may give some more clarity.




**Answering the questions raised earlier:**

a) Who will ensure proper implementation of the resolution plan?

The resolution plan should contain measures for proper implementation of the resolution plan. One of the most important aspect in this process is managing the affairs of the corporate debtor. As the payment of resolution plan amount to various creditors usually takes some time, say – 6 months to 1 year or more – there has to be some independent agency who will ensure that the timelines for payment of resolution plan amount and its distribution to various creditors are done properly. Therefore, such a work can be done by an independent monitoring agency or by the MC itself.

b) Who will check whether all the terms and conditions specified in the plan in conjunction with the final approval of NCLT have been complied with?

It is the role of the independent monitoring agency or the MC.

c) When the company under IBC (corporate debtor) is said to be under the control of the new management?

The financial creditors will release the charge on the assets mortgaged only when the last rupee is paid to them. Therefore, only when the entire resolution plan amount is paid by the successful resolution applicant, they will cede full control of the management of the corporate debtor. Until then, normally the financial creditors insist on a supervisory role under which the operations and management of the corporate debtor can be carried on by the SRA.

d) Who pays for the cost during such implementation process?

Any cost incurred for the purpose of implementation shall be borne by the SRA. Generally, remuneration to the RP or the Monitoring Agency for implementation work will be paid by the SRA on mutually agreed terms.

e) Who is responsible for various compliances during the period of implementation of the resolution plan?

If the management control has been handed over to the SRA, they shall be responsible for all compliances. If the MC retains control until full payment is made, then, MC shall be responsible for all compliances.

It is also pertinent to note that the Form CIRP-6 of IBBI requires the IRP/RP to furnish details regarding non-implementation of Resolution Plan as approved by the AA within seven days of default.

**Conclusion**

In view of the above, it is assumed that the stakeholders will keep a watch and if necessary, they would file an application to the NCLT in case of improper implementation of the approved resolution plan. However, it would be a good practice for the RP to file an implementation report with the NCLT upon completion of the entire process.

## Breaking News

MCA Circular no C-31014/2/2020-Vig.

The Central Vigilance Commission has launched a new initiative for citizens to suggest systemic improvements in Central Government organizations. These suggestions may be sent directly to the Central Vigilance Commission from 27.10.2020 to 14.11.2020 by email (coord1-cvc@nic.in) or Telephone (011-24651632), or directly.

## Predicaments of a secured creditor of a Corporate Debtor in Liquidation under IBC

**CGRF Bureau**

A secured financial creditor is perceived to be in a better position compared to an unsecured financial creditor when it comes to recovery of his dues from a corporate debtor. Under the provisions of IBC, the secured financial creditors are on a better wicket so far as corporate insolvency resolution process is concerned. Does it mean that in the event of liquidation, the secured financial creditors are getting a raw deal? Well, it could be a "yes".

Let us have a quick look at the provisions relating to CIRP and Liquidation concerning the interest of secured financial creditors:

| CIRP proceedings | Liquidation proceedings |
|---|---|
| Sec.30(4) states that the CoC may approve a resolution plan 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 Sec.53(1) including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board.<br><br>The resolution plan may recognise the security interest held by various secured creditors and accordingly offer differential value to them in the resolution plan. In other words, within the class of secured creditors itself, there could be differential treatment to them.<br><br>An unrelated unsecured creditor is entitled to be a member of the Committee of Creditors. In a situation, if his dues from the Corporate debtor is significant and consequently his voting share is large, say 50%, then he holds the key in deciding the fate of a resolution plan.<br><br>The resolution applicant would think of paying such unsecured creditor less amount because he does not have any security interest; but since the voting share held by him is higher, resolution applicant may think of alternative proposals.<br><br>In CIRP proceedings, the secured creditor has no further hassles like realisation of security interest, etc. | Sec.52 provides that a secured creditor may relinquish his security interest to the liquidation estate and receive the proceeds from the sale of assets by the liquidator in the manner specified in Sec.53 or it can realise its security interest by itself.<br><br>A Secured Creditor may choose to realise the security interest by himself but there are some time-lines under the provisions to realise the security interest.<br><br>A secured creditor who has not relinquished his security interest shall realise the asset within 180 days from liquidation commencement date (LCD). After adjusting his dues, he has to remit the balance amount to the Liquidator.<br><br>There is another requirement also. If the secured creditor is not realising the security interest within 90 days of LCD, he has to pay the proportionate share of liquidation cost and the workmen's dues to the liquidator, in order to retain the asset until 180 days for sale. If he fails to comply with any of the above requirements, the security interest shall be deemed to be relinquished to the liquidator.<br><br>Though the intent is to guard against delays by secured financial creditors, these provisions go against the interest of the secured creditors.<br><br>**Consider the following example:**<br><br>Secured Creditor A: Amount admitted Rs.5 crores. Security interest – 1st charge on land & buildings valuing Rs.15 crores.<br><br>Secured Creditor B: Amount admitted Rs.25 crores. Security Interest - 2nd charge on the same property valuing Rs.15 crores.<br><br>In the above example, if the Secured Creditor A is able to sell the asset, he can realise his dues of Rs.5 crores in full. If he is unable to sell the assets and assuming the liquidator realises the asset at Rs.15 crores, Secured Creditor A will get a proportionate amount, i.e. Rs.2.50 crores (5/30 x 15), only half the amount of his claim, from the liquidator. (without considering sharing of liquidation and other costs) |

| CIRP proceedings | Liquidation proceedings |
|---|---|
| Secured or unsecured, a financial creditor is part of the CoC. | If a secured financial creditor has not relinquished his interest, he cannot be part of the Stakeholders' Consultative Committee while a second charge holder of the same asset, can be part of the SCC by relinquishing his security interest. |

IBC, in the event of liquidation, does not recognise differential treatment for secured creditors who hold a preferential charge over the same assets on which some more creditors hold second charge. While Sec.52 gives the choice to the secured creditor to retain the security interest and realise it by himself, there is a mill-stone around his neck - the timelines. On the failure to meet the deadlines, the security interest shall become part of the liquidation estate. He loses the advantage to realise his full dues. However, the secured creditor whose dues have not been paid in full on realisation of the security interest can stand in the waterfall process again ranking pari passu with the Government dues as per Sec.53(1)(e).

