CGRF

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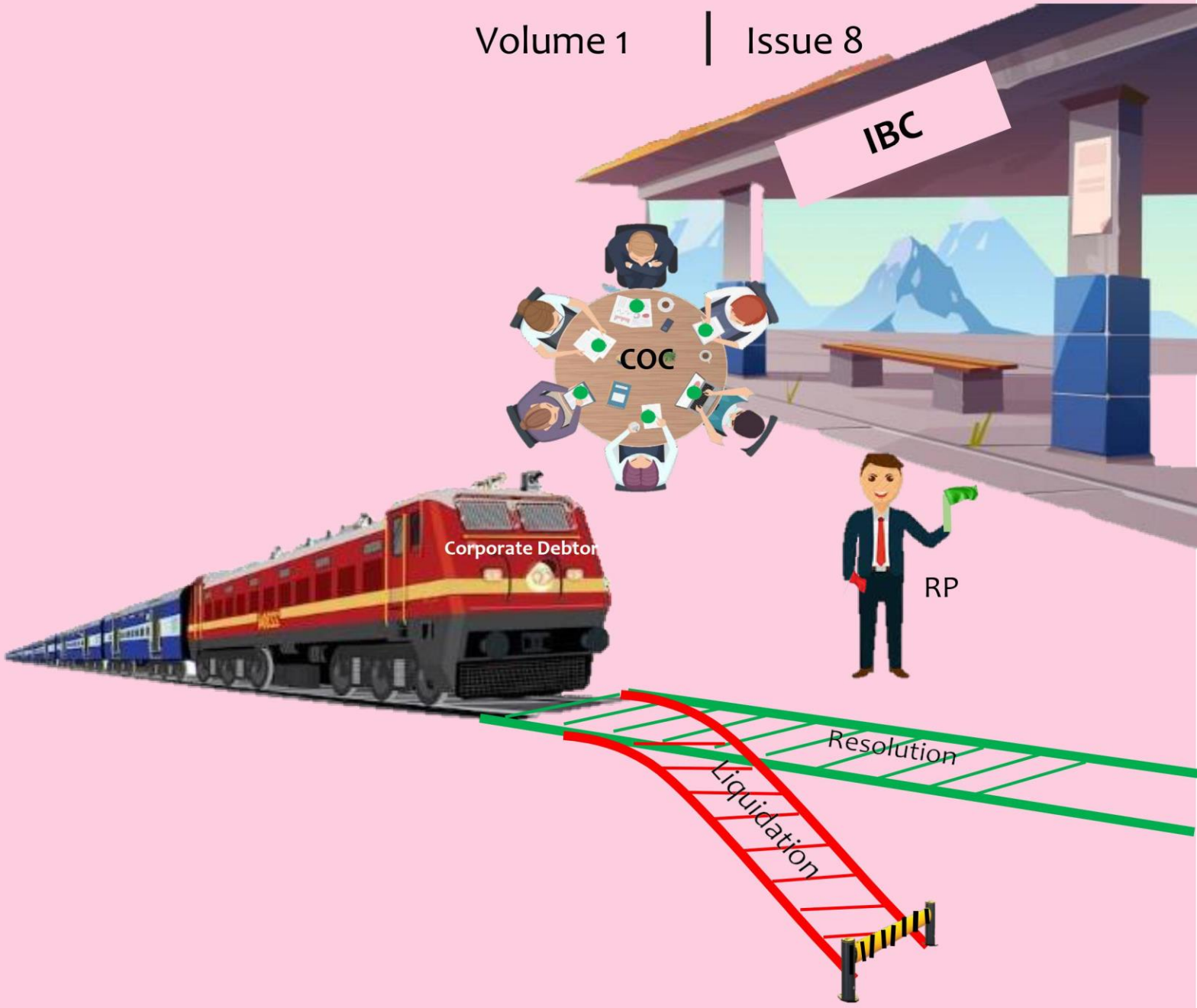

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At the time when one should use self-control, let him restrain himself like a heron; and, let him like it, strike, when there is a favourable opportunity.

From the Editor's Desk

Dear Readers

Having seen off Diwali and the ominous "Nivar" cyclone towards the end of November, we are at the threshold of 2021. The Christmas celebrations are understandably muted this December with fresh reporting of Covid-19 infections elsewhere in Europe, USA and to some extent in India as well. However, there are positive hopes of getting a reliable vaccine for the entire country as the Central Government has been taking concerted action on this front. Well, it is going to be a massive exercise and one does hope the battle against Covid-19 would be successful.

In this backdrop, it is our pleasure to reach the CGRF SandBox once again in your hands. Several interesting events have taken place during November 2020. Our team has great pleasure to share important developments in the fields of banking, corporate laws and IBC provisions.

Emergency Credit Line Guarantee Scheme (ECLGS - 2.0)

In order to provide a strong impetus to medium industries hit by Covid-19 pandemic, the Government has announced ECLGS-2.0 for those having borrowings of above Rs.50 crores and upto Rs.500 crores to provide 100% guarantee to the lenders for providing additional credit to the said borrowers in the form of working capital term loan facility upto a maximum of 20% of loan outstanding as on 29th Feb. 2020, subject to some conditions. The interest rate to be applied by banks is subject to a maximum of 9.25% p.a. No security need to be provided by the borrowers for this additional limit. Repayment of the loans under ECLGS scheme shall be over a period of 5 years including a moratorium period of 1 year. The scheme shall be operative until 31st March 2021 subject to the overall sanction under both ECLGS-1.0 and ECLGS 2.0 not exceeding Rs.3 lakh crores. It is noteworthy that already Rs.2.05 lakh crores has been sanctioned to 61 lakh borrowers, out of which Rs.1.52 lakh crores has been disbursed. It is hoped that the entities in 26 stressed sectors and health care sector would get a breather by way of this additional collateral-free funding from banks.

Lakshmi Vilas Bank rescued by RBI

It was quite some time LVB was scouting for a strategic partner as the bank was struggling with rising NPA and erosion of capital. Shareholder activism resulted in ousting of the existing management as the directors were voted out in the annual general meeting, forcing RBI to sit up and take notice. Though talks were going on with Clix Capital, the negotiations faced severe head winds on valuation while the bank tottered without a proper head. RBI stepped in, announced a moratorium and the deal to take over by DBS Bank India Ltd., which is an SPV of DBS Bank, Singapore. The Cabinet gave its approval and the merger took effect on 27th November 2020.

However, in its trail, the shareholders and tier-2 bond-holders got washed away without any compensation, paving way for fierce court-room battles. The Madras High Court has refrained from staying the merger but has questioned the decision that there is no value for shareholders of the Bank which has a chequered history of more than 90 years. The coming weeks will shed more light on this interesting litigation. One sees a kind of similarity between a resolution plan under IBC for an ailing corporate debtor and the LVB rescue story where in both the cases, the shareholders have been harder down a raw deal.

CGRF turns One

It is our great pleasure to share with our esteemed readers that CGRF has completed one year of its service and it is our fervent hope that getting into the 2nd year, we look forward to much more fruitful collaborations with the banking community, corporates and professionals.

CGRF SandBox Team wishes its readers a brand new 2021 leaving behind the difficult and challenging times and bringing in new hopes and opportunities!!

Yours truly
S. Rajendran

Relaxing the norms for banking licences for corporates

N.Nageswaran
Insolvency Professional

The Reserve Bank of India had constituted an Internal Working Group (IWG) on 12th June 2020 to review extant ownership guidelines and corporate structure for Indian private sector banks. The Terms of Reference of the IWG inter alia included review of the eligibility criteria for individuals/ entities to apply for banking license; examination of preferred corporate structure for banks and harmonisation of norms in this regard; and, review of norms for long-term shareholding in banks by the promoters and other shareholders.

The following were the terms of reference to the working group:

> *"(i) To review the extant licensing guidelines and regulations relating to ownership and control in Indian private sector banks and suggest appropriate norms, keeping in mind the issue of excessive concentration of ownership and control, and having regard to international practices as well as domestic requirements;*
> *(ii) To examine and review the eligibility criteria for individuals/ entities to apply for banking licence and make recommendations on all related issues;*
> *(iii) To study the current regulations on holding of financial subsidiaries through non-operative financial holding company (NOFHC) and suggest the manner of migrating all banks to a uniform regulation in the matter, including providing a transition path;*
> *(iv)To examine and review the norms for promoter shareholding at the initial/licensing stage and subsequently, along with the timelines for dilution of the shareholding; and,*
> *(v) To identify any other issue germane to the subject matter and make recommendations thereon."*

The IWG has since submitted the report and the same was placed in the website of RBI with a press release dated 20th November 2020 inviting comments of stakeholders and members of public latest by 15th January 2021. RBI will examine the comments and suggestions before taking a view in the matter, as per the press release.

It is interesting to note that the following para appears in the report under reference with regard to the previous exercise to consider issuing banking licences to corporate houses.

> 3.18 Taking into account the feedback received on the Discussion Paper the draft guidelines on 'Licensing of New Banks in the Private Sector' were framed. *The draft guidelines were placed on the website of the Reserve Bank in August 2011 for comments.*

The final guidelines were framed in the matter in February 2013. It would be further interesting to note that based on all discussions that emanated on the guidelines framed, another comprehensive draft discussion paper was floated in 2013 and the final policy guidelines were issued only in November 2014 in the matter of "Licensing of New Banks in the Private Sector".