In contrast, during the CIRP proceedings, the resolution plan can suitably address the advantage held by such secured creditors whereas in the case of liquidation, the differentiation is lost.

Does it lead one to think ceding even a second charge on a security interest may lead to complications sometimes for an otherwise comfortable secured financial creditor? Holding exclusive charge on an asset – is it the best thing to have for a secured lender, keeping in view eventualities of a liquidation of the borrower?

## Do You Know?

GST Annual Return Date Extended

Ministry of Finance Department of Revenue, Central Board of Indirect Taxes and Customs in press release dated 24th October 2020 has stated that on account of the COVID-19 pandemic related lockdown and restrictions, the due dates for Annual Return (FORM GSTR-9) and Reconciliation (FORM GSTR-9C) Statement for 2018-19 have been extended from 31st October, 2020 to 31st December, 2020.

CGRF turns 1 on 27th November 2020.

We seek your continued blessings and support to grow further.

## Interplay of Suits/Arbitration/Proceedings Vis-à-vis IBC

**N.P. Vijay Kumar**
**Advocate**

### A. Introduction

Moratorium on all suits and proceedings against the Corporate Debtor under Section 14 is one of the main features of the Insolvency and Bankruptcy Code, 2016. As a result, once the Company petition is admitted against a Corporate Debtor, all the delinquent suits/proceedings against the Corporate Debtor are virtually stayed during the period of Corporate Insolvency Resolution Process ('CIRP') and that no fresh suit/proceedings can be filed against the Corporate Debtor. The objective of such moratorium is to prevent the creditors from enforcing their right against the assets of the Corporate Debtor so that the Corporate Debtor can consolidate its estate and ascertain if a holistic resolution of the debt is possible during the CIRP. It is with this laudable intent the Legislature contained Section 14 to protect the assets of Corporate Debtor. The question that now arises is: can the Corporate Debtor initiate or continue the arbitration/suit/other proceedings through the Resolution Professional while the CIRP is pending or does Section 14 of the Code prevent the Resolution Professional from initiating or continuing any suit/proceedings even though such proceedings may be for the benefit of Corporate Debtor and may contribute to its assets of the Corporate Debtor enhancing the value of the Corporate Debtor?

### B. Interpretation of Section 14 of the Code

For purpose of discussion and ease of reference, relevant part of Section 14 is reproduced below-

"14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by ***order declare moratorium for prohibiting all of the following, namely***:—

a) **the institution of suits or continuation of pending suits or proceedings against the corporate debtor** including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;"

From a plain reading of Section 14 of the Code, it is clear that the moratorium is with reference to institution of suits or continuation of pending suits or proceedings **against** the corporate debtor. There is nothing that prohibits the CD from initiating the suits or proceedings. The objective of prohibiting proceedings against the CD is to protect the assets of CD from any coercive actions of enforcement by the creditors of the Company. This view has been held by Delhi High Court in Power Grid Corporation of India vs Jyothi Structures. The Delhi High Court held as follows-

> *"The object of the Code is to provide relief to the corporate debtor through standstill period during which its assets are protected from dissipation or diminishment, and as a corollary, during which it can strengthen its financial position, extending of the unexecutability of the award would rather prevent the corporate debtor from recovering money due to it and adding to its financial corpus. Such a consequence would in fact be directly contrary to the object of the Code. To determine the true meaning of the statute, the provision would have to be construed in the context of the statute as a whole, for which purpose interpretative criteria may have to be applied even when the statutory language is apparently free from any semantic ambiguity."*

### C. Can the Corporate Debtor initiate fresh suit or proceedings or continue with existing suit or proceedings

The Corporate Debtor can initiate fresh suit or proceedings for recovery of debt or assets as maximisation of value of assets is the objective of the Code. How can the Corporate Debtor initiate such proceedings? Once the Company Petition is admitted by the Adjudicating Authority ('AA') and Interim Resolution Professional (IRP) is appointed by the AA, the Board of Directors is suspended and all powers are vested in the IRP. The IRP is required to perform his duties in terms of Section 25 of the Code and also keep the CD as a going concern in terms of Section 20 of the Code.

By virtue of provisions of Section 63 of the Code there is bar on the jurisdiction of Civil Court to entertain suit or proceedings in respect of any matter in which NCLT or NCLAT has jurisdiction. As per Section 60(5)(a) and (b) any claim or application by or against the Corporate Debtor shall be dealt with by the NCLT. In light of the above provisions, the question arises in what should be role of RP in dealing with the proceedings by or against the Corporate Debtor.

In SSMP Industries Ltd vs Perkan Food Processors Limited, the Plaintiff who had initiated the suit for recovery of money went into insolvency while the suit

was pending adjudication. The Defendant had not only denied the claim but also made counter claim. The issue arose whether the suit can be continued and whether the Defendant is entitled to prosecute the counter claim in the matter. The Delhi High Court observed as follows –

"*The Court has considered the plaint and the written statement/counter claim. The adjudication of the plaint, defences in the written statement and the amounts claimed in the counter claim would have to be considered as a whole in order to determine as to whether the suit or the counter claim would be liable to be decreed. A counter claim would be in the nature of a suit against the Plaintiff which in this case is the `corporate debtor'. Under Section 14(1)(a) of the Code, strictly speaking, a counter claim would be covered by the moratorium which bars `the institution of suits or continuation of pending suits or proceedings against the corporate debtor". A counter claim would be a proceeding against the corporate debtor. However, the counter claim raised in the present case against the corporate debtor ie., the Plaintiff, is integral to the recovery sought by the Plaintiff and is related to the same transaction. Section 14 has created a piquant situation i.e., that the corporate debtor undergoing insolvency proceedings can continue to pursue its claims but the counter claim would be barred under Section 14(1)(a). When such situations arise, the Court has to see whether the purpose and intent behind the imposition of moratorium is being satisfied or defeated. A blinkered approach cannot be followed and the Court cannot blindly stay the counter claim and refer the defendant to the NCLT/RP for filing its claims.*

*9. The nature of a counter claim is such that it requires proper pleadings to be filed, defences and stands of both parties to be considered, evidence to be recorded and then issues have to be adjudicated. The proceedings before NCLT are summary in nature and the RP does not conduct a trial. The RP merely determines what payment can be made towards the claims raised, subject to availability of funds. The NCLT/RP cannot be burdened with the task of entertaining claims of the Defendant which are completely uncertain, undetermined and unknown. Moreover, the question as to whether the Defendant is in fact entitled to any amounts, if determined by the NCLT, prior to the adjudication of the plaintiff's claim for recovery, would result in the possibility of conflicting views in respect of the same transaction. Under these circumstances, this court is of the opinion that the Plaintiff's and the defendant's claim ought to be adjudicated comprehensively by the same forum. At this point, till the defence is adjudicated, there is no threat to the assets of the corporate debtor and the continuation of the counter claim would not adversely impact the assets of the corporate debtor. Once the counter claims are adjudicated and the amount to be paid/recovered is determined, at that stage, or in execution proceedings, depending upon the situation prevalent, Section 14 could be triggered. At this stage, due to the reasons set out above, the counter claim does not deserve to be stayed under Section 14 of the Code. The suit and the counter claim would proceed to trial before this Court."*

(Image Source: Website)

Similarly, an interesting issue arose before the Madras High Court in Mrs. Jai Raj Kumar vs Stanbic Bank Ghana Limited wherein the very petition of insolvency was admitted based on a decree passed by the Queen's Bench Division Commercial Court, London in favour of Stanbic Bank Ghana Limited. The said order of admission of petition was challenged by the Promoters of the Corporate Debtor, Raj Kumar Impex Private Limited upto the Hon'ble Supreme Court. The Supreme Court while dismissing the appeal did not interfere with the findings of NCLAT. NCLAT while dismissing the appeal held that the decree obtained by Stanbic Bank Ghana Limited was exparte decree and validity of such ex-parte decree cannot be decided by the AA or by NCLAT while deciding the application filed under Section 7 of Code by Stanbic Bank Ghana Limited.

As a result, two fold questions arose –

a. What is the role of RP with reference to such decree?

b. Can the RP challenge such ex-parte decree which ex-parte decree is the basis of admission of the very Company petition.

The Madras High Court considered the role of RP and in a very crisp manner held that one of the duties of the RP under Section 25(2)(b) of the Code is to preserve and protect the assets of the Corporate Debtor and for the purpose of preserving and protecting the assets of the Corporate Debtor, RP can represent and act on behalf of the Corporate Debtor in judicial, quasi judicial and

arbitration proceedings. It relied on Legislative Guide on Insolvency Law of UNCITRAL and held as follows –

*"..... From the aforesaid discussion and deliberation it follows as a necessary corollary and inevitable sequitur that RP can act on behalf of corporate debtor against any one. When such an action on behalf of Corporate Debtor runs into the interest of the financial creditor, it necessarily is an issue which has to be looked into, dealt with and decided by NCLT by applying the IB Code. In this regard Section 63 of IB Code kicks in. In other words, the question as to whether RP should file a suit assailing the foreign decree has to be examined and answered by NCLT as it is against the financial creditors in the instant case. Once NCLT comes to the conclusion that such a suit has to be filed by RP, the scenario shifts to this Commercial Division without being hit by Section 63 (as rightly held by NCLAT). It is clarified that NCLT will not have to decide about actions of RP in cases where the suit is not against the financial or operational creditor.*

*59. The logic is, IB Code is a complete and comprehensive Code wherein when the Corporate Insolvency Resolution Process commences, there are only two broad routes it can take.*

*.....*

*Section 60(5), when it speaks of the NCLT having jurisdiction to entertain or dispose of any application or proceeding by or against the corporate debtor or corporate person, does not invest the NCLT with the jurisdiction to interfere at an applicant's behest at a stage before the quasi-judicial determination made by the Adjudicating Authority. The non-obstante clause in Section 60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings."*

## D. Conclusion

Reading the above, it can be concluded as follows-

a. RP can file suit or arbitration proceedings on behalf of CD to protect the assets of the CD;

b. Where the suit or proceedings relates to the Financial Creditor/ Operational Creditor, RP shall approach the jurisdictional NCLT for orders enabling RP to take necessary action in view of orders of the Madras High Court.

c. Where such suit or arbitration proceedings are for the benefit of the CD, the Courts will not prohibit initiation or continuation of such suit or proceedings to protect the assets of CD;

d. RP shall represent and act on behalf of the CD and take steps to recover the assets/money due to CD either by filing application before the NCLT or where NCLT is of the view that these are matters involving elaborate trial and evidence involving claims/counter claims and cannot be decided summarily then the parties can be relegated to suit or arbitration proceedings to protect and preserve assets of CD;

(Image Source: Website)

Therefore RPs can avail of remedies of arbitration/suits/proceedings based on the facts and evidence to let in each case. Though IBC seeks to provide holistic solution to all the proceedings against the Company, the very nature of proceedings like proceedings under Section 34 of the Arbitration and Conciliation Act, statutory appeals before tax tribunals necessitate that the RP takes steps to protect and preserve the assets of the Corporate Debtor.