This is the known story of how much time is consumed by RBI, may be rightly also, before finalising such important policy decisions. Still, within such a short time of the press release on 20th November 2020 the discussions that have emanated, help us to chronicle the dates and events of history of banking in India, the special status afforded to this business and the reasons for corporate business houses to think whether they should apply for a banking licence or not.

Banking in India before Independence

In India, it was the private sector which played a major role in commercial banking since inception till as late as 1960s. Among the first banks were the Bank of Hindustan, which was established in 1770 by the **agency house of Alexander and Company** and liquidated in 1829–32. Then, The General Bank of India, established in 1786 but failed in 1791, was the first joint stock bank. Three banks were formed by presidency government, namely Bank of Calcutta (later renamed as Bank of Bengal) which started working in 1806, Bank of Bombay in 1840 and Bank of Madras in 1843. These three were later merged to function as Imperial Bank of India in 1921 which eventually became State Bank of India in 1955.
As an offshoot of the swadeshi movement, all over India many such banks were promoted by influential traders and trading groups such as Seths, Pais, Shettys, Chettiars etc. and of course catering to the promotion of trade, industry and agriculture.

A case in sample was the recently merged Lakshmi Vilas Bank (LVB) with DBS, Singapore. LVB was founded in 1926 by a group of seven businessmen of Karur (Tamilnadu) under the leadership of Shri V.S.N. Ramalinga Chettiar. ***Their objective was to cater to the financial needs of people in and around Karur who were***

occupied in trading businesses, industry and agriculture. Finding a need to regulate the banks and to make them function in an orderly manner, the government promoted Reserve Bank of India in 1935 through the RBI Act 1934.

Post-Independence

At the time of independence in 1947, India had 97 scheduled private banks, 557 non-scheduled private banks and 395 cooperative banks. During the next two decades of functioning, the government identified that the plethora of banks were short in performance particularly in achieving social objectives. Hence the Government nationalised 14 banks in 1969 and another 6 banks in 1980 and brought about 91% of the banking business under the control of Public Sector Banks. Thereafter, till 1993 establishment of Bharat Overseas Bank Ltd as a private bank was the only instance.

The following table will give in a nutshell the changes that were prompted in the banking industry in the last three decades:

1. 1993 - Licensing Guidelines for new Private Sector Bank
2. 2001 - Licensing Guidelines for new banks in Private Sector
3. 2004 - Guidelines for acknowledgement of transfer/allotment of shares in private sector banks
4. 2005 - Guidelines on Ownership and Governance in private sector banks
5. 2010 - Discussion Paper on Entry of New Banks in the Private Sector
6. 2013 - Guidelines for Licensing of New Banks in the Private Sector
7. 2013 - Discussion Paper for Licensing Small Finance Banks and Payments Banks
8. 2014 - Guidelines for Licensing Small Finance Banks and Payments Banks
9. 2016 - Guidelines for 'on tap' Licensing of Universal Banks in the Private Sector
10. 2018- Voluntary Transition of Primary (Urban) Co-operative Banks (UCBs) into Small Finance Banks (SFBs)
11. 2019 - Guidelines for 'on tap' Licensing of Small Finance Banks in the Private Sector

To quote again from the IWG's report referred above, "The guidelines for licensing of banks have kept pace with changing ecosystem; various developments in the area of technology, economy, capital markets; legislative reforms and developments; increasing needs of customers (particularly marginalised section of the society); need to extend reach of banks upto last mile; international practices; improving governance standards; etc."

Admittedly, even after so much of discussion under various heads and topics detailed above, the Government and Reserve Bank of India's expected level of co-ordination and intermediation did not happen between banking sector and industry as a whole including agriculture. Though it might look like a step in retrograde with reference to the decision taken in 1969 to nationalise banks, still the Government with the assistance of RBI would like business houses to dream of owning a bank, albeit with the strings that the regulators would put forward along with such licences in the form of directives to achieve social objectives.

Quoting the IWG's report again, "It was in this context that, in order to leverage these developments for engendering competition through entry of new players, the Reserve Bank initiated the process for a comprehensive review of the extant guidelines on licensing and ownership for private sector banks. This exercise would also provide an opportunity to harmonise the norms applicable to banks set up under different licensing guidelines to ensure a level playing field and foster competition among these banks."

What is the "hue and cry about"?

When corporate houses are freely and to a greater extent efficiently present in all financial intermediation areas such as asset management firms, brokerages, life and general insurance, non-banking finance companies etc., why not in banking?

Of course, however efficient the regulator could be, the powerful corporate house would give a slip and by the time identified, most of the horses would have bolted out of the stable is a constant fear of the authorities which make them flex the elbow muscle only to a half while formulating the licencing policies with regard to prescribing ownership requirements.

On the part of the corporates, they will be attracted by the fact that the depositors would be bearing the risk, at the end of the story unlike in other areas of businesses. They also know that on behalf of such depositors, the regulators would be insisting on compliances with the regulations governing the licences issued. There is also a constant fear that such regulations are permanent impediments for efficient commercial performance.

Conclusion:

Has the time come for one to think that attaching social objectives to the business of banking is the root cause for the trust deficit in general on corporates who want to own a banking licence? Is it possible to create a Chinese wall between protecting the depositors' interest and business risks taken by the banks? Approaching this subject with a pure business perspective will probably lead to the best solution.

Companies (Amendment) Act 2020- Remuneration to Independent Directors and Non-executive Directors in case of No /Inadequacy of Profits

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1. Independent director

Independent Director means a non-executive director who apart from receiving director's remuneration, does not have any material pecuniary relationships or transactions with the company, its promoters, its directors, its senior management or its holding company, its subsidiaries and associates which may affect independence of the director.

Sub-section (47) of section 2 of the Companies Act 2013 spells out that "independent director" means an independent director referred to in sub-section (6) of section 149. Section 149(6) of the Companies Act, 2013 sets out the criteria of independence for a director.

2. Non-executive director

A non-executive director is a member of a company's board of directors who is not part of the executive team. A non-executive director typically does not engage in the day-to-day management of the organization but is involved in policymaking and planning exercises. The term non-executive director is not at all described under the Companies Act, 2013. One can derive the meaning of non- executive director by going through the definition of executive director. As per Rule 2(1)(k) of the **Companies (Specification of definitions details) Rules, 2014** "executive director" is the one who is a whole time director as defined in clause (94) of section 2 of the Act". A person who is not satisfying the conditions of definition of 'executive director' could be considered as 'non-executive director'. Therefore, one can conclude that all the directors except 'whole time director' and "managing director' could be considered as non- executive director.

3. Provision in the existing in Companies Act 2013 for remuneration of independent director and non-executive director

There is no provision for independent directors and non-executive directors in the Companies Act, 2013 to receive remuneration by way of commission if the company has incurred losses or in case of inadequacy of profits. Schedule IV of the Companies Act, 2013 specifies that independent director is entitled to remuneration, periodic fees, reimbursement of expenses for participation in the boards and other meetings and profit related commission, if any, as provided in the letter of appointment of the independent director.

As per section 197(6) of the Companies Act, 2013, a company is allowed to pay remuneration by way of commission to all its directors either by way of a monthly payment or at a specified percentage of the net profits of the company or partly by one way and partly by the other. Further, the section also provides that

(i) where the company has either managing director or whole-time director or manager, then a maximum of 1% of its net profits can be paid as remuneration to its non-executive directors.
(ii) in case there is no managing director or whole-time director or manager, then a maximum of 3% of net profit can be paid.

Thus, the basis of payment of remunerating by way of commission to the non-executive director is the net profit of the Company.

The following are the provisions relating to the payment of sitting fees:-

Sub-section (5) of section 197 of the Companies Act, 2013 read with Rule 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 states that a director may receive remuneration by way of fee for attending meeting of the board or committee thereof or for any other purpose whatsoever as may be decided by the board of director-provided such fee shall not exceed a sum of rupees 1,00,000/- (One Lakh Rupees) per meeting.

4. Provision relating to professional fees to non-executive directors

Section 197(4) of the Companies Act 2013, allows a company to pay remuneration to its non-executive directors for services rendered by any such director if:

a) the services rendered are of professional nature;
b) in the opinion of Nomination and Remuneration Committee the Director possess the requisite qualification for the practice of the profession.

As per the provision of section 188 of the Companies Act, 2013, the Audit Committee and the Board of Directors of the company is required to approve the professional fees to be paid to non-Executive director(s), and with the approval of the shareholders where ever required.

5. Amendment proposed in Companies (Amendment) Act 2020

One of the major amendment proposed by the Companies (Amendment) Act 2020 is to compensate the independent directors and non-executive directors considering their valuable time and expertise provided in enhancing the efficiency of the functioning of the company.

The amendment Act recognizes the efforts put in by the independent directors and non-executive directors and would like to reward them even if the company is making inadequate profits or loss.