## 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'.

## Court Orders

**CGRF Legal Team**

(Image Source: Website)

### Kridhan Infrastructure Private Ltd. vs. Venkatesan Sankaranarayan 09.10.2020 - Supreme Court

*"Liquidation of the Corporate Debtor should be a matter of last resort."*

An appeal was filed by a successful resolution applicant against the order of Hon'ble NCLAT which upheld the order of Hon'ble NCLT granting the Corporate Debtor to liquidate, pursuant to an application filed under Section 33 of IBC seeking liquidation on the ground that the Resolution Plan had not been implemented by the Resolution Applicant.

The Hon'ble NCLAT, had upheld the order of liquidation on the grounds that 'Resolution Applicant' through its subsidiaries had defaulted to Union Bank of India and hence, ineligible u/s 29A of the IBC. Also, as on 31.03.2020 the 'Resolution Applicant' had reported a turnover of Rs.21.17 crores and suffered a loss of Rs.12.11 crores and thereby the financial position of it is not in a favourable circumstance to implement the resolution plan.

The Apex Court held that:

*"Liquidation of the Corporate Debtor should be a matter of last resort. The IBC recognizes a wider public interest in resolving corporate insolvencies and its object is not the mere recovery of monies due and outstanding. The appellant has indicated its bona fides, at least prima facie at the present stage, by unconditionally agreeing to subject itself to the forfeiture of an amount of Rs 20 crores, which has been deposited by it, in the event that it fails to comply with the requirement of depositing an additional amount of Rs 50 crores within a period of three months in terms of the understanding that was arrived at on 25 February 2020."*

Accordingly, the liquidation ordered by Hon'ble NCLAT was stayed The appellant was ordered to demonstrate its ability to implement the Resolution Plan and in compliance with the understanding arrived at on 25 February 2020 deposit an amount of Rs 50 crores, on or before 10 January 2021.

### M/s. Anupam Industries Ltd. vs. Sh. Mahendra Kumar Khandelwal & Anr 07.10.2020 - NCLAT

*"No claim can be admitted after approval of the Resolution Plan"*

The Resolution Plan was approved in the month of September 2019 and hence the Corporate Insolvency Resolution Process period was already expired. The Appellant's claim was not included as an Operational Creditor during the Corporate Insolvency Resolution Process as he did not make such a claim within the prescribed time.

The Hon'ble NCLAT held that:

> *"In the given circumstances, the Adjudicating Authority (National Company Law Tribunal), Principal Bench, New Delhi, was right in declining to issue a direction for the inclusion of Appellant in the list of Operational Creditors of the Corporate Debtor."*

The NCLAT dismissed the appeal on the ground of lack of merit.

### Anup Sushil Dubey (suspended Board Member) vs National Agricultural Cooperative Marketing Federation of India Ltd & Ors. 07.10.2020 - NCLAT

*"Leave and License agreement entered for commercial purposes falls under the ambit of operational debt as defined in Section 5(21) of the Code."*

A leave and license agreement was entered into between Umarai Worldwide Private Limited (Operational Creditors) and National Agriculture Cooperative Marketing Federation of India Ltd (Corporate Debtor), for the usage of cold storage facilities for a period of three years. The corporate debtor has defaulted in the payment of the licensee fee for the period from September 2017. Demand notices were sent, however, there was no reply received from the Corporate Debtor. Section 9 application was filed before the NCLT, Mumbai and an ex-parte order was passed admitting the Corporate Debtor into CIRP, for which an Appeal was preferred by the suspended Board Member of the

Corporate Debtor. The question before the Hon'ble Appellate Tribunal was, whether the licensor in this case falls under the definition of 'operational creditor'.
The Appellate Tribunal took into consideration the definition of 'service' in Consumer Protection Act, 2019 and the activities listed down in Schedule II of the Central Goods and Services Act, 2017 and ascertained that the any leave and license agreement entered into for commercial purposes falls under the ambit of 'Operational debt' as the premises has been leased out for 'commercial purpose'. Therefore the Hon'ble NCLAT held that the Leave and License agreement entered for commercial purposes fall under the ambit of operational debt as defined in Section 5(21) of the Code.

Thus, the Hon'ble NCLAT dismissed the appeal upholding the order of Hon'ble NCLT.


(Image Source: Website)

**M/s. Advance Surfactants India Ltd Vs. State Bank of India**
**08.10.2020 - NCLAT**

*"The commercial wisdom of the CoC is beyond the pale of challenge in regard to the decision taken for liquidation of the Corporate Debtor"*

An Appeal was filed by the Corporate Debtor against the order of the Hon'ble NCLT, Principal Bench, New Delhi, directing the Corporate Debtor to be liquidated.

Approval of the Hon'ble NCLT was based on the recommendation of the Committee of Creditors to liquidate the Corporate Debtor, with 100% voting shares.

Hon'ble NCLAT considering that it is settled law that the commercial wisdom of the Committee of Creditors is beyond the pale of challenge in regard to the decision taken for liquidation of the Corporate Debtor which essentially is a business decision resting upon their commercial wisdom and keeping in view the provision of Section 33(2) of the Insolvency and Bankruptcy Code, 2016, and the explanation added thereto, dismissed the appeal as devoid of merit.

**Singh Raj Singh Vs. SRS Meditech Limited**
**07.10.2020 - NCLAT**

*"Objection on networth certificate provided by Successful Resolution Applicant cannot be raised by the suspended Board of Directors after the Resolution Plan has been approved by the CoC with a huge majority of voting share."*

An Appeal was preferred by a member of the suspended Board of Directors of M/s SRS Meditech Limited and Ors. (Corporate Debtor) against the approval order of the Resolution Plan of Vaibhav Build Tech Private Limited (Successful Resolution Applicant) the Hon'ble NCLT, Chandigarh, on the ground that the networth criteria was overlooked and certificate produced by the Successful Resolution Applicant in regard to its networth was fraudulent and sham which vitiated the whole exercise and approval of said Resolution Plan.

The Resolution Professional is stated to have presented the Resolution plan before the Committee of Creditors, which, after considering the eligibility of RA, negotiated on the financial terms of the Resolution Plan and approved with 93% of the voting shares. It was brought out by the Respondents that the Appellant had also participated in the aforesaid meeting held during the CIRP process but never raised the issue with regard to the eligibility of RA as regards networth criteria.

The Hon'ble NCLAT observed that no objection can be permitted to be raised by the Appellant after the Resolution Plan has been approved by the Committee of Creditors with a required majority of voting share.

The Hon'ble NCLAT referred to the dictum of Hon'ble Supreme Court in K.Shashidhar vs. Indian Overseas Bank and Ors. reported in (2019)" and held that the commercial wisdom of CoC has been given paramount status without any judicial intervention for ensuring completion of the Resolution Process within the timelines prescribed by IBC.

Thus the Appeal was dismissed due to lack of merit.

**Mirco Dynamics Vs. Cosmos Cooperative Bank Ltd. & Anr**
**12.10.2020 - NCLAT**

*"Once the CIRP admission order is set aside, no further enquiry in regard to fraudulent or malicious initiation of the CIRP would be warranted"*

The CIRP proceedings admitted by the Hon'ble NCLT was set aside by the Hon'ble NCLAT stating that the Application was hit by Limitation Act and directed the Hon'ble NCLT to close the proceedings of CIRP of the Corporate Debtor. In view of this, the Hon'ble NCLT while closing the main Company Petition filed for initiating CIRP, also dismissed 2 other pending applications which related to complaints of perjury made by a Director/ Shareholder of the Corporate Debtor. Aggrieved by the dismissal order an appeal was preferred by the shareholder of the Corporate Debtor contending that the setting aside of admission order of the NCLT by NCLAT does not affect the jurisdiction of the Adjudicating Authority who had to look into the aforesaid 2 other applications filed by the Appellants, to enquire into the matter which essentially pertained to fraudulent initiation of CIRP under Section 7 of the Code.

The Hon'ble NCLAT took a view that the aforesaid contention of the Appellant (shareholder of the Corporate Debtor) was unacceptable and held that once the main application under Section 7 of the IBC, which was the basic edifice for passing of order of admission at the hands of the Adjudicating Authority, was dismissed and proceedings emanating therefrom and consequential thereto were closed, the incidental and ancillary applications including the MAs in which the proceedings were closed in terms of the impugned order, does not survive for further consideration. Thus the Appeal filed by the shareholder was dismissed and upholding the order of Hon'ble NCLT.

**Madhusudan Tantia Vs. Amit Choraria**
**12.10.2020 - NCLAT**

*"MCA Notification dated 24.03.2020 is prospective in nature & will not apply to the pending applications led before the NCLT (waiting for admission), prior to the issuance of the notification"*

An Appeal was filed by the suspended director of the corporate debtor against the order of the Hon'ble NCLT admitting CIRP, pursuant to the Application filed by The Foseco India Ltd. (Operational Creditor) under Section 9 of Code on 05.09.2019 contending that the Hon'ble NCLT, overlooked the submissions of the Corporate Debtor, that amendment to Section 4 of the Code ought to be given a retrospective application.

The Hon'ble NCLT had taken a view that upon an application being filed by the concerned person in terms of the ingredients of Section 9(1) of the Code and the default sum is quite in tune with Section 4 of the Code. Thus an Application is to be admitted by the Adjudicating Authority subject to the ingredients of Section 9(2) to Section 9(5) of the Code. Further, the notification dated 24.03.2020 of the Ministry of Corporate Affairs (MCA), Government of India, cannot be interpreted to be retrospective as the relevant words are conspicuously absent. Also, if the notification dated 24.03.2020 of the Ministry of Corporate Affairs, Government of India, is made applicable to the pending applications of IBC, it will create absurd results of wider implications / complications. The Hon'ble NCLT had held that on the occurrence of default, the operational creditor gets the right to trigger the CIRP process.

In view of the above the Hon'ble NCLAT, held that the notification dated 24.03.2020 of the MCA is **prospective in nature** and it is not retrospective or retroactive in nature. Further, the said **notification will not apply to the pending applications** filed before the concerned NCLT, under IBC, prior to the issuance of the aforesaid notification. Thus, the Appeal was dismissed upholding the order of the Hon'ble NCLT.