The Companies (Amendment) Act 2020 has proposed to insert the relevant sections in the Companies Act 2013, equivalence in the remuneration of the independent directors and non-executive directors with the executive directors. As per the Amendment, Section 149 and 197 in the Companies Act 2013 is to be altered so that independent directors and non-executive directors could receive remuneration even if a company has no profits or inadequate profits in a particular year, in accordance with schedule V of the Companies Act 2013.

The following table gives an overview on the existing v/s proposed amendment to the section 149 and 197 of the Companies Act 2013.

Section of Companies Act 2013	Existing provision	Amended provision	Impact / effect of the amended provision
Section 149	Section 149 (9) of the Companies Act 2013:- Notwithstanding anything contained in any other provision of this Act, but subject to the provisions of section 197 and 198 an independent director shall not be entitled to any stock option and may receive remuneration by way of fee provided under sub-section (5) of section 197, reimbursement of expenses for participation in the Board and other meetings and profit related commission as may be approved by the members (no proviso is there at present for this section)	In section 149 of the principal Act, in sub-section (9), the following proviso shall be inserted, namely: - "Provided that if a company has no profits or its profits are inadequate, an independent director may receive remuneration, exclusive of any fees payable under sub-section (5) of section 197, in accordance with the provisions of Schedule V."	As per the amended proviso, an independent director may receive remuneration, if a company has no profits or inadequate profits in accordance with Schedule V of the Act.
Section 197	Section 197(3) of the Companies Act 2013:- Notwithstanding anything contained in sub-sections (1) and (2), but subject to the provisions of schedule V, if, in any financial year, a company has no profits or its profits are inadequate, the company shall not pay to its directors, including any managing or whole time director or manager, by way of remuneration any sum exclusive of any fees payable to directors under sub-section (5) hereunder except in accordance with the provisions of Schedule V	Section 197(3) of the Companies Act 2013:-Notwithstanding anything contained in sub-sections (1) and (2), but subject to the provisions of Schedule V, if, in any financial year, a company has no profits or its profits are inadequate, 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 under sub- section (5) hereunder except in accordance with the provisions of Schedule V.	If a company fails to make profits or makes inadequate profits in a financial year, any non-executive director of such company, including an independent director shall be paid remuneration in accordance with Schedule V of the Act

8. Conclusion

From the foregoing paragraphs, we can conclude that though the independent directors and non-executive directors do not get involved in the day-to-day management / operational activities of the company, but they get involved in policy making and planning exercises, it is justified and also a welcome move to provide remuneration to them in case of no / inadequacy of profits in a company for a particular financial year.

Search and Status Report-A Tool not fully exploited

(S. Srinivasan, Senior partner
SR *Srinivasan & Co* LLP)

Very often I get requests from my credit manager friends in the bank to give a "Search Report" on the charges registered as per ROC Records of his corporate constituents.

So I ask him "what's the purpose?"

The first reaction is "Inspection from my head Office is due any time and, therefore, I have to finish off the formality before the inspection begins". Or sometimes the request for a Search Report is made after the inspection is over and the Bank Inspector has made adverse remarks in his inspection report that the Search Report is not available or is inadequate, which puts the manager in the docks and may spoil his personal records.

I sometimes feel sad that there is utter lack of proprietary interest in some bankers. The aim to seek a "Search Report" seems to be the fulfilment of the requirements of the inspection only. In some cases, 1 find that the Credit Manager would have obtained the "Search Report" from a professional and "filed" it in his records. He will "look" at the report for the first time only when the Inspector points out the discrepancies. Or there are cases when the Manager would have had a "look" at the report to ensure the charges in favor of his bank appear, ignoring charges in favor of the other charge holders.

Therefore, the conclusion is that:

I. there is lack proprietary interest on the part of some managers: and
II. the purpose of a Search and Status Report is not fully understood by some bankers.

I hasten to add that I do not really want to make a generalized statement, as above, and cast aspersions on the working of all bank officers. However, one cannot deny that there are some credit managers whose likes are as stated above. I have also come across shrewd and goal oriented managers, whose proprietary interests in their bank are impeccable. It has also been a delight for me to interact with such managers in the past 36 years as a Practising Company Secretary, since the discussions on the Search Report becomes healthy and we, as professionals, are kept on our toes.

Having said this. I would like to elaborate in this issue on the purpose of obtaining "Search and Status Report' by the Credit Manager from a Practicing Company Secretary or the like.

PURPOSE 1: The Law will not forgive a recalcitrant banker. Just like the Doctrine of Indoor Management seeks to protect the banker from being vulnerable to being charged with abetting in violations of internal rules of the Company, the Doctrine of Constructive Notice has cast a duty on the banker to be vigilant in his duties failing which he and his bank may have to face adverse legal consequences. Section 126 of the Companies Act, 1956 which has been replaced by Section 80 of the Companies Act, 2013 casts an indirect duty on the Credit Manager to go through the rigmarole of checking the records of the company which is available in the public domain.

PURPOSE 2: The fall out of the search of the records of the RoC would also help the Credit Manager to arrange for rectification of mistakes, if any, in the contents of the Form No.8 / CHG – 1 already submitted and registered in time.

PURPOSE 3: A company enjoys various credit facilities from various banks either in the form of multiple banking or through consortium lending. Therefore, his aim should be to safeguard the interest of the bank for which he works, by ensuring that the security intended while advancing the loan is deeply fastened in his Bank's favour on the records of the ROC, reflecting the Registration of Charges on the assets of the Company, such that, in the event the Company is wound up his bank's charges rank over and above the other charge holders in an appropriate manner, and his bank will be able to recover the monies due to the maximum extent at the time of liquidation.

PURPOSE 4: The Search and Status Report must not be looked at only for confirming whether his bank's charges are registered. More importantly, he should ascertain which are the other charge holders who rank in priority to his bank and to what extent. This exercise will enable him to insist on a pari-passu charge, with the other charge holders holding prior charges on the assets of the company if the security common to charge holders is inadequate as registered.

(Image source: website)

PURPOSE 5: Inspection is an important facet relating to the adoption of precautions in lending to corporate borrowers and is carried out generally by the inspection division of the banks, the statutory auditors and sometimes by the RBI. Therefore, the purpose of carrying out a search in the records of the RoC for existence of charge is a periodical exercise to meet the requirements of the inspectors, but certainly not the main purpose.

PURPOSE 6: Even as it is conceded that computerisation of records by the MCA, since the year 2005, has brought down the requirements to obtain a Search and Status Report by a professional, as the Credit Manager is able to view the charges registered from his own table, a Search and Status Report issued by a professional under the latter's signature would give authenticity to the facts as appearing on the records of the MCA. This may help him defend himself against any charge of misreporting.

Limited Search: On some occasions in his anxiety to retain customers, the Credit Manager goes overboard to please them by trying to bring down the billing of the professional by seeking a Search and Status Report of charges relating to the company for a limited period say for the last two years. This practice should be shunned since charges created earlier and continuing to be live will not be reflected in the Report. A prudent professional will resort to riders in his report absolving his responsibilities arising out of charges, which are created earlier and not being reflected in his report. In short, the report would be incomplete and would not serve the purpose.

Conclusion: In summation, we can say that the Search and Status Report is an important tool in the hands of the Credit Manager, crying to be exploited for not only ascertaining the status of registration of charges, but also containing the present composition of the Board, the existing share holding pattern and the financial health of the company as reflected in the Annual Accounts of the company which are available in the public domain on the MCA site.

sine die

The Latin term sine die translates as "without fixing a day [for future action]." When an adjournment is granted sine die in a court of law, this means that the court has neglected to assign a specific date for another conference or hearing in the future. To adjourn a matter sine die means to adjourn it for an indefinite period of time.

Insolvency and Bankruptcy Board of India (Liquidation Process) (Fourth Amendment) Regulations, 2020.

Following Regulations are inserted as per the above amendment dated 13th November 2020

1) ***Regulation 30A.***

"Transfer of debt due to creditors.

(1) A creditor may assign or transfer the debt due to him or it to any other person during the liquidation process in accordance with the laws for the time being in force dealing with such assignment or transfer.

(2) Where any creditor assigns or transfers the debt due to him or it to any other person under sub-regulation (1), both parties shall provide to the liquidator the terms of such assignment or transfer and the identity of the assignee or transferee.

(3) The liquidator shall modify the list of stakeholders in accordance with the provisions of regulation 31".

2) ***Regulation 37A. Assignment of not readily realisable assets***

"(1) A liquidator may assign or transfer a not readily realisable asset through a transparent process, in consultation with the stakeholders' consultation committee in accordance with regulation 31A, for a consideration to any person, who is eligible to submit a resolution plan for insolvency resolution of the corporate debtor.

Explanation.—For the purposes of this sub-regulation, —not readily realisable asset|| means any asset included in the liquidation estate which could not be sold through available options and includes contingent or disputed assets and assets underlying proceedings for preferential, undervalued, extortionate credit and fraudulent transactions referred to in sections 43 to 51 and section 66 of the Code"

Applicability of Secretarial Audit in Private limited company under the provisions of Companies Act 2013

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Secretarial audit

Secretarial audit is a process which checks the required compliances made by the company under corporate Law & other laws, rules, regulations, procedures etc. applicable to a particular company. The secretarial audit is also a mechanism to monitor compliance with the requirements of stated laws and processes and the secretarial audit, during its audit process bring out the errors & mistakes and helps in making a robust compliance mechanism system in an organization.

Applicability of secretarial audit from financial year 2020-21 (with effect from 1st April 2020)

We need to look into the applicability, having regard to the amendment notified on 3rd January 2020, by introducing a new Rule 9(c) to the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 by the Ministry of Corporate Affairs.

With effect from financial year commencing on or after 1st April 2020 as per the new Rule 9(c) of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the regulators have prescribed for secretarial audit for every company having outstanding loans or borrowing from banks or public financial institutions of one hundred crore or more.

With this amendment, the secretarial audit is also required to be conducted for both public and private company having loans or borrowing from banks or public financial institutions of rupees hundred crore or more.

The provisions of the Companies Act, 2013 does not mandate secretarial audit for a private company whose outstanding loans or borrowing from banks or public financial institutions does not exceed the threshold limit as provided under Rule 9 (c) of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014.

In short, the provisions of section 204 read with Rule 9 (c) would now apply to:

(i) All listed companies,
(ii) Public companies, having a paid-up share capital of fifty crore rupees or more or having a turnover of two hundred fifty crore rupees or more.
(iii) Every company having loans or borrowing from banks or public financial institutions of rupees hundred crore or more

It could be observed that the amendment notified on 3rd January 2020 has increased the scope of secretarial audit. It may be noted that the loans and borrowing should be from bank or public financial institution and does not include the inter-corporate or borrowing.

Applicability of secretarial audit under SEBI (Listing Obligations and Disclosure Requirement) Regulations 2014 for listed companies

As per Regulation 24A of SEBI (Listing Obligations and Disclosure Requirement) Regulations, 2014, the Secretarial Audit is mandatory for listed entities and their material unlisted subsidiaries incorporated in India and shall annex the secretarial audit report given by the practicing company secretary with the Annual Report of the company.

(Image source: website)

Applicability of Secretarial audit to a private company which is deemed to be a public company

To examine whether secretarial audit is applicable to a private limited company which is a deemed public company, we need to understand the definition of public company and deemed public company as per the provisions of the Companies Act 2013.

Concept of deemed public company

Sub-section (71) of the section 2 of the Companies Act 2013 defines a "Public Company" as a company which is (a) not a private company; and (b) has a minimum paid-up share capital as may be prescribed. The provision further states that "provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles."

Secretarial audit applicability in deemed public company

From the above definition of section 2(71) of the Act read with the proviso, it is clear that Section 204 pertaining to secretarial audit is applicable to a private company which is a subsidiary of a public company, and such company

also falls under the prescribed class of companies where the secretarial audit is applicable.

Appointment of secretarial auditor

All those companies to which secretarial audit is applicable are required to appoint a secretarial auditor according to Rule 8 of the Companies (Meetings of Board and its powers) Rules, 2014, by means of resolution passed at a duly convened Board meeting.

Filing requirement upon the appointment of secretarial auditor

Once the appointment has taken place, the company is required to file e-Form MGT-14 with the Registrar of Companies within thirty days along with the resolution passed at meeting of the Board for appointment of secretarial auditor.

Secretarial audit to be carried out by the secretarial auditor

As per sub-section (14) of section 143, secretarial auditor and has given him all rights and powers as given to that of a statutory auditor for the purpose of carrying out the secretarial audit. The secretarial auditor shall be entitled to require from the officers of the company such information and explanation as the secretarial auditor may consider necessary for the performance of his duties as secretarial auditor.

Secretarial audit report needs to be annexed to Board Report

Secretarial audit report in form MR-3 made in terms of sub-section (3) of section 134 of the Companies Act 2013 which addressed to the members of the company pursuant to sub-section (1) of section 204 of the Companies Act, 2013 and rule No.9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 is required to be annexed / attached with the Board Report of the company.

Punishment for contravention under the provisions of Companies Act 2013

Sub-section 4 of section 204 of the Companies Act, 2013, provides that if a company or any officer of the company or the company secretary in practice, contravenes the provisions of section 204 of the Act, the company, every officer of the company or the company secretary in practice, who is in default, shall be punishable with fine which shall not be less than 1 lakh rupees but which may extend to 5 lakh rupees.

Role and responsibility of company secretary

One of the function provided by the Companies Act 2013 in its section 205 is that the company secretary is required to report compliance with the provisions of applicable laws to the Company amongst others. The Company Secretary is also responsible particularly with regard to ensuring compliance with statutory and regulatory requirements being the principle officer of the company and he is also known as "officer in default".

The company secretaries of a private limited company need to ascertain as to whether the secretarial audit is applicable for the company or otherwise, by checking as to whether the company is subsidiary company of a public limited company as per the proviso to section 2(71) of the Companies Act 2013 requiring the secretarial audit. Though the company is incorporated as a private limited company, without running a thorough check and coming to a conclusion that there is no requirement for a secretarial audit since the company is a private limited company is not right on the part of a company secretary. It is very much essential for a company secretary in knowing thoroughly the regulations, updated amendments issued by the regulators and take a right decision relating to the required compliance as per the provisions of the Companies Act 2013.

(Image source: website)

Last but not the least, the company secretary needs to put in place a proper compliance mechanism in the company as envisaged in sub-section 5 (f) of section 134 in order to ensure compliance with provisions of all applicable laws to the company and to be very vigilant doing the things by following the principle of "First Time Right".

Conclusion

From the foregoing paragraphs, the question of applicability of secretarial audit could be concluded as under:-

(i) Secretarial audit is not applicable for a private limited company simpliciter till the financial year ending 31st March 2020.

(ii) For deemed public companies by virtue of definition of section 2(71) of the Companies Act 2013 read with the proviso, the secretarial audit is applicable to a private company which is a subsidiary of a public company if such company falls under the prescribed class of companies where the secretarial audit is applicable.

(iii) From the financial year commencing on or after 1st April 2020, the secretarial audit is mandatory, for private companies, if such private companies total outstanding loans or borrowing from banks or public financial institutions of rupees hundred crore or more.

Role of Committee of Creditors & its Commercial Wisdom

N. Nageswaran
Insolvency Professional

The report of the Bankruptcy Law Reforms Committee based on which the Insolvency Bankruptcy Code is conceptualized explained in detail why the Committee was rightly putting its weight on the Financial Creditors that they should be the members of the Committee of Creditors. Their ability to restructure liabilities and to take business decisions, as may be required for resolution of the Corporate Debtor was recognised and the BLRC wanted the same to be further strengthened.

Through resolution, the CoC is supposed to achieve the end result of meeting the liabilities of all creditors including the ones who were not the members of the CoC in a fair and equitable manner. This decision making process necessarily involves exhibiting a level of 'wisdom' and it should be transparent and backed by existence of commercial data. The Hon'ble Supreme Court made the following observation in their order in the Essar Steel case.

> "Ultimately it is the commercial wisdom of the requisite majority of the CoC that must prevail on the facts of any given case, which would include distribution of assets. It is, therefore, not possible that the AA and consequently, the NCLAT would be vested with the discretion that is vested in the CoC."

The matter of CoC's wisdom, though it had been talked about in other rulings by different NCLTs and NCLAT, seemed to attain finality by the above judgement.

CoC's wisdom is non-justiciable

Earlier in the matter of K. Sashidhar vs. Indian Overseas Bank & Others the Supreme Court laid down the role of the CoC in accepting or rejecting the resolution plan as well as the role of the AA while considering the application for approval of the resolution plan or liquidation of the CD. To quote from the order:

> "The legislature has not endowed the AA with the jurisdiction or authority to analyze or evaluate the commercial decision of the CoC much less to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. There is an intrinsic assumption that the FCs are fully informed about the viability of the CD and the feasibility of the proposed resolution plan. They act on the basis of a thorough examination of the proposed resolution plan and an assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meeting through voting, as per voting shares, is a collective business decision. The legislature, consciously, has not provided any grounds to challenge the "commercial wisdom" of the individual financial creditors or their collective decision before the AA— that is made non-justiciable."

Suggesting modification to CoC approved Resolution Plan

An appeal was preferred against an order passed by the NCLAT in the matter of Maharashtra Seamless Ltd vs P.Venkatesh and others wherein it had directed the successful resolution applicant to modify its resolution plan because the value of the resolution plan was lower than the liquidation value of the CD. The Supreme Court in its order observed as under.

> "The IBC and its underlying provisions do not provide that the resolution applicant has to match the liquidation value and that the object behind the valuation process is to assist the CoC to take a decision on the resolution plan. "

Relying on the Essar judgment, the Supreme Court held that the court ought to cede ground to the commercial wisdom of the creditors rather than assess the resolution plan on the basis of quantitative analysis.

Reversal of CoC's decision by Tribunals and Supreme Court

However, at the same time certain other decisions by the CoC which were thought to have been taken under the garb of "CoC's wisdom" have been challenged and got reversed and they are discussed hereunder.