**Mr. Bhaskar Vs.**
**M/s. Sai Precious Traexim Pvt. Ltd & Anr.**
**14.10.2020 - NCLAT**

*"Serving an advance copy of the application to the corporate debtor cannot be construed or deemed to be Service of Notice & Processes under Rule 38 of NCLT Rules."*

An appeal has been preferred by one of the erstwhile directors of the CD, Pine View Portfolio Consultants Pvt. Ltd., against the order dated 31.01.2020 passed by NCLT, Delhi admitting CIRP against the CD.

The appellant contended that there was no legal notice served upon the CD by the Hon'ble Tribunal in the Section 7 application filed by the first respondent. This raises the question of violation of Rule 38 of NCLT Rules, 2016 which deals with 'service of notice and processes'. The Appellate Tribunal directed the Adjudicating Authority to follow the ingredients of Rule 38 and stated in this case that the serving of advance copy of application to the Corporate Debtor cannot be construed/ deemed to be service of notice in the eyes of Law as required under Rule 38 of NCLT Rules. It was

also held that *the Adjudicating Authority while reserving orders in this matter had committed an error of jurisdiction in reserving the orders and passed the impugned judgment without issuing notice to the 'Corporate Debtor' which is clearly unsustainable in the eyes of law.*

The other contention raised by the Appellant that there is no privity of contract between FC & CD; and the debt in question is not extended by the FC to the CD but to a third party which is not a party to this proceeding. On finding that the facts were clear that the FC had extended finance not to CD, it was observed by the Appellate Tribunal that the Adjudicating Authority was at default in classifying a payment to third-party as a financial debt of the CD.

In the light of the above said reasons NCLAT stated that to prevent an aberration of justice, the appeal is allowed and the order of the Hon'ble NCLT is set aside.


(Image Source: Website)

**Sh. B. Prashanth Hegde, Suspended Managing Director, Metal Closures Pvt Ltd Vs. State Bank of India 14.10.2020 - NCLAT**

*"The period of Limitation for Section 7 or 9 and Applications under the Insolvency and Bankruptcy Code 2016 would be governed by Article 137 of the Limitation Act, 1963.*
*And the date of default to be the date of NPA."*

An appeal was preferred by the appellant (ex-Director of the Corporate Debtor) against the order passed by Hon'ble NCLT, Bengaluru admitting the CIRP initiated by the Financial Creditor, State Bank of India behalf of Consortium Banks under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC).

The case of the Appellant is that, in the year 2007 State Bank of India granted credit facilities to the Corporate Debtor M/s Metal Closures Private Limited. The account of the Corporate Debtor was classified as NPA by SBI on 31st January 2010 for the first time. Thereafter, it was restructured and fresh loans were sanctioned by consortium of bankers consisting of PNB, UCO Bank and Corporation Bank. A Master Joint Lenders Forum agreement also was entered into on 21st June 2014. However, on failure of the restructuring the consortium members classified the account as NPA on different dates as follows: SBI 31st October 2010; PNB 30th June 2014 and Corporation and UCO Bank on 31st December 2014. Even if the date of default was taken to be the last of the four, as per Article 137 of limitation Act, the 3 years period of limitation ended on 30th December 2017 and the petition is filed on 23rd July 2018, that is after the period of limitation ended.

The Appeal against the said Order of admission was dismissed by the Appellate Tribunal, which was challenged before the Hon'ble Supreme Court wherein the Hon'ble Supreme Court set aside the Order of the Appellate Tribunal and remanded back the matter to the Appellate Tribunal and directed the Appellate Tribunal to re-examine the question of Limitation applying Article 137 of the Limitation Act.

Referring to the law laid down by the Hon'ble Supreme Court in the case of *Gaurav Hargovindbhai Dave*, the date of default was considered to be the date of NPA i.e., is 31st January 2010.

The Hon'ble Bench held that the right to sue under IBC occurs when default occurs. If the default has occurred over a three years period prior to the date of filing the Application, the Application would be time-barred given the law laid down by Hon'ble Supreme Court in the case of *B K Educational*.
In view of the law enunciated by the Hon'ble Supreme Court of India and considering the facts and circumstances of the case, it was held that the Application filed under Section 7 of the Code by the Financial Creditor was barred by Limitation and the order admitting CIRP was set aside directing Corporate Debtor to be released from all rigours of 'Moratorium' and was allowed to function through its Board of Directors with immediate effect. The IRP/Resolution Professional was ordered to hand over the assets and records of the Corporate Debtor to its Board of Directors.

**Raman Raheja Vs. Prime Air Global Ltd. & Ors. 20.10.2020 - NCLAT**

*"On the pretext of settlement, pre-admission proceedings could not be permitted to protract"*

A shareholder of the CD had filed an appeal aggrieved of admission of application under Section 9 filed by the Operational Creditor and that adequate opportunity for proper representation was denied by the Adjudicating Authority.

It is further submitted that settlement talks were going on when lockdown was imposed and part payment was made by cheque. NCLT had granted time for the CD to file a reply. However, CD had not raised any defence in the nature of there being a pre-existing dispute or in respect to satisfaction of the claim of the Operational Creditor or pendency of a Civil Suit or Arbitration Proceeding.

It was held that on the pretext of settlement, pre-admission proceedings could not be permitted to protract. Admittedly, the period of 14 days from the date of filing of the application had elapsed by the time when the impugned order came to be passed.

Being devoid of merit, the appeal was dismissed.