Protection under Sec 238 for decision taken under CoC's wisdom

Municipal Corporation of Greater Mumbai (MCGM) had given land owned by it to the M/s Seven Hills (Corporate Debtor) for constructing a hospital. However, before the lease deed could be completed, the CD came under CIRP and the CoC invited Resolution Plans without discussing the matters with MCGM. Despite objections by MCGM, the plan was approved by AA and upheld by the NCLAT. MCGM, arguing that a show cause notice had already been issued prior to the commencement of insolvency resolution process to the Corporate Debtor, proposing to terminate the contract. They quoted the provisions of the Mumbai Municipal Corporation Act, 1888 which required MCGM's approval for changing the allottee's name. This was overruled, both at AA level as well as at NCLAT that as per provisions of Section 238 provisions of any other statute cannot prevent a resolution plan approved by CoC.

The Hon'ble Supreme Court overturned the verdicts of the NCLT and NCLAT stating that

> "Section 238 could be of importance when the properties and assets are of a debtor and not when a third party like MCGM is involved. Therefore, in the absence of approval in terms of the Mumbai Municipal Corporation Act, the AA could not have overridden MCGM's objections and enabled the creation of new interest in respect of its properties and land. The authorities under the IBC could not have precluded the control that MCGM undoubtedly has, under law, to deal with its properties and the land in question which undeniably are public properties."

Material irregularity committed with the approval of CoC by RP observed

(Image source: website)

Kotak Investment Advisors Limited (KIAL), was an unsuccessful Resolution Applicant having submitted a resolution plan for Ricoh India Limited (Corporate Debtor). As per the Request for Resolution Plan, the last date for receipt of resolution plan was 8th January 2019. As on the last date Phoenix Asset Reconstruction Company Limited, an associate of Kotak Investment Advisors Limited submitted a Resolution Plan. The other Resolution applicant, Karvy Group tendered its resolution plan on 9th January 2019 without furnishing the required guarantee of Rs.10crores. However, the plans were opened on 15th January 2019 and discussed by CoC. Later two more resolution plans were accepted on 13th Jan 2019 and 28th Jan 2019 and according to KIAL, the due process was not followed for such an extension. After KIAL raising objections, they were also asked to submit a revised resolution plan by 12th Feb 2019 whereas the CoC had already declared a successful resolution applicant on 30th January 2019. Aggrieved by the actions of the RP and CoC, KIAL filed an application with NCLT, Mumbai which rejected the same on the grounds that Hon'ble the Supreme Court of India in K. Sashidhar v. Indian Overseas Bank & Ors has held that the commercial decision of CoC for approval of resolution Plan is non-justiciable and hence, is required to be sanctioned by the Adjudicating Authority.

In the appeal, NCLAT rejected the orders of NCLT making it clear that the material irregularity as in exercise of powers by the Resolution Professional, even with the approval of CoC, in the conduct of CIRP cannot be treated as an exercise of Commercial Wisdom.

Presence of Common prudence and Commercial wisdom

Post the Apex court's notable decision upholding CoC's approval of the resolution plan in K. Sashidhar Vs. Indian Overseas Bank & Others an interesting tussle was noticed in the matter of Ushdev International vs State Bank of India on the decision taken by CoC in rejecting the resolution plan for the corporate debtor. In this case, the CoC rejected the resolution plan of M/s Taguda Pte Limited, Singapore. After detailed deliberations, the AA concluded that the CoC has rejected a technically qualified resolution plan and resolved to liquidate the CD.

The Tribunal decided that, "**within its jurisdiction the tribunal can neglect such an illogical, unreasoned, unfounded and unsound decision of CoC".** The AA went on to add that for a commercial wisdom to be exhibited, existence of prudence and existence of commercial data should be found in the decision taken by the CoC.

Thus it is very clear that all decisions of approving or rejecting a resolution plan by the CoC cannot get the omnibus protection under the heading 'CoC's wisdom'.

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ex parte

A Latin word means "for one party," referring to motions, hearings or orders granted on the request of and for the benefit of one party only. This is an exception to the basic rule of court procedure that both parties must be present at any argument before a judge, and to the otherwise strict rule that an attorney may not notify a judge without previously notifying the opposition. Ex parte matters are usually temporary orders (like a restraining order or temporary custody) pending a formal hearing or an emergency request for a continuance. Most jurisdictions require at least a diligent attempt to contact the other party's lawyer of the time and place of any ex parte hearing.

Pre-Pack Mechanism in IBC

B.Mekala
Insolvency Professional

The principal object of Insolvency and Bankruptcy Code (IBC) is to preserve and protect the assets of the Corporate Debtor (CD) and sell it as a going concern. The primary duty of the Insolvency Professional is to take the CD through Corporate Insolvency Resolution Process, whereby the existing management of the CD will be taken over by a new management by submitting a resolution plan for the frail or sinking CD.

Think of a scenario where the Expression of Interest (EOI) is invited by the Resolution Professional and where no one has opted to show their interest to take over the Company. Then the only option for the CoC members is to go for Liquidation. Even if RP has received EOI from one or two Prospective Resolution Applicants, and finally the resolution plan Amount quoted is very low, then the only left option for the CoC members is to go for Liquidation.

Any day, liquidation of a company is not a solution, and it is rather a disaster in many ways. The industry to which it belongs will get affected. The employees, operational Creditors and their families will suffer a lot in case, the company is put under liquidation. The allied industries which depend on the CD will also face the downfall. Unemployment and hunger will be the result of closure of any CD and particularly in case of bigger ventures. Failure of CD need not always be due to diversification of funds, but it may be due to change of monsoon, outdated, technology, change in taste of the consumer, spiralling up of the cost of raw material, etc. Sometimes due to change in the policy of the government, a particular industry may also get drowned. An alternative and viable solution which would be a boon to the said CD has to be looked into, so that the CD would rise from its down fall.

In the USA and UK they follow a system of pre-pack which is a mode of corporate rescue. It is a form of restructuring. In India, the government is proposing to introduce Pre Pack Mechanism before an application is filed in NCLT against a CD. Pre Pack is a mechanism where a balance is struck among the creditors, particularly the financial creditors and a plan is drawn to restructure the workings of the CD to the advantage of all stake holders and to rescue the CD before it-sinks and save the company from going into Liquidation. Different measures are followed such as:

1. Change in the management
2. Sale of non-core assets of CD
3. Convert the debts to Equity
4. Go for Interim Finance
5. Assigning the assets to Asset Reconstruction Company

In IBC, the above said tools are mixed and blended with procedure to be followed under the head Pre-pack.

In the past, the experience in a few cases have shown that due to cases filed in different forums there was delay in the process which got extended beyond one year. Taking that into consideration Government wanted to reduce the process to 3 to 4 months and thought of Pre-Pack. It is reported that Mr. Sahoo Panel will submit a Report which may form the basis for a few amendments IBC.

(Image Source: website)

An appointment of Insolvency Professional is required to take this pre-pack process. It is an out of court settlement. While forming the terms of pre pack, the Insolvency Professional should take into consideration the interests of the Board of Directors, Key Managerial Person, Shareholders, Employees, Creditors and Statutory authorities without which a corporate cannot operate.

With the consent of the creditors, a portion of assets which are held as security interest by them are sold and the proceeds are paid to the creditors as per Sec.53 of IBC. By doing this, the financial stress will get reduced to a considerable extent and it can concentrate on day to day operations. The terms of the pre pack should be such that it is beneficial to all the stakeholders such as Shareholders, Employees, Creditors and Statutory authorities. The CD can avoid the litigations, as well, if the terms of pre pack are approved by the NCLT before implementation. Even in case of any dispute, the aggrieved party can approach the Adjudicating Authority.

Whether moratorium can be put in place during the period of pre-pack is a question which needs to be addressed.

Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020

Following Regulations are inserted as per the above amendments dated 13th November 2020

1. **After regulation 2,** the following regulation shall be inserted

Regulation 2A.

"Record or evidence of default by financial creditor. For the purposes of clause (a) of sub-section (3) of section 7 of the Code, the financial creditor may furnish any of the following record or evidence of default, namely:-

(a) certified copy of entries in the relevant account in the bankers' book as defined in clause (3) of section 2 of the Bankers' Books Evidence Act, 1891 (18 of 1891)

(b) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, where the period of appeal against such order has expired".

2. **After Regulation 13(2)(c) ,** the following regulation shall be inserted

"(ca) filed on the electronic platform of the Board for dissemination on its website: Provided that this clause shall apply to every corporate insolvency resolution process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020;".

3. **After Regulation 39(5),** the following regulation shall be inserted

"(5A) The resolution professional shall, within fifteen days of the order of the Adjudicating Authority approving a resolution plan, intimate each claimant, the principle or formulae, as the case may be, for payment of debts under such resolution plan:

Provided that this sub-regulation shall apply to every corporate insolvency resolution process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020;".

Functus officio

Functus officio refers to an officer or agency whose mandate has expired, due to either the arrival of an expiry date or an agency having accomplished the purpose for which it was created. When used to describe a court, it can refer to one whose duty or authority has come to an end: "Once a court has passed a valid sentence after a lawful hearing, it becomes functus officio and cannot reopen the case."

Court Orders

CGRF Legal Team

Narinder Bhushan Aggarwal vs M/s. Little Bee International Pvt Ltd & Anr
NCLAT - 18-Nov-2020

The remuneration of liquidator falls within the realm of the Committee of Creditors in terms of Regulation 39D (the committee may, in consultation with the resolution professional, fix the fee payable to the liquidator, if an order for liquidation is passed under section 33)

An Application for liquidation was filed before the Hon'ble NCLT, Chandigarh by the Resolution Professional pursuant to the decision taken by the CoC at their 8th meeting as the CIRP period of 180 days expired and no resolution plan was received within the time limit prescribed under the Code. The Hon'ble NCLT passed an order for liquidation of the CD and the RP was appointed as the Liquidator subject to the submission of written consent.

With regard to remuneration payable to Liquidator, the Hon'ble NCLT observed that the CoC had approved Rs.50,000/- per month or as specified by the Board as per Regulation 4 (2) of the Liquidation Process Regulations, 2016 on the realisation of the assets of the corporate debtor. The Hon'ble NCLT was of the view that Regulation 39D provides for fixation of the fees separately by the CoC for the three periods viz. ,

"(a) the period, if any, used for compromise or arrangement under section 230 of the Companies Act, 2013;
(b) the period, if any, used for sale under clauses (e) and (f) of regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016; and
(c) the balance period of liquidation."

And that the fees fixed by the CoC was not in consonance with Regulation 39D. Holding the above view, the Hon'ble NCLT directed the fee payable to the Liquidator to be only as per Regulation 4 (2) and (3) of the Liquidation Process Regulations, 2016 removing the choice of Rs. 50000/- per month which was approved by the CoC.

Aggrieved by the above decision, an Appeal was preferred by the Liquidator. It was held by the Hon'ble NCLAT that, "*it is immaterial which provision of the 'I&B Code' squarely governs the passage of order of liquidation. The fact remains that the Committee of Creditors has decided in regard to the liquidation costs, expenses, and the remuneration payable to the liquidator which in the light of the recommendation of the Committee of Creditors with the requisite percentage brings it within the ambit of Regulation 39D."*

The Hon'ble NCLAT set aside the order to the extent of remuneration of the liquidator and directed that the liquidator's remuneration will be governed in accordance with the recommendation of the Committee of Creditors.

Ms. Ratna Singh & Mr. Brijendra Singh vs M/s. Theme Export Pvt. Ltd & Ms. Nandini Singh
NCLAT - 18-Nov-2020

The I&B Code is not meant for initiating proceedings for prevention of oppression and mismanagement, however, it is equipped with provisions for initiation of actions against wrong-doers and illegal activities etc.

An Appeal was filed by the Ex-Directors of the CD (M/s. Theme Export Pvt. Ltd) for staying the liquidation proceedings and quashing the liquidation order dated 29.07.2020 passed by the Hon'ble NCLT, apart from seeking directions to the RP to continue CIRP and also to bring back the money belonging to the CD which according to the appellant was fraudulently drawn by a Director with majority stake holding, etc.

The appeal was preferred on various grounds which included, that Ms. Nandini Singh, one of the directors of the CD, who is holding 92% of the shareholding in the company is guilty of cheating, fraud, diversion/ siphoning of funds of the CD, thus, classifying it as Oppression and Mismanagement of the company.

The Liquidator submitted that an Appeal against a liquidation order can be challenged only on the ground of material irregularities or fraud committed concerning such liquidation order as per Sec. 61(4) of the Code. It was also pointed out by the liquidator that the grounds on which the Appeal has been preferred is a matter u/s 241-242 of the Companies Act, 2013 (oppression and mismanagement).

The Hon'ble NCLAT, after considering the representations from both the parties, dismissed the Appeal and clarified that the Code is not meant for initiating proceedings for prevention of oppression and mismanagement. However pointed out that the Code is armed with provisions under part -II Chapter – III for initiation of actions against wrongdoers/illegal transactions,etc.(Preferential/Fraudulent/undervalued/Extortionate).

M/s Venus Recruiters Private Limited
Vs. Union of India and ors.
High Court of Delhi - 26-Nov-20

The RP becomes functus officio after the approval of the resolution plan and cannot file or prosecute any applications thereafter, including those under Section 43." This is however subject to any clause in the Resolution Plan to the contrary, permitting the RP to function for any specific purpose beyond the approval of the Resolution Plan.

A writ petition before the Hon'ble High Court of Delhi was filed seeking issuance of writ of certiorari declaring the continuing the proceedings filed for avoidance pf preferential transactions and pending before the NCLT, New Delhi as void and *non-est.*

The Resolution Professional (RP) of Bhushan Steel filed an application before NCLT Delhi on April 9, 2018, seeking avoidance of certain allegedly preferential transactions, including Bhushan Steel's contract with Venus Recruiters. The application came to be filed after Tata Steel's plan was approved by the Committee of Creditors (CoC) on March 20, 2018 and while it was pending for approval before the NCLT (the application for approval was filed on March 28, 2018).

Almost five weeks after the filing of the avoidance application, on May 15, 2018, the NCLT approved Tata Steel's resolution plan and simply disposed of all other applications. Soon thereafter, the new management of Bhushan Steel took over the CD.

On July 24, 2018 however, the NCLT issued notice on the avoidance application. On August 25, 2018 (after the NCLAT upheld the NCLT plan approval order), the NCLT impleaded Venus Recruiters as a party to the RP's avoidance application and issued fresh notice. Aggrieved by this, Venus Recruiters petitioned the Delhi High Court, praying for the proceedings against it in the NCLT to be quashed.

The Court ruled that:

1. Once a Resolution Plan is approved, the RP shall forward all the records relating to the CIRP and the Resolution Plan to the Board to be recorded on its database. The role of a RP comes to an end here.
2. An avoidance application is meant to benefit the creditors of the corporate debtor (in its state prior to the insolvency) and not the corporate debtor in its 'new avatar', after approval of the resolution plan. This is evident from Section 44 of the IBC, which sets out the kind of orders which the NCLT can pass in such cases. Clearly, the benefit of such orders would be for the corporate debtor, prior to the approval of the resolution plan.
3. A conjoint analysis of Sections 43 and 44 read with the CIRP Regulations clearly shows that the assessment by the RP of preferential transactions cannot be an unending process.
4. The RP cannot continue beyond an order under Section 31 of the IBC, as the CIRP comes to an end with a successful Resolution Plan having been approved. This is however subject to any clause in the Resolution Plan to the contrary, permitting the RP to function for any specific purpose beyond the approval of the Resolution Plan. In the present case, no such clause has been shown to exist.
5. The RP's role cannot continue once the Resolution Plan is approved and the successful Resolution Applicant takes charge of the Corporate Debtor.
6. The avoidance applications are neither for the benefit of the Resolution Applicant nor for the company after the resolution is complete. The RP whose mandate has ended cannot indirectly seek to give a benefit to the Corporate Debtor, who is now under the control of the new management/Resolution Applicant, by pursuing such an application.
7. The RP becomes functus officio after the approval of the resolution plan and cannot file or prosecute any applications thereafter, including those under Section 43. The RP cannot continue to act on behalf of the corporate debtor, under the title of 'Former RP'.
8. The NCLT also has no jurisdiction to entertain and decide avoidance applications, in respect of a Corporate Debtor which is now under a new management unless provision is made in the final resolution plan.

In view of the above findings, the order of the NCLT impleading the Petitioner and any consequential orders were set aside. The proceedings before the NCLT under the Avoidance application were accordingly quashed.

IIFCL Mutual Fund vs
Committee of Creditors of GVR Infra &Ors.
NCLAT - 02-Nov-2020

The contingent amount reserved in the Resolution Plan is a commercial decision of CoC & not under the scope of judicial review under S. 61(3) of IBC.

A resolution plan submitted by UVARC (UV Asset Reconstruction Company Ltd.) was approved by members of CoC holding 67.97% voting share in its 16th meeting, and the same was approved by NCLT, Chennai vide order dated 20.07.2020. IIFCL Mutual Fund, a financial creditor having 3.94% voting right, had assented to the resolution plan. They were one amongst the five FCs to the corporate debtor.

Post approval of the plan, an issue was raised on the distribution of the contingency fund of Rs. 135 Crores as per the approved resolution plan to only 4 of the five FCs on the basis of uninvoked guarantees issued by the FCs in proportion to the amount of such guarantees. The Resolution Professional had taken the stand that the pay-out of Rs.135 Crores was essentially a contingent payment, to meet certain eventualities and that if the contingencies do not arise, these amounts will not be required to be released. However, as per the approved resolution plan the contingency amount was disbursed. The Appellant (FC) had raised objections to the allocation of Rs.135 Crores in favour of only four Secured Creditors resulting in inequitable distribution of the proceeds of the Resolution Plan amount amongst the similarly placed five Financial Creditors and that such allocation contravened provisions of Section 53 of Insolvency and Bankruptcy Code, 2016 (in short the 'I&B Code'). The application filed by the IIFCL MF before the Hon'ble NCLT in this regard was dismissed stating the prayer sought is untenable.

(Image Source: Website)

IIFCL MF aggrieved by the dismissal of its application and seeking revision of share proportion of the resolution fund amongst the Secured Financial Creditors equally, filed the appeal. However, Hon'ble NCLAT observed that the scope of judicial review under Section 61(3) of the Code being limited to grounds enumerated therein, and as no such case has been made out, dismissed the appeal.