**Ascot Realty Private Limited Vs Ajay Kumar Agarwal, IRP of RDH Technologies Private Limited**
**15th October 2020 - NCLT**

*"On invoking the guarantee issued by CD in recovery proceeding for the financial debt of a third party, the amount liable to be paid by the CD falls within the definition of financial debt."*

The Appellant is a Financial Creditor, submitted his claim on the basis of an arbitral award and was accepted by the CoC members in their third meeting. After forming a part of the CoC, the appellant had objected before the Adjudicating Authority (NCLT Kolkata), that the claim of Respondent No.2, Oriental Bank of Commerce, to be Financial Creditor to the extent of corporate guarantee furnished by Corporate Debtor for third party debts was illegal as in the matter of "Anuj Jain", Hon'ble Supreme Court has held that security extended by Corporate Debtor towards third party's debt would stand outside the purview of financial debt and the creditor would not qualify as Financial Creditor within the meaning of Section 5(8) of IBC. On a similar nature, it was contended by the appellant that the claim of Respondent No. 3. IndiaBulls Housing Finance Ltd. was towards corporate guarantee given by CD for third party dues.

The Adjudicating Authority took note of the fact that there was a Term Loan Agreement admittedly executed by the Corporate Debtor in favour of OBC for availing loan by third parties. OBC claimed before Adjudicating Authority that out of Rs.40 Crores, Rs.7.54 Crores and odd due was relating to default in payment of term loan and Rs.33 Crores and odd was on account of corporate guarantee which was invoked by letter dated 26.09.2018. OBC claimed that in addition to executing term loan availed by Corporate Debtor, Corporate Debtor stood as a guarantor by executing corporate guarantee for availing loan by five Companies which was invoked. OBC claimed that the Corporate Debtor was liable to pay those amounts and these are financial debts under Section 5(8)(i) of the Code. The Respondent No.3 (India Bulls) claimed that the Corporate Debtor was one of the borrower of the loan sanctioned on 31st March, 2016 and had executed Term Loan Agreement. The Directors of the suspended Board of the Corporate Debtor claimed that invocation of the corporate guarantee was not factually correct and Rs.19.04 Crores were relating to corporate guarantees of five Companies which had not been invoked till filing of the Application by OBC.

The question before the AA was, whether the entire claim of OBC and the claim of India Bulls was contrary to the proposition laid down in the matter of "Anuj Jain".

The AA observed that since the lender/OBC had invoked the corporate guarantee even before the CIRP (i.e. on 26.09.2018), the concepts of financial debt as discussed in the "Anuj Jain" judgment is different from the debt claimed by the OBC in the present case.

It was also observed that that Corporate Debtor was a co-borrower of the loan and was principal borrower of Respondent No.3 – India Bulls and had even created mortgage on its property to secure the loan and thus, it was a financial debt.

The Hon'ble AA looking into "Anuj Jain" judgment, wherein it was found that the mortgagees in that matter were not financial creditors of Corporate Debtor JIL, observed that in the present case, the Corporate Debtor had guaranteed repayment of debts and the guarantees were executable against the Corporate Debtor which is a totally different case in case of mortgage where the Creditor has to proceed against the mortgaged property and cannot directly proceed against the debtor.

Thus the Hon'ble AA held *that there is no fault with the claims made by OBC and India Bulls and stated it to fall within the ambit of financial debt.*

When the aforementioned matter was before the Hon'ble NCLAT, the view taken by the Hon'ble NCLT was upheld and further it was observed that, *even if CD issued guarantee in recovery proceeding for the financial debt of third party and in default the said guarantee/s have been invoked by the Financial Creditor, the CD is liable to pay the amount being amount of liability in respect of guarantee issued which falls within the definition of financial creditor.* Thus the appeal was dismissed.

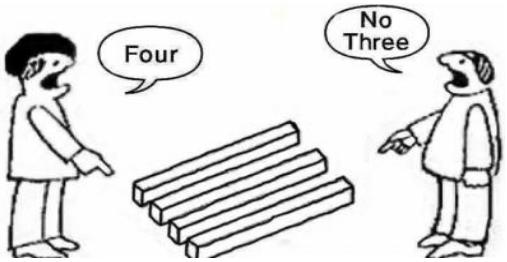
## Building Communication Skills

### CGRF Training Bureau

Be it in an official context or in a personal relationship, a minor lapse in communication can create a havoc. This is all the more true where the relationships are very delicate. Things can go irretrievably wrong and God knows, impressions will be formed quickly about individuals.

Therefore, one must take extra efforts to learn the nuances of effective communication and how effective communication can be gainfully employed to achieve one's objectives.

a) **Respect Perspectives**




(Image Source: Website)

However educated we are, sometimes we give in to our ego calls and take positions. Relax for a while and try to put ourselves in other person's shoes. Maybe we see a good reason for the behaviour of the other person.

**b) Cultivate Good Manners**

Wish the seniors, peers and subordinates first time in the morning with a smiling face. This can do wonders and sometimes it will break the ice paving way for a pleasant conversation. Keep your work place neat and tidy.

While speaking to the Boss or peer or any colleague try to have an eye ball contact. It not only gives the instant feedback of the receiver's response, it also shows your forthright in your communication.

**c) Telephone conversations**

Always open the telephone dialogue with a greetings and sharing your name and ask how you can be of help to the caller. Be polite while asking questions. Listen to the other person's point of view. Don't be in a hurry to express your view pre-empting the other person. While in a meeting with a group of people, don't indulge in your call. Sometimes a pesky one will land at you when you are in a meeting where serious discussions would be taking place. Your talking loud will completely pollute the atmosphere. If you are a senior person, people may not express their displeasure at your face but it will sure show in their face. Go away from the meeting place and complete the call quickly and return to the meeting.