State Bank of India vs
Krishidhan Seeds Pvt Ltd
NCLAT - 17-Nov-2020

There cannot be two defaults in respect of the same debt, one for the purpose of claim filed before the Debts Recovery Tribunal and the other for purposes of IBC based on OTS proposal

State Bank of India, FC, vide various sanction letters dated 01.12.2006 had granted and disbursed term loan and cash credit facilities in favour of the CD, Krishidhan Seeds Pvt Ltd. The account of the CD was declared as NPA on 10.06.2014.

The FC sent a notice under S. 13(2) of SARFAESI Act on 02.08.2014 and filed recovery proceedings before DRT, Jabalpur on 20.10.2015. Later, a Section 7 application was filed before the Hon'ble NCLT, Indore bench on 19.09.2018. However, the application was rejected by Hon'ble NCLT stating it to be filed beyond the period of limitation. An Appeal was filed primarily on the ground of there being acknowledgment on the part of the Corporate Debtor in the form of revival letter extending the period of limitation which is said to have been overlooked by the Hon'ble NCLT while passing the order.

Hon'ble NCLAT observed that there cannot be two defaults in respect of the same debt, one for the purpose of claim filed before the Debts Recovery Tribunal and the other for purposes of 'I&B Code' based on the OTS proposal. The judgment of the Hon'ble NCLT was upheld by the Hon'ble NCLAT stating that by reckoning limitation in terms of Article 137 of the Limitation Act, the term of 3 years commence from the date of default i.e. 10th June, 2014, which would neither be shifted nor extended once a default has occurred.

State Bank of India Stressed Asset vs Athena Energy Ventures Private Limited
NCLAT - 24-Nov-2020

Two Applications can be filed and maintained, for the same amount against Principal Borrower and Guarantor keeping in view the Sec. 60(2) & (3) of IBC.

Athena Chattisgarh Power Ltd, principal borrower, had borrowed from SBI and other banks (as consortium) and Athena Energy Ventures Private Limited provided corporate guarantee for this borrowing. The principal borrower had committed default in the borrowings and Section 7 application filed by the SBI against the borrower was admitted by the Hon'ble NCLT vide order dated 15th May 2019. The Appellant Bank filed another Section 7 application against the Corporate Guarantor. However, the same was rejected by Hon'ble NCLT relying on the judgment of Vishnu Kumar Agarwal vs Piramal Enterprise Ltd. wherein the Appellate Tribunal held that –

"There is no bar in the 'I&B Code' for filing simultaneously two applications under Section 7 against the 'Principal Borrower' as well as the 'Corporate Guarantor(s)' or against both the 'Guarantors'. However,

once for same set of claim application under Section 7 filed by the 'Financial Creditor' is admitted against one of the 'Corporate Debtor' ('Principal Borrower' or 'Corporate Guarantor(s)'), second application by the same 'Financial Creditor' for same set of claim and default cannot be admitted against the other 'Corporate Debtor' (the 'Corporate Guarantor(s)' or the 'Principal Borrower')."

An Appeal was filed against the rejection of such Application, and Hon'ble NCLAT referring to State Bank of India vs V. Ramakrishnan & Anr. judgment quashed the order of the Hon'ble NCLT and allowed the Appeal on interpreting that if two Applications can be filed, for the same amount against Principal Borrower and Guarantor under Sec. 60(2) & (3) of IBC then the Applications can also be maintained.

Diwan Chand Arya Vs.
Government of Sikkim & Ors
NCLAT - 23-Nov-20

"If the conduct of CIRP was disapproved by the CoC, the ResolutionProfessional has no vested right of foisting himself on the CoC for his continuance"

An application before NCLT New Delhi, Court IV was filed under Section 22 of IBC for replacement of Resolution Professional (RP) during the Corporate Insolvency Resolution Process against 'Sikkim Hydro Venture Limited'- (Corporate Debtor). An order was passed replacing the RP based on the resolution passed with 97.98% voting share at the 4th CoC meeting to remove the RP and replace with another RP.

An appeal against the order was filed by the erstwhile RP against the Power Department of Government of Sikkim being the major stakeholder. The Hon'ble NCLAT dismissed the appeal on the ground that the decision was taken to remove the RP as the CoC was not satisfied with the conduct of CIRP. It was further pointed out that it cannot be termed to be a case of casting any stigma on the conduct of the RP. It was observed that if the conduct of CIRP was disapproved by the CoC and the RP has lost the CoC's confidence, the RP would have no vested right of foisting himself on the CoC for his continuance. Hence, the appeal was dismissed in view that the removal having the requisite majority vote cannot be held to be flawed in any manner.

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'.

Approbate and Reprobate

This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say that one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage" Law does not permit a person to both approbate and reprobate.

Smart Trust pays dividend

S. Rajendran

Every one of us in our personal lives or in professional pursuit comes into contact with various persons. We are required to deal with them in different situations. At times, we trust someone and entrust them with some tasks hoping that they would accomplish it without fail. In some other critical situations, we take a decision that we will not take any risk in delegating a task but we ourselves shall do it.

In all these situations, the question of trusting someone comes into play. To what extent you can trust someone with reference to a particular task or issue or assignment is a million dollar question.

To quote Walter Anderson, "We are never so vulnerable than when we trust someone – but paradoxically, if we cannot trust, neither can we find joy".

In the words of Frank Crane, "you may be deceived if you trust too much, but you will live in torment if you don't trust enough".

No doubt, it is a paradoxical situation. Yet, it is rare to acquire the skill sets required to develop the ability to identify and recognise the right persons who are worthy of your trust. Gaining one's trust doesn't happen overnight. It takes a lot of efforts before you become a "trusted" friend or colleague or a leader.

The advantages of putting "trust" on the right person are that you can enjoy greater satisfaction and happiness, gain more energy and greater prosperity. And believe me, it's not only for the person trusting, it also applies to the person trusted.

To quote Stephan M.R. Covey and Greg Link, "Trust is directly linked to the degree of prosperity, energy and joy we experience in our personal and professional lives. The reason is that trust is a fundamental and timeless principle of quality of life – not only for us in our personal relationships but also for teams, organisation, societies, and industries and even nations".

"Trust is an enabling and empowering catalyst that is woven through every part of a strong, civilized society. But most of us are not even aware of it, or dependence on it, until we lost it".

⇧Trust = ⇧Speed ⇩ Cost

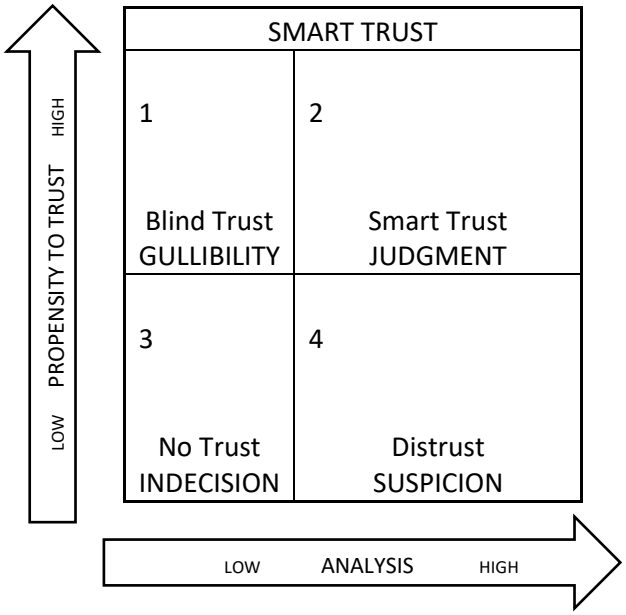
When the trust factor of a person or an organisation goes up, it increases the speed of execution and results in savings in cost. On the other hand, lack of trust necessitates more interventions, verifications, redundancy and rework leading to more loss of time and less productivity leading to cost escalation.

(Image source: website)

Smart Trust

In a world with so much of negative things happening, blind trust and distrust do not really get the best outcome. Instead, smart trust opens new doors and opportunities while at the same time minimising the risks associated with trust.