**d) Meeting Do's and Don'ts**

Do not get into a private conversation with your neighbour, however important it is, when another person is speaking. You will be distracting the attention of other persons. The importance of the meeting will get instantly diluted when a distraction takes place. Many senior people cannot grasp two conversations at a time. It will be a complete breakdown when many persons speak at the same time. God knows what the TV viewers make out of a political debate show..!!

**e) Email Etiquette**

- Take care to use the right subject line in your emails. Examples of a good subject line include :

  **"Tomorrow's Meeting schedule changed"**
  **"I need your urgent help"**
  **"Quick query on the new project"**
  **"My suggestions on your proposal"**
  **"Congrats on your promotion", etc.**

  Many a times, people decide whether to open an email or not based on the subject line.
- Don't type recipient email id until you complete the message, Sometimes, even before you correct the draft email, by mistake, the message might be sent. This could cause embarrassment to both the parties. Better to complete the draft, verify the contents, spell-check and then type the recipient address and hit "send".


(Image Source: Website)

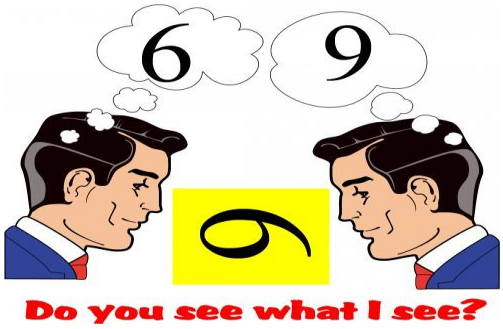
- Spell-check – be careful if you use this tool. Even a correctly spelt word can be changed by the tool, sometimes to your amusement sometimes and many times an embarrassment.
- Be careful while typing the email id of the person to whom you are sending the message. Sometimes, the first few characters of the person will match and we tend to quickly move ahead accepting the email id prompted.

Bang….Instead of sending the message to Jegan, the email will go to Jegadeeswari!!

(Image Source: Website)

**f) Check back after delegation and instructions**

It is always a good practice to check back with the other person what he has understood after you complete your instructions or delegation. This will avoid possible miscommunication in understanding the instructions.




(Image Source: Website)

**g) Timely communication**

One must be very careful about the timing of the communication. When you are inviting even the best of your friends for a family function, take note to send the invitation at least before a reasonable time and not at the eleventh hour. Sending an invite message very late could be misconstrued as a perfunctory invite, not really an invitation. When a relationship is at its edge, even a small spark like this can cause a big divide.

When there is dual command – two bosses for an individual - the timing of communication of any important matter is very critical as one boss may get upset if the other one got the news earlier.

h) **How you can help build better communication skills in the organisation**

Take a keen look at the conversations taking place in the office or home. How the people communicate, their facial impressions, body language – all these inputs will help you a lot in shaping your communication skills. Even a very harsh message can be communicated in a better way thereby making the recipient see the subtle message in the communication.

i) **Trust bridges the gap**

It takes time to develop trust in someone. Cultivate conscious efforts to build trust with your colleagues and family members. Even when a communication misfires, the trust factor will not allow the damage to be devastating, rather it would mellow it down and promote a better understanding in future when the other person sees your perspective.

# Your Feedback matters

Was indeed expecting your edition for the month and the timing was too close between my mind and your mail. Kudos!!!

Ramkumar Jagannathan
JRK & Associates, CS,
Advocates & GST Practitioners

It was indeed very thoughtful of you to have remembered and sent me the issue of October 2020. Thank you and all the best in your endeavors.

Sudhakar Kudva

This October journal is very useful, Clarification about private placement, independent director etc., are explained in simple language. Wishing you and your team for the efforts and knowledge sharing.

A. Kaliannan
Chartered Accountant

Articles on Notice of Invitation to Statutory Auditors for AGM and Appointment of Independent Directors are quite relevant and useful. Also very nice presentation.

S Kalyanaraman
TTK Pharma Ltd

# CGRF offers online/class-room Awareness/Training sessions on Corporate Laws, IBC and other Commercial Laws

We are glad to share with you that Create & Grow Research Foundation (CGRF) is a premier, not-for-profit research organization established as a Section 8 Company under the Companies Act, 2013. CGRF has been organizing seminars and Awareness programs on IBC and various other corporate laws to bankers, corporate professionals, faculty members of Universities, Colleges, Legal Professionals, Students, Government Organizations like EPFO, ESIC, Income Tax, GST, etc.

Training capsules are exclusively designed meeting specific client requirements on following domains:

- **Companies Act 2013**
- **Insolvency & Bankruptcy Code 2016**
- **Intellectual Property Laws**
- **Competition Laws**
- **Labour Laws**
- **Excellence in Management**
- **Contract Management**


We have rich expertise on the abovesaid commercial laws with practical exposure in several industries. Our association with all the major banks gives an edge to provide professional training to your faculty members. We also provide classroom training for students on latest developments in business environment, regulatory domain and challenges faced, etc. Online sessions are also available for 2hours/ 4hours.

Our training sessions to various educational institutions, bankers and Government departments have been received well with appreciable improvement in recognizing importance of updating knowledge in relevant fields.

**Ms. Priya Karthick – Contact no: 044-28141604 – call for more information**

CREATE & GROW RESEARCH FOUNDATION

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

*****Well-informed is well-armed******

# Our Services

Providing Services to the Investors / Bidders / Corporates:

- Assessing 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

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 Services:

- 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


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 1604 | Mob: 94446 48589 / 98410 92661
Email: createandgrowresearch@gmail.com
Website: www.createandgrowresearch.org