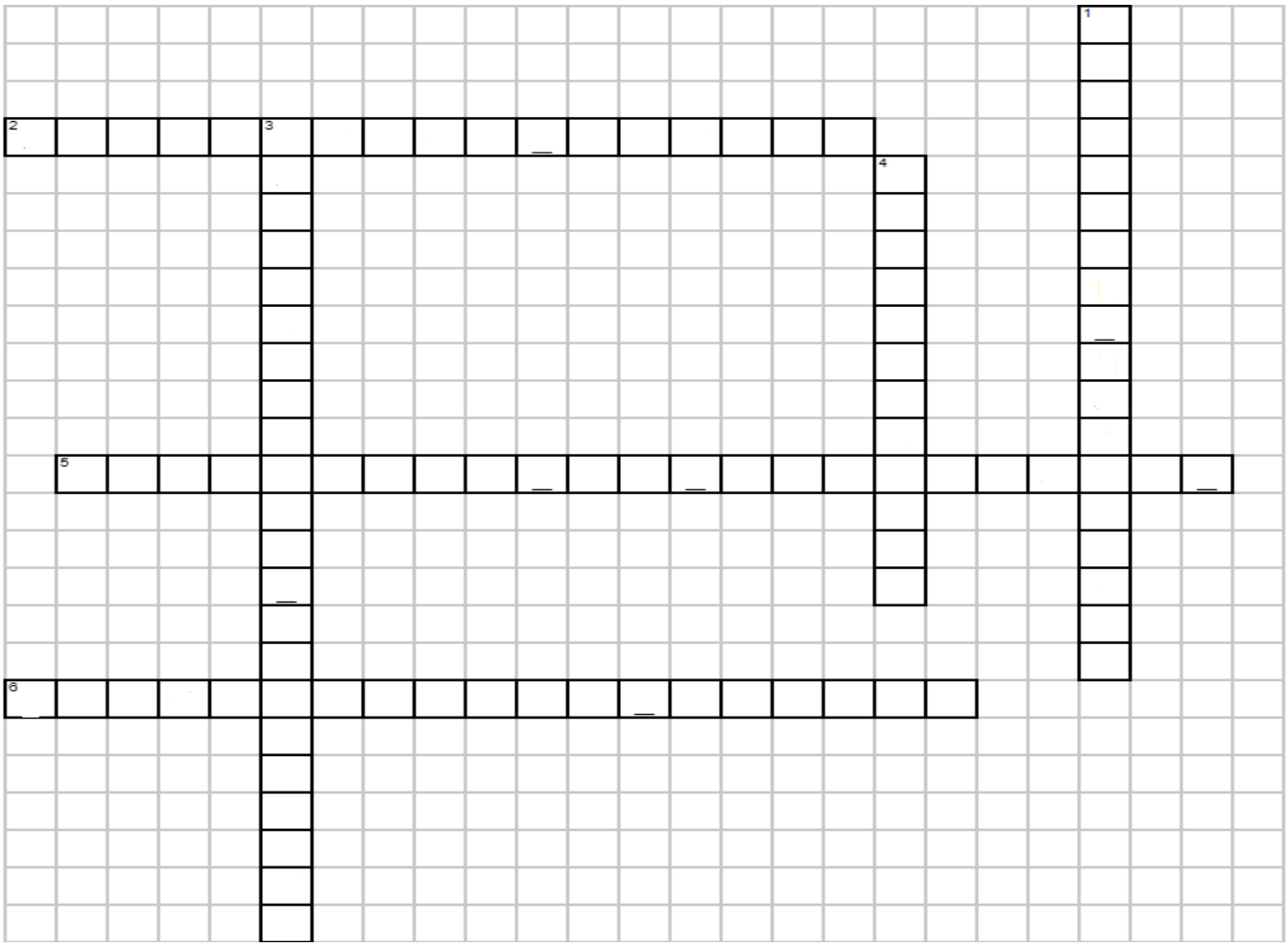
Smart trust is analysis and judgement. We should have the right mix of inclination to trust and the ability to analyse the plus and minus of placing such trust. To put it in a Quadrant, the different situations of trust will be as follows:



Conclusion

Please do trust people but take adequate care to weigh the possible after effects. You will enjoy life, have more energy, satisfaction, joy and prosperity.

SHARPEN YOUR MIND – CROSS WORD



Across

2. The parameters to be applied and the manner of applying such parameters, as approved by the committee, for consideration of Resolution Plans for its Approval.

5. Deciding committee for the Corporate Debtor under CIRP

6. _____TRANSACTIONS are the credit transactions which involve the receipt of financial or operational debt to the corporate debtor.

Down

1. An Individual who is the surety in a contract of guarantee to a Corporate Debtor

3. Under whose order the Corporate Debtor shall be dissolved after completion of Liquidation.

4. _____ are entitled to the proceeds from the sale of Liquidation assets under section 53 of IBC, 2016.

Answers

1. Personal Guarantor 2. Evaluation Matrix 3. Adjudicating Authority 4. Stakeholders 5. Committee of Creditors 6. Extortionate Credit

Your Feedback Matters

All the articles were extremely topical and well researched and written.

Mr. H. Parmeswar
Management Consultant

Building Communication skills was really good which most of current generation people are not giving importance to it.

Mr. K Ramu
Sr. Manager, Pioneer Wincon

Thank you very much for sending me the soft copy of the latest issue of SandBox.

Mr. Ravindra Sathyamurthy
FCA

I find the articles under Company Law, IBC & latest court orders to be informative and educative. It will be quite useful for the practicing IPs, Bankers as well as students. A Q & A session on Company law for bankers (especially relating to filing of Charges & financial statements with ROC etc) would be of great help to bankers, especially for those who are associated with Corporate Credit in banks. I wish you all success in all your endeavors. I would suggest that a copy of this publication may be forwarded to all banks (Head offices, Credit Department and Training centres)

S Bhaskaran
General Manager (Retired), SBI

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.

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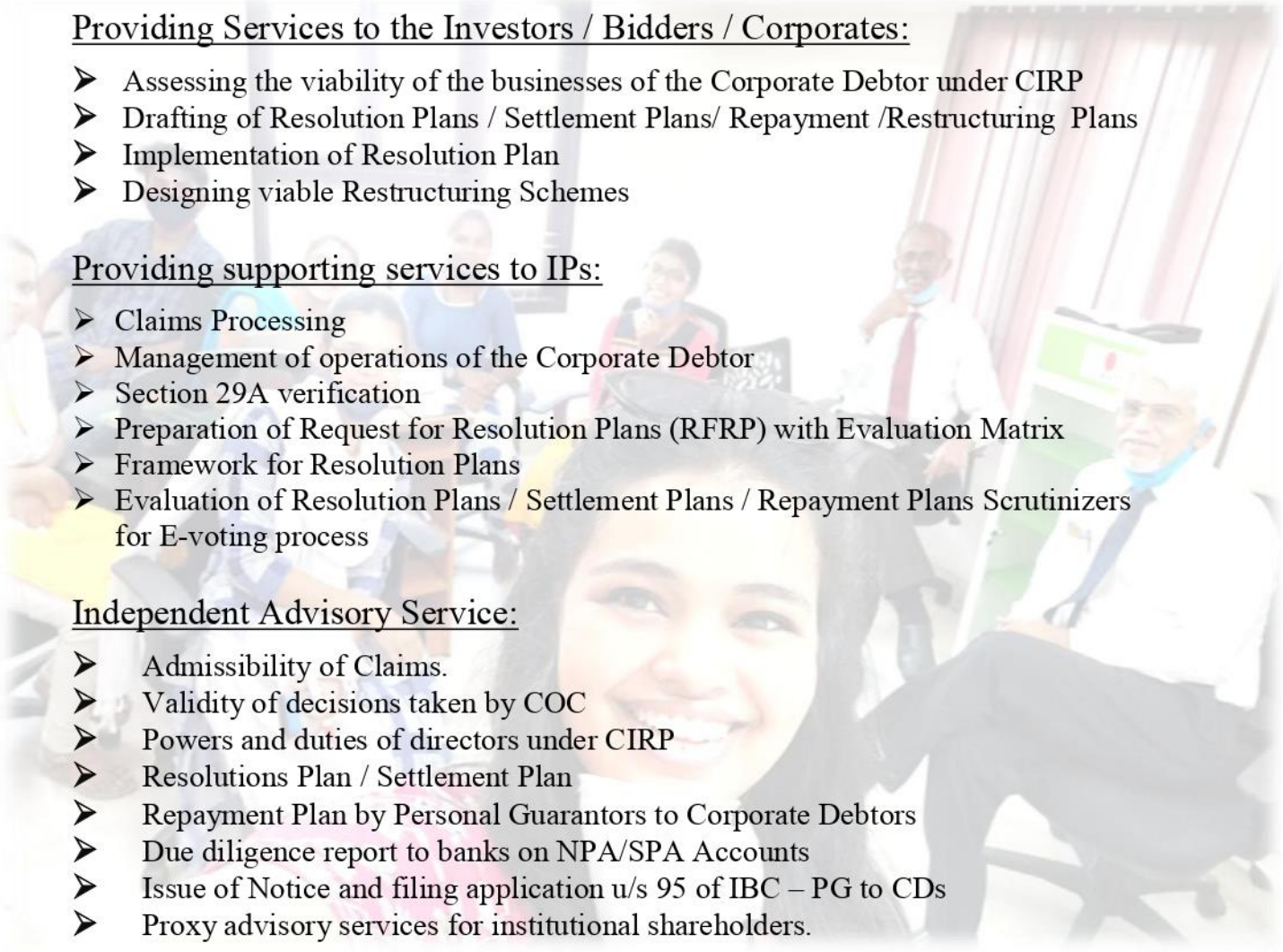
Our Services



Providing Services to the Investors / Bidders / Corporates:

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

Providing supporting services to IPs:

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

Independent Advisory Service:

- Admissibility of Claims.
- Validity of decisions taken by COC
- Powers and duties of directors under CIRP
- Resolutions Plan / Settlement Plan
- Repayment Plan by Personal Guarantors to Corporate Debtors
- Due diligence report to banks on NPA/SPA Accounts
- Issue of Notice and filing application u/s 95 of IBC – PG to CDs
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